**No. 22A184**

# In the Supreme Court of the United States

YESHIVA UNIVERSITY, ET AL., *Applicants,*

v.

YU PRIDE ALLIANCE, ET AL.

*On Emergency Application*
*for Stay Pending Appellate Review*
*or Petition for a Writ of Certiorari and Stay*

## UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES SUPPORTING APPLICATION

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SEPTEMBER 2, 2022

## MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Council for Christian Colleges & Universities ("CCCU") respectfully moves for leave to file the enclosed brief as *amicus curiae* in support of applicants. Counsel for *amicus* notified counsel for applicants and respondents to obtain consent for the proposed brief. All parties consented. This case—which threatens to deprive religious schools of their ability to shape their communities according to their beliefs—is of enormous concern and interest to CCCU, which comprises some 140 faith-based institutions in the United States.

Like Yeshiva, CCCU's member schools cannot achieve their religiously motivated goals unless they can choose the religion-based standards governing campus life. CCCU's members thus have a powerful interest in protecting their right to create—free from government interference—a community of students, staff, and faculty aligned with the institution's religious missions.

Accordingly, the proposed brief makes two points on the importance of a stay that complement Yeshiva's application. *First*, the brief expands on why the injunction entered against Yeshiva violates multiple First Amendment rights and cannot survive a review on the merits. *Second*, the brief advances an important reason why the Court is likely to grant review, and why a stay is in the public interest: namely, that the approach of the New York Supreme Court decision here would compromise and even destroy some of the substantial benefits that religious colleges and universities bring to their communities and students.

As a collection of religious schools, CCCU is uniquely qualified to present the latter point and directly interested in the proper resolution of the first point. Its motion for leave should be granted.

Given the exigencies surrounding the present application, *amicus* also moves to file its *amicus* brief without ten days' notice to the parties as ordinarily required by Sup. Ct. R. 37.2(a), and to file this brief in an unbound format on 8 1⁄2-by-11-inch paper rather than in booklet form.

Respectfully submitted,

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## QUESTIONS PRESENTED

1. Whether, under the First Amendment's Religion Clauses, the New York City Human Rights Law can be applied to override Yeshiva University's religious judgment about which student organizations to officially recognize on campus consistent with its Torah values.

2. Whether, under *Employment Division* v. *Smith*, the New York City Human Rights Law, which categorically exempts hundreds of organizations from its reach and allows individualized exceptions for "bona fide reasons of public policy," is "neutral" and "generally applicable."

3. Whether *Employment Division* v. *Smith* should be overruled.

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

In forcing Yeshiva University, the Nation's premier Jewish institution of higher learning, to recognize YU Pride Alliance despite the university's religion-based decision against such recognition, the New York Supreme Court elevated a statute over the requirements of the First Amendment. That decision contradicts law and reason, deeply harms Yeshiva, and violates the Nation's best traditions of recognizing and protecting religious liberty even when the religious beliefs at issue may be unpopular. To prevent further harm to Yeshiva, and in furtherance of the public interest in enforcing First Amendment protections for religious higher education, this Court should stay the injunction.

Among other things, the First Amendment protects the "freedom to engage in association for the advancement of beliefs and ideas." *NAACP* v. *Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). And the right to associate necessarily includes the right *not* to associate. Indeed, the members of a religious community and any groups they might form, no less than the community's ministers, can have a powerful impact on the development of the community and the furtherance—or not—of its doctrines and missions. For that reason, what has come to be called the First Amendment's religious-autonomy doctrine, see *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru,* 140 S. Ct. 2049, 2060 (2020), shields religious institutions from judicial scrutiny of their decisions, not just regarding their leaders and teachers, but also their membership

[1] No one other than *amicus*, its members and counsel authored any part of this brief or made a monetary contribution to fund it. Counsel for the parties have consented to its filing.

and other associations—including decisions affecting what clubs the religious institutions recognize. See generally, *e.g., Bouldin* v. *Alexander*, 82 U.S. (15 Wall.) 131, 139-140 (1872).

These freedoms are especially important to religious higher education. In a typical religious college, community members are expected to live according to a set of guidelines inspired by the community's shared faith. That expectation is part of the distinctive promise made to students and their families—that the community will be shaped by adherence to the school's particular theological understandings. For these reasons, a school's religious practices are not a mere additive to the educational experience; they are the oxygen that gives it life.

In turn, graduates of these religious schools typically provide the next generation of religious leaders. Accordingly, interfering with these schools' ability to live out their beliefs necessarily affects the spiritual life of churches, mosques, temples, synagogues, and the broader organizations and communities of which they are part. For example, Jewish colleges like Yeshiva deliver on their duty to the larger Jewish community by maintaining a space where students and teachers agree to live according to their Torahic beliefs. That is why, for many religious colleges, as for Yeshiva, faithful living according to religiously based standards is a continuing condition of admission to the community.

That is also why this case—which threatens to deprive religious schools of their ability to shape their communities according to their beliefs—is of great concern to *Amicus* Council for Christian Colleges & Universities ("CCCU"), which comprises

some 140 faith-based institutions in the United States. Like Yeshiva, CCCU's member schools cannot achieve their religiously motivated goals unless they can choose the standards governing campus life. They thus have a powerful interest in protecting their right to create—free from government interference—a community of students, staff, faculty, and campus organizations that are aligned with the institution's religious missions. The Court should enter a stay.

## STATEMENT

Yeshiva University is a Jewish institution, tasked with instructing its students in Jewish values. Like a synagogue, it has a powerful interest in maintaining cohesion and unity of message and practice on beliefs fundamental to its Jewish identity.

Here, after serious consideration, senior rabbis at Yeshiva made the decision not to formally recognize YU Pride Alliance ("Alliance"), an LGBT student group. App. 199. That decision was made after those rabbis concluded that placing Yeshiva's imprimatur on the Alliance would be inconsistent with Torah values. App. 191.

The Alliance sued, arguing that Yeshiva's decision violated the New York City Human Rights Law ("NYCHRL"). Although the NYCHRL expressly excludes "religious corporation[s] incorporated under the education law," the New York Supreme Court ultimately agreed with the plaintiffs' narrow interpretation of that exemption and held that Yeshiva must recognize the Alliance. At bottom, this case now presents the question whether the First Amendment gives Yeshiva University the right to reject student clubs that are, or even appear to be, inconsistent with Torah values. App. 236. For reasons explained below, it does.

## ADDITIONAL REASONS FOR GRANTING THE APPLICATION

Yeshiva's Application persuasively explains why this case satisfies all the requirements for a stay. This brief first expands upon Yeshiva's cogent explanation of why it is likely to prevail on the merits of its First Amendment claim, emphasizing Yeshiva's First Amendment rights as an expressive association—and a religious one to boot. The brief next advances an important reason why the Court is likely to grant review *and* why a stay is in the public interest: namely, that the approach of the New York Supreme Court here would seriously compromise some of the important benefits of religious colleges and universities.

### I. Yeshiva Is Likely To Prevail On The Merits Because The First Amendment Allows Religious Schools To Apply Their Own Standards For Belief, Membership, And Conduct.

On the merits, this case is about as clear as they come. The New York courts, by applying the NYCHRL against Yeshiva and by denying it access to religious exemptions available to other schools, have prevented Yeshiva from making its own decisions about on-campus groups. That ruling runs headlong into two of the First Amendment's key protections. *First*, the decision improperly allows civil courts to second-guess a religious organization's decision about what beliefs, activities or groups conflict with its religious teachings—decisions that are themselves fully protected by the Religion Clauses. *Second*, the decision would punish Yeshiva (and by extension other religious colleges) for exercising its First Amendment right, as a religious expressive association, to determine which messages and organizations it wishes to associate with. Because the First Amendment protects Yeshiva's decision

not to recognize the Alliance, the Court should stay the injunction.

### A. The Religion Clauses allow religious schools to decide what standards of belief and conduct determine community membership and privileges.

Under the First Amendment's Religion Clauses, the mere fact that the students seeking to form a campus group were members of a religious community and subject to the community's norms should have barred the Alliance's claims even if the NYCHRL lacked a religious exception.

1. This Court has repeatedly affirmed that the "First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055 (cleaned up). The Court has explained that this doctrine, known as the church- or religious-autonomy doctrine, is grounded in and compelled by the both the Free Exercise Clause and the Establishment Clause. *Id.* at 2060.[2] That doctrine demands respect for the authority of each religious organization to set religious conduct standards within its community, including by exercising ultimate control over what groups are allowed to form within the community. As a result, "[c]ourts generally do not scrutinize closely the relationship among members (or former members) of a church." *Paul* v. *Watchtower Bible & Tract Soc'y of New York, Inc.*, 819 F.2d 875, 883 (9th Cir. 1987). The same principles apply to any organizations that a religious institution's members wish to form and have recognized

[2] The First Amendment "clearly [protects] organizations less pervasively religious than churches." *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988).

within the broader religious community.

This Court's recognition of the need to defer to religious organizations stems from the practical understanding that "secular tribunals 'lack the power to answer some questions—religious questions—whose resolution is, under an appropriately pluralistic political theory, left to other institutions.'" *Korte* v. *Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013) (quoting Richard W. Garnett, *A Hands–Off Approach to Religious Doctrine: What Are We Talking About?*, 84 Notre Dame L. Rev. 837, 861 (2009)). And no matter is more ecclesiastical than the question of what standards of religious conduct and belief define the groups that may be members of a religious community. As Justice Brennan recognized, for many people of faith, "religious activity derives meaning in large measure from participation in a larger religious community" that "represents an ongoing tradition of *shared* beliefs." *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment) (emphasis added). The question of who can help form or shape those beliefs, either as a leader, a teacher, or—as here—an officially designated subgroup comprised of ordinary members, is solely for the organization to decide.

For this reason, by as early as 1850, the Massachusetts Supreme Court recognized that the "powers and privileges" of religious organizations had been "established by long and immemorial usage." *Farnsworth* v. *Storrs*, 59 Mass. (5 Cush.) 412, 415 (1850). Included in those "established" powers were the "authority to deal with *** members" or groups who violate the community's norms. *Ibid.* Many other courts have also recognized the authority of religious organizations to decide such

questions without judicial interference.[3] Yeshiva's decision to deny recognition to the Alliance is thus protected by centuries of American practice.

Indeed, this Court itself recognized the complete autonomy of religious organizations over membership decisions more than 140 years before it formally recognized, in *Hosanna-Tabor,* that the "ministerial exception" protects the rights of religious organizations to choose their ministers. In *Watson* v. *Jones*, the Court held that courts could "exercise no jurisdiction" over a "matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." 80 U.S. (13 Wall.) 679, 733 (1871). Months later, the Court stated expressly what it implied in *Watson*—that courts "cannot decide who ought to be members of the church." *Bouldin*, 82 U.S. (15 Wall.) at 139-140. That principle applies with equal force to subgroups that seek to form not only within the religious organization, but also with the organization's blessing.

Moreover, although this Court has recognized that secular courts can address some issues involving religious organizations—such as property disputes, *e.g.*, *Jones* v. *Wolf*, 443 U.S. 595, 602 (1979)—by applying neutral principles of law, there is "no neutral principle of law that could assist in evaluating whether" a subgroup of members within a religious community or "a member lives his or her life in a manner

[3] See *Shannon* v. *Frost*, 42 Ky. (3 B. Mon.) 253, 258 (1842) ("This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision."); *Harmon* v. *Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (1843) ("It belongs not to the civil power to enter into or review the proceedings of a Spiritual Court" of a religious group of which the person was a "voluntary member").

consistent with church doctrine." *Askew* v. *Trustees of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith*, 684 F.3d 413, 419 (3d Cir. 2012).

2. Plaintiffs' attempt to apply the NYCHRL against Yeshiva, an expressly religious college, because of Yeshiva's decision to exclude them from its religious community conflicts with these principles. Yeshiva exercised a right afforded by the Religion Clauses to all religious organizations: It declined to give its stamp of approval to the Alliance, a group that it believed, as a matter of religious faith, would likely stray from the religious standards that govern its undergraduate polity—and would advocate for conduct contrary to those standards. Indeed, as the Application summarizes, the Alliance seeks to turn many religious activities into affirmations of its members' sexual and gender identities. Appl. 11-12. By putting the focus on non-Jewish aspects of its members' identities, such affirmations would, in Yeshiva's religious judgment, detract from the fundamental Jewish character of those campus activities. *Id.*

The protected nature of Yeshiva's refusal to recognize a club on First Amendment grounds is bolstered by the reality that recognizing the Alliance would alter Yeshiva's religious identity. Yet the religious-autonomy doctrine guarantees that the authority to make such membership decisions, and decisions about which privileges members can exercise, "is the [religious institution's] alone." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 195 (2012). As the Ninth Circuit has explained, "[r]eligious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be."

*Paul*, 819 F.2d at 883 (citation omitted). For this reason, Yeshiva cannot be constitutionally *required* to recognize a would-be student group when it has rejected that group based on its religious beliefs or standards.

3. Applying the religious-autonomy doctrine here would also prevent courts from engaging in the kind of excessive entanglement that the Establishment Clause forbids. See, *e.g., NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 502 (1979) (noting that "the very process of inquiry" into a religious school's interactions with its teachers could "impinge on rights guaranteed by" the Religion Clauses); *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1341-1343 (D.C. Cir. 2002) (similar). Indeed, any judicial inquiry into whether a religious organization is "truly religious" or "sufficiently religious" to warrant a religious exemption from a statute is fraught with entanglement concerns. See, *e.g.*, *Carson* v. *Makin,* 142 S. Ct. 1987, 2001 (2022) ("Any attempt to * * * scrutinize[e] whether and how a religious school pursues its educational mission would * * * raise serious concerns about state entanglement with religion and denominational favoritism."). One reason is that, as this Court explained in *Amos*, the "line" between what is "religious" and "secular * * * is hardly a bright one, and an organization might understandably be concerned that a judge" charged with making such a determination "would not understand its religious tenets and sense of mission." 483 U.S at 336. And that is one reason why Justices across the spectrum have said that religious organizations should generally be granted a great deal of deference on such questions. See*, e.g., id.* at 345 (Brennan, J., concurring) (explaining the importance of allowing a "sphere of deference with respect to those

activities most likely to be religious"); *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 752-754 (2014) (Ginsburg, J., dissenting) (explaining that because "[r]eligious organizations exist to foster the interests of persons subscribing to the same religious faith," the Court provides "'special solicitude to the rights of religious organizations'"(quoting *Hosanna-Tabor*, 565 U.S. at 189)).

The risk of inappropriate entanglement is apparent from this case: Yeshiva's response to the Plaintiffs' claim that it violated the NYCHRL by refusing to recognize the Alliance as an official club was that Yeshiva's decision was based on its long-standing and well-known commitments to the Jewish faith—that is, that the decision was based on bona fide religious concerns. Yet the lower court here questioned that conclusion, in part, by questioning whether Yeshiva could properly be characterized as a "religious" corporation—despite recognizing that Yeshiva openly promotes the "study of Talmud." App. 60. Rather than looking at the ways that Yeshiva furthers the Jewish faith, for example, the court instead focused on all the ways it felt it didn't. See App 59-69. That in turn led to an analysis in which Yeshiva's putative secular purposes were allowed to eclipse its religious identity.

In the process, the court ignored the conclusions of Yeshiva's senior rabbis, instead relying on a letter from Yeshiva professors. App. 61. To the court, the fact that even "law professors" "within Yeshiva's own community" discount Yeshiva's religious status was deemed relevant to the court's analysis. App. 61. The court also cited a handful of internal documents that, among other things, recognized the existence of LGBT clubs at Yeshiva's graduate schools, in an apparent attempt to

suggest that Yeshiva's policies were internally inconsistent. App. 62. The New York court thus conducted what amounted to an improper inquiry into whether Yeshiva had checked enough religious boxes to qualify for constitutional and statutory protections. Compare, *e.g., University of Great Falls*, 278 F.3d at 1341-1343.

The Establishment Clause—properly understood—exists in part to prevent secular courts from making such an inquiry. Yeshiva's religious identity is, at bottom, itself a religious decision. And this Court has explained that a court risks excessive entanglement when, based on what it may perceive as logical inconsistencies, it second-guesses either a religious school's religious character or its religion-based judgments. Compare, *e.g., Hobby Lobby,* 573 U.S. at 724 (cautioning against judicial second-guessing of religious beliefs on complicity in acts the faith views as immoral). And that is why, unlike the New York courts here, other courts have correctly explained that they are not just forbidden to answer ecclesiastical questions about what groups are "really" religious and who should be allowed into a religious community; they are forbidden from even *asking* such questions. *Natal* v. *Christian Missionary All.*, 878 F.2d 1575, 1578 (1st Cir. 1989) (explaining that "[b]y its very nature, the inquiry" into religious practices would thrust civil courts "into a maelstrom of Church policy, administration, and governance").

To be sure, this Court has held that courts may inquire into the sincerity of religious beliefs to determine (for example) whether an alleged religious belief is merely a pretext to cover an otherwise discriminatory or unlawful act. But once sincerity is established, or without any serious question of sincerity—of which there

is none here—courts cannot inquire into the reasonableness, validity, or legitimacy of that belief. See, *e.g., Burwell*, 573 U.S. at 724 (although courts may review sincerity, they have "no business" deciding "whether the religious belief *** is reasonable"). For reasons stated previously, this necessarily includes a religious community's decisions about what groups can and cannot appropriately be part of the community, consistent with the community's own religious standards. This limitation on judicial power also extends to the religious judgment of whether students who are further along in their religious training—like Yeshiva's graduate students—can appropriately form and be part of a club that, in the institution's religious judgment, those who are less experienced and grounded in the faith cannot.

In short, the questions of which individuals or groups can be part of a religious community, and how those decisions can appropriately be made, are ecclesiastical. Because the First Amendment forbids secular courts from answering ecclesiastical questions, the NYCHRL cannot constitutionally apply against religious colleges and universities for exercising their rights to make those decisions. Because the injunction entered against Yeshiva presumes otherwise, this Court's immediate relief is needed to ensure that Yeshiva is not denied its First Amendment freedoms even for a moment. See *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality).

### B. The expressive-association doctrine protects the rights of religious schools to choose which groups are allowed in their communities.

In entering the injunction and leaving it in place, the New York courts also violated Yeshiva's right under the First Amendment-based expressive-association doctrine to form a religious community designed to further its own expressive, religious goals.

1. This Court has long recognized that the First Amendment protects the "freedom to engage in association for the advancement of beliefs and ideas," and that such association "is an inseparable aspect of the 'liberty' assured" by the First and Fourteenth Amendments. *NAACP*, 357 U.S. at 460. This freedom of expressive association is especially important for the right of "[e]ffective advocacy" of "public and private points of view, particularly controversial ones," and has caused the Court to see the "close nexus between freedoms of speech and assembly." *Ibid.* That right of association, moreover, extends not only to "educational * * * and cultural" points of view, but "religious" ones as well. *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added).

Moreover, the right to associate protected by the First Amendment necessarily includes the right *not* to associate. *Id.* at 623. The doctrine of expressive association thus forbids the government from forcing or pressuring expressive groups, such as religious schools, to include either an unwanted group or even an "unwanted person in a group" if doing so affects "the group's ability to advocate public or private viewpoints." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000). This First Amendment right to freely associate for expressive ends is so fundamental that it

prevents governments from applying public-accommodation laws in a way that interferes with an expressive association's ability to control its own message. *Id.* at 644; *accord Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 559 (1995).

This right of association is at its strongest when it comes to religious institutions, given the extra protections of the First Amendment's Religion Clauses. Indeed, as this Court recently held, the First Amendment affords "double protection" to "religious expression." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022). Accordingly, it protects the right of all religious organizations, including religious colleges and universities, to decide for themselves what beliefs and practices will define those who "ought to be members," teachers, and leaders of their communities. *Bouldin*, 82 U.S. at 139-140. That same reasoning applies with equal force to a religious organization's decision about what groups to recognize within the community.

2. Properly understood, religious schools such as Yeshiva are expressive associations. They exist, to borrow from Justice Brennan, to foster an "ongoing tradition of shared beliefs." *Amos,* 483 U.S. at 342 (Brennan, J., concurring in the judgment). Many such schools—both in and out of New York City—have beliefs on human sexuality and gender that depart, often substantially, from secular or contemporary understandings.[4] Yet the First Amendment fully protects those beliefs,

[4] *E.g.,* The King's College, *Student Handbook 2022-2023*, at 99 (2022), https://tinyurl.com/KingsHandbook ("[W]e are bound by the historic Christian tradition regarding sexuality, gender, and marriage. We believe that God intends sexual relations to be reserved for marriage between a man and a woman."); George Fox University, *George Fox University*

even if they are unpopular. *Dale*, 530 U.S. at 660; *accord Obergefell* v. *Hodges*, 576 U.S. 644, 679-680 (2015) (emphasizing First Amendment protections for traditional Jewish and Christian beliefs on marriage and sexuality). And, because any "requirement that [those schools] retain" student groups that advocate views contrary to those beliefs "would significantly burden [their] right to oppose or disfavor" conduct or messaging that violates their organizational views, the First Amendment forbids the government from imposing such a requirement. *Dale,* 530 U.S. at 659.

In short, Yeshiva is likely to succeed in showing that the injunction forcing it to recognize the Alliance hinders Yeshiva from furthering its religious messages and missions and thus violates the First Amendment.

## II. This Court Is Likely To Grant Review, And The Public Interest Strongly Supports A Stay, In Part Because The New York Courts' Approach Would Thwart Some Of The Unique Social Benefits That Yeshiva And Other Religious Schools Provide.

The public interest also strongly supports Yeshiva's request. New York City is home to several world-class religious colleges that also provide excellent secular educations to their students. But it would be a mistake to recognize them only for their academics. Indeed, religious colleges provide significant benefits to the communities they serve and to the world at large. If the injunction is not stayed, the legal theories supporting it will threaten not only the benefits that Yeshiva brings to its community, but also the benefits flowing from religious colleges generally. And

*Undergraduate Student Handbook* 2020–21, at 13 (2020), https://tinyurl.com/GeorgeFoxHandbook ("In regard to sexual morality, we believe that only marriage between a man and a woman is God's intention for the joyful fulfillment of sexual intimacy.").

that is a powerful reason supporting *both* the likelihood of this Court's review, and the public interest in the requested stay.

### A. Religious colleges and universities offer unique benefits—including much-needed diversity—to higher education.

Beyond academic excellence competitive with secular schools, religious colleges and universities in New York City and nationwide offer students advantages that often are not as readily available in secular institutions. These include not only the opportunity to study academic disciplines from the standpoint of faith, but also the opportunity to naturally integrate community service into higher education; to enjoy greater physical safety; and to learn in an environment with broader diversity of philosophical and political perspectives among professors and students than in most secular institutions.

1. Congress recognized one such benefit in the Higher Education Opportunity Act of 2008—helping students integrate community service into their educational pursuits. Pub. L. 110-315, 122 Stat. 3078. That is one reason why, among other things, that Act requires accrediting bodies to "respect[] the * * * religious missions" of such institutions. 154 Cong. Rec. H7668 (July 31, 2008). Noting that "[t]he time to recognize and encourage an increased commitment to public service is now," the House Report on this Act specifically mentioned, as a reason for congressional protection, the increasing number of students at religious colleges who serve religious missions or perform other kinds of service. 154 Cong. Rec. H7661 (July 31, 2008). These observations reflect that community service is one important way colleges contribute to society.

Religious colleges foster community service intentionally. Students and professors in these institutions are typically encouraged by their foundational religious texts, traditions, and teachings to take care of the foreigner, the poor, and the needy.[5] And they are consequently more likely to embrace the challenging principle that the value of one's life is measured not by what one achieves in a secular occupation, but by how well one serves others.[6]

Indeed, studies show that more students at religious colleges devote time in community service than students at secular colleges, public or private. At schools that belong to *Amicus* CCCU, for example, 35.2 percent of students participate in community service compared to only 25.7 percent of college students generally.[7]

Students at such colleges also often pause their formal educations for domestic or overseas public service.[8] This too is by design: Institutional policies and accommodations provide deferment options to encourage such service without detrimentally affecting the student's education.[9]

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[5] See, *e.g.*, *Deuteronomy* 10:18-19; *Matthew* 25:40; *The Qur'an* 16:90 (Sahih Int'l) ("Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression."); *Mosiah* 2:17 (Book of Mormon) ("[W]hen ye are in the service of your fellow beings ye are only in the service of your God.").

[6] See, *e.g.*, *Luke* 12:15 (ESV) ("[O]ne's life does not consist in the abundance of his possessions."); *Exodus* 22:20, Chabad.org, https://tinyurl.com/ChabadExodus (accessed Sept. 2, 2022) ("And you shall not mistreat a stranger, nor shall you oppress him, for you were strangers in the land of Egypt.").

[7] CCCU, *The Case for Christian Higher Education* 2 (2020), https://tinyurl.com/39sjcb4a.

[8] See Kathryn A. Tuttle, *The Effects of Short-term Mission Experienced on College Students' Spiritual Growth and Maturity*, 4 Christian Educ. J. 123 (2000).

[9] See La Sierra Univ., *Spiritual Life, Long-Term Missions*, https://tinyurl.com/2p8wnhmc (accessed Sept. 2, 2022); Brigham Young Univ., Enrollment Servs., *Missionaries*, https://tinyurl.com/5d6597bs (accessed Sept. 2, 2022).

It is also common for students who don't serve traditional (evangelizing) missions to serve as humanitarian volunteers in foreign countries while studying abroad.[10] All such humanitarian work not only benefits the religious groups of which the students are a part, but also reduces cultural divides between nations and religions. These ongoing humanitarian activities benefit students and the world.

Often, moreover, the schools themselves provide key services to the less fortunate to enhance their surrounding communities. Multiple religious schools, including several schools belonging to *Amicus* CCCU—Campbell University, Indiana Wesleyan University, and Southern Wesleyan University[11]—are even now participating in a program administered by the Department of Education that serves to "help incarcerated individuals access educational programs * * * to support reentry, empower formerly incarcerated persons, enhance public safety, and strengthen our communities and our economy."[12] Many other religious colleges have participated in the program.[13]

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[10] See R. Michael Paige et al., *Study Abroad for Global Engagement: The Long- Term Impact of Mobility Experiences*, 20 Intercultural Educ. S29 (2009).

[11] U.S. Dep't of Educ., Experimental Sites Initiative, *New Institutions Invited to Participate in the Second Chance Pell (SCP) experiment* (Apr. 26, 2022), https://tinyurl.com/ymf8xkuj.

[12] Press Release, U.S. Dep't of Educ., *U.S. Department of Education Announces Expansion of Second Chance Pell Experiment and Actions to Help Incarcerated Individuals Resume Educational Journeys and Reduce Recidivism* (Apr. 26, 2022), https://tinyurl.com/3se7ccph.

[13] U.S. Dep't of Educ., Experimental Sites Initiative, *New Institutions Invited to Participate in the Second Chance Pell (SCP) experiment* (Apr. 24, 2020), https://tinyurl.com/25datmsk (Calvin University, Eastern University, and University of the Southwest); U.S. Dep't of Educ., *Institutions selected for participation in the Second Chance Pell experiment in the 2016-2017 award year* (July 8, 2016), https://tinyurl.com/nzt59kvb (North Park University and Nyack College (now Alliance University)).

2. Religious colleges and universities also provide increased physical safety for learning and academic inquiry. For instance, in a 2016 study of campus safety, many private, religious institutions were named the safest in the nation.[14]

Accordingly, for students and parents concerned about physical safety, religious colleges and universities are an attractive option. And the mere existence of such options in the higher education market helps ensure that other institutions themselves place greater emphasis on student safety.

3. Religious colleges also contribute substantially to the diversity of American higher education. In most religious traditions, the call to faith is a challenge to think and live differently from the rest of society: From the Islamic command to "[b]e in the world as if you were a stranger or traveler" to Jesus's command that his disciples be "a light to the world,"[15] people of faith are encouraged to transcend the cultures in which they live. Thus, it should come as no surprise that educational institutions founded and run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions.

[14] Tanza Loudenback, *The 25 safest college campuses in America*, Bus. Insider (Jan. 12, 2016), https://tinyurl.com/5fwnmsvb.

[15] See also Avi Lazerson, *Holiness and Judaism*, Jewish Mag. (Jan. 2001), https://tinyurl.com/2p8nb3ph (directing the Jewish people to "liv[e] in this world, marrying, procreating, working and at the same time not to be affected by the daily worldly occurrences"); *Matthew* 5:14-15 (Christians are to be a "light" to the world).

Yeshiva, for example, promises that "five core Torah values comprise [its] moral compass and guide [it] toward a better future."[16] Thus, it tells its students that its distinct way of life—guided by Mosaic law—will permeate campus life.

Religious schools differ from secular schools in other ways too. For example, the most comprehensive available study addressing the political leanings of university faculties confirms that religious colleges and universities have value in part because they attract professors and students from across the political spectrum.[17]

As a result, religious colleges are more likely than others to provide students extensive exposure to divergent political views. And that includes not only the more "conservative" views that, for whatever reason, are largely missing in many secular institutions, but also more progressive views leavened by religious perspectives.[18]

The diversity that religious colleges add has long been understood and valued by Congress. As it said in the Higher Education Opportunity Act, "[i]t is the sense of Congress that * * * the diversity of institutions and educational missions is one of the key strengths of American higher education." 20 U.S.C. § 1011a(a)(2)(A). Consistent with that view, the provision further urged that "individual institutions of higher education have different missions and each institution should design its academic program in accordance with its educational goals." *Id.*(a)(2)(B).

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[16] Yeshiva, *Values*, https://www.yu.edu/about/values (accessed Sept. 2, 2022).

[17] Ellen B. Stolzenberg et al., *Undergraduate Teaching Faculty: The HERI Faculty Survey, 2016-2017,* at 38, Higher Educ. Rsch. Inst. at UCLA (2019), https://tinyurl.com/428n8t93.

[18] See CCCU, *The Case for Christian Higher Education* 12 (Jan. 2018), https://tinyurl.com/4yw2spb5.

In short, the diversity that religious schools in New York City—and nationwide—bring to the broader community greatly benefit the public.

### B. The lower court's approach would seriously compromise the unique benefits that Yeshiva and other religious schools provide.

One reason why granting a stay is so important is because it threatens to seriously compromise those unique benefits. Indeed, the legal theory adopted by the New York courts here as a basis for overriding Yeshiva's First Amendment protections would have catastrophic consequences for religious higher education if not squarely rejected by this Court. The public interest would thus be furthered by protecting both the schools in their exercise of their religious rights, *Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020), and in ensuring that the community benefits that flow from religious schools continue.

For example, if schools in New York City lose their ability to have exclusive control over their own religious decisions on personnel and campus culture issues, many benefits that religious colleges provide precisely because of their religious character would be lost. Indeed, as Circuit Judge James Ho recently recognized, with religious institutions, as with secular ones, "personnel *is* policy." *McRaney* v. *N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 980 F.3d 1066, 1067 (5th Cir. 2020) (Ho, J., dissenting).

The same is self-evidently true of groups that seek to form within a religious community. If such groups are not forced to live up to the standards of the community, then religious communities will lose the spiritual glue that has historically held them

together, and that their sacred texts teach them to value.[19] And without that glue, it is likely that the benefits such institutions offer to the broader community—be it from community service, increased viewpoint diversity, etc.—will fall as well.

This Court should enter a stay to ensure that New York City does not "impose a government-enforced and 'immediate' change to [Yeshiva's] religious character." Appl. 30. Given the enormous risk to Yeshiva and other religious schools created by the New York Supreme Court's anemic understanding of the First Amendment, there is no public interest in any other result.

### C. A stay will help protect the First Amendment rights of all religious schools.

Entering a stay would also send a message to courts around the country that cavalier treatment of First Amendment rights of the sort at issue here will not go unanswered. The First Amendment was enacted precisely because some groups or some views may not be popular among the majority. As Justice Black explained, the Founders "were too close to oppressions and persecutions of the unorthodox, the unpopular, and the less influential, to trust even elected representatives with unlimited powers of control over the individual." *Feldman* v. *United States*, 322 U.S. 487, 501 (1944) (Black, J., dissenting) (subsequent history omitted). The rights of religious institutions like Yeshiva—which only want to exist free from government interference with their most sacred decisions—are just as worthy of protection. And

[19] See, *e.g., Proverbs* 27:17 (NIV) ("As iron sharpens iron, so one person sharpens another.").

courts throughout the Nation need to know that this Court stands ready to protect them.

## CONCLUSION

Because Yeshiva is almost certain to succeed on the merits, and because protecting the First Amendment rights of Yeshiva and other religious schools would substantially benefit the public interest, this Court should grant the application.

Respectfully submitted,

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September 2, 2022