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.

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

BRIEF OF THE ARCHDIOCESE OF NEW YORK, BIOLA UNIVERSITY, BRIGHAM YOUNG UNIVERSITY, CEDARVILLE UNIVERSITY, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE ETHICS AND RELIGIOUS LIBERTY COMMISSION, HOUSTON BAPTIST UNIVERSITY, LIBERTY UNIVERSITY, THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, AND WHEATON COLLEGE AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

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INTERESTS OF *AMICI CURIAE*[*]

The Archdiocese of New York is America's second-largest Roman Catholic diocese, serving more than 2.8 million Catholics in 283 parishes and nearly 54,000 students from Pre-K through 12th grade in 170 schools. The Archdiocese also oversees Catholic Charities of the Archdiocese of New York, a federation of approximately 90 agencies and programs that serve New Yorkers of all faiths.

Biola University (Biola), founded in 1908, is a Christian institution of higher education located in La Mirada, California. Biola offers undergraduate, graduate and online studies in fields of Theology, Science Technology & Health, the Humanities and Social Sciences, Cinema & Media Arts, Fine Arts, Education, Psychology, Business, and Intercultural Studies. It provides biblically centered education, intentional spiritual development and vocational preparation by its faculty and staff who are all professing Christians. Its mission, which is governed by its Theological Positions, and which is at the core of all significant decisions made by the University, is "biblically centered education, scholarship and service—equipping men and women in mind and character to impact the world for the Lord Jesus Christ." Biola's Statement of Biblical Principles, one of its three Theological Positions approved by its Board of Trustees, affirms traditional biblical beliefs in the context of God's Intentional Design for Life,

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[*] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

God's Sacred Value for Life, and God's Final Plans for Life. Biola also has rich co-curricular programs and competes in NCAA Division II athletics.

Brigham Young University (BYU) is a religious institution of higher education in Provo, Utah, with more than 34,000 daytime students. BYU was founded and is guided and supported by The Church of Jesus Christ of Latter-day Saints. BYU's mission is to assist individuals in their quest for perfection and eternal life. The common purpose of all education at BYU is to build testimonies of the restored gospel of Jesus Christ, in an environment that is enlightened by living prophets and sustained by those moral virtues which characterize the life and teachings of the Son of God.

Cedarville University (Cedarville), located in southwest Ohio, is an accredited, Christ-centered, Baptist institution with an enrollment of 4,715 undergraduate, graduate, and online students in more than 150 areas of study. Founded in 1887, Cedarville is one of the largest private universities in Ohio, recognized nationally for its authentic Christian community, rigorous academic programs, strong graduation and retention rates, accredited professional and health science offerings, and high student engagement ranking. It is intentional about teaching from a biblical worldview, about academic excellence, and about spiritual growth and discipleship. All students are required to have evidence of a personal relationship with Jesus Christ and to comply with the Community Covenant. All employees and staff are required to uphold and affirm the Doctrinal Statement, Community Covenant, and General Workplace Standards, which are approved by the Board of Trustees. Its

mission is to transform lives through excellent education and intentional discipleship in submission to biblical authority.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with nearly 17 million members worldwide. Religious freedom is an essential element of its faith. The Church joins this brief out of a profound commitment to the principle that the First Amendment guarantees a faith community the autonomy to operate a religious school according to the community's doctrine, policies, and standards.

The Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 50,000 churches and congregations and nearly 14 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

Houston Baptist University (HBU) is a comprehensive Christian liberal arts university affiliated with the Baptist General Convention of Texas. HBU's Christian faith permeates everything it does. It hires only faculty and staff who share this faith.

And while it admits students of any faith or none, HBU asks its students to live according to a set of Christian principles while enrolled.

Liberty University (Liberty) is a distinctively Christian institution of higher education located in Lynchburg, Virginia. Founded by Dr. Jerry Falwell in 1971, Liberty maintains the vision of its founder by developing Christ-centered men and women with the values, knowledge, and skills essential to impact the world. Its board-approved Doctrinal Statement affirms the traditional biblical beliefs concerning God-ordained sex, marriage, sexuality, and sexual relations, and its governing documents require all its functions, operations, and actions to be consistent its Doctrinal Statement. Through its residential and online programs, services, facilities, and collaborations, Liberty educates men and women who will make important contributions to their workplaces and communities, follow their chosen vocations as callings to glorify God, and fulfill the gospel's Great Commission. With a residential enrollment of 15,800 students and a total enrollment exceeding 130,000, Liberty is one of the largest Christian universities in the world. Liberty offers undergraduate, graduate (master's and doctoral level), and professional programs in more than 700 unique programs of study, including programs in business, counseling, divinity, education, engineering, law, nursing, and medicine. Known as "the Flames," Liberty has 20 NCAA Division I athletic programs and over 40 club sports programs.

The United States Conference of Catholic Bishops (USCCB) is an assembly of Catholic bishops who jointly exercise pastoral functions in the United States. The USCCB coordinates Catholic activities throughout the U.S., organizes religious,

charitable, and social welfare work at home and abroad, aids education, cares for immigrants, and engages with the public on a wide range of matters, including Catholic faith, education, religious liberty, and the sanctity of human life.

Wheaton College (Wheaton) is a Christian, academically rigorous, fully residential liberal arts college and graduate school located in Wheaton, Illinois. Established in 1860, Wheaton's educational mission is to build the church and benefit society worldwide through excellence in whole-person education. Wheaton seeks to relate Christian liberal arts education to the needs of contemporary society—to combine faith and learning to produce a biblical perspective needed to relate Christian experience to the demands of those needs. To live out that whole-person education, Wheaton asks all students and employees to both profess a personal faith in Jesus Christ and agree to be bound by the moral standards expressed in its Community Covenant, which sets forth how community members are expected to live out our collective Christian commitments.

* * *

Amici differ from one another in many ways. Some are Protestant, others are Roman Catholic; some are institutions of higher learning, others focus on education and service more broadly. But what unites *amici* is that their respective religious missions do not end on Sunday mornings but permeate all of life, especially in the realms of education and service. Like Yeshiva University, and countless other religious organizations, *amici* orchestrate these efforts according to their beliefs and through corporate forms.

Amici have an interest in this case because their ability to serve and to structure their ministries as their beliefs require depends upon the protections of the First Amendment. The decision below—and the unreasoned refusal of the New York appellate courts to grant a stay of that decision—are a grave and pressing threat to religious liberty that warrants this Court's immediate action. If not checked now, *amici* and many other religious institutions may soon face precisely the same impossible choice now presented to Yeshiva University: abandon your faith or risk being held in contempt. As explained below, the Constitution forbids this in the clearest and most fundamental terms; this Court should do the same, and without delay.

INTRODUCTION

This is not a hard case, but it is an important one. Religious freedom means the freedom to be different, both individually and institutionally. As this Court has long recognized, this freedom can exist only if religious institutions are able to create environments where their beliefs and way of life are passed on through both instruction and lived example. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 234–36 (1972); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 531–32, 534–35 (1925).

All agree that Yeshiva University's decision not to recognize YU Pride Alliance was based on a sincere religious belief about how to clearly communicate Judaism's Torah values to its students. This Court's First Amendment jurisprudence categorically forbids the government from second-guessing or interfering with Yeshiva University's decision in any way. See *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v.

EEOC, 565 U.S. 171, 188–89 (2012); *NLRB* v. *Roman Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979). As Yeshiva University has ably argued, this case readily satisfies the standards for an emergency stay. And *amici* agree with Yeshiva University that the decision below is impermissible under the church autonomy doctrine, unconstitutionally entangles secular courts in a religious dispute, exacerbates a circuit conflict about the proper interpretation of *Fulton* v. *City of Philadelphia*, and violates Yeshiva University's right to the free exercise of its religion.

Amici submit this brief (1) to underscore that—unless it is stayed—the decision below will have potentially devastating consequences for a wide variety of religious institutions; and (2) to provide additional reasons why the decision below violates both the historic understanding of the First Amendment's protection of church autonomy and this Court's applications of that principle.

ARGUMENT

I. The First Amendment Prohibits State Interference with Questions of Religious Doctrine or Practice.

As this Court recently noted, the First Amendment "protect[s] the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady*, 140 S. Ct. at 2060 (internal quotation marks and citation omitted). "State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion." *Id.* This principle—known as the church autonomy doctrine or the freedom of the church—thus marks "a

boundary between two separate polities, the secular and the religious." *Korte* v. *Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013).

And while this Court has indicated in passing that some components of church autonomy are not "jurisdictional" as a matter of civil procedure, *Hosanna-Tabor*, 565 U.S. at 195 n.4, the Constitution's protection of church autonomy *is* jurisdictional in the more colloquial sense that the First Amendment prohibits secular intrusions in the religious "sphere" entirely. *Our Lady*, 140 S. Ct. at 2060. In that sense, as this Court has explained, secular courts in this country by their very nature "hav[e] no ecclesiastical jurisdiction." *Watson* v. *Jones*, 80 U.S. 679, 730 (1872) (quoting *Shannon* v. *Frost*, 42 Ky. 253, 258 (1842)); see also Lael Weinberger, *Is Church Autonomy Jurisdictional?*, 54 Loy. U. Chi. L.J. (forthcoming fall 2022).

Part of the reason for this separation of authority is simply a matter of competence and public respect. Distinguishing between secular and religious sovereignty ensures that "[r]eligious questions are . . . answered by religious bodies." *McCarthy* v. *Fuller*, 714 F.3d 971, 976 (7th Cir. 2013). After all, "[j]udges have an interest independent of party preference for not being asked to decide an issue that they cannot resolve intelligently. Americans would, moreover, be deeply offended at the thought of their secular courts taking on the additional role of religious courts, as if the United States were a theocracy." *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated on unrelated grounds by Hosanna-Tabor*, 565 U.S. 171.

But church autonomy also rests on a more fundamental ground: a recognition that religious institutions truly are "separate polities." *Korte*, 735 F.3d at 677. Much

like the quasi-jurisdictional doctrine of sovereign immunity, the church autonomy doctrine thus flows from a recognition that religious institutions have a sphere over which they—and not the state—are in fact sovereign. See Weinberger, *supra*. Church autonomy is thus not merely a matter of government tolerance; it is also an acknowledgement by the state of a "structural feature of social and political life—one that promotes and enhances freedom by limiting government—and also as a moral right to be enjoyed by religious communities." Richard W. Garnett, *The Freedom of the Church: (Toward) an Exposition, Translation, and Defense*, in *The Rise of Corporate Religious Liberty* 39, 56 (Schwartzman et al. eds., 2015).

II. The First Amendment Was Designed to End the Long and Abusive Pattern of State Interference with Religious Institutions.

For most of human history, the union—or at least the interdependence—of throne and altar was common. And it was not until the Investiture Crisis of the 11th century that something like a legal notion of a "freedom of the church" began to emerge. See, *e.g.*, Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 179 (2011). The Investiture Crisis began in 1072 because of a disagreement between the Pope and the Holy Roman Emperor over who would select bishops. This dispute resolved only after some fifty years of civil war in Germany, when Emperor Henry V agreed on the Concordat of Worms, in which he "guaranteed that bishops and abbots would be freely elected by the church alone," although the emperor retained the right to invest them with their rights of temporal property. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 98 (1983). Yet the Church's victory was in

some ways more formal than actual—as monarchs often exercised *de facto* control over the election process and Church matters more generally, a recurring pattern in subsequent contests about church autonomy.

English kings were no exception to this tendency to attempt to control the Church. For example, when Pope Gregory VII insisted upon his clergy's celibacy, William I (1028–87) saw the situation "from a more worldly point of view" and granted dispensations to the English priests. E.F. Churchill, *The Dispensing Power of the Crown in Ecclesiastical Affairs*, 38 L. Q. Rev. 297, 298 (1922). And while William's successor, Henry I (1068–1135), eventually did agree to enforce the celibacy of the clergy, he too dispensed with the requirement for any offending priest willing to "pay the price of his protection." *Id.* Thus, as Florence of Worcester recounted, "all went home and the decrees stood for nought; all held their wives by the King's leave as they had done before." *Id.* (citing H.W. Carless Davis, *England Under the Normans and Angevins* 146 (1915)).

The English nobility correctly saw such royal intermeddling in Church affairs as a threat to their own prerogatives. Hence, at Runnymede in 1215, the English barons demanded and the King accepted that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." *Hosanna-Tabor*, 565 U.S. at 182 (quoting J. Holt, Magna Carta App. IV at 317 cl. 1 (1965)) (internal quotation marks omitted). Yet Magna Carta too promised more church independence than it achieved.

The question of who, exactly, was in charge of the Church came to a head during the reign of Henry VIII, after his court officials failed to secure a papal annulment of his marriage to Queen Catherine of Aragon so that the King could marry Anne Boleyn.[2] Facing politically explosive consequences, Rome delayed and delayed its answer. Enraged, Henry took matters into his own hands. With the aid of Parliament and his ecclesial allies, Henry was declared supreme head of the English Church in 1535, with full authority over the English Church's doctrine and practice. See Act in Restraint of Annates of 1532, 25 Hen. VIII, ch. 20; Act of Supremacy of 1534, 26 Hen. VIII, ch. 1.

This union of civil and religious authority under a single autocrat dramatically raised the stakes of English politics to a new and bloody height. In the years after the Act of Supremacy, the major parties in the profound religious disagreements of that day each sought to wield civil power to eliminate their theological opponents, and many of Britain's leading statesmen and clergymen met violent ends at the hands of royal executioners. Thus, as C.S. Lewis observed in his magisterial *English Literature in the Sixteenth Century Excluding Drama* 200–01 (1954), "[i]t was an age very like

[2] The disagreement was—like in this case—about religious teachings on sexual morality. Henry (apparently quite sincerely) believed that he had been cursed by God because Catherine was the widow of his late brother, making Henry's marriage a violation of Leviticus 20:21 ("And if a man shall take his brother's wife, it is an unclean thing: he hath uncovered his brother's nakedness; they shall be childless.") (KJV). Catherine's supporters disagreed, pointing to Deuteronomy 25:5, which requires the brother of a deceased man to marry his brother's widow if the brother died without an heir.

our own. Behind every system of sixteenth-century thought, however learnedly it is argued, lurks cruelty and Ogpu"—*i.e.,* the Soviet secret police.

This all-or-nothing entanglement of English politics and theology eventually contributed to the outbreak of the English Civil War in 1642 and the trial and execution of Charles I in 1649. Interestingly, subsequent attempts by some Puritan and Reformed sects like the Fifth Monarchists to establish a theocratic republic with no king but Christ were unsuccessful. And Oliver Cromwell's Commonwealth (1649–60) government took a comparatively moderate approach. The Rump Parliament repealed the Act of Uniformity in 1650, and the government generally favored religious tolerance for many. This moderation did not, however, extend to Roman Catholics. Indeed, Cromwell's government and military continued to suppress Catholicism both in England and—notoriously—in brutally violent military campaigns in Ireland and Scotland.

Following the restoration of the English monarchy in 1660, Charles II's government reenacted his father's persecutions, ordering all ministers to pledge their allegiance or face being labeled seditious and removed from their positions. Similarly, "all schoolmasters, private tutors, and university professors were required to 'conforme to the Liturgy of the Church of England' and not 'to endeavour any change or alteration' of the church." *Our Lady,* 140 S. Ct. at 2061 (quoting Act of Uniformity of 1662, 14 Cha. II, ch. 4); see also Corporation Act of 1661, 13 Cha. II. St. 2, ch. 1 (prohibiting from elected office those who had not received communion within the past twelve months according to the rites of the Church of England); Test Act of 1673, 25

Cha. II, ch. 2 (requiring all government officers to take an oath of supremacy and allegiance while rejecting the doctrine of transubstantiation).

The consequences were profound. Following the restoration, England imprisoned, exiled, or otherwise suppressed thousands of Catholics and Protestant non-conformists, including Baptist minister John Bunyan, who wrote *Pilgrim's Progress* while in prison for preaching without a license.

It was in response to these coercive policies that John Locke famously argued for religious tolerance. John Locke, *A Letter Concerning Toleration* 3 (Bennett ed. 2010) (1690). As he explained, it was "utterly necessary" to "draw a precise boundary-line between (1) the affairs of civil government and (2) the affairs of religion." *Id.* Failure to recognize the distinction between civil and religious authority, he warned, would result in endless "controversies arising between those who have . . . a concern for men's souls and those who have . . . a care for the commonwealth." *Id.* Because government is "constituted only for the purpose of preserving and promoting" life, liberty, and property, while the church "care[s] for the salvation of men's souls," *id.*, they need different laws. And since members of a church "joined it freely without coercion . . . it follows that the right of making its laws must belong to the [church] itself." *Id.* at 5.

Locke's argument made a lasting impact. As part of the Glorious Revolution, England moderated its approach by passing the Act of Toleration of 1689, 1 Will. & Mary, ch. 18, granting non-conforming Protestants limited freedom of worship if they swore allegiance to the Crown. But the Act of Toleration was a half-way reform.

Protestant non-conformists were still prohibited from holding public office, and the statute completely excluded Roman Catholics and non-trinitarians from its protections. Thus, many who disagreed with the state on matters of religion continued to face state interference with church government and other forms of persecution and suppression. See, *e.g.*, 4 William Blackstone, *Commentaries on the Laws of England* 55 (8th ed. 1778).

Beginning with the Pilgrims' departure for New England in 1620, many religious dissenters in Great Britain chose to leave for the New World rather than suffer under the Crown's heavy-handed interference. In the ensuing decades, thousands of "Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship." *Hosanna-Tabor*, 565 U.S. at 182**Error! Bookmark not defined.**. "William Penn, the Quaker proprietor of what would eventually become Pennsylvania and Delaware, also sought independence from the Church of England," and "[t]he charter creating the province of Pennsylvania [in 1681] contained no clause establishing a religion." *Id*. at 183. Maryland, similarly, was founded as a haven for Roman Catholics from the discriminatory policies of the Crown. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2128 (2003).

Yet, even then, many colonial governments continued to exercise varying degrees of "control over doctrine, governance, and personnel of the church." *Id.* at 2131. In particular, colonists were often subject to laws giving government authorities "the power to appoint prelates and clergy" and—as "a principal means of government

control over the church"—"laws governing doctrine," resulting, predictably, in "continual conflicts between clergymen, royal governors, local gentry, towns, and congregants over the qualifications and discipline of ministers." *Id*. at 2132, 2137.

In light of these problems, "the founding generation sought to prevent a repetition of these practices in our country" by setting a firm boundary, once and for all: the First Amendment's categorical prohibition on laws "respecting an establishment of religion or prohibiting the free exercise thereof." *Our Lady*, 140 S. Ct. at 2060 (quoting U.S. Const. amend. I). It is difficult to overstate how profound this change was. It moved government authority from the center of religious debates to the periphery, rejecting "government control over the character and teachings" of any church. McConnell, *supra*, at 2133; see also *Disestablishment and Religious Dissent: Church-State Relations in the New American States 1776–1833* (Esbeck & Hartog eds., 2019) (detailing similar disestablishments state-by-state).

The Framers understood this to be a fundamental correction of the kinds of historical abuses catalogued above. Most famously, James Madison—building on Locke's *A Letter Concerning Toleration*—attacked the root of the problem, skewering the contention that a "Civil Magistrate is a competent Judge of Religious truth" as "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world." James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 8 *The Papers of James Madison* 295, 301 (Rutland et al. eds., 1973).

And unlike previous attempts to preserve the freedom of the church, the Founders' novel step of imposing a structural and constitutional restraint on government largely succeeded in limiting state interference with religion. Indeed, early federal treatment of religious institutions is characterized by a remarkable scrupulosity in maintaining the respective spheres of church and state.

For example, when the first Roman Catholic Bishop in the United States, John Carroll, asked then-Secretary of State Madison for advice on who should be appointed to head the Catholic Church in New Orleans, Madison refused, responding that he should not be involved in the decision as the "selection of [religious] functionaries . . . is entirely ecclesiastical." Letter from James Madison to John Carroll (Nov. 20, 1806), in *The Records of the Am. Catholic Historical Soc'y. of Phila.*, 20:63, at 63–64 (1909); see also Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J. L. & Pub. Pol'y 821, 830 (2012). Madison withheld comment not because he lacked an opinion, but because he did not believe that his opinions should be shared in his official capacity as Secretary of State.[3] Madison was consistent in his views on the freedom of the church as President—as this Court has noted, he refused to allow a secular charter to strip an institution of its religious autonomy. See *Hosanna-Tabor*, 565 U.S. at 184–85.

[3] In fact, Madison later wrote a letter offering his personal opinion as a private citizen. See Kevin Pybas, *Disestablishment in the Louisiana and Missouri Territories*, in *Disestablishment and Religious Dissent: Church-State Relations in the New American States 1776–1833*, *supra*, at 273, 283–85 [hereinafter Pybas].

Thomas Jefferson was far less religiously orthodox than Madison, but as President he too advanced the same principles. For example, when he was informed in 1804 that local authorities had barred entry into a Catholic parish in the Orleans Territory in response to a dispute over control of the parish, he complained that

> it was an error in our officer to shut the doors of the church. . . . The priests must settle their differences in their own way, provided they commit no breach of the peace. . . . On our principles all church-discipline is voluntary; and never to be enforced by the public authority.

Pybas, *supra*, at 282.

Jefferson penned another letter a few days later responding to the Ursuline Nuns of New Orleans, who ran an orphanage and Catholic school in that city. Jefferson assured the sisters that the Louisiana Purchase would not undermine their "broad right of self-governance and religious liberty," despite Catholic France ceding control over the territory to the non-Catholic United States. *Id.* at 281; see also 1 Anson Phelps Stokes, *Church and State in the United States* 678 (1950). Jefferson explained that "[t]he principles of the constitution . . . are a sure guaranty to you that [your property and rights] will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to [its] own voluntary rules, without interference from the civil authority." Pybas, *supra*, at 281. Like Madison, "Jefferson also saw church-state separation as guaranteeing the autonomy, independence, and freedom of religious organizations—not just churches but religious schools as well." Berg et al., *supra*, at 182–83.

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In sharp contrast to the decision below, then, early federal practice understood the First Amendment to protect a religious organization's autonomy in decisions about "theological controversy, church discipline, ecclesiastical government, [and] the conformity of members" to required standards, *Watson*, 80 U.S. at 733, free from state interference and second-guessing.

III. The Church Autonomy Doctrine Prohibits Government Intrusion into Yeshiva's Decision Not to Recognize YU Pride Alliance.

This Court has steadfastly looked to the original understanding of the First Amendment's protections of religious autonomy. See *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Hosanna-Tabor*, 565 U.S. at 182; *Our Lady*, 140 S. Ct. at 2060. Of course, "[t]his 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." *Our Lady*, 140 S. Ct. at 2060.

Yeshiva University's decision to not recognize YU Pride Alliance is precisely such a decision. As this Court has noted, "the raison d'être of [religious] schools is the propagation of a religious faith." *Catholic Bishop of Chi.*, 440 U.S. at 503 (internal quotation marks and citation omitted). And there is no genuine dispute that Yeshiva University's recognized clubs are important organs by which Yeshiva University creates and preserves a community "wholly committed to and guided by Halacha and Torah values." Doc. 11; Rec 65 ¶ 98. Only after extensive religious deliberation did Yeshiva University reject YU Pride Alliance's application, because the school

determined that official approval of that group would "cloud [the Torah's] nuanced message" on human sexuality. *Id.* ¶ 101.

Respondents disagree with this conclusion, and they brought this suit to enlist state support to force Yeshiva University to "send[] a clear message" supporting YU Pride Alliance's views on Judaism and human sexuality, App.168, and to "force cultural changes" in the religious environment at Yeshiva University, Statement of M. Meisels, YouTube, at 26:22 (May 10, 2021), https://bit.ly/3e4LKWE. But such attempts are always improper. From its earliest church autonomy cases, this Court has categorically refused to take sides in "schism[s]" among coreligionists. *Watson*, 80 U.S. at 726 (refusing to adjudicate a dispute between a church and those members who would not "repent and forsake their sins" as a condition of membership).

It is passing strange, then, that the trial court did not even engage in the religious autonomy inquiry and that the state appellate courts did nothing to ensure even the most basic process protections for Yeshiva University. The trial court's conclusion that Yeshiva University had too many secular classes to be considered *religious enough* for protection under New York civil rights law, and its imperious assertion that—despite Yeshiva University's sincere religious beliefs to the contrary—"formal recognition of an LGBTQ student group . . . is [not] inconsistent with the purpose of

Yeshiva's mission," are precisely the kinds of court determinations that the church autonomy doctrine exists to prevent from ever happening in the first place.[4]

Indeed, by ignoring the church autonomy doctrine and proceeding to second guess Yeshiva University's understanding of its own religious beliefs, the trial court *itself* violated the First Amendment's prohibition on government officials "act[ing] in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). As this Court recognized just last term, governmental "scrutinizing whether and how a religious school pursues its educational mission . . . raise[s] serious concerns about state entanglement with religion and denominational favoritism." *Carson* v. *Makin*, 142 S. Ct. 1987, 2001 (2022).

The unconstitutional *process* here underscores the need for emergency relief, and the only remedy available to prevent harm from that process is for this Court to grant a stay of the trial court's decision. *Cf. Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022) (when "'official expressions of hostility' to religion

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[4] The trial court's conclusion that Yeshiva University erred in understanding its own religious beliefs is reminiscent of Philadelphia's argument in *Fulton* v. *City of Philadelphia* that Catholic Social Services erred in viewing certification of same-sex couple foster families as an endorsement of homosexual conduct: "In [Philadelphia's] view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But [Catholic Social Services] believes that certification is tantamount to endorsement. And 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714 (1981)).

accompany laws or policies burdening religious exercise," the proper remedy is to "'set aside' [the action] without further inquiry" (quoting *Masterpiece*, 138 S. Ct. at 1732)). Further, that the New York appellate courts have refused to give even a cursory explanation for why they have refused to grant a temporary stay of this patently erroneous decision more than justifies granting *certiorari* before judgment. As Yeshiva University's application persuasively argues, there is no need to wait, and there is much to lose in delay.

CONCLUSION

This Court should grant Yeshiva University and President Ari Berman's emergency application for a stay, or writ of certiorari and stay.

Respectfully submitted,

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