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 *AMICI CURIAE* OF NATIONAL ORTHODOX JEWISH ORGANIZATIONS IN SUPPORT OF APPLICANTS' EMERGENCY APPLICATION FOR STAY AND OTHER RELIEF

DENNIS RAPPS
Of Counsel
450 Seventh Avenue
44th Floor
New York, NY 10123
(646) 598-7316
drapps@dennisrappslaw.com

NATHAN LEWIN
Counsel of Record
LEWIN & LEWIN, LLP
888 17th Street NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Counsel for Amici Curiae

September, 2022

MOTION FOR LEAVE TO FILE

The National Jewish Commission on Law and Public Affairs ("COLPA") and other undersigned national Orthodox Jewish organizations respectfully move 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 *amici*'s intent to file as ordinarily required.

In light of the schedule set by the Court for responding to the Application, it was not feasible to give 10 days' notice. Applicant has, however, consented to the filing of this brief.

COLPA and the other national Orthodox Jewish organizations have filed *amicus curiae* briefs in scores of cases on this Court's docket. *Amici* seek to file this brief because the constitutional issues it presents are of major importance to the Orthodox Jewish community and the *amici* are presenting separate identifiable reasons why the requested relief should be granted.

For the foregoing reasons, *amici* respectfully request that the Court grant leave to file the attached proposed brief *amicus curiae.*

Respectfully submitted,

NATHAN LEWIN
Counsel of Record
LEWIN & LEWIN, LLP
888 17th Street NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

INTEREST OF THE AMICI[1]

The undersigned *amici* are national Orthodox Jewish organizations that have submitted *amicus* briefs in many cases before this Court and in lower federal courts to advocate on behalf of the interests of the American Orthodox Jewish community. Yeshiva's Application for Emergency Relief and Petition for a Writ of Certiorari are critical for our community's ability to transmit to students in Jewish religious institutions of learning the ideological messages that have been taught in our faith for over 3000 years. While deeply committed to the values of equality embodied in the Constitution, Jewish Orthodox observance and practice maintains gender distinctions that conflict with the expressed goals and programs of the Pride Alliance organization and the plaintiffs in this case. Compelling Yeshiva to grant Pride Alliance recognition as an official campus club violates not only the respect for religious conviction that is commanded by the Free Exercise Clause but also infringes the constitutional guarantees for speech and association that have been secured by this Court's decisions.

The *amici* parties include:

---

[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* 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 consented to the filing of this Brief. Respondents have not replied.

- COLPA (National Jewish Commission on Law and Public Affairs)
- Agudath Harabbanim of the United States and Canada
- Orthodox Jewish Chamber of Commerce
- Orthodox Union (Union of Orthodox Jewish Congregations of America)
- Rabbinical Alliance of America
- Torah Umesorah (National Society for Hebrew Day Schools)

INTRODUCTION

In its Question Presented, Yeshiva's Application addresses the constitutional issue raised by the conflict between rulings of the New York courts and the "First Amendment's Religion Clauses." While we concur with Yeshiva's emphasis on the free exercise of religion, we note that in the circumstances of this case, Yeshiva is also being denied the First Amendment's protection for speech and association.

SUMMARY OF THE ARGUMENT

New York's directive that Yeshiva recognize Pride Alliance as a student club squarely violates the Free Exercise Clause of the First Amendment. But it is unconstitutional for other reasons as well.

As was true in *Hurley v. Irish-American, Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), Yeshiva's inclusion or exclusion of student clubs is speech protected by the First Amendment.

Like the parade organizers in *Hurley*, Yeshiva has the right protected by the First Amendment to choose how it speaks to its students and to the world. That speech is "beyond the government's power to control."

How Yeshiva structures its educational program is "expressive activity" within the reach of this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Just as the Boy Scouts were held to be an association that transmits "a system of values," so, too, is Yeshiva an institution that pursues and teaches values to "instill in its youth members." Yeshiva's view of gender distinctions may not be the view that has current public acclaim, but "[t]he First Amendment protects expression, be it of the popular variety or not."

This Court has, as recently as *Shurtleff v. Boston*, 142 S. Ct. 1583 (2022), sustained the First Amendment speech right of a private speaker whose religiously motivated speech was silenced. The constitutional free-speech issue in this case is similar, in many ways, to *303 Creative, LLC v. Elenis*, No. 21-476, and could be set for argument together with that case.

ARGUMENT

I.

YESHIVA IS A PRIVATE EDUCATIONAL INSTITUTION THAT HAS A FIRST AMENDMENT FREE SPEECH RIGHT TO PROMOTE ITS IDEOLOGY

As an educational institution, Yeshiva speaks to its students and to the world at large with its program of study. Its administration selects subjects for curricular courses and chooses texts that students are required to read. It arranges and provides facilities for extra-curricular programs.

The university speaks, as well, by acknowledging student groups to which it grants formal recognition. Yeshiva's choices in this regard are as secured by the First Amendment free speech protection as were the choices made by the parade organizers in *Hurley v. Irish-American, Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). A unanimous Court, speaking through Justice Souter, held in *Hurley* that the parade organizers had "the autonomy to control [their] own speech." 515 U.S. at 574. As in *Hurley,* a university is "more than a passive receptacle," and it may exercise the "choice of a speaker to propound a particular point of view" -- a "choice . . . presumed to be beyond the government's power to control." 515 U.S. at 575.

II.

YESHIVA'S FIRST AMENDMENT RIGHT OF EXPRESSIVE ASSOCIATION IS UNCONSTITUTIONALLY INFRINGED BY REQUIRING YESHIVA TO FORMALLY RECOGNIZE A PRIDE ALLIANCE CLUB

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court held that the Boy Scouts of America was "engage[d] in expressive activity" and had First Amendment protection as "an association that seeks to transmit . . . a system of values." 530 U.S. at 650. This characterization surely applies *a fortiori* to a private university that teaches the values of Jewish tradition.

The Court held in its *Boy Scouts* opinion that the First Amendment bars state regulation that "significantly burdens" expressive association. It found that the Scouts' discharge of an employee was constitutionally privileged because the employee's conduct was "inconsistent with the values [the Scouts] seeks to instill in its youth members." 530 U.S. at 654. If Yeshiva is mandated to recognize Pride Alliance as a student club, Yeshiva's right of expressive association will be abrogated as substantially as the comparable right of the Scouts.

Nor is the recent public acceptance of LGBTQ rights a ground for restricting Yeshiva's message to its students. The Court said in its *Boy Scouts* opinion, "The First Amendment protects expression, be it of the popular variety or not." 530 U.S. at 660. Those "who wish to voice a different view" are entitled to the constitutional shield.

III.

PRIVATE FREE SPEECH AND ASSOCIATION RIGHTS WERE RECENTLY RE-AFFIRMED IN *SHURTLEFF v. BOSTON*

This Court's recent decision in *Shurtleff v. Boston*, 142 S. Ct. 1583 (2022), re-affirmed the constitutional significance of any governmental limitation of private speech. The Court's opinion concluded that governmental "refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment." 142 S. Ct. at 1593. By the same token, denying Yeshiva the right to choose the message it is expressing to students and to the world – also based on its "religious viewpoint" – violated the Free Speech Clause.

IV.

THE SIMILARITY OF ISSUES COULD WARRANT PAIRING THIS CASE WITH *303 CREATIVE, LLC v. ELENIS*, NO. 21-476

The petitioner in *303 Creative, LLC v. Elenis*, No. 21-476, has been ordered, because of a local public-accommodations law, to express herself in a same-sex marriage with a created web design notwithstanding her religious principles prohibiting such participation. This Court granted her petition for certiorari only on the free speech claim. Yeshiva is also being ordered in this case to engage in a public expression of approval for views that conflict with its religious doctrine.

CONCLUSION

The Court should grant Yeshiva's petition on its Question Presented which concerns the conflict with the First Amendment's Religion Clauses. The parties should be directed, in addition, to brief and argue the application of the First Amendment's Speech and Association Clauses to Yeshiva's decision. The case could be set for argument immediately following No. 21-476.

Respectfully submitted,

DENNIS RAPPS
Of Counsel
450 Seventh Avenue
44th Floor
New York, NY 10123
(646) 598-7316
drapps@dennisrappslaw.com

NATHAN LEWIN
Counsel of Record
LEWIN & LEWIN, LLP
888 17th Street NW
4th Floor
Washington, DC 20006
(202) 828-1000
nat@lewinlewin.com

Counsel for Amici Curiae