No. 22A184

In the Supreme Court of the United States

YESHIVA UNIVERSITY AND PRESIDENT ARI BERMAN,

Applicants,

v.

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

Respondents.

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

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

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YU Undergraduate Enrollment Set to Achieve Record Growth, Yeshiva University News, Aug. 11, 2022, https://perma.cc/7XGP-B5RA 16

If this Court does not intervene, secular courts will force Yeshiva's rabbis to yield to secular government on a religious decision. A New York state court has overruled the religious judgment of Yeshiva University and its rabbis about whether Yeshiva should have an official "Pride Alliance" club for undergraduates. Worse, the court ordered Yeshiva to comply "immediately." The state courts provide no available path for timely relief.

In the face of this extraordinary situation, Plaintiffs urge this Court to sit on its hands. Plaintiffs concede that Yeshiva made a religious decision in consultation with its rabbis. App.107 ¶ 101; Application 13. And Plaintiffs concede Yeshiva's religious character, "primarily in its undergraduate colleges" which are at issue in this case. Opp.3. Plaintiffs admit that the First Amendment issues at stake are "weighty," Opp.1, 36, and "important issues of public concern," Opp.38. Yet Plaintiffs urge this Court's inaction because the state courts may, eventually, reverse themselves on the state law questions, Opp.14, and because Yeshiva "remain[s] free to express [its] religious views"—so long as the courts can control Yeshiva's behavior in the interim. Opp.21, 27.

But Plaintiffs have both the procedure and the substance of the law exactly backwards. It is precisely because of the "weighty" First Amendment protections at stake that this Court can and ought to exercise jurisdiction. That the state courts could someday come out differently on these important questions should have "militate[d] powerfully," Opp.14, against a state court issuing a permanent injunction requiring immediate compliance. But now that the state courts have taken this unprecedented step, longstanding precedent shows that those factors favor this Court's proper exercise of its jurisdiction, especially where, as here, timely interim relief is otherwise unavailable. And our understanding of the First Amendment is long past the era when this Court deemed government coercion acceptable so long as the coerced believer can publicly register her disagreement. Compare Opp.21, 27 (no

harm to Yeshiva because it is free to disagree), with *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586, 599 (1940) ("this is the vital aspect of religious toleration"), overruled by *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943).

Granting a temporary stay to preserve the status quo and protect Yeshiva would hardly deliver a "blow to the heart" of federalism. Opp.17. But failing to do so would deliver a blow to the soul of Yeshiva—and, as the outpouring of amicus support attests, to many other religious institutions of different faiths—by allowing courts to impose immediately binding changes to their institutions while this Court stands aside. Nothing in federal law requires that approach. The Court should therefore grant the requested stay or, in the alternative, grant certiorari and set this appeal for expedited briefing and argument.

ARGUMENT

I. This Court has jurisdiction.

The Court's jurisdiction is guided by 28 U.S.C. 1257(a), which gives the Court certiorari jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." The Court has two paths to grant Yeshiva relief: the All Writs Act, which turns on potential jurisdiction under Section 1257, and Section 2101, which turns on immediate jurisdiction under Section 1257.

A. The Court has jurisdiction to grant a stay under the All Writs Act.

The Court's path to grant relief under the All Writs Act is unimpeded. Plaintiffs dispute whether Yeshiva is *entitled* to a stay under the Act, but not whether the Court has jurisdiction to grant such a stay. This is unsurprising, as the All Writs Act authorizes the Court to issue "all writs necessary or appropriate in aid of" its jurisdiction. 28 U.S.C. 1651. This embodies the Court's "inherent" power to "hold an order in abeyance while it assesses the legality of the order." *Nken* v. *Holder*, 556 U.S. 418, 426 (2009). It also authorizes the Court to take action to preserve its "potential jurisdiction." *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603 (1966).

As discussed in greater detail below, this Court has jurisdiction—both immediate *and potential*—to grant a writ of certiorari under Section 1257. But unless the Court issues a stay (or an immediate writ) now, its jurisdiction later will be defeated. And the path back to this Court would be years in the making. If Yeshiva is compelled to give official recognition to a student club in violation of its sincere religious beliefs, its religious culture will be irreparably transformed. This Court will have no ability to unwind that change or to put Yeshiva back on the course it would have taken absent the permanent injunction. Jurisdiction would be defeated as to those harms, because the relief Yeshiva seeks would be no longer attainable.

Because the Court *will* have jurisdiction under Section 1257 at the conclusion of this case, the All Writs Act authorizes this Court to issue a stay "in aid of" its jurisdiction now. And Plaintiffs offer nothing to the contrary. Therefore a stay may issue under the All Writs Act.

B. The Court has jurisdiction to grant a stay under Section 2101 and to grant certiorari under Section 1257.

Plaintiffs say that this Court lacks jurisdiction because the decision below is not final for purposes of 28 U.S.C. 1257(a). Opp.10-11. But this Court's longstanding precedent confirms that this Court can and ought to exercise jurisdiction over this appeal in order to prevent an egregious violation of the First Amendment that is imminent and cannot be remedied later.

1. Indeed, the Court need look no further than *National Socialist Party of America* v. *Village of Skokie* to conclude that it has jurisdiction. 432 U.S. 43 (1977) (per curiam). In *Skokie*, an Illinois trial court issued an injunction prohibiting a neo-Nazi group from parading through the predominantly Jewish town of Skokie. After the Illinois Appellate Court and the Illinois Supreme Court denied motions to stay the preliminary injunction, the group applied for relief in this Court. The Court construed the application as a petition for certiorari and held that it had jurisdiction

under Section 1257 because the Illinois courts had "finally determined the merits of petitioners' claim that the outstanding injunction will deprive them of rights protected by the First Amendment during the period of appellate review." *Id.* at 44.

This application is on all fours with *Skokie*. The New York Court of Appeals' decision is final because it "finally determined the merits of [Yeshiva's] claim that the outstanding injunction will deprive [it] of rights protected by the First Amendment *during the period of appellate review*." 432 U.S. at 44. (emphasis added). That order is thus "a final judgment for purposes of [the Court's] jurisdiction." *Ibid.*

Plaintiffs attempt to distinguish *Skokie* in a footnote. First they argue that—in contrast to the prior restraint principles discussed in *Skokie*—Applicants are "break[ing] new ground" by invoking church autonomy. Opp.11 n.2. But the rights at issue here are at least as deeply rooted as the right to parade in *Skokie*. The protection of church autonomy goes back to at least *Watson* v. *Jones*, decided in 1871, and is ultimately rooted in the religio-political struggles of early modern Britain. See *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871); *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020) (discussing British history and *Watson* in explaining "the general principle of church autonomy"); see also Archdiocese Br.9-18 (historical development of church autonomy). There is nothing new about it.

Plaintiffs also play Chicken Little, claiming that following *Skokie* here would allow review of "every state trial court order that arguably infringes on federal constitutional rights." Opp.11 n.2. But the sky will not fall. Ever since the trial court's injunction issued, Applicants have sought stays and review, filing three motions at two different courts of review and appealing all the way through.[1] As explained in the

[1] See App.40 (Appellate Division denial of interim stay); App.23 (Yeshiva's Appellate Division emergency motion for leave to appeal denial of interim stay); App.21 (Appellate Division statement that interim stay no longer available); App.6 (Yeshiva's Court of Appeals emergency motion for leave to appeal denial of interim stay); App.5 (Court of Appeals denial of motion for leave).

Application, Applicants have exhausted every avenue available for seeking immediate relief from the New York courts. Application 16; App.40, App. 23, App.6. There are no more state court rulings on interim relief to be had. That factual background—combined with the trial court's demand for immediate compliance on a "weighty" issue *before* core constitutional rights are fully adjudicated—makes this case an outlier, and belies Plaintiffs' fever dreams about the emergency docket.

Skokie alone is thus reason enough to reject Plaintiffs' jurisdictional argument. Put another way, because the Court had jurisdiction to keep state courts from prohibiting a Nazi parade in a predominantly Jewish village, it must at least have jurisdiction to keep state courts from forcing a Jewish university to violate its beliefs about how to live out its faith and mission.

2. Aside from the rule of *Skokie*, this case also falls within multiple well-recognized exceptions to the final judgment rule. As explained in *Cox Broadcasting Corporation* v. *Cohn*, there are "at least four categories" in which the Court has treated orders as final "without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. 469, 477 (1975).

One such category involves cases where "the federal issue has been finally decided in the state courts" and "reversal of the state court on the federal issue would be preclusive of any further litigation," but "the party seeking review" also "might prevail on the merits on nonfederal grounds" in the proceedings below. *Id.* at 482-483. The Court has exercised jurisdiction in such cases where "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 483. This is just such a case. The New York courts have "finally decided" to refuse Yeshiva a stay protecting its First Amendment rights for the duration of this appeal. *Cox,* 420 U.S. at 482; App.5. That determination "is not subject to further review in the state courts." *Cox*, 420 U.S. at 485. And if the Court "now hold[s]" that the First

Amendment protects Yeshiva's decision whether to officially recognize a student organization, "this litigation ends." *Id.* at 485-486.

Plaintiffs' repeated claim that Yeshiva's emergency motion in the New York Court of Appeals was "procedurally defective" is simply wrong. Opp.12, 37. Parties appealing a stay denial in the New York Court of Appeals can request leave to appeal in either the Appellate Division or the Court of Appeals—particularly where, as here, a court order will cause immediate change to the status quo and result in irreparable harm. See Arthur Karger, *The Powers of the New York Court of Appeals* § 5:2 (Aug. 2022); App.13-14. Here, Yeshiva sought leave to appeal the stay denial in the Appellate Division and the Court of Appeals—and both courts denied relief.

Plaintiffs also offer up a red herring, claiming a procedural defect in the Appellate Division that should be cured by "fil[ing] a Notice of Motion with a return date." Opp.8. But the Appellate Division instructed Applicants that an interim stay is "*not applicable*," because "a full bench has already denied your request for stay." App.21 (emphasis added). Yeshiva was thus directed in writing, and by telephone to its counsel, that its only option was to file "[a] completed full motion with proper return date," with full briefing on a *non-expedited* briefing and hearing schedule. App.21 ("An Interim Stay request is not applicable anymore, since a full bench has already denied your request for a stay."). That process would take months, only for Yeshiva—if successful—to be sent back for a months-long appeal to the Court of Appeals, which has already refused to consider a stay. There is no path to interim relief.

Moreover, the federal policy at stake here is weightier than, say, federal policy concerning federal venue, see *Construction Laborers* v. *Curry*, 371 U.S. 542 (1963), or the jurisdiction of the NLRB, see *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963) (both cited in *Cox*). At issue is a provision at the heart of our political order: the First Amendment. And "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits

application of an exception to the general finality rule." *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989) (collecting cases); see also *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974) (it would be "intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment"); *New York Times Co.* v. *Jascalevich*, 439 U.S. 1331, 1333-1334 (1978) (Marshall, J., in chambers) ("[T]his Court has shown a special solicitude for applicants who seek stays of actions threatening a significant impairment of First Amendment interests.").

Here, failure to review the lower court's ruling now would have the "intolerable" result of leaving Yeshiva to "operat[e] in the shadow of the civil * * * sanctions of a rule of law * * * the constitutionality of which is in serious doubt." *Cox*, 420 U.S. at 485-486. Because denying review of an order that requires immediate compliance would thus "seriously erode federal policy" in favor of adjudicating First Amendment questions, see *id.* at 483, this Court can and should exercise jurisdiction.

The Court has further grounds to exercise jurisdiction because this is a case "in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481; see also *Kansas* v. *Marsh*, 548 U.S. 163, 168 (2006) ("State will be unable to obtain further review * * * later in this case"). That category of finality applies with full force here because of the extraordinary stakes for Yeshiva's religious identity and future. If Yeshiva is forced to comply with the permanent injunction, the infringement of its religious liberty and the injury to its reputation as a bastion of Torah values will be irreparable. No petition for certiorari down the road—inevitably after years of additional litigation—will allow Yeshiva to fully vindicate its First Amendment rights. Thus, "[i]f review were to be postponed until the termination of the litigation, it will be too late effectively to review the present order and the rights conferred by the [First Amendment] * * * will have been lost, probably irreparably." See *Cox*, 420 U.S. at 482 n.10 (cleaned up); see also

Republic Nat. Gas Co. v. *Oklahoma*, 334 U.S. 63, 68 (1948) (collecting cases deemed final because "the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing").

The Court has still further grounds to exercise jurisdiction under *Cox* because the First Amendment issues here are "conclusive" as to further proceedings on interim relief. *Cox*, 420 U.S. at 479; see also NCLA Br.5. Indeed, this is the *only* chance this Court will have to determine whether Yeshiva must give its stamp of approval to Pride Alliance—years from now the Court will not be able to unring the bell.

* * *

In short, "whatever the ultimate outcome of the case," see *Cox*, 420 U.S. at 481, this Court has only one opportunity to review the constitutionality of the stay denial that will deprive Yeshiva of its First Amendment rights for the duration of this litigation. That opportunity is now.

II. A stay should be granted.

Applicants have shown that under either 28 U.S.C. 2101 or 28 U.S.C. 1651, the lower court's injunction should be stayed because (1) it is reasonably probable this Court will grant certiorari, (2) Applicants are likely to succeed on the merits, and (3) the remaining equitable factors favor a stay. Application 17.

A. Certiorari is reasonably probable.

Plaintiffs' response concedes that Yeshiva's application raises "weighty" and "important issues of public concern"—at least four times. *E.g.*, Opp.1, 2, 36, 38. "The importance of the issues involved in the case as to which review is sought is of major significance in determining whether the writ of certiorari will issue." Shapiro, S. et al., *Supreme Court Practice* 4-33 (11th ed. 2019). By Plaintiffs' own admission then, "[t]here is a reasonable probability that four Justices will *eventually* grant certiorari in this case." *U.S. Postal Serv.* v. *National Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302 (1987) (emphasis added); *Merrill* v. *Milligan*, 142 S. Ct. 879, 880 (2022)

(Kavanaugh, J., concurring) (same). With this concession, the remainder of Plaintiffs' response is whistling past the graveyard.

Church autonomy. Plaintiffs do not dispute the stakes: Yeshiva's "Torah values are what they are," and, absent a stay, they will be violated "due to legal mandate." Opp.27, 26; see also Application 11-13. This is "of major importance to the Orthodox Jewish community," COLPA Br.1, especially in New York City, "home to the largest concentration of Jewish schools in the United States," with a "sizable number" now deemed public accommodations under the NYCHRL because they, like Yeshiva, are "incorporated as educational institutions." Agudath Br. 2-3.

Because Plaintiffs concede the case's importance, they are reduced to two remarkable legal claims. First, they claim that the First Amendment's church autonomy protections don't matter, because "[t]he Human Rights Law appropriately respects the rights to religious autonomy for religious organizations." Opp.36. "That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171, 189 (2012) (rejecting "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers"). Second, Plaintiffs claim that Yeshiva can be forced to "join the ranks" of schools that don't share its faith Opp.25 (citing Christian schools) because Yeshiva can still publicly "clarify" its Torah values *Id.* at 27. But this Court has long refused to reduce religious freedom to "the[] right to counteract by [one's] own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote." *Minersville*, 310 U.S. at 599 (reversed three years later).[2]

[2] The fact that some other religious universities "have LGBTQ clubs on their campuses," Opp.25, says nothing about the religious processes and standards

This Court also frequently grants certiorari in cases, like this one, that raise important legal issues absent a circuit split. See, *e.g.*, *Federal Bureau of Investigation* v. *Fazaga*, 142 S. Ct. 1051 (2022) (no split); *Ramirez* v. *Collier*, 142 S. Ct. 1264 (2022) (same). And Plaintiffs ignore that this Court could either summarily reverse the decision below or grant, vacate, and remand considering the New York courts' glaring misapplication of church autonomy precedent. Application 22-25. Such relief would be justified, as Plaintiffs are now using their trial court victory to propound discovery in support of their punitive damages claim against Yeshiva's religious exercise. See App.118 (pleading punitive damages). With the trial court's refusal to even consider Yeshiva's church autonomy rights, Plaintiffs' discovery demands portend another religious liberty violation. See *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions" a civil court reaches that may "impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.").

Ultimately, all Section 2101 requires is that "four Justices will eventually grant certiorari." *Letter Carriers*, 481 U.S. at 1302. Yeshiva's church autonomy claim easily meets that standard.

Free Exercise Clause. Despite Plaintiffs' best efforts, the undisputed facts of this case confirm that the New York courts have deepened an entrenched split among the lower courts on a legal issue of demonstrated interest to this Court. There is no dispute that both "distinctly private" clubs and "benevolent orders" are categorically exempted from the public accommodation provisions of the NYCHRL, while religious

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surrounding their recognition on campus or who guides and controls them. Yeshiva is committed to ongoing dialogue with its students, but has concluded that an official Yeshiva Pride Alliance club is inconsistent with its Torah values. App.121. What matters is not what other universities from other religious traditions have decided, but that each has the ability to act consistently with its own religious beliefs and practices.

schools like Yeshiva are not. Application 27. Nor is there any dispute that the NYCHRL contains an individualized exemptions system for gender discrimination claims. Application 27-28. By ignoring the existence of admitted secular exemptions, the decision below deepens a 4-4 split over whether comparable categorical exemptions suffice to negate general applicability under *Fulton* and *Smith*. Application 20-21. But Plaintiffs purport to distinguish *Fulton* without even acknowledging the split. See Opp.34. Nor do Plaintiffs even mention this Court's prior GVR in *Vullo*—or that three Justices have already expressed interest in addressing the legal issue presented here. See Application 21.[3] This is remarkable, because Plaintiffs argued that the New York appellate courts in *Vullo* "rejected the *precise claim* that Appellants make here." Pls' Mem. in Opp. to Mot. to Stay at 9, *YU Pride Alliance* v. *Yeshiva University*, No. 154010/2021 (N.Y. App. Div., July 25, 2022), https://perma.cc/WBB6-W8LR (emphasis original). This Court has thus already demonstrated an interest in the "precise" free exercise "claim" made by Yeshiva. Certiorari is probable.

B. Yeshiva is likely to succeed on the merits.

Plaintiffs' arguments confirm that Yeshiva will succeed on the merits of its religious autonomy and free exercise claims. By holding that "formal recognition" of a Yeshiva Pride Alliance "is [not] inconsistent with the purpose of Yeshiva's mission," the trial court imposed a religious decision on Yeshiva. App.69. Plaintiffs fail to show how this blatant imposition on religious autonomy is consistent with the Religion Clauses. Nor have they shown how the trial court's refusal to exempt Yeshiva can survive strict scrutiny under the Free Exercise Clause, especially considering that

[3] Presumably Plaintiffs duck discussing *Vullo* in an effort to avoid a grant of certiorari. However, here the split has already been aired at length before this Court, so Plaintiffs' tactical lack of engagement is no barrier to the Court's consideration of certiorari.

the NYCHRL is riddled with comparable secular exemptions—both categorical and discretionary.

Church autonomy. Plaintiffs attempt to limit church autonomy to a "church's disciplinary proceeding[s]" and ministerial "appointments," Opp.35, and then argue that Yeshiva's decision here "is not a matter of ecclesiastical governance or instruction." Opp.36. Setting aside the obvious point that establishing rules and fostering the religious environment at a religious university is *both* ecclesiastical governance *and* instruction, Plaintiffs are simply wrong on the law.

As the Court said in *Our Lady*, there is a "sphere" of "autonomy"—of which the ministerial exception is one "component"—for religious organizations (schools included) "with respect to internal management decisions that are essential to the institution's central mission." 140 S. Ct. at 2060; *Hosanna-Tabor*, 565 U.S. at 188 (foreclosing anti-discrimination lawsuit against religious school). Moreover, as the Court reiterated just last Term, religious autonomy also protects religious schools from the "entanglement * * * and denominational favoritism" that follow when the government "scrutinize[es] whether and how a religious school pursues its educational mission." *Carson* v. *Makin*, 142 S. Ct. 1987, 2001 (2022). While nondiscrimination laws are "undoubtedly important," when it comes to religious groups' right to "preach their beliefs, teach their faith, and carry out their mission," "the First Amendment has struck the balance for us." *Hosanna-Tabor*, 565 U.S. at 196; Application 18-19, 22-25. Plaintiffs have no response. They ignore *Carson*, mention *Our Lady* only as to the ministerial exception, and cramp *Hosanna-Tabor*.

Because Yeshiva's "very existence is dedicated to the collective expression and propagation of shared religious ideals," Yeshiva must be free to decide how its religious mission is expressed on its campus. *Hosanna-Tabor*, 565 U.S. at 200-201 (Alito, J., concurring); cf. *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 653 (2000) (Court "must * * * give deference to an association's view of what would impair its

expression"); COLPA Br.3-5; CCCU Br.13-15; Epstein Br.10-11. As such, Yeshiva's decision not to approve the Pride Alliance club falls within this sphere of protected religious governance. Yeshiva has long sought to ensure that approved clubs are consistent with halachic tradition and the religious atmosphere on the undergraduate campuses. Application 10 (official recognition denied to shooting, gaming, and gambling clubs, as well as to Jewish fraternity). Allowing civil courts to second-guess Yeshiva's judgment over what student activities comport with its religious mission would invite judicial entanglement and denominational favoritism. That's exactly what happened in the trial court. Compare App.63 with App.348 (trial court claiming Yeshiva is not religious because it could not cite hierarchical religious control when filling out a government document); see also Laycock Br.7-9; Archdiocese Br.18-21. That's exactly what Plaintiffs encourage here, when they say that Yeshiva should "join the ranks" of various Christian colleges. Opp.25. And that's exactly why Yeshiva's religious autonomy claim must prevail.

Free Exercise Clause. Plaintiffs' response confirms that the NYCHRL is not generally applicable. Plaintiffs do not dispute that the NYCHRL is riddled with exemptions. Rather, they concede that "private clubs" with up to 400 members are excluded, as are "benevolent" orders," houses of worship, and religious educational institutions. Opp.31; N.Y.C. Admin. Code 8-102. Plaintiffs' argument that these are statutory carve-outs, not exemptions, Opp.31, is irrelevant. See *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 543-547 (1993) (statute not generally applicable if exclusions from *other* laws undermine statute's alleged purpose). As is their selective reference to the legislative history regarding "private clubs" of up to "400 members" Opp.31, 32, 33; see also N.Y.C. Admin. Code 8-102. The "benevolent orders" exclusion alone exempts nationwide fraternal orders with hundreds of thousands of members, including the Order of Elks, the American Legion, and the Veterans of Foreign Wars—just to name a few. N.Y.C. Admin. Code

8-102 (citing the New York "benevolent orders law" at sections 2 and 7)). These are hardly the "distinctly private," Opp.31, "family-like," "extension of [the] home[]," Opp.32, "intimate association[s]," Opp.33, that Plaintiffs seek to portray. See *Gifford* v. *Guilderland Lodge*, *No. 2480, B.P.O.E. Inc.,* 272 A.D.2d 721, 722-723 (N.Y. App. Div. 2000) (distinguishing legislative intent behind exclusion of benevolent orders from that of private clubs with up to 400 members). Plaintiffs don't even mention the NYCHRL's exclusion for "religious corporations incorporated under the education law," which must include at least *some* religious universities. See N.Y.C. Admin. Code 8-102; N.Y. Educ. Law 216 (requiring education institutions to incorporate under the education law). Even if the trial court were right that Yeshiva is not religious enough for that exemption, the fact that some religious universities are covered means that Plaintiffs are wrong to argue that exempting Yeshiva undermines a government purpose different from the interests undermined by other exempted entities.

Plaintiffs' attempt to distinguish the NYCHRL's discretionary exemptions is also unavailing. Nothing in the statute supports Plaintiffs' *ipse dixit* conclusion that the exception for "bona fide considerations of public policy" that are "in the public interest" is any less "unfettered" than the "exemptions at issue in *Fulton*." Opp.34. If the "public policy" exemption has any limiting principle, Plaintiffs have not identified it in the statute. See also *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021) ("misapprehends the issue" to argue that "the Commissioner never granted" a certain exception; "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable"). So too with the "religious principles" exception. N.Y.C. Admin. Code 8-107(12). Plaintiffs' mere say-so that it "rais[es] no conflict with *Fulton*" says nothing about the scope of discretion in its application. Opp.34. And even if the NYCHRL's "religious principles" exemption is not fully discretionary, then it is categorical, undermining general applicability either way. Application 26-27.

Strict Scrutiny. Plaintiffs' sole argument on strict scrutiny is that the Court's ruling in *Obergefell* established a "compelling interest in providing LGBTQ individuals with 'equal dignity in the eyes of the law.'" Opp.34. But *Obergefell* never addressed strict scrutiny. And while the government's interest in "equal treatment" is certainly "weighty," it "cannot justify denying [a religious institution] an exception for its religious exercise." *Fulton*, 141 S. Ct. at 1882; Application 28-29. Indeed, in *Obergefell*, the Court promised that religious organizations like Yeshiva would be "given proper protection as they seek to teach" their own beliefs regarding marriage and sexuality. *Obergefell* v. *Hodges*, 576 U.S. 644, 679-680 (2015). The First Amendment itself "enshrine[s]" a compelling interest in "preserving the promise of the free exercise of religion," a guarantee that "lies at the heart of our pluralistic society." *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1754 (2020); see also *Hosanna-Tabor,* 565 U.S. at 196 ("The First Amendment has struck the balance for us.").

C. The remaining equitable factors also support a stay.

Irreparable Harm. Plaintiffs cannot so easily dismiss the irreparable harm to Yeshiva as if this were a debate over "access" to "bulletin boards." Opp.22. This application poses an undisputedly weighty question: whether a civil court can "immediately" strip Yeshiva of its First Amendment protections. If the answer is yes and this Court does not stay the injunction, the New York court's mandatory override of Yeshiva's constitutional rights will work an immediate injury to Yeshiva and its religious community that cannot be undone. Yeshiva was formed and continues to operate today with an expressly religious purpose: "to promote the study of the Talmud." If Yeshiva loses the authority to determine what values it will teach and promote, then Yeshiva—and any other religious school in New York City—loses an essential part of its religious character. Letting that happen—even if only temporarily—would also open a Pandora's box, putting the city's many religious schools at risk of a religious discrimination lawsuit any time they made a faith-based

decision—something they do all the time. This would mean that schools will either close or be forced to abandon portions of their religious identity. Little could be more "urgent" and irreversible. Opp.22.

Yeshiva's student body will also suffer absent a stay. While other colleges have faced steep enrollment declines, Yeshiva's undergraduate colleges had their highest-ever enrollment this year. See *YU Undergraduate Enrollment Set to Achieve Record Growth, Yeshiva University News,* Aug. 11, 2022, https://perma.cc/7XGP-B5RA. Yeshiva's success can be directly attributed to the Torah-centered environment intentionally fostered on its campuses. Yeshiva's students, like Plaintiffs, choose to attend specifically *because* of this religious environment. Cf. App.146-147 ¶ 9 (Plaintiffs' supporting declaration stating, "I love Torah learning and came to YU to further my religious growth just like any other student who chooses YU."). These thousands of students deserve to attend the Yeshiva University they chose, which is one operated according to Yeshiva's Torah values, not the government's.

Plaintiffs' counterarguments fail. *First*, Plaintiffs make a fuss over an LGBTQ club at Yeshiva's law school. Opp.23-24. But as Plaintiffs concede, the religious formation and expectations at Yeshiva's undergraduate schools differ dramatically from the professional environment of its graduate school campuses. Torah study is front-and-center "in [Yeshiva's] undergraduate colleges," Opp.3, whereas at "Yeshiva's graduate schools, the focus shifts to professional training and academic research," App.191. There is a world of difference between allowing an LGBTQ club on the Cardozo Law campus in Union Square, where nearly half the students are non-Jews and the focus is American law, and approving one on the undergraduate men's campus in Washington Heights (170 blocks north) where the focus is on Torah

studies in a uniquely and pervasively Jewish environment. Application 5-9.[4] And whether or not Plaintiffs *agree* with that distinction has no bearing on the undisputed fact that the distinction is a *religious* one, driven by Yeshiva's religious convictions about how to form undergraduates in Torah values. Application 12-13.

Second, Plaintiffs claim Yeshiva already "acknowledged" it is subject to the NYCHRL—in a 20-year-old case that concerned housing, not public accommodations. Opp.25. See *Levin* v. *Yeshiva Univ.*, 96 N.Y.2d 484, 490 (N.Y. 2001) (applying § 8-107(5) of the NYCHRL (housing), not § 8-107(4) (public accommodations)). A decades-old legal position on an issue different both legally and religiously cannot come close to waiving Yeshiva's right to its First Amendment defenses.

Third, Plaintiffs claim that approving a Yeshiva Pride Alliance club "sends no 'irrevocable' message to anyone." Opp.26. But their argument for recognition concedes the opposite, that the presence or absence of a club sends a strong message. Opp.37. Plaintiff Meisels even admitted that the purpose of this lawsuit is specifically to "send[] a clear message." App.168. But Yeshiva seeks to send a more "nuanced" message that balances "accepting each individual with love" while still upholding the Torah's "timeless prescriptions." App.121. Plaintiffs' claim that Yeshiva can counter the recognition of a Yeshiva Pride Alliance by making "public efforts" to broadcast "that [its] Torah values are what they are" only further concedes that recognition is endorsement. Opp.27.

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[4] Plaintiffs' argument that "[l]ess than five percent of students major in Jewish studies," Opp.4, only shows how hard Plaintiffs must work to obscure Yeshiva's intensely religious character. One hundred percent of its students engage in religious courses every semester, with most spending hours each day in Torah studies—sufficient for over ninety percent to earn an Associate Degree. Application 6. Plaintiffs' other critiques about things Yeshiva does or does not do on campus, Opp.3-4, similarly demonstrate a misunderstanding of Yeshiva's Jewish theology and traditions.

Balance of equities. Yeshiva's harms far outweigh any prejudice Plaintiffs may experience from a stay. Most Plaintiffs have already graduated from Yeshiva and have no way to benefit from the permanent injunction ordering Yeshiva to "immediately" violate its religious beliefs and approve their former club. The one Plaintiff still on campus has never disputed Yeshiva's religious nature and has stated his plans to use Yeshiva's recognition of Pride Alliance for religious ends. App.475-476 ¶ 6.

Plaintiffs also claim to seek "equal treatment." Opp.37. Not so. Plaintiffs want Yeshiva's religious decision, informed by its *Roshei Yeshiva*, the Torah, and halachic law, to yield to their own religious views. They want the secular government to pick a winner—them—in this religious debate. But courts cannot mediate such disputes. As this Court has held, "the First Amendment has struck the balance for us." *Hosanna-Tabor*, 565 U.S. at 196. That balance requires a stay.

Public Interest. The people of New York and this nation have no interest in abetting First Amendment violations, even when they come in the name of laudable statutory aims. Rather, the public interest favors maintaining the status quo, and preserving Yeshiva's religious, Torah-centered identity, while weighty issues of First Amendment law are deliberated by the courts. Indeed, this age-old distinction between public interest and private religious interest is one that "touch[es] the heart of the existing order." *Barnette*, 319 U.S. at 642. And if no official "can prescribe what shall be orthodox" nor should any official prescribe what shall be Orthodox. *Ibid.*

CONCLUSION

The application for a stay should be granted. Alternatively, the Court should grant certiorari and set the appeal for expedited hearing and argument.

Respectfully submitted.

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