

No. 22A184

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**In the Supreme Court of the United States**

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YESHIVA UNIVERSITY AND PRESIDENT ARI BERMAN,

*Applicants,*

v.

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

*Respondents.*

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**To the Honorable Sonia Sotomayor, Associate Justice of the United States  
Supreme Court and Circuit Justice for the Second Circuit**

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**MOTION BY JEWISH COALITION FOR RELIGIOUS LIBERTY AND  
COALITION FOR JEWISH VALUES  
FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF APPLICANTS**

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Barry Black  
NELSON MADDEN BLACK LLP  
*Counsel for Amici Curiae*  
475 Park Ave. South, 28th Floor  
New York, New York 10016  
Telephone: 212-382-4300  
Facsimile: 212-382-4319  
bblack@nelsonmaddenblack.com

Amici respectfully move for leave to file a brief in support of Applicants' Emergency Application for Stay Pending Appellate Review or, in the Alternative, Petition for Writ of Certiorari and Stay Pending Resolution, without 10 days' advance notice to the parties of Amicus's intent to file as ordinarily required. In light of the expedited briefing schedule set by the Court, it was not feasible to give 10 days' notice, but Amici were nevertheless able to obtain a position on the motion from the parties. Applicants consent to the filing of the amicus brief. Respondents consent to the filing of the amicus brief.

Amicus Curiae JCRL is a nondenominational organization of Jewish communal and lay leaders, seeking to protect the ability of all Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square that recognizes the unique societal benefits of religious exercise, religious liberty, and religious diversity.

Amicus Curiae Coalition for Jewish Values ("CJV") is the largest rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in American public policy.

JCRL and CJV have filed amicus briefs before this and other appellate courts regarding the rights of religious institutions to freely profess and practice their faith.

Amici recognize the danger inherent in the lower court's decision that Yeshiva University is not sufficiently religious to merit legal protection. In order to highlight the mistaken nature of that determination, we briefly describe the important and fundamentally religious role that Yeshiva University has played and continues to play

in maintaining Orthodox Judaism in America. We believe that Yeshiva's history and modern day religious role support the conclusion that New York's statute as applied by the trial court violates the First Amendment. Our amicus brief thus includes relevant material not fully brought to the attention of the Court by the parties, see Sup. Ct. R. 37.1, and it urges this Court to reverse that decision in order to protect religious institutions from undue governmental interference with matters of faith.

For the foregoing reasons, proposed amici respectfully request that the Court grant this unopposed motion to file the attached proposed amicus brief and accept it in the format and at the time submitted.

Dated: September 1, 2022

Respectfully submitted.



Barry Black  
NELSON MADDEN BLACK LLP  
475 Park Ave. South, 28th Floor  
New York, New York 10016  
Telephone: 212-382-4300  
Facsimile: 212-382-4319  
bblack@nelsonmaddenblack.com

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**BRIEF *AMICUS CURIAE* BY JEWISH COALITION FOR RELIGIOUS  
LIBERTY AND COALITION FOR JEWISH VALUES**

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Barry Black  
NELSON MADDEN BLACK LLP  
475 Park Ave. South, 28th Floor  
New York, New York 10016  
Telephone: 212-382-4300  
Facsimile: 212-382-4319  
bblack@nelsonmaddenblack.com

*Counsel for Amici Curiae Jewish Coalition for Religious Liberty and Coalition for  
Jewish Values*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
PRELIMINARY STATEMENT .....	1
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i> .....	2
ARGUMENT .....	2
I.    A STATUTE THAT INTERFERES WITH THE INTERNAL GOVERN- ANCE OF A RELIGIOUS INSTITUTION VIOLATES THE FIRST AMENDMENT .....	11
II.   THE ESTABLISHMENT CLAUSE PROHIBITS LEGISLATION THAT GIVES PREFERENCE TO A PARTICULAR WORLDVIEW TO THE DETRIEMENT OF RELIGIOUS DOCTRINE.....	13
CONCLUSION.....	16

## TABLE OF AUTHORITIES

### Cases

<i>Epperson v. Ark.</i> , 393 U.S. 97 (1968) .....	14
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947) .....	13
<i>Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church</i> , 344 U.S. 94 (1952) .....	11, 12
<i>Kennedy v. Bremerton Sch. Dist.</i> , 142 S. Ct. 2407 (2022) .....	13, 15
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984) .....	14
<i>School Dist. of Abington Twp. v. Schempp</i> , 374 U.S. 203 (1963) .....	13, 14
<i>Watson v. Jones</i> , 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871) .....	11
<i>Zorach v. Clauson</i> , 343 U.S. 306 (1952) .....	13, 15

## PRELIMINARY STATEMENT

Beyond a classic clash of conflicting rights, this case contends with First Amendment principles in their most foundational essence. That principle was expressly concretized in this nation's foundational governing documents to ensure that the British government's oppressive establishment of the Church of England could never occur here.

In 2020, certain students asked Yeshiva to recognize the "YU Pride Alliance" as an official campus club. The school's rabbinic deans ("Roshei Yeshiva") determined that such a club would be inconsistent with Judaism and incompatible with Yeshiva's faith-based mission. Unwilling to accept that determination or to allow the school to observe its faith in peace, the students sued in an attempt to coerce the school into violating its faith.

On June 14, 2022, the New York County Supreme Court ruled in favor of the students. It concluded that Yeshiva was not sufficiently religious in nature to qualify for a religious exemption to New York City's Human Rights Law. The decision below effectively invites the state to interfere with Yeshiva's internal affairs, including on matters relating to religious doctrine. The notion that Yeshiva is insufficiently religious is wholly inconsistent with the school and its history. This brief will outline some of Yeshiva's history, role, and practices in order to demonstrate that it is unquestionably a thoroughly religious institution. The trial court's conclusion that Yeshiva is insufficiently religious gives license to the City of New York to impose its worldview upon one of Orthodox Judaism's central institutions in violation of its religious mandate, and in direct conflict with the First Amendment.

## **STATEMENT OF INTEREST OF *AMICI CURIAE***

Amicus Curiae Jewish Coalition for Religious Liberty (“JCRL”) is a nondenominational organization of Jewish communal and lay leaders, seeking to protect the ability of all Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square that recognizes the unique societal benefits of religious exercise, religious liberty, and religious diversity.

Amicus Curiae Coalition for Jewish Values (“CJV”) is the largest rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in American public policy.

Amici recognize the danger that the lower court decision poses to religious institutions, and urge this Court to reverse, in order to protect such institutions from undue governmental interference with matters of faith.

### **ARGUMENT**

Appellant Yeshiva University (“Yeshiva”) faces a government in New York City that, through its Human Rights Law (“NYCHRL”) threatens to undermine religious traditions and institutions that are vital to the survival and growth of Modern Orthodox Judaism in America. Yeshiva’s functional indispensability to the faithful is best understood against the backdrop of its unique, often painful, history.

Tsar Alexander II was assassinated on March 13, 1881, and blame turned on the usual scapegoat: the Jews. “In its wake,” one historian describes, “an orgy of anti-Jewish hatred swept over Russia, abetted by the new tsar, and 169 Jewish communities were

attacked in a series of pogroms that destroyed twenty thousand Jewish homes and left tens of thousands of individuals economically ruined.” Jonathan D. Sarna, *American Judaism: A History* 152 (2d ed. 2019). The antisemitic wave spread through Eastern Europe, and some two million Jews desperately fled. *Id.* at 151. Seeking a country where they could practice their religion freely, 80% of those Russian Jewish refugees came to the United States, 85% of whom passed through the port of New York. *Id.* at 153. So unprecedented was this exodus—even for an ancient people accustomed to fleeing—that a Jewish leader noted at the time that “[i]n New York City there have come . . . more Jews than have been together at any one time and place since the destruction of Jerusalem,” in 70 A.D. *Id.* at 153-54.

Saved physically, some of these Jewish emigres in New York yearned to preserve their heritage and religious culture. Unfortunately, New York lacked the Orthodox Jewish educational institutions through which to transmit their faith to the next generation. The situation was so bad that by the beginning of World War I only one-quarter of school-aged children received any Jewish education in New York City. *See History of Jewish Schooling in America*, <https://www.myjewishlearning.com/article/jewish-schooling/> (last visited August 10, 2022). When Rabbi Moses Weinberger immigrated to New York from Hungary in the early 1880s, he exclaimed in horror: “There is nothing in the way of schooling here for the young men of Israel. Our faithful Orthodox brethren . . . allow their sons to grow up without Torah or faith.” Sarna, Jonathan D., *Jewish Education in New York— 1887*, 19 *Tradition: A Journal of Orthodox Jewish Thought*, no. 3, 244, 245 (1981), <http://www.jstor.org/stable/23258624>

(accessed 10 Aug. 2022). Pious Jewish immigrants, “hav[ing] trouble finding steady work” worked long hours in order to survive; they did not have the ability to teach their children in addition to putting food on their table and a roof over their heads. *Id.* at 246.

Without Jewish schools to attend, their children were ignorant of fundamental Jewish teachings. A large mass, perhaps three-fourths of NYC’s Jewish children, were described by Rabbi Weinberger as “poor lambs” that “wander the main roads, as so many other wild urchins of their age in this city do, much to the regret of everyone who loves his people and religion.” *Id.* at 248. These children were lost to the Jewish faith, as a rabbi lamented that “the longer a person remained in such a land . . . the souls of his children were exposed to extreme [spiritual] danger.” *Id.* at 154. “Initially,” one historian describes, the education of Jewish youth was so absent that “many posited a straight-line path to complete assimilation: They expected Jews to disappear as a separate group in American society.” See Deborah Dash Moore, *Assimilation in the United States: Twentieth Century* (June 23, 2021), <https://jwa.org/encyclopedia/article/assimilation-in-united-states-twentieth-century>.

To help solve this dire problem and to improve what they called American Jewry’s “terribly degenerate spiritual situation,” several lay leaders gathered funds in 1886 to open a full-time elementary school yeshiva—the first of its kind in America—named Etz Chaim (Tree of Life), a phrase from the Book of Proverbs describing the Torah as a tree of life. Sarna, *American Judaism* at 180. “The yeshiva conceived itself as being just that—a tree of life for American Judaism, a tiny oasis of traditional

learning in a vast desert of secular[] ignorance. It set Talmud study at the core of its curriculum.” *Id.* The goal was “to save the next generation of Jews for Judaism.” *Id.*

Finally, with a school to rear their youth, the Orthodox, like Rabbi Weinberger, believed Etz Chaim had, quite literally, saved Judaism. The mood was exultant: “Hurrah! What pleasant news! How lovely! How dear! A yeshivah for Mishnah and Gemara! How much good is hidden in these words. I can hardly believe my own ears. Am I awake? Is this possible? Can it be? Here in New York? In America? . . . It is a marvelous thing—a wonder.” Sarna, *Jewish Education* at 250.

In 1897, a group of New York Orthodox rabbis, critical of the non-traditional nature of New York’s Jewish academies, founded Rabbi Isaac Elchanan Theological Seminary (RIETS) to bolster higher education for Orthodox Judaism and create an “American Torah enclave [where] the advanced study of the Talmud and its commentaries [would] serve [] as the focus.” *Id.* at 192.

In 1915, RIETS merged with Etz Chaim, added a yeshiva high school for boys, and eventually rebranded this singular institution which could provide comprehensive Jewish education, “Yeshiva of America.” In 1928, it began issuing bachelor’s degrees and soon became known as Yeshiva University. See *History of YU*, <https://www.yu.edu/about/history> (last visited July 31, 2022).

The religious fervor and mission never abated. In the post-World War II decades, Yeshiva University “announced far-reaching programs of expansion, spurred both by the catastrophic extinction of Jewish centers of learning abroad [in the Holocaust] and

by the glaring need of the American community for religious direction.” Sarna, *supra* at 280. This initiative led to the creation of the Stern College for Women in 1954. *Id.*

Today, as then, Talmud study and Jewish religious instruction remain the bedrock of a Yeshiva University undergraduate education. *All* male undergraduates are required to complete the Torah Studies Program (“Program”).<sup>1</sup> *See* Undergraduate Torah Studies Program Comparison Chart, [https://www.yu.edu/sites/default/files/inline-files/UTS%20Comparison%20Chart.pdf?fbclid=IwAR0IC\\_M6cYbBDSyUG1wthWrF6q1HTR1TfS7sLi8D7OKrqPpAEAxOx9URkZg](https://www.yu.edu/sites/default/files/inline-files/UTS%20Comparison%20Chart.pdf?fbclid=IwAR0IC_M6cYbBDSyUG1wthWrF6q1HTR1TfS7sLi8D7OKrqPpAEAxOx9URkZg). This rigorous core curriculum includes Talmud, Hebrew Bible, Jewish Law, Jewish theology, and other foundational Jewish subjects. But this is no vestige of a bygone era; the Program is *the* defining feature of a Yeshiva University schedule: meeting for 3 - 4.5 hours every weekday morning, every semester, and every year. Not surprisingly, the University grants full years of credits for students who studied at Orthodox Israeli seminaries that teach only religious subjects. *See* Guide to Israel Schools, <https://www.yu.edu/israel-program/gis> (last visited July 31, 2022).

Beyond Judaic studies, Jewish religious instruction infuses all aspects of a Yeshiva education—even secular studies. Students at Yeshiva’s Sy Syms School of Business, for instance, are required to complete additional Jewish Studies requirements.<sup>2</sup> To be clear, these are not academic surveys of Judaism. The Business

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<sup>1</sup> The Stern College for Women has a comparable program. *See* Undergraduate Catalog for Women 2016-2018, [https://www.yu.edu/sites/default/files/inline-files/Stern%20College%20for%20Women%202016-18%20Final\\_0.pdf](https://www.yu.edu/sites/default/files/inline-files/Stern%20College%20for%20Women%202016-18%20Final_0.pdf) at 3-4, 6-7.

<sup>2</sup> This is true of all undergraduate divisions and applies to all majors.

School Jewish Values Curriculum is taught by rabbis and offers courses on religious precepts like “Practical Workplace Halacha,” using the Hebrew word for binding Orthodox Jewish law. See Sy Syms Jewish Values Curriculum 2020-2021, [https://www.yu.edu/sites/default/files/inlinefiles/Sy%20Syms%20Jewish%20Values%20Curriculum%20-%20Overview%20and%20Course%20Synopses%20for%202020-2021%2C%2005Apr2020\\_1.pdf](https://www.yu.edu/sites/default/files/inlinefiles/Sy%20Syms%20Jewish%20Values%20Curriculum%20-%20Overview%20and%20Course%20Synopses%20for%202020-2021%2C%2005Apr2020_1.pdf) (last visited July 31, 2022). For finance majors, Jewish doctrine is as much a requirement as accounting.

But even accounting is a “Jewish” class at Yeshiva University. Indeed, all classes are infused with Judaism as intended by Yeshiva’s founders. Under President Bernard Revel (1915-1940) and Head Rabbi Joseph B. Soloveichik (1941-1993), Yeshiva University went from having “grudgingly taught state-mandated secular subjects” to condoning it, but only through a rabbinic philosophy known as “Torah U’Madda” or Torah and Science, which sees value in other subjects because of their capacity to “enhance Torah” and expound knowledge that can be used in divine pursuits. Sarna, *supra* at 180, 192; Norman Lamm, *Some Comments on Centrist Orthodoxy*, TRADITION: A Journal of Orthodox Thought (1985), at 303, <http://modernjh.pbworks.com/f/Lamm-Comments+on+Centrist+Orthodoxy.pdf>. This principle remains the school’s motto today, emblazoned on its seal, and marks no dilution of Yeshiva’s religious character.<sup>3</sup> “Torah U’ madda does not imply . . . coequality. Torah remains the unchallenged and preeminent center,” Yeshiva’s president Rabbi Norman Lamm (1976-

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<sup>3</sup> See Stern College for Women, <https://www.yu.edu/stern> (last visited July 31, 2022) (self-described as “rooted in the tradition of Torah Umadda”).

2003) asserted. Lamm, *supra* at 304. Yeshiva University Rabbi Yehuda Parnes preached that “Torah Umadda can only be viable if it imposes strict limits on freedom of thought in areas that may undermine the fundamental Jewish beliefs.” Yehuda Parnes, *Torah U’Madda and Freedom of Inquiry*, at 71, [https://www.yutorah.org/\\_cdn/\\_shiurim/TU1\\_Parnes.pdf](https://www.yutorah.org/_cdn/_shiurim/TU1_Parnes.pdf). With regard to the observance of Jewish law, Rabbi Lamm wrote, “No, not a single fundamental of Judaism has been disturbed by us, we adhere to the same ikkarim (principles of faith), we are loyal to the same Torah, we strive for the same study of Torah and observance of *mitzvot* that our parents and grandparents before us cherished throughout the generations, from Sinai onward.” Lamm, *supra* at 301. As in 1886, everything at Yeshiva today is rooted in and guided by religious doctrine.

In 2017, Yeshiva University officially adopted a statement of its “core values,” expressing the “central teachings of our institution.” See The Investiture of Rabbi Dr. Ari Berman, September 10, 2017, <https://www.yu.edu/tomorrow#transcript>; Yeshiva University, Core Torah Values, <https://www.yu.edu/about/values> (last visited July 31, 2022). Posted proudly on its Website and on banners throughout its campuses, Yeshiva’s “core Torah values” include beliefs in:

- The Torah of Truth: “The Jewish people in particular affirm that beginning with the Revelation of the Torah at Mount Sinai, God entrusted eternal teachings and values to us that we must cherish and study diligently above all else, for they represent the terms of the special covenant that God made with us.”
- The Torah of Zion: “In Jewish thought, the concept of [messianic] redemption represents the conviction that . . . we have a responsibility to strive toward [the world’s] perfection. . . . The Jewish people’s task [is] to build up the land of Israel.”

*Id.* The undergraduate experience is thoroughly religious and is a primary reason many students choose to attend Yeshiva.<sup>4</sup> The undergraduate Colleges are still separated by sex.<sup>5</sup> Male visitors are forbidden from entering a female dorm building beyond the lobby and vice versa. *See* Visitor Policy for Undergraduate Student Housing (effective April 7, 2022), [https://www.yu.edu/sites/default/files/inline-files/Visitor%20Policy%20for%20Undergraduate%20Student%20Housing%20April%202022\\_0.pdf](https://www.yu.edu/sites/default/files/inline-files/Visitor%20Policy%20for%20Undergraduate%20Student%20Housing%20April%202022_0.pdf). A dress code is enforced based on biblically sanctioned modesty. *See* Yeshiva University Undergraduate Dress Code (Rev. Oct. 2017), [https://www.yu.edu/sites/default/files/inline-files/Yeshiva%20University%20Undergraduate%20Dress%20Code\\_0.pdf](https://www.yu.edu/sites/default/files/inline-files/Yeshiva%20University%20Undergraduate%20Dress%20Code_0.pdf) (“Female students are required to wear dresses or skirts that are knee-length, and tops that have sleeves and a modest neckline.”). The school is closed for Jewish holidays,<sup>6</sup> athletic teams do not compete on the Sabbath and Festivals,<sup>7</sup> the Israeli national anthem is sung (along with the American) before each match,<sup>8</sup> all campus food

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<sup>4</sup> *See* The Constitution of the Yeshiva University Wilf Campus Undergraduate Student Body at 4 (establishing in the preamble the goal to “enrich the religious atmosphere on campus”), <https://www.yu.edu/sites/default/files/inline-files/YU%20Constitution%202020.pdf>.

<sup>5</sup> The male and female campuses are nine miles apart and have all separate classes.

<sup>6</sup> *See generally* Yeshiva University FAQ Brochure, [https://www.yu.edu/sites/default/files/legacy/uploadedFiles/Offices\\_and\\_Services/HR/Working\\_at\\_YU/Orientation/FAQ\\_Brochure.pdf](https://www.yu.edu/sites/default/files/legacy/uploadedFiles/Offices_and_Services/HR/Working_at_YU/Orientation/FAQ_Brochure.pdf).

<sup>7</sup> *See* Judah Ari Gross, *Yeshiva University Team Won't Play on Shabbat*, *The Times of Israel*, Feb. 27, 2018, <https://www.timesofisrael.com/yeshiva-university-basketball-team-wont-play-on-shabbat/>.

<sup>8</sup> Shiryn Ghermezian, *YU president slams decision by Brooklyn College athletes to kneel during Israeli anthem*, *Jewish News Syndicate* (Feb. 27, 2020), <https://www.jns.org/yu-president-slams-decision-by-brooklyn-college-athletes-to-kneel-during-israeli-anthem/> (President Berman: “We are proud to be the only university who sings both the American and Israeli national anthems before every athletic competition and major event.”).

is kosher,<sup>9</sup> non-kosher food is prohibited at certain campus locations,<sup>10</sup> *mezuzahs* adorn every doorpost,<sup>11</sup> and assemblies frequently begin with religious invocations.<sup>12</sup> Harkening back to its origins withholding stipends to students who failed to study Torah, students today can be fined for failing to attend worship services at some University events.<sup>13</sup>

Yeshiva's website lists Undergraduate and Graduate Jewish Studies programs:

- Center for the Jewish Future
- The Emil A. and Jenny Fish Center for Holocaust and Genocide Studies
- Sephardic Programs
- Azrieli Graduate School of Jewish Administration & Education
- Bernard Revel Graduate School of Jewish Studies
- Israel Program
- Undergraduate Torah Studies
- Yeshiva College's Beren Department of Jewish Studies
- Stern College for Women's Rebecca Ivry Department of Jewish Studies

<https://www.yu.edu/jewish-studies-full-list>.

Simply put, Yeshiva is as much a religious organization as the Yankees are a baseball team.

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<sup>9</sup> Dining Services, <https://www.yu.edu/dining> (last visited July 31, 2022) (“We conduct a strictly kosher operation, under the strict rabbinical supervision of the Kashruth Division of the Orthodox Union (O-U).”)

<sup>10</sup> FAQ Brochure, *supra* at 2 (“Non-kosher food (even sandwiches) cannot be used in areas where non-disposable equipment is used.”).

<sup>11</sup> *Id.* at 1 (“What is a Mezuzah and why is there one on every door in the school?”).

<sup>12</sup> *See e.g.*, YU Commencement 2022, <https://www.youtube.com/watch?v=xY0IM-fuYIg> at 19:50.

<sup>13</sup> Times of Israel, *Yeshiva U students could be fined \$150 for skipping Shabbat prayers*, Nov. 10, 2017, <https://www.timesofisrael.com/yeshiva-u-students-to-be-fined-150-for-skipping-shabbat-prayers/>.

**I. A STATUTE THAT INTERFERES WITH THE INTERNAL GOVERNANCE OF A RELIGIOUS INSTITUTION VIOLATES THE FIRST AMENDMENT**

Government may not interfere with the ecclesiastical determinations of a religious association, regardless of whether incorporated. This principle, known as “ecclesiastical abstention” or “church autonomy” finds its roots in a line of this Court’s decisions, the earliest of which primarily involved church property and internal leadership disputes. This Court set forth the foundational principle:

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, 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.

*Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871).

Although *Watson* “was decided in 1872, before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action,” the decision “radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 115-16 (1952). *Watson* and its progeny firmly establish that no law can be validly enacted or enforced which has the effect of prohibiting the free exercise of religion, including interfering with church governance. Indeed, as *Kedroff* continues,

Ours is a government which by the “law of its being” allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion.

*Id.* at 120-21 (footnotes omitted).

The state may implement and enforce statutes governing religious institutions only to the extent that they effect their temporal, and not ecclesiastical, affairs. Moreover, as noted above, even when seemingly temporal rights, such as a university’s right to formally recognize a student organization, “follows as an incident from decisions of the [religious] custom or law on ecclesiastical issues,” as is the case here, no statute may be imposed prohibiting the free exercise of those rights. Indeed, the only reason the RCL itself is constitutional is because, although it governs religious corporations, it applies only to their temporal affairs, and expressly not to their ecclesiastical governance, for “an enactment by a legislature cannot validate action which the Constitution prohibits.” *Id.* at 107. In *Kedroff*, this Court invalidated Section 5-C of the RCL, which, held the Court, constituted “a transfer by statute of control over churches. This violates our rule of separation between church and state.” *Id.* at 110.

The NYCHRL, as applied by the trial court, unmistakably breaches that wall of separation, because it violates Yeshiva’s religious prerogative to determine on doctrinal grounds that YU Pride should not be recognized as a university organization.

## II. THE ESTABLISHMENT CLAUSE PROHIBITS LEGISLATION THAT GIVES PREFERENCE TO A PARTICULAR WORLDVIEW TO THE DETRIMENT OF RELIGIOUS DOCTRINE

Government “may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963). The Establishment Clause is not a vehicle for government to “preference secular activity,” but one prong of “the First Amendment’s double protection for religious expression.” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022).

“The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned.” *Watson v. Jones*, 13 Wall [80 US] 679, 728-729 (1871). And in *Everson v. Board of Education*, Justice Hugo Black set forth the principles that inform Establishment Clause jurisprudence: “Neither a state nor the federal government can . . . force nor influence a person to . . . profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (emphasis added).

The First Amendment to the U.S. Constitution begins, “[c]ongress shall make no law respecting an establishment of religion.” It is black letter law that, regardless of personal preferences, “[t]he government must be neutral when it comes to competition between sects.” *Zorach v. Clauson*, 343 U.S. 306 (1952). “The First Amendment mandates government neutrality” and “the State may not adopt

programs or practices. . . which ‘aid or oppose’ any religion . . . This prohibition is absolute.” *Epperson v. Ark.*, 393 U.S. 97 (1968) (citing *Sch. Dist. of Abington Twp.*, 374 U.S. at 225. As Justice Goldberg articulated in *Abington School District*, “[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.” *Id.* at 305.

The Establishment Clause neither calls for nor envisions marginalizing the religious community and hampering its members’ right to freely exercise their own religion. Nor should the Establishment Clause be read to prioritize the secular over the spiritual, the temporal over the ecclesiastical, atheists and agnostics over believers, or cultural norms over religious traditions—in effect creating its own religion of moralism or secularism.

To the contrary, “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. . . We are a religious people whose institutions presuppose a Supreme Being.” *Lynch v. Donnelly*, 465 U.S. 668, 674-75 (1984) (Scalia, J. dissenting).

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

*Zorach*, 343 U.S. at 313-14.

This Court recently noted that a “proper understanding” of the Establishment Clause does not “require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.” *Kennedy*, 142 S. Ct. at 2431. Indeed, noted the Court, “[r]espect for religious expressions is indispensable to life in a free and diverse Republic.” *Id.* at 2432-33.

As Kelsey Curtis wrote in *The Partiality of Neutrality*, 41:3 *Harv. J. L. & Pub. Pol’y* 935 (2018), the Court’s rulings have not been neutral towards religion but, instead, have “embrace[d] the secular.” Daniel O. Conkle similarly wrote in *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 *Ind. L.J.* 1 (2000), that “the immediate impact of formal neutrality may seem beneficial for religion, but its long-term effect . . . may be to . . . secularize religion.”

Plaintiff Meisels frankly admits that she hopes to use the lawsuit to impose “cultural changes” at Yeshiva and to “make a statement” about Meisels’ views and “change things . . . even for people who are against the movement.” “*Second class citizens*”: *LGBTQ students allege culture of alienation and fear at Yeshiva University*, YOUTUBE (May 10, 2021), [https://www.youtube.com/watch?v=J2c7R\\_8zUbM](https://www.youtube.com/watch?v=J2c7R_8zUbM). This holy war is precisely what the trial court has blessed via its misguided interpretation of the NYCHRL, and it is constitutionally intolerable. The First Amendment provides

double protection for religion. It is therefore inconceivable that the trial court would allow government's worldview or cultural preferences to trump religion.

### **CONCLUSION**

For the reasons set forth above, the trial court's decision and order should be reversed.

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Respectfully submitted,



Barry Black  
Nelson Madden Black LLP  
475 Park Ave. South, 28<sup>th</sup> Floor  
New York, NY 10016