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

MOTION OF PROFESSOR RICHARD A. EPSTEIN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPLICANTS WITHOUT 10 DAYS' NOTICE AND IN PAPER FORMAT

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Professor Richard A. Epstein respectfully moves for leave to file the enclosed brief as *amicus curiae* in support of applicants. Professor Epstein is one of the nation's leading authorities on the law of public accommodations. He is the Laurence A. Tisch Professor of Law at New York University School of Law, the Peter and Kirsten Bedford Senior Lecturer at the Hoover Institution, and the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer at the University of Chicago. Professor Epstein has taught constitutional law to generations of law students around the country and is strongly invested in the accurate interpretation of public accommodations laws. He has written multiple law review articles on this subject as well as over 15 books covering a wide range of legal and constitutional issues that combine doctrinal, historical, and economic perspectives. He has also written extensively on civil rights law.

In Professor Epstein's view, private religious institutions must not be treated as public accommodations because to do so would chill religious exercise, disrupt the marketplace of private education, and impose unconstitutional restraints designed for state instances of monopoly power. The proposed brief analyzes these and other relevant legal issues from *amicus*'s unique perspective.

Amicus also moves to file the brief without ten days' notice to the parties of their intent to file as ordinarily required by Sup. Ct. R. 37.2(a) and to file this brief in an unbound format on 8½-by-11-inch paper rather than in booklet form. These requests are necessary due to the press of time related to the emergency nature of the application.

Counsel for *amicus* notified counsel for applicants and respondents to obtain consent for the proposed brief. All parties consented.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

Amicus curiae, Richard A. Epstein, is one of the nation's leading authorities on the law of public accommodations. He is the Laurence A. Tisch Professor of Law at New York University School of Law, the Peter and Kirsten Bedford Senior Lecturer at the Hoover Institution, and the James Parker Hall Distinguished Service Professor Emeritus and Senior Lecturer at the University of Chicago. Professor Epstein has taught constitutional law to generations of law students around the country and is strongly invested in the accurate interpretation of public accommodations laws. He has written multiple law review articles on this subject as well as over 15 books covering a wide range of legal and constitutional issues that combine doctrinal, historical, and economic perspectives. He has also written extensively on civil rights law.

In Professor Epstein's view, private religious institutions must not be treated as public accommodations because to do so would chill religious exercise, disrupt the marketplace of private education, and impose unconstitutional restraints designed for state instances of monopoly power.[1]

SUMMARY OF THE ARGUMENT

Yeshiva University is the nation's premier center for Jewish education and is deeply religious to its core. Its very name means "school for the study of Jewish sacred

[1] 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.

texts."[2] Yet the lower court ignored thousands of pages of evidence and focused instead on just a few documents—and a stilted view of public accommodations law—to reach its preordained conclusion. In a market system such as private education, this form of aggressive administrative oversight is wholly unnecessary; consumers choose from a wide variety of schools based on their individual preferences, whether religious, academic, athletic, or philosophical. And private universities have significant discretion in admissions, housing, and curriculum decisions that align with their unique ethos. The lower court's diktat that forces a religious institution to act in violation of its religious beliefs when the plaintiffs chose to attend Yeshiva precisely *because of* its religious fervor is not only illogical, it also violates the Constitution.

Private schools and universities are not public accommodations. *Amicus* cites extensive scholarship regarding federal and state nondiscrimination laws, including Title II of the Civil Rights Act, to demonstrate how treating private universities' internal decisions as public accommodations misconstrues this body of law. Indeed, the internal religious decision of whether to grant official approval to a club whose beliefs contradict Torah values belongs solely to the university's religious leaders, not a court whose very inquiry into the decision violates the First Amendment principle of religious autonomy, which is at its height in matters of faith and doctrine. If left unchecked, the lower court's decision will inflict lasting damage on religious

[2] *Yeshiva (Pl. Yeshivot)*, Encyclopedia.com (2019), https://perma.cc/B3UB-QCQF.

educational institutions across the United States, forcing them to close their doors to non-adherents or sacrifice adherence to their beliefs.

ARGUMENT

Religious colleges are free to require student applicants to sign a statement of faith or hold particular beliefs. Yet some of America's most deeply religious schools, like Yeshiva University, open their doors to non-adherents precisely because they believe in the importance of Hebrew studies for all who are "willing and interested" in a rigorous religious education. App.403 at 138:22-139:3. Thus, "[a]nyone is eligible to apply to Yeshiva University," but Yeshiva is adamant regarding "what the campus life is really about." *Id.* Ask any rabbi; religious education plays a primary, formative role in passing down the rich traditions of Judaism, inculcating Torah values, and training the next generation of Hebrew scholars and teachers. Yeshiva University holds a unique position in this effort as the nation's largest and foremost center of Hebrew Torah studies.

In this case, the plaintiffs chose to attend Yeshiva University out of the many options available to them primarily because of its religious character. Indeed, one YU Pride member conceded, "I love Torah learning and came to YU to further my religious growth just like any other student who chooses YU." App.146–47 ¶ 9. One plaintiff declared, "YU was a religious community for me too." App.125 ¶ 9. Another plaintiff explained that "a crucial part of my identity" is being "a Jewish individual" at Yeshiva. App.135–36 ¶ 8. Yet the lower court ignored these testimonials and other undisputed evidence of Yeshiva's religious nature. Judicial misapplication of public

accommodation law that interferes with the religious decisions of private universities concerning student life on campus will incentivize private universities like Yeshiva to close their doors, as they are fully entitled to do, to anyone who does not fully embrace their beliefs and values for fear of litigation. Why force this choice when its inevitable consequence would be to deprive some American students of access to uniquely religious institutions and the educational opportunities they offer?

I. Yeshiva University is not a place of public accommodation.

Forcing the internal decisions of this unique institution into the mold of public accommodations laws irretrievably interferes with the nature of these institutions. First, the New York City Human Rights Law ("NYCHRL") specifically excludes "distinctly private" organizations and "religious corporations," and Yeshiva is both. N.Y.C. Admin. Code § 8-102. Second, federal and state public accommodations laws do not apply to religious private schools because legislatures designed these laws to prevent discrimination by common carriers with monopoly power, not disrupt the intensely competitive marketplace of private education. Third, nearly all religious organizations fulfill additional purposes besides worship, and they should not be punished for providing services to the public as part of their religious exercise. The lower court's attempt to limit religious protections to places of worship alone would incentivize organizations to close their doors to non-adherents and limit their public service ministries because of government interference in their religious decisions—a perverse result which would deprive needy communities of service ministries they depend on. Finally, judicial interference in Yeshiva's religious decisionmaking

process violates the First Amendment by undermining the longstanding protections for religious schools because of their unique integration of faith and learning. The situation indeed is even worse than this. Yeshiva is sensitive to the needs of all students who attend and thus has made multiple ongoing efforts to ensure that LGBTQ students are included in campus life. App.121 (updating inclusivity training, hiring clinician with LGBTQ experience, creating support groups and a Warm Line for reporting harassment, fostering ongoing dialogue with religious leaders). These arrangements may be imperfect. But they represent workable compromises that the court's autocratic enforcement of the nondiscrimination law necessarily ignores.

A. New York City's law explicitly excludes "distinctly private" organizations and "religious corporations" as places of public accommodation, and Yeshiva is both.

As the lower court initially held in August 2021, subjecting Yeshiva to the NYCHRL violates the statute's plain language. The statute's own definition of public accommodations excludes "distinctly private" organizations. N.Y.C. Admin. Code § 8-102. And it makes clear that "a religious corporation incorporated under the education law or the religious corporation law is deemed to be in its nature distinctly private." *Id.* Yeshiva is "distinctly private" because it is a "religious corporation[] incorporated under the education law," and thus the NYCHRL does not apply. *Id.*

Yeshiva University is also exempt because it is a "religious or denominational institution or organization." N.Y.C. Admin. Code § 8-107(12) (allowing such organizations to "limit[] employment or sales or rentals of housing accommodations or admission to or giv[e] preference to persons of the same religion or denomination

or from making such selection as is calculated *by such organization* to promote [its] religious principles.") In other words, because Yeshiva is a religious institution, it is legally authorized to decide how to promote its religious principles—even when this means selective decisions in areas including but not limited to employment, admissions, or housing. Since this likely results in excluding some applicants without any legal sanction, it is an absurd result to conclude that Yeshiva cannot make decisions about which clubs to approve once students are admitted. To put it simply: Yeshiva could have refused admission to the plaintiffs because they hold religious beliefs that differ from the Torah's teachings on human sexuality. But Yeshiva admitted them—and advocates of nondiscrimination should commend rather than disincentivize that choice. For a secular court to find that Yeshiva has suddenly forfeited all ability to make nuanced religious decisions about campus life, especially when the plaintiffs chose Yeshiva because of its religious nature, is not only inconsistent, but it violates the plain language of the NYCHRL.

This application of the NYCHRL not only respects the statute's plain language, but it also respects the Supreme Court's unanimous holding in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1880–81 (2021). There, in response to the City's attempt to frame religious foster care providers as public accommodations, the Court held that "public accommodations" must be construed narrowly to avoid entangling church and state. *Id.* Philadelphia's Fair Practices Ordinance contained nearly the exact language as the NYCHRL, defining a public accommodation as a provider "whose goods, services, facilities, privileges, advantages or accommodations are

extended, offered, sold, or otherwise made available to the public." Phila. Code § 9–1102(1)(w); *compare with* N.Y.C. Admin. Code § 8-102 (defining public accommodation as "providers . . . or places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available.") The Court held that "the one-size-fits-all public accommodations model is a poor match for the foster care system," because it involves a "customized and selective assessment that bears little resemblance to staying in hotel, eating at a restaurant, or riding a bus." *Fulton*, 141 S. Ct. at 1880. So too here.

Club application and approval on a private religious university's campus is an individualized process which requires religious leaders to consider whether the club's mission and activities comport with the university's ethos and mission. Yeshiva has undergone this nuanced decisionmaking process multiple times in the past, declining to approve shooting, videogame, and gambling clubs as well as a fraternity because it concluded that they would not be consistent with Yeshiva's Torah values. App.198 ¶ 41–44. Here, Yeshiva's senior officials and rabbis, called the *Roshei Yeshiva*, have engaged in a multi-year discernment process that included meeting with student representatives and discussing Torah values. Appl. at 12. Thus, under *Fulton*, Yeshiva's religiously-based decision about which clubs to give its formal stamp of approval should not be treated as a public accommodation.

B. Religious schools are not places of public accommodation under federal or state nondiscrimination laws.

If this Court adopts the plaintiffs' extreme position, then all private universities would be considered public accommodations under the NYCHRL. App.176 ("A private . . . university like YU meets this definition.") The statute's language exempting organizations "operated for charitable or educational purposes" "in connection with a religious organization" would be superfluous. N.Y.C. Admin. Code § 8-102. On the contrary, courts do not treat private universities—especially religious universities—as public accommodations under either federal or state nondiscrimination laws. *Univ. of Great Falls v. NLRB,* 278 F.3d 1335, 1344 (D.C. Cir. 2002); *Romeo v. Seton Hall Univ.*, 378 N.J. Super. 384, 395 (N.J. Super. Ct. App. Div. 2005); *Roman Cath. Archdiocese of Phila. v. Pa. Hum. Rels. Comm'n*, 548 A.2d 328, 447 (Pa. 1988); *Gay Rts. Coal. of Georgetown Univ. L. Ctr. v. Georgetown Univ.,* 536 A.2d 1 (D.C. 1987).

Notably, the NYCHRL was patterned after Title II of the Civil Rights Act of 1964, and passed a year later using very similar language.[3] Congress enacted the Civil Rights Act of 1964 as a dramatic and necessary measure against racial discrimination in a society of pervasive racial segregation. Title II in particular

[3] Title II protects "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation." 42 U.S.C. § 2000a. Similarly, the NYCHRL defines public accommodation as "providers . . . or places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available." *See also Commission's History*, NYC Human Rights (2022), https://perma.cc/9XGE-E726.

"functioned as a corrective against private force and public abuse in government." Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right,* 66 Stan. L. Rev. 1241, 1261 (2014). Early cases upholding the Civil Rights Act made clear that the purpose of this act was to prevent discrimination against racial minorities in places where the state has monopoly power or where interstate commerce is affected. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 252–53 (1964) (citing testimony from African Americans experiencing great difficulty because of "discrimination in transient accommodations" such as hotels when traveling between states); *Daniel v. Paul,* 395 U.S. 298, 306 (1969) (President Kennedy emphasized to Congress that "no action is more contrary to the spirit of our democracy and Constitution . . . than the barring of that [Negro] citizen from restaurants, hotels, theatres, recreational areas and other public accommodations and facilities.") These cases underscore the purpose of Title II: to prevent widespread discrimination in contexts such as common carriers, hotels, and entertainment establishments where monopolies exist, by invoking Congress' power to regulate interstate commerce.

In contrast to this historical backdrop of state-operated monopolies wielding their power to segregate based on race, religious educational institutions today are a dramatically different context to which Title II—and other public accommodations laws—do not apply. With private organizations, "[n]ot only is there a complete absence of monopoly power, but there is also a concern with internal operations that just does not arise in the earlier civil rights cases." Epstein, *Public Accommodations*,

supra, at 1265. In a series of cases addressing First Amendment freedom of association claims, the Supreme Court initially applied civil rights acts to private organizations. *Roberts v. United States Jaycees*, 468 U.S. 609, 624–25 (1984) (ignoring freedom of association principles and finding that private, voluntary club's decision to exclude female members violated Minnesota Human Rights Act); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (upholding California's Unruh Civil Rights Act against freedom of association challenge). Neither of these clubs had any sort of monopoly power, and their attempts to exclude some members probably lost internal support of other members. "But far from justifying state coercion, that process of internal transformation of membership rules" demonstrates that "there is no compelling state interest in changing norms that often change by voluntary means, especially when none of the clubs in question have anything close to the monopoly position that normally is needed to justify the application of an antidiscrimination norm." Epstein, *Public Accommodations*, *supra*, at 1273. Private organizations in a market setting that choose to bear the costs of selectivity should not be doubly penalized by state regulators.

The Supreme Court acknowledged this important principle when it declined to apply New Jersey's public accommodations law to a private organization rooted in moral principles and beliefs. *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 644 (2000). The Court refused to require the Boy Scouts to readmit a gay Scout leader, finding that they were not a common carrier but a private club with distinct moral beliefs including the Scout Oath. The dissenters argued that the Boy Scouts had not taken

a clear enough position against homosexuality to merit First Amendment protection. Yet "[w]hy should the First Amendment protect only the extremes of the political distribution, but not the associational preferences of large, mainstream organizations?" Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119, 130 (2000). "The obvious incentive is for organizations to take extreme positions in order to avoid the heavy hand of state regulation." *Id.* at 131. But the Supreme Court made clear that public accommodations law does not force private organizations to admit members whose beliefs or practices would interfere with the organization's mission or expressive association. *Boy Scouts*, 530 U.S. at 661.

Public accommodations law applies even less to religious universities than to private clubs such as the Boy Scouts, because universities are selective by design and base their internal decisions on deeply held religious beliefs. "Where a school, college, or university holds itself out publicly as a religious institution, '[w]e cannot doubt that [it] sincerely holds this view.'" *Univ. of Great Falls*, 278 F.3d at 1344 (citing *Boy Scouts,* 530 U.S. at 653). In determining whether a university is religious, "whether an institution holds itself out to the public as religious" is "a far more useful inquiry" than government scrutiny, because "such public representations serve as a market check." *Univ. of Great Falls*, 278 F.3d at 1344. Indeed, a university's choice to identify publicly as religious "will no doubt attract some students and faculty to the institution" but "will dissuade others." *Id.* These "market responses will act as a check

on institutions that falsely identify themselves as religious" merely to obtain an exemption. *Id.*

Several states with nondiscrimination laws similar to the NYCHRL have also concluded that private religious schools are not public accommodations. In *Romeo*, 378 N.J. Super. at 395, the court declined to force a Catholic university to approve an LGBTQ club because "a private religious university's values and mission must be left to the discretion of the university," and "[c]ourts should avoid entanglement in religious disputes involving ecclesiastical 'polity or doctrine,' as well as policy." (internal citation omitted). In *Roman Catholic Archdiocese of Philadelphia*, the court held that Catholic schools were not public accommodations although they admitted non-Catholic students, because "their religious character supports the appellants' argument that they are 'distinctly private' in nature." 548 A.2d at 450. Even the District of Columbia case on which the plaintiffs rely, App.176, demonstrates that private universities and their internal decisions are not public accommodations. In *Gay Rights Coalition of Georgetown University Law Center*, 536 A.2d at 8, the court found that Georgetown University was not a public accommodation under the D.C. Human Rights Act. With a very different philosophy than Yeshiva, which is "wholly committed to and guided by Halacha and Torah values" that permeate every aspect of its mission, App.121, Georgetown's president called education "principally a secular business, and the university is a secular entity with a clear secular job to do." *Gay Rts. Coal. of Georgetown Univ. L. Ctr.*, 536 A.2d at 8. Yet even Georgetown was not a public accommodation. Thus, multiple state courts have recognized that private,

religiously-affiliated universities are not public accommodations under state or local law. This Court should reject the plaintiffs' extreme arguments to the contrary.

Here, Yeshiva is a deeply religious organization that is *not* seeking to exclude anyone from admissions or campus life. On the contrary, Yeshiva has taken a thoughtful, moderate approach by fostering extensive discussions between students, faculty, and religious leaders about LGBTQ+ inclusion. LGBTQ students are notably still welcome to attend Yeshiva, to meet with one another, to hold discussions, and to engage fully in campus life. Yeshiva has shown deep sensitivity to the concerns of LGBTQ students on campus, emphasizing its long-standing policies against harassment and discrimination, updating its diversity, inclusivity and sensitivity training to include sexual orientation and gender identity, staffing its Counseling Center with a clinician with LGBTQ experience, "creating support groups that allow a safe space for LGBTQ students to gather in the counseling center," creating a Warm Line for reports of harassment or non-inclusive behavior, and "creat[ing] a space for students, faculty and Roshei Yeshiva to continue this conversation." App.121. Despite all these efforts, the plaintiffs invoke them to question Yeshiva's religious character.

The lower court erred in wielding a public accommodations law to force Yeshiva to give its official endorsement to a YU Pride Club, because Yeshiva's religious leaders determined that it "will cloud th[e] nuanced message" of the Torah, "both accepting each individual with love and affirming its timeless prescriptions." App.121. The court's ruling creates perverse incentives: Yeshiva should not be punished for seeking to welcome LGBTQ students on campus and to ensure that they

receive support and are free from harassment. Besides, as the court noted in *University of Great Falls*, 278 F.3d at 1344, Yeshiva has borne the market costs of identifying as authentically Jewish. This likely deters many applicants for both employment and admission, and the University has also unfortunately endured anti-Semitism because of its consistent identification as a religious center for Hebrew Torah studies.[4] Yet the lower court brushed away the key evidence of how Yeshiva publicly presents itself, downplaying this as only of "secondary" importance. App.65.

C. The unconstitutional conditions doctrine prohibits the government from requiring Yeshiva to violate its religious beliefs in order to receive education funding.

The First Amendment prohibits the government from "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Agency for Int'l Dev. v. AOSI*, 570 U.S. 205, 214 (2013) (internal citation omitted); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would

[4] In 2018-19, photos of thousands of Yeshiva University students were posted on a white nationalist website as part of an anti-Semitic and racist diatribe. As senior vice president of Yeshiva stated, "[t]argeting individuals on the basis of their religion, ethnicity or race is inexcusable." JTA and Marcy Oster, *Photos of Thousands of Yeshiva University Students Appear on anti-Semitic Website*, Haaretz (Sept. 2, 2019), https://perma.cc/RU8G-GXMH. Yeshiva is also the only NCAA institution that "adhere[s] to Jewish principles and requirements. In fact, many of our players wear their kippot while they play, visibly identifying them as Jews and making them targets for bigots." *Joe Behnarsh, YU Athletics Director, and Anti-Semitism in Sports*, YU News (Sept. 26, 2019), https://perma.cc/4G5A-3V8E.

in effect be penalized and inhibited.") In other words, the government cannot "requir[e] recipients to profess a specific belief" in order to receive funding. *AOSI*, 570 at 218. This same concept applies to public accommodations doctrine. In *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995), the Supreme Court held that a privately-organized parade on public streets could not be forced to include a group whose message was contrary to its own. "[T]his use of the State's power," wielding a public accommodations law, would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573.

Here, the unconstitutional conditions doctrine prevents the government from requiring Yeshiva to endorse a club that would send a message of endorsement contrary to its Torah values. The plaintiffs make much of Yeshiva's interactions with the government, specifically its receipt of funding as an educational institution. App.178-79. Yet the government cannot require Yeshiva to disavow its religious character and beliefs merely because it also receives funding as a university. As the plaintiffs admit, their goal is to force "cultural changes" at Yeshiva and "make a statement" about what Torah values should be. App.251. For the government to force Yeshiva to make that endorsement contrary to its religious beliefs violates Supreme Court precedent in *Perry,* 408 U.S. at 597, and *AOSI,* 570 U.S. at 214. As in *Hurley*, 515 U.S. at 572–73, where the Court recognized that the plaintiffs were seeking to apply public accommodations doctrine not just to a parade but to the organizers' choice of messages in that parade, the First Amendment protects Yeshiva's ability to

decide which clubs to endorse. The tragedy of violating the unconstitutional conditions doctrine is that "it allows the government to act as a discriminating monopolist against weak and vulnerable groups, precisely because . . . the government forces those small groups to toe its own collectivist line on discrimination." Epstein, *Public Accommodations, supra*, at 1289. Given that the deplorable attempt to exterminate Jewish people during the Holocaust occurred only 80 years ago, and Jewish citizens and institutions still experience blatant discrimination and anti-Semitism today, the principle holds true here. New York City—and courts charged with upholding the Constitution—must not act as a discriminating monopolist against a Jewish university seeking to faithfully live out the religious beliefs of its diverse community.

D. Religious organizations are not public accommodations even where they are open to the public and have additional purposes other than religious exercise.

Courts have repeatedly held that religious organizations do not forfeit their legal protections when they serve the public and fulfill additional purposes besides religious exercise. *Fulton*, 141 S. Ct. at 1880-81; *Downtown Soup Kitchen v. Municipality of Anchorage,* 576 F. Supp. 3d 636, 653–54 (D. Alaska 2021); *Burwell v. Hobby Lobby*, 573 U.S. 682, 710–12 (2014); *Varlesi v. Wayne State Univ.,* 909 F. Supp. 2d 827 (E.D. Mich. 2012). Such organizations should not be punished or incentivized to close their doors to non-adherents because of the threat of government interference in their internal religious decisions. That chilling effect could deprive America's neediest communities of ministries they depend on, because faith-based

organizations provide a vast range of social services free of charge.[5] When religious organizations contract with the government to provide services to the public, they do not forfeit their religious identity or legal protections. *Fulton*, 141 S. Ct. at 1880–81. Likewise, a private organization that conducts a "customized and selective" assessment of incoming guests is not a place of public accommodation. *Downtown Soup Kitchen*, 576 F. Supp. 3d at 653–54 (religious homeless shelter for women was not public accommodation) (citing *Fulton*, 141 S. Ct. at 1880). Like Yeshiva, an organization that is selective in its admissions process because of its religious beliefs, indeed, a program "that excludes most members of the general public," is not a public accommodation. *Id.* at 654. Even a for-profit corporation whose "central objective . . . is to make money" can invoke legal protections including the Religious Freedom Restoration Act, because corporations often "support a wide variety of charitable causes" and "further religious objectives." *Hobby Lobby*, 573 U.S. at 710–12; *see also Varlesi*, 909 F. Supp. 2d at 846 (adult rehabilitation center operated by religious organization was not a "place of public accommodation" within meaning of Michigan civil rights act).) Given that a soup kitchen, a craft store, and a rehabilitation center are not required to comply with public accommodations laws because they are inherently religious, how much more should a private religious university be able to make internal religious decisions without government sanction.

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[5] *See, e.g.,* Byron Johnson, William H. Wubbenhorst, and Alfreda Alvarez, *Assessing the Faith-Based Response to Homelessness in America: Findings From Eleven Cities*, Baylor Institute for Studies of Religion (2017), https://perma.cc/W5MZ-9PKZ (finding that faith-based organizations provide nearly 60% of emergency shelter beds for homeless Americans nationwide).

II. Treating Yeshiva University's internal religious decision-making process as a public accommodation ignores binding Supreme Court precedent.

A. The lower court violated the First Amendment doctrine of religious autonomy when it analyzed whether Yeshiva University exists for a "primary" religious purpose.

The lower court's "primary purpose" test violates the doctrine of religious autonomy by requiring courts to troll through an organization's religious beliefs and operations. *Univ. of Great Falls*, 278 F.3d at 1340 (explicitly rejecting "primary purpose" test because it violates First Amendment); *Carson v. Makin*, 142 S. Ct. 1987, 2000 (2022) (courts must focus on "the substance of free exercise protections, not on the presence or absence of magic words" in corporate documents); *see also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) ("courts should refrain from trolling through a person's or institution's religious beliefs" to determine eligibility to participate in otherwise available public benefit program); *Colo. Christian Univ. v. Weaver,* 534 F.3d 1245, 1261 (10th Cir. 2008) (constitutional prohibition against entanglements "protects religious institutions from governmental monitoring or second-guessing of their religious beliefs and practices . . . as a basis for regulation or exclusion from benefits."). Distinctions between a religious organization's religious and secular activities are difficult to draw, and such close inquiry inevitably requires the court to make theological determinations. *See Corp. of the Presiding Bishop v. Amos,* 483 U.S. 327, 343 (1987) (Brennan, J., concurring) ("What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. . . . While a church may regard the conduct of certain functions

as integral to its mission, a court may disagree."). The "primary purpose" test exacerbates this problem by asking courts to parse out various activities, define their religious or secular nature, and weigh them against each other to determine which is primary. All these questions require theological determinations about the nature of worship, which a court does not have constitutional authority or expertise to make. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714 n.8 (1976) ("[c]ivil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes"); *see also Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2nd Cir. 2017).

Thus, the trial court erred when it used the "primary purpose" test to troll through Yeshiva's religious beliefs and practices, distinguishing between worship and non-worship activities and weighing some activities as more important—and religious—than others. App.60–61. The court concluded that Yeshiva's successful transition to a large university that is able to "confer many secular multi-disciplinary degrees" prevented it from being a religious corporation. App.61. Yet, even if only degree titles mattered, and they do not, 14 of the degrees Yeshiva offers focus explicitly on religion or the religious underpinnings of art, law, and philosophy. App.60–61. Every male student at Yeshiva, regardless of major, spends up to four and a half hours every day in Torah and Talmud study, and female students receive religious instruction multiples times a week. App.429; App.370 at 7:14–19; App. 194 ¶ 6. The entire campus observes Shabbat and all Jewish holidays, expecting all students to keep kosher. App.245–46; App.403 at 138:20–139:5; App.338 at 77:17–

78:2. And Yeshiva has never stopped "promot[ing] the study of Talmud" or "preparing students of the Hebrew faith for the Hebrew Orthodox ministry." App.358; App.376 at 31:2–3. Ignoring all this, the trial court focused instead on "magic words" in a handful of Yeshiva's corporate documents. *Carson*, 142 S. Ct. at 2000.

B. Religious schools receive special protections in the law because they intentionally integrate faith and learning.

In the education context, religious autonomy protections are especially strong for schools like Yeshiva, because "[t]he religious education and formation of students is the very reason for the existence of most private religious schools." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). Because this mission cannot be separated into secular or religious categories, the internal decisions of religious schools cannot be adjudicated by secular courts. Here, the trial court drew a false dichotomy between "religious" and "educational," as if these purposes could be bifurcated. Yet "[a]ny attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism." *Carson*, 142 S. Ct. at 2001.

Because private schools differ from public schools in important ways, the law treats them differently. Private schools are "different by definition because they do not have to accept all students" but can be selective based on criteria such as religion, family legacy, and academic skill, their curriculum "need not even resemble that taught in the . . . public schools," they can be "single-sex," and they may set their own tuition prices. *Id.* at 1999. Because of these and other important differences, the

Constitution affords special protections to private religious schools, including the ministerial exception. In *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC,* 565 U.S. 171, 189, 196 (2012), the Supreme Court recognized that because "the First Amendment itself . . . gives special solicitude to the rights of religious organizations," employment discrimination statutes did not apply to a school's decision about who is qualified to "preach their beliefs, teach their faith, and carry out their mission."

Religious education is especially important for minority faiths in an increasingly diverse society. As the Court held in *Our Lady of Guadalupe*, "the Torah is understood to require Jewish parents to ensure that their children are instructed in the faith," and [r]eligious education is a matter of central importance in Judaism." 140 S. Ct. at 2065. For Muslim families, "the development of independent private Islamic schools" is key because learning religious duties is "mandatory for the Muslim individual." *Id.* The Church of Jesus Christ of Latter-day Saints and the Seventh-day Adventist Church both have a long tradition of religious education as a uniquely important pursuit that is integrated with secular instruction. Thus, many faiths draw a "close connection" "between their central purpose and educating the young in the faith." *Id.* at 2066.

When religious schools teach secular subjects and are certified by the state, this practice does not undermine their religious nature or their importance for religious institutions. In *NLRB v. Catholic Bishop*, 440 U.S. 490, 498–99 (1979), the Supreme Court rejected the Board's argument that it could only decline jurisdiction

when schools were "completely religious, not just religiously associated." "It is not only the conclusion[]" that religious schools are excluded "which may impinge on rights guaranteed by the Religion Clauses, "but also the very process of inquiry leading to findings and conclusions." *Id.* at 502.

Here, Yeshiva University integrates faith and learning at its very core. The University's motto, which is prominently displayed on all public materials, is "Torah Umadda," which means combining religious and secular studies. Rabbi Norman Lamm, *Torah Umadda* 171 (2010). This integrated mission guides all of Yeshiva's programs and decisions, including its curriculum and its student club program. Yeshiva seeks to balance its mission of forming students in the faith while preparing them academically to carry their values to the highest levels of their professions. Even for degree programs that are not explicitly religious, Torah values are thoroughly incorporated, and a wide range of "spiritual guidance and programming" is available for all undergraduates. App.451–54, App.190. Every student has a "spiritual advisor[]," some of whom "are also faculty." App.370 at 8:5–7. Yeshiva is "wholly committed to and guided by Halacha and Torah values." App.121. While Yeshiva permits undergraduates to "socialize in gatherings they see fit," the school cannot put its seal of approval on undergraduate clubs that appear inconsistent with Torah values. *Id.* For Yeshiva, like other religious schools, these internal religious decisions flow directly from its mission. The trial court's decision downplays Yeshiva's religious character and creates a false dichotomy between its religious and educational missions, violating the Religion Clauses under *Carson*, 142 S. Ct. at 2001,

Our Lady of Guadalupe, 140 S. Ct. at 2055, and *Catholic Bishop*, 440 U.S. at 498–99. This Court must correct that error, which will otherwise work lasting harm to the religious missions of not just Yeshiva but all religious schools and universities.

Conclusion

Thus, private religious schools are not public accommodations, and the lower court erred when it treated Yeshiva's internal religious decision as such. On the contrary, religious universities like Yeshiva play a unique role in the diverse marketplace of educational opportunities available to students, and courts should respect that diversity instead of undermining it. The First Amendment demands—and Yeshiva deserves—no less.

Respectfully submitted,

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