No. 22A184

In the Supreme Court of the United States

YESHIVA UNIVERSITY, VICE PROVOST CHAIM NISSEL, AND PRESIDENT ARI BERMAN,

Applicants,

v.

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

Respondents.

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

OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING APPELLATE REVIEW OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND STAY PENDING RESOLUTION

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PRELIMINARY STATEMENT

Applicants' extraordinarily premature application blows past all prerequisites to this Court's jurisdiction and its orderly review of state court orders. Applicants ask the Court to stay a state trial court decision that has yet to be reviewed by *any* New York State appellate court—much less the state's highest court—even though 28 U.S.C. § 2101(f) only authorizes this Court to stay final judgments of the state's highest court that have finally determined the federal issues in the case. Here, the state appellate process is at an entirely nascent stage. Respondents have yet to even file an answering brief to the appeal of the trial court's decision.

Not only do Applicants leapfrog the entire state appellate process, but they also press the Court to address both novel and weighty First Amendment questions on a rocket docket without the benefit of full briefing or oral argument. And they do so when the New York state appellate courts can still resolve this dispute without reaching those First Amendment questions *at all*, since it is a state law dispute at center stage in the ongoing state court proceedings: whether Yeshiva University qualifies as a public accommodation under the New York City Human Rights Law.

No "emergency" exists that justifies the University's grossly irregular procedural maneuvers around the normal state court appellate process. The state trial court's decision that Yeshiva University is a public accommodation under the Human Rights Law simply requires the University, a large educational institution that educates 5,000 students of all religious faiths every year, to grant the YU Pride Alliance access to the same facilities and benefits as its 87 other recognized student

groups. This ruling does not touch the University's well-established right to express to all students its sincerely held beliefs about Torah values and sexual orientation. Pending appeal, the University and its counsel can continue to explain, as they have this week in press releases, online "FAQs" about this case, and television interviews, that it is required to provide the student club with access to a classroom, bulletin board, or club fair booth as one step in a legal process, not because it endorses the club's mission of support and acceptance for LGBTQ students.

At the same time, while Yeshiva University can espouse its Torah values without interference, it may not deny certain students access to the non-religious resources it offers the entire student community on the basis of sexual orientation. "It is unexceptional that [state] law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018). Applicants may vigorously disagree with the trial court's ruling, but an emergency stay application giving only cursory treatment to the state law interpretive dispute at the heart of this case, before the intermediate state appellate court has even received the full appeal, much less considered it, is not the right way to bring these important questions to this Court for review.

STATEMENT OF THE CASE

Yeshiva University is a top research university in New York City that educates 5,000 undergraduate and graduate students of all religious backgrounds

every year. App. 375 at 26:2-11.[1] It is a major actor in the intellectual, economic, and professional marketplace of higher education, both within New York City and nationally. It comprises four colleges and seven graduate schools chartered by the New York State Board of Regents to award 23 exclusively secular degrees in disciplines ranging from law to biology to psychology. R. App. 829; App. 373-74 at 18:13-22:21. The University's undergraduates all matriculate with Bachelor's Degrees. R. App. 829. The University has historically been affiliated with Orthodox Judaism and remains so today, although primarily in its undergraduate colleges.

YU is incorporated as an educational corporation under the New York Education Law, is organized "exclusively for educational purposes," R. App. 37 ¶ 1, and has no religious rules of governance or stated religious affiliation in its corporate charter. YU's Bylaws also state no religious rules of governance and do not reference any religious affiliation. R. App. 36-52. People of all religious faiths are equally entitled to hold offices and appointments at YU. R. App. 37 ¶ 8. YU does not require its Trustees, President, administrators, faculty, or students to be Jewish. R. App. 36-52, 119 at 138:6-139:25. In 1967, YU legally transformed itself from a corporation with a stated religious purpose, comprised up of both a secular academic program and RIETS (its seminary ordaining future rabbis), to a corporation with an exclusively educational purpose granting only secular degrees, and separately incorporated from RIETS, which continued to ordain rabbis. R. App. 37, 59-67, 70-186, 829. In 1969, YU again changed its Certificate of Incorporation, this time to eliminate "Religious

[1] Citations to "App." are to Applicants' Appendix; citations to "R. App." are to Respondents' Appendix; and citations to "Br." are to Applicants' brief in support of their emergency application.

Education" degrees from its charter to be "consistent with its present corporate organization and operation." R. App. 73-74. YU clarified that "[i]t is also desired to effectuate the foregoing change to clarify the corporate status of the University as a non-denominational institution of higher education." R. App. 75-76. Faculty are not required to sign a religious pledge, statement, or oath or to attend religious services. R. App. 98. Less than five percent of students major in Jewish studies out of all academic majors. R. App. 103 at 74:11-21.

The top five undergraduate majors at the University are Psychology, Biology, Accounting, Finance, and Marketing. *Ibid.* The top six industries for YU graduates are finance, accounting, non-profit/social service, health care, education, and marketing. R. App. 811. A significant percentage of YU undergraduates also matriculate into graduate schools after graduation; the top areas of graduate study are law, medicine, nursing, social work, education, and dentistry. *Ibid.*

Respondent YU Pride Alliance is an unofficial YU undergraduate student group formed in 2018 whose goal is to offer a safe, supportive space on campus for LGBTQ students for "peer support, academic and professional networking opportunities, and inclusive community-building." App. 475 ¶ 4; R. App. 1089. Respondents Meisel, Miller, Weinrich and Anonymous are current and former student members of the Pride Alliance.

For years, Applicants have refused to allow the Pride Alliance (and its predecessors) to operate as an official club solely because of the sexual orientation of the club's members and its LGBTQ inclusive mission. It is undisputed that the

University has therefore excluded the Pride Alliance "from equal access to the facilities, resources and support that other student groups receive to host social events and academically and professionally enriching activities," App. 477 ¶ 10, because of the sexual orientation and gender identity of the club's mission and members. The University has denied the club the ability to hold meetings on campus, access funding available to other student groups, publicize its events on school list-servs and bulletin boards, and participate in student club fairs. App. 152-54 ¶¶ 35-42.

PROCEDURAL HISTORY

Respondents filed this action in the Supreme Court of the State of New York, New York County, on April 26, 2021, bringing claims for sexual orientation and gender discrimination under Section 8-107(4) of the New York City Human Rights Law (the "Human Rights Law"). App. 85-118. Applicants moved to dismiss pursuant to New York Civil Practice Law and Rules ("CPLR") § 3211(a)(1) and (a)(7) on June 3, 2021, asserting that they were a "religious corporation" exempt from the Human Rights Law's definition of "public accommodation," attaching amendments to the University's corporation charter, and arguing in the alternative that the Human Rights Law's application to the University violated the First Amendment. App. 231-87. Applicants' briefing on the First Amendment spanned about two pages of their 20-page brief; of that, Applicants prepared two paragraphs each on their interpretation of religious autonomy and the applicability of the Free Exercise Clause, and another paragraph each on the Free Speech and Assembly Clauses. App. 250-52.

The trial court converted Applicants' motion to dismiss to one for summary judgment on the legal question of whether the University was a covered entity under the Human Rights Law and ordered the parties to file surreplies, and also granted limited discovery on the narrow issue "of whether Yeshiva University is a religious corporation within the meaning of the [Human Rights Law]." R. App. 1086. After completing the limited discovery, the parties filed their surreplies. Applicants' surreply again focused on its statutory interpretation argument that the University was excluded from the Human Rights Law as a "distinctly private" "religious corporation," followed by a page of argument each on their religious autonomy and Free Exercise defenses. App. 345-47. Respondents cross-moved for summary judgment that the University was not a "religious corporation" under New York law, arguing that the University was included in the Human Rights Law's definition of a public accommodation.

The trial court issued its Decision and Order on June 14, 2022, analyzing under New York law whether YU was a "religious corporation," and concluding that YU was not one, and holding that the University was therefore a covered public accommodation. The trial court also held that complying with the Human Rights Law did not violate Applicants' First Amendment rights to Free Exercise, Free Speech, and religious autonomy. App. 66-69. The trial court issued a permanent injunction "restrain[ing] [Applicants] from continuing their refusal to officially recognize the YU Pride Alliance as an official student organization because of [] sexual orientation or gender" and "direct[ing] [Applicants] to immediately grant

plaintiff YU Pride Alliance the full and equal accommodations, advantages, facilities, and privileges afforded to all other student groups at Yeshiva University." App. 70-71.

Applicants filed a Notice of Entry and Notice of Appeal of the trial court's Decision and Order to the Appellate Division, First Department, on June 24, 2022. Applicants initiated their appeal on August 8, 2022 with the filing of their moving brief. R. App. 1010. Respondents' answering brief is due on September 16, 2022, and Applicants' reply is due September 30, 2022.

On July 5, 2022, prior to perfecting their appeal, Applicants moved by Order to Show Cause in the First Department asking for a stay of the trial court's Decision and Order pending resolution of the appeal. After briefing on an agreed-upon schedule, the First Department, with four judges present, unanimously denied Applicants' motion in a one-page order on August 23, 2022. App. 40.

Applicants next filed two identical, procedurally improper motions with the First Department and the New York Court of Appeals, on August 23, 2022 and August 24, 2022, respectively. Respondents opposed the latter application on August 25, 2022. The same day, the Court of Appeals notified the parties by letter that Applicants' motion "was reviewed by Judge Madeline Singas, who declined to sign the order. As a result of the determination by Judge Singas, no motion is pending at the Court of Appeals in the above title." App. 5.

Also on August 25, 2022, the First Department returned Applicants' Order to Show Cause because it was improperly filed. It instructed Applicants to

refile their motion as "a full notice of motion with a proper return date and not an interim relief application." App. 21. Applicants never re-filed the motion according to the Court's instructions. *See* App. 24-27 (relabeling original filing without curing defect). As of this response, Applicants still have not cured the defect in their motion to the First Department seeking leave to appeal its denial of their stay motion to the Court of Appeals, although all Applicants need to do is file a Notice of Motion with a return date.

On August 29, 2022, Applicants filed the present emergency application to this Court for relief.

LEGAL STANDARD

I. 28 U.S.C. § 2101(f)

Under 28 U.S.C. § 2101(f), the Supreme Court may stay a "final judgment or decree of any court" that "is subject to review by the Supreme Court on writ of certiorari . . . for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." 28 U.S.C. § 2101(f). The Court examines three factors to determine the propriety of a stay under § 2101(f): "(1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, Circuit J.). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam).

II. 28 U.S.C. § 1651

An application for a stay under the All Writs Act, 28 U.S.C. § 1651(a), "demands a significantly higher justification than that described in the § 2101(f) stay cases." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) ("*Ohio Citizens*") (Scalia, Circuit J.). A writ under § 1651 is one of "the most potent weapons in the judicial arsenal," so it should only be issued in "exceptional circumstances." *Cheney v. U.S. Dist. Ct. for the Dist. of Colum.*, 542 U.S. 367, 380 (2004) (citations and quotation marks omitted). Accordingly, an applicant must meet three prerequisites to obtain it: "(1) no other adequate means exist to attain the relief he desires, (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances." *Hollingsworth*, 558 U.S. at 190 (citation, quotations marks, and alterations omitted).

ARGUMENT

I. THE COURT SHOULD DENY APPLICANTS' PREMATURE AND IMPROPER APPLICATION TO STAY A STATE TRIAL COURT ORDER BEFORE ANY STATE APPELLATE REVIEW

A. There Is No "Reasonable Probability" that This Court Will Grant Certiorari Because the Court Cannot Grant Certiorari in this Posture

The first factor to obtain a stay under 28 U.S.C. § 2101(f) is a "reasonable probability" that the Court will grant certiorari. Applicants fail this test because the Court can only grant certiorari to review a state court order when the state's highest court has finally determined the federal issues in the case. The trial court's order in this case has yet to be reviewed on the merits by any state appellate court. It does not come close to meeting the finality rule for this Court to review state court orders.

Under § 2101(f), the Court only has authority to stay "final judgments" that are "subject to review by the Supreme Court on writ of certiorari." 28 U.S.C. § 2101(f); *see* S. Ct. Rule 23 ("A stay may be granted by a Justice as permitted by law."). The only state court orders that are "subject to review" by this Court on a writ of certiorari are "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). The final state court judgment requirement has existed since "the earliest days of our judiciary," as part of the Judiciary Act of 1789. *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 80-81 (1997). And § 2101(f) is clear that this Court is limited to staying "the execution and enforcement" of a "*final* judgment or decree." *Ibid.* § 2101(f) (emphasis added). This Court lacks authority under § 2101(f) to stay non-final judgments of state courts.

Circuit Justice Scalia made this point expressly over 35 years ago: "It is clear from [the statute's] language that . . . it is only the execution or enforcement of *final* orders that is stayable under § 2101(f)." *Ohio Citizens*, 479 U.S. at 1312 (emphasis in original); *see also Johnson v. California*, 541 U.S. 428, 431 (2004) (finality is "an essential prerequisite to [the Court] deciding the merits of a case"); *Jefferson*, 522 U.S. at 76 ("This finality rule is firm, not a technicality to be easily scorned.").

An order of a state's highest court qualifies as a "final judgment" that this Court can review on the merits only when the state high court "has finally determined the federal issue present in a particular case" and "the federal issue [] is not subject to further review in the state courts." *Cox Broad. Cop. v. Cohn*, 420 U.S.

469, 477, 485 (1975). *Cox* identified four situations where the Court may review the orders of a state's highest court even though "there are further proceedings in the lower court"; in all four situations, however, "the federal issue has been finally decided in the lower state courts." *Ibid.* at 477-83. Following *Cox,* in "almost all of the practical finality cases, the federal question presented for review has been finally decided by the highest court that was then available to consider it," and "the decision was by the highest court that ever would be available to consider the question." 16B Wright et al., Federal Practice & Procedure § 4010.[2]

The New York Court of Appeals has not issued a "final judgment or decree" on the federal issues presented in this emergency application. The state appellate process is in its earliest stages. No state appellate court—let alone the state's highest court—has finally determined the merits of Applicants' First Amendment defenses. Respondents have yet to even file their opposition to Applicants' appeal of the trial court's order: Respondents' brief is not due until September 16. The state trial court is the *only court* that has addressed a federal question—and even then, Applicants' briefing to the trial court focused primarily on

[2] Applicants cite *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam), to support the Court's jurisdiction to enter a stay, but that case is directly at odds with the text of § 2101(f) and has fallen out of favor. *Skokie* based its cursory reasoning (treating an application for a stay as a petition for certiorari and granting it) on the fact that the case involved a prior restraint on speech, *see ibid.* at 44, which comes "with a heavy presumption against its constitutional validity," *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (citation and quotation marks omitted). Applicants' effort to break new ground in the Court's First Amendment jurisprudence on the emergency docket does not enjoy this same presumption. *Skokie* therefore "rested finality on such special reasons that the apparent expansiveness of the approach may signify little for general doctrine," and it "has not yet had a sweeping impact on general finality doctrine." 16B Wright et al., Federal Practice & Procedure § 4010. On the theory Applicants advance, every state trial court order that arguably infringes on federal constitutional rights would fall within this Court's authority under § 2101(f) and § 1257(a) to both review directly and to issue emergency relief against. That would turn *Cox's* limited reading of § 1257—and the principles of federalism on which it rests—on its head.

their statutory defense under New York law, not the First Amendment defenses they raise here. *See* App. 250-51 (1.5 of 19 pages discussing religious autonomy and Free Exercise); App. 345-49 (3 of 22 pages discussing religious autonomy and Free Exercise). Applicants lack any basis to ask the Court to stay the state trial court's order under 28 U.S.C. § 2101(f).

The New York Court of Appeals' two-sentence letter dated August 25, 2022 declining to sign Applicants' procedurally defective Order to Show Cause seeking leave to appeal, App. 4-5, is not a final determination of the merits of any federal issue. "When the highest state court is silent on the federal question before us, we assume that the issue was not properly presented." *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). The record here proves that assumption true.

Under the New York CPLR, a party must seek leave to appeal an intermediate appellate court's non-final order—such as the First Department's denial of Applicants' stay motion—from the intermediate appellate court, not the Court of Appeals. *See* CPLR § 5602(b)(1); *Waheed v. Keit*, 89 N.Y.2d 1072 (1997). Applicants failed to follow the proper procedure and seek leave to appeal from the First Department, even though they could have and still can. *See infra* § I.B.2. By going straight to the Court of Appeals instead, Applicants ignored New York's clear procedural requirements, and the Court of Appeals rejected their application on those procedural grounds, rather than the merits of the federal claim. Because the Court of Appeals has yet to finally determine the federal issues Applicants raise, the Court lacks jurisdiction to stay the trial court's order under § 2101(f).

Section 2101(f)'s requirement that a stay can be granted for only "a reasonable time to enable the party aggrieved to obtain a writ of certiorari," 28 U.S.C. § 2101(f), seals the point. The Court cannot grant a stay for a "reasonable time" to allow Applicants to petition for certiorari because Applicants cannot even file that petition under § 1257(a) until the First Department and then the New York Court of Appeals finally decide the federal questions—a process that has only just begun. Applicants have asked this Court in the alternative to treat their application as a petition for a writ of certiorari, but for all of these reasons, the Court lacks the power to grant that petition at this interlocutory juncture.

The Court should end its analysis here. Applicants filed a patently premature application for a stay under § 2101(f) when the plain text of that statute does not permit the Court to issue a stay in this posture.

B. The Interlocutory Posture of the Case in the New York State Courts Counsels Strongly Against a Stay or Certiorari

Even if this Court believes that it has the formal authority to grant a stay and/or certiorari at this preliminary stage, there are compelling practical reasons not to do so and to instead allow the state court litigation to run its course: (1) the state appellate courts can resolve this case in its entirety on statutory grounds interpreting New York law, without addressing the First Amendment at all; (2) Applicants have failed to use available state court appellate procedures to obtain the same interim relief they ask for here; and (3) an emergency application seeking review of a state trial court order without full briefing or oral argument is an

inappropriate vehicle to resolve the novel First Amendment questions Applicants pose.

1. Applicants Can Prevail in the State Appellate Courts on Statutory Grounds, Which May Remove the First Amendment Issues from the Case Altogether.

There is no dispute that if Applicants prevail on their statutory argument under the Human Rights Law, Applicants win the case and the state appellate courts do not need to pass on their First Amendment defenses at all. *See, e.g.*, App. 242. The state appellate courts' ability to resolve this dispute without reaching the constitutional issues militates powerfully against this Court undertaking a premature merits preview of those same issues.

One reason why the Court "insist[s] that federal issues be presented first in the state-court system" is that it "permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges." *Webb v. Webb*, 451 U.S. 493, 500 (1981). Put another way, "an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved." *Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975). That is precisely the case here.

Applicants' main defense of this case in the trial court, as well as Point I of its opening brief to the First Department, is that YU does not have to comply with the Human Rights Law because it is a "religious corporation incorporated under the education law," an entity that the statute carves out of its definition of a covered

"public accommodation." N.Y.C. Admin. Code § 8-102(9); *see* App. 230-256; R. App. 1034-52. If they prevail on that defense, they win the case, with no need for the state appellate courts to address the First Amendment issues in this emergency application.

Whether Yeshiva University is a "religious corporation" under New York law is a quintessential question of state law. *See N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 16-17 (1988) ("*NYSCA*") (recognizing that a "religious corporation" is a type of corporation "treated in a separate body of legislation" in New York). To answer it, the state trial court turned to state corporate law and statutes. Under the Religious Corporations Law ("RCL"), a religious corporation is a "corporation created for religious purposes." RCL § 2. Every corporation incorporated under the RCL is necessarily a "religious corporation." *See ibid.* When a corporation is incorporated under another statute (like YU, under the education law), New York courts have held that it can still qualify as a religious corporation when (1) its organizing documents state a religious purpose; and (2) it is organized as a place of worship, consistent with the types of corporations provided for under the RCL. *See, e.g.*, *Temple-Ashram v. Satyanandji*, 84 A.D.3d 1158, 1160 (2d Dep't 2011) (cleaned up); *Agudist Council of Greater N.Y. v. Imperial Sales Co.*, 158 A.D.2d 683, 683 (2d Dep't 1990).

The trial court relied on this framework to decide that YU is not a "religious corporation," *see* App. 56-64, and the First Department will take this question up next. Respondents are confident that the state appellate courts will

affirm the trial court's finding that YU is not a "religious corporation" because the University "is not a 'religious corporation' on paper, does not hold itself out to be a 'religious corporation' and at least 27 years ago knew that it was not exempt from the [Human Rights Law]." App. 63. But either the First Department or the Court of Appeals could disagree with the trial court on this point when they take up the merits. If they do, the state's appellate courts will have resolved this case in Applicants' favor without addressing the First Amendment at all.

The Court's review of such novel constitutional questions when the state appellate courts could eliminate them entirely is especially inappropriate because Applicants only raised their Free Exercise and church autonomy defenses to the trial court in cursory fashion, in contrast with their expansive exposition of those issues here. *Compare* App. 250-51, 345-49 (1.5 pages and 3 pages, respectively, in two trial court briefs on church autonomy and Free Exercise), *with* Br. at 18-29 (11 pages on same arguments). In other words, no state court—not even the trial court—has reviewed Applicants' First Amendment arguments at anything close to the depth they present them here. That will change during the state appellate process. Applicants have significantly expanded on their church autonomy and Free Exercise arguments in their merits brief to First Department. *See* R. App. 1052-67 (15 pages on church autonomy and Free Exercise). The Court should "afford[] the parties the opportunity to develop the record necessary for adjudicating the issue[s]" in state court rather than intervene at this unprecedentedly early stage without full briefing. *See Webb*, 451 U.S. at 500.

Reaching the merits of constitutional issues in this early posture also raises the real risk of "piecemeal review of state court decisions," a result the "finality requirement limit[ing] [Supreme Court] review of state court judgments" is designed to "avoid." *N. Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); *see also Cox*, 420 U.S. at 477 (finality rule requires that "additional [state court] proceedings would not require the decision of other federal questions that might also require review by the Court at a later date"). Applicants raised four First Amendment defenses to the trial court—church autonomy, Free Exercise, Free Speech, and Assembly. App. 250-54. They raise all four of those defenses to the First Department. R. App. 1033. But they raise only church autonomy and Free Exercise on this emergency application. If this Court takes up the merits now, Applicants may well come back later, after state appellate review, with an additional application to review their Free Speech and Assembly defenses that are not presented here. The finality rule is designed to prevent this exact result.

In short, this emergency application strikes a blow to the heart of the tenets of comity and federalism that proscribe the Court's authority to stay non-final state court judgments. If the Court hears this emergency application, it is certain to invite a flood of similar applications directly from state trial courts when no state appellate court has passed on the merits, the state appellate courts can obviate the constitutional issues by deciding a threshold state law question, and other federal issues remain for litigation in the state courts that the applicants failed to present.

2. Applicants Have Not Used Available New York State Appellate Process to Seek the Interim Relief They Request Here.

Applicants misrepresent the record when they claim that "both the Appellate Division and the New York Court of Appeals denied further review of the motion for a stay pending appeal." Br. at 16. The First Department did not deny further review of the motion for a stay pending appeal. It instructed Applicants to cure and refile their motion for leave to appeal to the Court of Appeals. *See* App. 21; CPLR §5602(b)(1) (permitting parties to seek leave to appeal Appellate Division non-final orders to the Court of Appeals by filing motion with the Appellate Division). But Applicants never did so.

Under Supreme Court Rule 23, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." S. Ct. Rule 23(3). These are not the "most extraordinary circumstances" the Rule requires. Rather, Applicants' ongoing failure to cure their First Department motion to continue seeking available interim relief in the state courts reveals their emergency application for what it is: a transparent effort to leapfrog the state appellate process and secure a merits preview on novel First Amendment questions without full briefing or oral argument.[3]

[3] Applicants' ability to seek relief from the First Department's interlocutory order in the state courts defeats this Court's authority to issue the "exceptional" relief of a writ under 28 U.S.C. § 1651 because that relief is only available when "no other adequate means exist to attain the relief [the party] desires." *Hollingsworth*, 558 U.S. at 190 (citation and quotation marks omitted). The novelty and complexity of the First Amendment issues raised by this application also defeat any argument that Applicants have a "clear and indisputable right" to a writ. *Ibid.*

3. An Emergency Stay Application in a Case Where the State Appellate Courts Have Not Yet Even Heard the Case is Not the Appropriate Vehicle to Re-Examine *Employment Division v. Smith*.

Just last year, in *Does 1-3 v. Mills*, 142 S. Ct. 17 (2021) (Mem.), the Court declined to stay a Maine law requiring healthcare workers to receive COVID-19 vaccines or lose their jobs in the face of the stay applicants' Free Exercise objections under *Employment Division v. Smith*, 494 U.S. 872 (1990). *Does 1-3*, 142 S. Ct at 18 (Barrett, J., joined by Kavanaugh, J., concurring). Concurring in the stay denial, two Justices cautioned that enjoining the state law under the Free Exercise Clause was not appropriate "on a short fuse without the benefit of full briefing" because the case was "the first to address the questions presented." *Ibid.*

The concerns expressed in *Does 1-3* apply with even greater force here. Like *Does 1-3*, Applicants ask the Court to address significant and novel First Amendment questions "on a short fuse" without full briefing or any oral argument. But this case presents even deeper problems because, in *Does* 1-3, the Court at least had statutory authority to issue a stay or grant certiorari of the federal appeals court order if it so chose. That is not the case here.

Applicants badly overreach in suggesting that the Court address the scope and viability of *Smith* or apply the church autonomy doctrine in an entirely novel context in this preliminary state court posture. Addressing these questions in a case where the lower state courts have not yet had a chance to fully consider and ventilate the legal issues because Applicants' state court appeal is still in its earliest stages would raise serious issues of intrusion into state courts' jurisdiction. For these

exact reasons, earlier this year, the Court denied certiorari of a state court interlocutory order addressing the church autonomy doctrine because although some Justices had "doubts about the state court's . . . application of the ministerial exception," they concluded that certiorari was not appropriate because petitioner would be able to "seek[] review in this Court when the decision is actually final." *Gordon College v. Deweese Boyd*, 142 S. Ct. 952, 955 (2022) (Mem.) (Alito J., concurring).

This Court should not depart from its own procedural norms to issue a stay in a case that is still nascent in the state appellate courts, especially one that turns on a question of state law that may obviate the need for this Court to ever address the federal constitutional issues presented in this application. At this juncture, there has only been a single state court trial decision and order, with the intermediate appellate court just now receiving merits briefing. Applicants improperly push the Court to act in this premature posture, on a matter of significant public concern, on a shallow procedural history, and in the context of a case arising from state courts interpreting first and foremost questions of state law.[4]

[4] The sheer volume of amici who have filed briefs in support of Applicants demonstrates the national and even international interest in Applicants' First Amendment claims. Respondents will not be able to respond to those briefs in this application, nor will they have time to line up amici who might support their position, since unlike Applicants, Respondents did not have the opportunity to coordinate these filings in advance. Depending on what issues there are for review, many additional friends of the Court may wish to weigh in. The gravity of the questions Applicants want this Court to resolve would certainly suggest providing a more robust opportunity for amicus participation on both sides.

II. APPLICANTS FACE NO HARM THAT WOULD JUSTIFY DISRUPTING THE NORMAL PROCEDURES THROUGH THE STATE APPELLATE COURTS

All of the above is reason enough for this Court to reject the Application. But even the *affirmative* case for emergency relief—that the trial court's ruling is causing Applicants irreparable harm—is far from persuasive. Indeed, the trial court's order simply requires Applicants to give a student club equal (and revocable) access to facilities and benefits like classrooms and bulletin boards that it gives to all other campus student groups. This does not occasion a sea change in Applicants' religious environment or disrupt YU's religious identity or message, as Applicants claim. The irreparable harm that Applicants claim justifies bypassing the state appellate courts to grant emergency relief is also one that Applicants have abided for more than 30 years. An LGBTQ club has existed within the Law School for decades, and has apparently inflicted no harm to its religious atmosphere. YU's Undergraduate Student Bill of Rights already guarantees students the protections of the Human Rights Law—the very law Applicants claim was unconstitutionally applied to them here.

Applicants remain free to express their religious views on LGBTQ relationships at the same time as an LGBTQ student group meets on campus for peer support while this appeal is pending. Applicants' claims of irreparable harm do not justify this Court staying a trial court order in a premature procedural posture when they have barely given the state courts an opportunity to review the case.

A. Unlike Cases Where Religious Worship Is Curtailed, No Urgent Circumstances Require this Court's Emergency Intervention

The circumstances of this case do not remotely resemble the series of cases from the October 2020 Term, in which this Court found irreparable harm and granted an injunction pending appeal where religious worship itself was curtailed "for even minimal periods of time" by state restrictions on religious exercise. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per cuiam) (quotation marks and citation omitted); *see also S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 716 (2021) (mem.) ("Respondents are enjoined from enforcing the Blueprint's Tier 1 prohibition on indoor worship services against the applicants pending disposition of the petition for a writ of certiorari."); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65 (2020) (per curiam); *accord. Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021) (mem.); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021) (mem.); *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020) (mem.).

Here, there is no emergency, and so no irreparable harm, and no curtailment of the fundamental right to religious worship. Unlike the Court's recent cases where the right to meet and gather for worship was quite literally infringed by the State's action, the University's claimed irreparable harm is of a markedly different character. Members of the YU community can congregate and worship freely. Instead, all this case is about is whether YU has to allow the student club access to campus classrooms for meetings or bulletin boards.

Applicants also exaggerate and misstate the consequences of the state trial court's finding that as a public accommodation like every other university in New York City, YU must provide non-discriminatory access to its facilities and benefits. YU still has the right to engage in "religion-based hiring" under Section 8-107(12). It can maintain kosher food service and Shabbat observance by closing campus buildings, without denying anyone the "full and equal enjoyment" of any "accommodations," "facilities," or "privileges" because those requirements apply to everyone on campus equally. N.Y.C. Admin. Code § 8-107(4)(a)(1). Its sex-segregated undergraduate colleges are fully permissible under N.Y.C. Admin. Code § 8-107(4)(d), which allows educational institutions to "establish[] or maintain[] a policy of educating persons of one gender exclusively." YU may continue to supervise the formation of student clubs, so long as it does not deny equal access to a club because of protected status under Section 8-107(4)(a)(1) (prohibiting discrimination "because of any person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or immigration or citizenship status"). YU had and still has the absolute right to deny a student gambling club and student fraternity, for example, because those denials were not based on protected traits. YU may not engage deny its gay students equal access to University resources, that is the sum total of the Court's ruling.

B. The University Is Not Irreparably Harmed Because an LGBTQ Student Club Already Exists Within the University

Applicants claim that it would "irrevocably change the religious atmosphere at Yeshiva" if it grants the Pride Alliance even transitory equal access to

facilities and benefits during this appeal. Br. 29-30. This claim is belied by the presence of an LGBTQ club on YU's campus that has peacefully existed in that institution's religious environment for decades.

The Cardozo School of Law, the University's renowned law school, has an official LGBTQ student group, OUTLaw, that operates on the same terms as all other student groups on campus. *See* R. App. 1074. And it does so without compromising the institution's Jewish character. Cardozo, "[a]s part of Yeshiva University, [] is closed from Friday evening . . . through Saturday in observance of the Sabbath"; it observes all Jewish holidays; its cafeteria and catering service "is a kosher operation, under [] rabbinical supervision"; mezuzahs hang on every door; it uses YU's seal; and it offers a "concentration in Jewish law." R. App. 1077-80. Applicants cite all of these features as evidence of the University's "religious character" that it claims will be irrevocably harmed during the course of this appeal. Yet Cardozo OUTLaw exists on equal terms at the law school, and no one has ever asserted that this well-established club has changed or negatively altered the University's religious atmosphere.

To the extent that Applicants claims that recognition of an LGBTQ club in one academic unit irreparably harms its religious environment in violation of its Free Exercise rights, but recognition in a different academic unit does not, this would be a novel issue that was not addressed below and is entirely ill-suited to resolution on an emergency application. Whatever its merits, the question of whether one unit of a university can suffer a violation of their Free Exercise rights from the same

conduct if another unit of a university does not, is yet developed. This would be a question of first impression, which is all the more reason that this case should be heard in the normal course, and not through an emergency application.

The reality is that Applicants' denial of facilities and tangible resources to the Pride Alliance make it an outlier among its peer universities around the country. Of the religiously affiliated universities listed in US News & World Report Top 100 universities, Fordham University, St. John's University, University of Notre Dame, Baylor University, Southern Methodist University, Loyola University Chicago, Pepperdine University, Creighton University, to name a few—all have LGBTQ clubs on their campuses. Applicants face no emergent irreparable harm if they join the ranks of these peers in permitting students to meet as a club in a campus classroom pending appeal.

C. YU Has Promised Students They Will Comply with the Human Rights Law and Has Acknowledged for Decades that It Must

Applicants' claim that complying with the Human Rights Law causes irreparable harm also raises questions because the University's *own policies* publicly guarantee the Human Rights Law's protections to its undergraduate students. YU's Undergraduate Student Bill of Rights gives students "the right to participate in fully in the University community without discrimination as defined by federal, state, and *local* law." R. App. 1093 (emphasis added). The Human Rights Law is the local antidiscrimination law in New York City.

YU has also acknowledged it must comply with the Human Rights Law without raising First Amendment concerns on numerous occasions. For example, YU

"concede[d] that it is subject to the City Human Rights Law" to the New York Court of Appeals in 2001. *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 491 (2001). It raised no First Amendment challenge to the application of the Human Rights Law in that case. Applicants' claim to be irreparably harmed by following this same law pending appeal in this case is therefore surprising.

D. The University's "Reputation" And "Message" Will Not Be Irreparably Harmed Pending Appeal

Applicants claim that they face irreparable harm in the form of injury to YU's "reputation among its past, present and future students and within the Jewish community more broadly," and that it would send an "irrevocable message inconsistent with [Torah] values" if the club functions pending appeal. Br. at 30. Requiring Applicants to provide a student club equal access to resources such as classrooms and bulletin boards while their appeal is pending in the state courts sends no "irrevocable" message to anyone. Indeed, Applicants have already actively sought (and received) widespread media coverage of the opposite message; any recognition of the YU Pride Alliance will be due to legal mandate, not due to Applicants' endorsement of the club.[5] Their public efforts make clear that Yeshiva University does not endorse any aspect of the YU Pride Alliance.

Applicants argue that the Pride Alliance's mission "cloud[s] the nuanced religious message it seeks to convey to its undergraduate students." Br. at 1.

[5] *See, e.g.*, *YU in the Supreme Court – What's at Stake?: FAQs*, Yeshiva University (Sept. 2, 2022 4:22 PM) ("YU FAQ"), https://www.yu.edu/case-faqs; Could Yeshiva University's Clash with LGBTQ+ Club Head to SCOTUS?, FOX NEWS (Aug. 31, 2022), https://video.foxnews.com/v/6311627263112; Ariane de Vogue, Yeshiva University Asks the Supreme Court to Let it Block LGBTQ Student Club, CNN (Aug. 29, 2022), https://www.cnn.com/2022/08/29/politics/yeshiva-university-supreme-court-lgbtq-pride-alliance/index.html.

Applicants may continue to take whatever steps they deem appropriate to clarify that their Torah values are what they are, and to state their belief that the club's mission is inconsistent with them, as they have always done.

The University's own website states that its 87 recognized student groups reflect the "vast interests of the *students*"—not the University—organizing around identities as diverse as poetry and finance and College Democrats and College Republicans.[6] No one will mistake the University's compliance with the trial court's order with endorsement of a student club's particular mission. *See*, *e.g.*, *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (rejecting First Amendment challenge by law schools to federal statute requiring they grant military recruiters equal access to campus placement services and finding that burden on speech could be sufficiently mitigated by university efforts publicizing their own messages). "We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school." *Ibid.* at 65. YU's students and community can likewise understand that providing a student club equal access to campus resources does not convey any official message from Applicants about the club's mission. And if Applicants eventually prevail in this litigation, whether on state-law or First Amendment grounds, the University can revoke the status the trial court's judgment currently requires it to grant.

[6] See https://www.yu.edu/student-life/student-organizations (emphasis added).

E. If Applicants Establish "Irreparable Harm" in this Case, Any Party Claiming Harm to Their Religious Atmosphere Would Be Entitled to Emergency Relief from this Court

Applicants suggest that they will be irreparably harmed here because the University's religious environment is impacted by the club. Unlike the literal infringement on a party's right to worship, *see Tandon*, 141 S. Ct. at 1294, this harm is common to any situation where a party claims that a practice infringes on its Free Exercise rights. Applicants do nothing to explain why this particular Free Exercise claim represents an emergency different from any other claim. If the University establishes irreparable harm by the existence of the club that it claims violates its Free Exercise rights, any party in this posture would be entitled to emergency relief from this Court. Every Free Exercise claim will become a matter for emergency review. This would open the floodgates to emergency applications to this Court. *But see Does 1-3*, 142 S. Ct. at 18 (Barrett, J., joined by Kavanaugh, J., concurring) ("Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without benefit of full briefing and oral argument.").

III. APPLICANTS' LIKELIHOOD OF SUCCESS IS LOW AND NEW YORK'S APPELLATE COURTS HAVE NOT YET PASSED ON THE MERITS BELOW

The Court should decline to prematurely assess the merits of the state trial court's decision, which addressed entirely different questions than those now presented, before the state court appellate process has run its course, and without the benefit of the state appellate courts' analysis of the foundational state law issues, all of which Applicants have improperly leapfrogged over.

Even in this posture, Applicants have not established that they are likely to succeed on the merits. The First Amendment does not protect Applicants' discrimination in denying students equal access to the University's tangible goods and services. "[W]hile [] religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop*, 138 S. Ct. at 1727. The University is bound by New York City's neutral and generally applicable public accommodations law. *See Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 5 (D.C. 1987) (in a pre-*Smith* and pre-*Masterpiece Cakeshop* free exercise challenge, the D.C. Court of Appeals held that Georgetown University's refusal to provide tangible benefits to LGBTQ student group violated the District of Columbia's Human Rights Act).

Applicants concede that universities are public accommodations properly included in the Human Rights Law's definition. But they claim to be a "distinctly private" "religious corporation" not subject to the statute at all, an argument that the state trial court rejected after analyzing what constitutes a "religious corporation" under New York law. Yeshiva University simply bears no resemblance to the small, intimate, membership associations that the New York City Council carved out of the definition of a public accommodation in 1984.[7]

[7] *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (holding that state public accommodation statute may use objective criterion of size—there, 400 people—when exempting private clubs from statute).

The trial court's decision that Yeshiva University is a public accommodation subject to the Human Rights Law does not interfere with the internal governance decisions of the University's religious leaders; it does not require any member of the University community to change their interpretations of the Torah; nor does it require any change to religious classroom instruction or pedagogy. The students in the Pride Alliance do not seek to "dictate how Yeshiva lives out its religion simply because they disagree with it."[8] Br. at 30. The University remains free to communicate and teach its students its sincerely held beliefs about Torah values and sexual orientation. That is its well-established right. The only limitation upon the University is that it may not deny certain students access to the non-religious resources it offers the entire student community on the basis of sexual orientation.

A. Section 8-102 Is a Neutral Law of General Applicability

Applicants' claim that Section 8-102 is not a neutral and generally applicable law is likely to fail on appeal. Applicants ignore that the Court has considered and approved this same provision (Section 8-102's exclusion of religious corporations, benevolent corporations, and small private clubs from the Human Rights Law's definition of a public accommodation) on two separate occasions in Equal Protection challenges. *See NYSCA*, 487 U.S. at 16 (Section 8-102 valid as written); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 580

[8] Applicants mischaracterize Respondent Meisels' comments in an interview on this point: her actual statements were that she hoped the club's existence would send a message that LGBTQ students *belong* at the University, which is the same message that the University says it seeks to send its LGBTQ students, *see* YU FAQ, not that she seeks to impose her view of "Judaism and sexuality" on the University.

(1995) (citing the Human Rights Law as an anti-discrimination statute that does not violate First Amendment). In *Hurley*, the Court cited approvingly to its decision in *NYSCA* that the Human Rights Law "compelled access to the benefit [of membership in a private club and] did not trespass on the organization's message itself." *Ibid.*

1. Section 8-102's Exclusion of "Distinctly Private" Membership Groups Fits the Statute's Purpose

Applicants argue that the Human Rights Law improperly contains "categorical secular exemptions" and therefore treats religious organizations worse than secular comparators, rendering it invalid under *Fulton v. City of Philadelphia*, 41 S. Ct. 1868 (2021). Br. at 27. Applicants' arguments are misplaced. As set forth in the legislative history discussed *infra* and this Court's decision in *NYSCA,* the statute deems benevolent corporations, religious corporations, and small private clubs not to be "public accommodations" at all. And because these "distinctly private" entities are not public accommodations to begin with, it does not undermine the purpose of the law that they fall outside its scope.

Before 1984, the Human Rights Law prohibited discrimination in any "place of public accommodation," but it excluded "private" clubs. R. App. 918. In 1984, the City Council amended the law to bring "private clubs that are determined to be sufficiently 'public' in nature" within the law's protections. *NYSCA*, 487 U.S. at 5. The goal was to target the City's remaining private men's clubs that refused to admit women and other traditionally excluded groups, harming their employment, professional, and business advancement. R. App. 286, 319. The 1984 amendment continued to exclude small, "distinctly private" clubs (with fewer than 400 members),

not serving meals, and not open to the public for any purpose. N.Y.C. Admin. Code § 8-102(9) (1984). In addition, the amendment stated that "a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporations law" "shall be deemed to be in its nature distinctly private." *Ibid.* (emphasis added).

The three "distinctly private" entities exempted by the Council's 1984 amendment—small private clubs, benevolent corporations, and religious corporations—share important characteristics: (1) they are private; (2) they are membership organizations; and (3) they are not places of business, professional, or employment opportunity and therefore do not pose a barrier to the advancement of "women and minorities": "Because small clubs, benevolent orders and religious corporations have not been identified in testimony before the Council as places where business activity is prevalent, the Council [] determined not to apply the requirements of this local law to such organizations." R. App. 319; *see* R. App. 312.

The City Council "recognize[d] the interest in private association asserted by club members," but found that "the public interest in equal opportunity" outweighed that interest. R. App. 319. In balancing private associational rights with this public interest, the Council found that only truly ("distinctly") private, "family-like" membership groups deserved protection to discriminate in their membership, while larger, public-facing entities with market interactions did not: "To have their privacy protected, clubs must function as extension of members' homes and not as

extension of their business. Racial prejudice will not be permitted to infect channels under the guise of privacy.'" R. App. 327. Then-Mayor Koch and Council President Bellamy explained that the exception is limited to private groups meeting for strictly private purposes: "We all agree that distinctly private clubs that are strictly social, religious or fraternal in nature are not at issue." R. App. 331; *see also* R. App. 333.

Accordingly, since 1984, the Human Rights Law has excluded from its definition small private clubs, benevolent corporations such as masonic lodges, and religious corporations, in order to protect the intimate associational rights of these membership groups. *See* App. 313-19; *see also NYSCA,* 487 U.S. at 16-17 (Scalia, J., concurring in part and concurring in the judgment) (rational basis existed for exemption of benevolent orders from 8-102 because "it was rational to think that such organizations did not significantly contribute to the problem the City Council was addressing"). Section 8-102's valid exceptions for these "distinctly private" entities is unchanged by *Fulton*.

2. Section 8-102 Does Not Provide Individualized, Discretionary Exemptions

Although it raised the issue only in passing below, Applicants now argue at some length that the Human Rights Law is not "generally applicable" because it allows for "individualized exemptions," citing N.Y.C. Admin. Code § 8-107(4)(b) and N.Y.C. Admin. Code § 8-107(12). Before the state trial court, Applicants devoted four lines of a 22-page brief to the idea that the statute's exemptions did not accord with *Fulton*, App. 347, although it is now a lynchpin of this application. Applicants' first substantive introduction of a new legal issue should not be in an emergency

application to this Court, without the benefit of full consideration from the state courts below on this question of state law, namely, the meaning and purpose of the statute's exemptions.

In any event, Section 8-107(4)(b)'s exemptions "with respect to age or gender . . . based on bona fide considerations of public policy," N.Y.C. Admin. Code § 8-107(4)(b), were intended to allow public accommodations to make distinctions that "are in the public interest," such as "senior citizen discounts, restrictions on viewing adult films and age limits on membership in peer groups." R. 1106-07; *Cf.* Local Law 63 (1984), R. App. 321 (establishing grace period for public accommodations to "construct or reconstruct" locker rooms or showers immediately after setting forth "bona fide considerations of public policy" exception). It does not contain the type of unfettered exemptions at issue in *Fulton*. *See Fulton*, 141 S. Ct. at 1878 (contract with a Catholic foster service allowed exemptions "based upon . . . sexual orientation" in the Commissioner's "sole discretion").

Similarly, Section 8-107(12) of the Human Rights Law permits religious organizations to prefer co-religionists in housing, employment, and admissions, specifically to give "preference to persons of the same religion or denomination" in order to promote "the religious principles for which it is established or maintained," N.Y.C. Admin. Code § 8–107(12), raising no conflict with *Fulton*.

Finally, even if the Court applies strict scrutiny, Applicants' Free Exercise claim fails. The government's compelling interest in providing LGBTQ individuals with "equal dignity in the eyes of the law" is well settled. *Obergefell v.*

Hodges, 576 U.S. 644, 681 (2015). Allowing members of protected classes "equal access to publicly available goods and services" is equally settled. *Roberts*, 468 U.S. at 624. Applicants' bald assertion that Yeshiva University must be entirely excepted from the local anti-discrimination law would compromise the City of New York's purpose to ensure dignitary rights and equal access for thousands of LGBTQ New Yorkers. The Human Rights Law achieves its purpose by the least restrictive means possible, satisfying strict scrutiny.

B. Applicants' Religious Autonomy Claim Is Not Likely to Succeed

Applicants advance the novel claim that denying students equal access to university resources because of their sexual orientation is an internal religious decision entitled to religious deference. If accepted, Applicants would create an unbounded exemption for any decision deemed "religious," a position that is divorced from the principles of religious autonomy established by this Court over the past decades. *See Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 714 (1976) (declining jurisdiction over church's disciplinary proceeding of bishop, internal reorganization, and amendments to church constitution); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 188 (2012) (recognizing "right to shape its own faith and mission through its appointments"). "This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission," including "the selection of the individuals who play certain key roles." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Such a

weighty and novel issue cannot be resolved in an emergency stay application, especially when Applicants devoted little more than a page to the question in the briefing below.

Setting aside that this issue was only superficially aired below, Applicants' rights to religious autonomy are not compromised. Applicants' refusal to allow students equal access to tangible campus resources on the basis of sexual orientation is not a matter of ecclesiastical governance or instruction. Crediting Applicants' claim that they decided to withhold the club benefits from LGBTQ club in consultation with their senior rabbis, the act of religious consultation alone does not transform every decision by a religious organization to one of internal ecclesiastical deliberation. If it did, religious organizations would not be required to follow any laws, since consultation with a religious leader about any aspect of its institutional operations would render every act one implicating religious autonomy beyond the review of any court.

The Human Rights Law appropriately respects the rights to religious autonomy for religious organizations. Section 8-107(12), the "religious principles" exception, allows religious organization to act to promote their religious principles in matters of employment, housing, and admissions, stating that a broad range of religious or denominational institutions or organizations may take steps "limiting employment or sales or rentals of housing accommodations or admission or giving preference to persons of the same religion . . . or from making such election as is calculated by such organization to promote the religious principles for which it is

established or maintained." These exceptions are entirely consistent with this Court's religious autonomy jurisprudence and recognize the right of religious organizations to self-governance.

IV. THE EQUITIES WEIGH STRONGLY AGAINST APPLICANTS' EXTRAORDINARY AND PROCEDURALLY DEFECTIVE REQUEST

Applicants blithely state that Plaintiffs will suffer "no prejudice" from a stay. Unfortunately, nothing could be further from the truth. The Pride Alliance comprises current LGBTQ students at the University who wish to function as a peer support club. Plaintiffs face significant dignitary, social, emotional, and educational harm from a stay. R. App. 1149 ¶ 9 (without an official club, the LGBTQ students at YU "have little to no access to safe spaces on campus to discuss their struggles as LGBTQ Jewish students or enjoy much-needed community and support in person."); App. 145 ¶ 6 ("I had no way of finding a group of people on campus who were struggling with similar identity issues or finding a source of much-needed support."); App. 138 ¶ 16 ("I have no official space where I can gather with other LGBTQ students to form a community, share our similar experiences, and provide support to each other."); App. 146 ¶ 8 ("Mental illness and distress are prevalent among LGBTQ students at YU because they feel totally alone."). YU's refusal to recognize the Alliance stigmatizes YU's LGTBQ students as unworthy of equal treatment. R. App. 1148 ¶ 6 ("[YU] has shown that it does not believe that LGBTQ students need to be treated equally."); App. 136-37 ¶¶ 11-14. This Court has held that "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,"

and that "[t]he exercise of their freedom on terms equal to others must be given great weight and respect by the courts." *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

Both the parties and the public also suffer from the enormous procedural defects of Applicants' "emergency" application, which seeks decisions on important issues of public concern in a truncated, back-channel process. Only by allowing the state trial court's decision to proceed in the normal course through the state appellate courts for decision can public confidence in the judicial process be maintained.

CONCLUSION

Applicants seek emergency relief in this Court based upon their own refusal to pursue available state appellate remedies in a woefully premature procedural posture when the state appellate process has just begun. They contrive to jump over New York state courts by downplaying the serious questions of state and federal law that the state's highest courts must review before the Court can intervene. Applicants must follow the regular procedures through the state appellate courts, which may even resolve the First Amendment issues that Applicants ask this Court to review in this precipitous emergency motion. No irreparable harm to Applicants' First Amendment rights exists here that sets this case apart to justify emergency relief in this unprecedented posture. The Court should deny this improper and irregular Application.

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