No. 22A____

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

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

IMMEDIATE RELIEF REQUESTED

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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.

IDENTITY OF THE PARTIES, CORPORATE DISCLOSURE STATEMENT, AND RELATED PROCEEDINGS

Applicants are Yeshiva University and its President Rabbi Ari Berman. Vice Provost Chaim Nissel was a party below but was dismissed by the trial court. Pursuant to Rule 29.6, Applicants each represent that they have no parent entities and do not issue stock.

Respondents are YU Pride Alliance, Molly Meisels, Doniel Weinreich, Amitai Miller, and Anonymous.

The related proceedings are:

YU Pride Alliance v. *Yeshiva University*, No. 154010/2021 (N.Y. Sup. Ct., June 24, 2022) (granting permanent injunction), App.50

YU Pride Alliance v. *Yeshiva University*, No. 2022-02726 (N.Y. App. Div., Aug. 23, 2022) (denying motion to stay permanent injunction pending appeal), App.39

YU Pride Alliance v. *Yeshiva University*, No. 2022-02726 (N.Y. App. Div., Aug. 25, 2022) (denying emergency motion for leave to appeal denial of stay), App.20

YU Pride Alliance v. *Yeshiva University*, (N.Y. Ct. App., Aug. 25, 2022) (denying emergency motion for leave to appeal denial of stay), App.4

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

Applicants Yeshiva University and its president, Rabbi Ari Berman, seek an emergency stay pending appeal of a permanent injunction ordering them to "immediately" approve an official Yeshiva "Pride Alliance" student club. As a deeply religious Jewish university, Yeshiva cannot comply with that order because doing so would violate its sincere religious beliefs about how to form its undergraduate students in Torah values. The club application process opened on August 26 and runs through September 12. To avoid the irreparable harm that would come to Yeshiva, its students, and its community from the government-enforced establishment of a Yeshiva Pride Alliance club, Applicants respectfully request an immediate stay pending appeal.

This extraordinary situation arises from what all parties—and the trial court—acknowledge was a *religious* decision not to approve a Yeshiva Pride Alliance club. All parties agree that Yeshiva made this decision in consultation with its *Roshei Yeshiva*, or senior rabbis. And all parties agree that Yeshiva has a deeply religious character as a Jewish university. In fact, Plaintiffs admit that they want to force the creation of a Yeshiva Pride Alliance precisely to alter Yeshiva's *religious* environment—for example, by distributing school-sponsored "Pride Pesach" packages for Passover—and to upend Yeshiva's understanding of Torah, with which Plaintiffs disagree.

The trial court held that the decision whether to have an official Pride Alliance organization on campus can be made by the government rather than Yeshiva itself in consultation with its rabbis. Relying on the New York City Human Rights Law (NYCHRL), the court concluded that the government can *force* Yeshiva to recognize an official Pride Alliance club because Yeshiva purportedly offers too many secular degrees to qualify for the law's express exemptions for religious organizations. Worse,

the court ignored Yeshiva's First Amendment church autonomy arguments entirely and cursorily rejected its Free Exercise arguments.[1] In essence, the court found that Yeshiva is not a religious entity and has no right to control how its religious beliefs and values are interpreted or applied on its campuses.

Yeshiva is the world's premier Torah-based institution of higher education. In Hebrew, the word "yeshiva" literally means a school for studying Talmud. All Yeshiva undergraduate students are required to engage in intense religious studies, with many receiving up to four and a half hours of Talmud instruction each day. And the entire undergraduate experience is designed to form students in the Jewish faith: the laws of Shabbat and Kashrut are strictly observed on campus; there are separate men's and women's campuses; students are expected to dress and behave consistently with Torah values; the campuses are adorned with religious imagery and symbolism; and the affiliated Rabbi Isaac Elchanan Theological Seminary is integrated into the men's undergraduate campus and programs. Yeshiva has determined, based on consultation with its *Roshei Yeshiva*—who opine on Jewish law for Jews all over the world—that an official Pride Alliance club, as described by Plaintiffs and as understood by the culture at large, would be inconsistent with Yeshiva's religious environment and Torah values.

Yet because of the permanent injunction below, Yeshiva and its President are now being ordered to violate their religious beliefs or face contempt. That ruling is an unprecedented intrusion into Yeshiva's religious beliefs and the religious formation of its students in the Jewish faith. It is also an indisputably clear violation of Yeshiva's First Amendment rights.

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[1] In accordance with this Court's usage, Applicants use the term "church autonomy" to refer to the "independence of religious institutions" of all different faiths. See *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060, 2064-2066 (2020) (discussing importance of religious education to many faith traditions, including Judaism).

The permanent injunction was entered after full discovery regarding Yeshiva's religious character and cross-motions for summary judgment. The factual record relevant to Yeshiva's constitutional defenses is thus well developed. And those defenses were thoroughly litigated on the merits in the trial court and on emergency applications for a stay to the Appellate Division, which denied relief without discussion. Despite the weighty constitutional issues in this case, the New York Court of Appeals refused to review the denial of a stay.

The full force of the permanent injunction is thus pressing on Yeshiva now. Yeshiva's claim that the First Amendment protects its right to uphold its religious values pending appeal has been finally rejected by the state courts. Outside of this Court, there is now no further avenue for interim relief. If Yeshiva is forced to comply, the infringement of its religious liberty, and injury to its reputation as a bastion of Torah values and flagship Jewish university, will be irreparable. A stay to maintain the status quo is thus essential in aid of the Court's jurisdiction.

And it will be years before Yeshiva can vindicate its rights in the regular course. A claim for damages remains in the trial court, and Plaintiffs are seeking further discovery to obtain punitive damages against Yeshiva for following its beliefs. Merits review in the state appellate courts, which have already rejected Yeshiva's likelihood of success, will take even longer. And because the trial court's order leaves Yeshiva subject to the full scope of the NYCHRL, including its prohibitions on religious discrimination, Yeshiva could be subjected to ongoing, crippling litigation for any of its religious decisions throughout that time, irreparably damaging its religious mission. Delay in protecting Yeshiva's religious exercise now will thus deprive the Court of jurisdiction to protect Yeshiva from the years-long effects of its religious beliefs and values being forcibly suppressed. The application should thus be granted.

Alternatively, the Court should treat this application as a petition for a writ of certiorari, grant the writ, and set the appeal for immediate briefing and argument.

* * *

In 1790, President George Washington wrote to the Jewish community in Newport, Rhode Island, of his wish that the "Children of the Stock of Abraham" would continue to enjoy the goodwill of their fellow citizens, such that each could "sit in safety under his own vine and figtree, and there shall be none to make him afraid." National Archives, *From George Washington to the Hebrew Congregation in Newport, Rhode Island* (Aug. 18, 1790), https://perma.cc/55Q7-JZ6K. Yet when the secular authorities of New York purport to overrule the religious authorities at Yeshiva—and when the civil courts insist the First Amendment has nothing to say about the matter—something has gone terribly wrong. And when those courts also insist upon "immediate" obedience by religious authorities to civil ones, this Court's intervention is urgently needed to preserve the status quo and protect Applicants' religious character, at least until such time as this Court can consider the case on its merits.

OPINIONS BELOW

The trial court granted Plaintiffs' cross-motion for summary judgment and entered a permanent injunction on June 24, 2022. App.50. The New York Appellate Division denied Yeshiva's motion to stay the permanent injunction on August 23, 2022. App.39. Two days later, on August 25, 2022, both the Appellate Division and the New York Court of Appeals expressly denied leave to seek expedited relief from the permanent injunction. App.4, App.20.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. 1257(a). See*, e.g.*, *National Socialist Party of Am.* v. *Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (providing interim protection under First Amendment to Nazi group); see also *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975) (reversal of finally decided federal issue would be preclusive of any further litigation); *id.*, at 481 (later review of the federal issue

cannot be had); *Republic Nat. Gas Co.* v. *Oklahoma*, 334 U.S. 63, 68 (1948) (collecting cases where losing party would be irreparably injured without review).

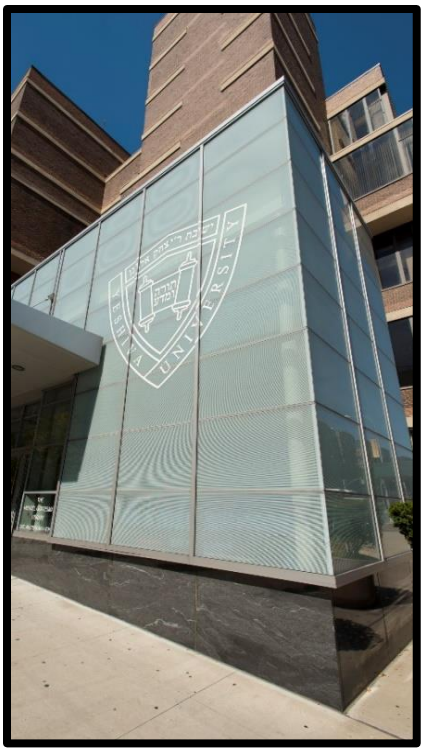
STATEMENT OF THE CASE

The following facts are undisputed:

A. Yeshiva University's Religious Character

Yeshiva was formed in 1897 for a purely religious purpose: "to promote the study of Talmud and to assist in educating and preparing students of the Hebrew faith for the Hebrew Orthodox ministry." App.334. Over time, Yeshiva added secular degrees, but its core mission has never changed: "promot[ing] the study of Talmud" and "preparing students of the Hebrew faith for the Hebrew Orthodox ministry." See App.358; App.376 at 31:2-3.

Today, devotion to Torah permeates everyday life at Yeshiva, including at its undergraduate colleges, which are the subject of this lawsuit. Plaintiffs have never disputed that, in everything it does, Yeshiva "operates with an understanding of [its] values," which "come from the Torah." App.385 at 65:14-16; see also App.244. These values are embraced by Yeshiva's motto, *Torah Umadda* (combining religious and secular studies), which is inscribed in Hebrew on the University's seal, along with the University's Hebrew name and the name of its affiliated seminary. To keep this mission at the forefront of campus life, the seal is prominently displayed at the campus entrance and on nearly all public-facing materials. App.335. Yeshiva's five core Torah values are also prominently displayed on buildings around campus.



Yeshiva seal on the exterior of Yeshiva's Center for Jewish Study, which includes the beit midrash. App.335.

Torah value banners on the side of campus buildings at Yeshiva's Main Campus. Cf. App.338.

All undergraduates are strongly encouraged to begin their Yeshiva experience with intensive religious studies in Israel, with over 80% doing so for university credit. App.336; App.375 at 26:14-15. "Throughout their time as undergraduates, all students have to take religious studies." App.194 ¶ 6; see also App.370 at 7:3-13. Most spend two to four and a half hours per day in Torah study. App.429; App.370 at 7:14-19; App 194 ¶ 6. The affiliated Rabbi Isaac Elchanan Theological Seminary "sits on the same campus" as the undergraduate men's school. App.383 at 60:13-14; App.336. The male undergraduate students study Talmud with the Seminary students, as the University doesn't "separate" undergraduates and seminarians for religious instruction in the *beit midrash* or "study hall" (pictured). App.384 at 62:12-13.

Senior rabbis lead a mix of male undergraduate Yeshiva students and seminarians in Torah study at the beit midrash. App.336.

Yeshiva students living on campus also agree "to live in accordance with halachic [Jewish law] norms and Torah ideals," and Yeshiva complies fully with the laws of Shabbat and Kashrut and expects students in its undergraduate programs to do the same. App.245-246; App.403 at 138:20-139:5 (students are "told * * * it's a religious campus, orthodox on campus, prayer, kashrut, [S]habbos"); App.431 (elevators run automatically on Sabbath; use of computers/electronics prohibited on Sabbath); App.434 ("Shabbat Programming"); App.436 (explaining to incoming undergraduates that "[e]very week is a Shabbaton" on campus, with "[t]ailored programs"). Yeshiva campuses, dorms, and prayers are sex-segregated consistent with Torah law and tradition; Yeshiva maintains multiple synagogues on its campuses; all doors on its campuses have mezuzahs affixed (*Deuteronomy* 6:4-9, 11:13-21); Yeshiva student government officers are charged to help "maintain the religious atmosphere on campus"; and all school-sponsored undergraduate student activities—including club events—are reviewed for religious compliance, App.245, App.247-248, App.253; App.210 (Men's Constitution, art. III § 6(3)).

Mezuzahs are attached to all classroom and office doorways at Yeshiva. App.337.

Yeshiva similarly expects all faculty and staff to display respect for its Torah values. The faculty handbook provides that "work hours" end at 2:30 PM on Fridays (three hours earlier than normal) to accommodate Shabbat. See App.438. It also confirms that "Jewish holidays are observed, and offices will be closed, when the holiday falls on a workday." App.440; see also *Yeshiva Undergraduate Academic Calendar Fall 2021* (Dec. 21, 2021), https://perma.cc/LT7N-LHU5 (noting observance of Jewish religious holidays and fast days). Everyone on campus is expected to be sensitive to the need for maintaining a kosher campus environment. App.387 at 76:15-25.

Yeshiva's Torah values are infused in all its undergraduate programs. Yeshiva's Real Estate Program, for example, seeks to "follow[] in Avraham's footsteps" so that "our next generation of leaders * * * like Avraham, can bring holiness to everything in the world." App.443. Across campuses, a wide range of "spiritual guidance and programming" is made available to all undergraduates, including Shabbatons, or Sabbath programs of religious study and celebration. App.451-454, App.190. There are signs throughout the dining halls to remind all students of the "expect[ation]" of keeping kosher. See App.338 at 77:17-78:2. "[E]ach" student has a *mashgiach ruchani*, or "spiritual advisor[]," some of whom "are also faculty." App.370 at 8:5-7, 11; see also App.457. And many players on the Yeshiva men's basketball team—aptly named the Maccabees—wear *kippahs* on the court. App.338.

During halftime at a Maccabees game, the Deans of Undergraduate Torah Studies and the Business School study Torah courtside. App.338.

Future Yeshiva students and their families are also well-informed about "what the campus life is really about." App.403 at 138:22-139:3. Students from Yeshiva's "feeder schools" are already coming from "Jewish religious background[s]." App.382 at 55:14-15. All undergraduate applicants are advised that every student who attends must be "willing and interested" in a rigorous religious education. App.403 at 138:22-139:3; see also App.454.

B. Religious Oversight of Yeshiva's Undergraduate Clubs

In its effort to "establish[] a caring campus community that is supportive of all its members," Yeshiva is "wholly committed to and guided by Halacha and Torah values." App.121; App.107 ¶ 98. The school therefore carefully manages its own interactions with undergraduate students to help them grow spiritually. App.191; App.195. For this reason, Yeshiva cannot put its own name or seal of approval on undergraduate clubs that appear "[in]consistent with [its] Torah values." App.191; see also App.195-198 ¶¶ 7, 18, 36, 44. Yeshiva has thus declined to approve proposed student clubs involving shooting, videogames, and gambling. App.198 ¶ 41-44. It also declined to approve a Yeshiva chapter of the Jewish "AEPi" fraternity, because it concluded that certain aspects of traditional fraternity life would be inconsistent with Yeshiva's Torah values. App.198 ¶ 43.

Official club recognition starts with Yeshiva's undergraduate Student Government. App.211 (art. V § 1(1)(*i*)). The Student Government constitution provides that "[w]ithin the first month of each semester, the YSU Vice President of Clubs shall designate and publicize a period of at least one week for the submission of petitions for new clubs." App.214 (art. X § 1(1)). Any new petitions must then be presented to the General Assembly at its "following meeting," where a majority vote is required for approval. App.214 (art. X § 1(3)-(4)). In voting, the General Assembly is expected to uphold Torah values to "enrich the religious atmosphere on campus." App.204; see also App.210 (art. III § 6(3) (providing that each elected officer "must sign an affirmation stating that he will strive [to] * * * maintain the religious atmosphere on campus"). Similarly, the Student Council for the women's campus can authorize a new club only if the club "embod[ies] the Halachic tradition." App.228 (art. 2.A); see also App.220 (art. 2 § 1).

Plaintiffs concede that, in all cases, Yeshiva "retains the discretion and authority to override the decisions of student governments to accept or reject a student club."

App.96. Yeshiva's Office of Student Life has the first level of responsibility to "ensure" that "the decisions of student government leaders" comply "with Torah values." App.197 ¶ 36. If a proposed club "raises especially complex issues," the Dean of Students and Director of Student Life "will discuss the approval." App.198 ¶¶ 38-39. "On particularly difficult issues, especially those affecting Yeshiva's religious mission," Yeshiva's "religious leadership," including its *Roshei Yeshiva*, "and other senior administrators" will also be consulted. App.198 ¶ 40. Even after a club has been approved, all of its activities and speakers must separately be approved to ensure that the student experience remains consistent with Yeshiva's Torah values. App.199 ¶ 45.

C. Plaintiffs' Attempt to Undermine Yeshiva's Torah Values

Plaintiffs are three former and one current student who want Yeshiva to formally recognize an undergraduate LGBTQ advocacy club: YU Pride Alliance. They freely admit that Yeshiva is a deeply religious Jewish institution. One supporting declaration states: "I love Torah learning and came to YU to further my religious growth just like any other student who chooses YU." App.146-147 ¶ 9. Another alleges that "YU was a religious community for me too." App.125 ¶ 9. Still a third admits that "a crucial part" of his identity is being "a Jewish individual" at Yeshiva. App.135-136 ¶ 8.

Plaintiffs further admit that they seek club recognition for religious reasons. In a recently filed declaration, Plaintiffs state that they are already actively planning Pride Alliance events for the fall 2022 semester, including plans to host school-sponsored LGBTQ "shabbatons"; prepare school-sponsored LGBTQ-themed Shalach manos (ritual packages for the Purim holiday); and make school-sponsored "Pride Pesach" packages to celebrate Passover. See, *e.g.*, App.475-476 ¶ 6; App.142 ¶ 32. Plaintiffs concede that "Judaism is deeply important to the University's existence and

activities." App.311. For them, Yeshiva's religiosity is a feature—one of the main reasons they chose to attend.

As Plaintiffs' complaint concedes, the decision not to recognize the Pride Alliance organization as an official campus club was a religious decision that Yeshiva made in consultation with its *Roshei Yeshiva*. App.107-109 ¶¶ 98-113. The complaint further admits that, over the past several years, senior religious and administration officials at Yeshiva have engaged in regular discussions with LGBTQ students about forums or clubs that can explore issues of interest to LGBTQ individuals in a manner consistent with Yeshiva's religious beliefs. App.58 ¶ 46; App.88 at 1. This has included discussions about students' requests for Yeshiva to put its imprimatur on the Pride Alliance club and, before that, a Gay-Straight Alliance. App.199 ¶ 46; App.97 ¶¶ 43-46.

In response, Yeshiva has taken many concrete steps to support its students within a Torah framework. See, *e.g.*, App.121. For example, it is undisputed that Yeshiva has recently emphasized continued enforcement of its policies prohibiting "any form of harassment or discrimination"; updated its "diversity, inclusion and sensitivity training" to better reflect concerns of LGBTQ students; ensured that there are staff in its counseling center "with specific LGBTQ+ experience"; "appoint[ed] a point person to oversee a Warm Line that will be available" for anyone to "report any concerns pertaining to non-inclusive behavior"; and continued "to create a space for students, faculty and Roshei Yeshiva to continue this conversation." App.121.

In February 2019, Plaintiffs submitted their most recent request for official approval of a Pride Alliance club. After extensive discussions between students, rabbis, and administrators, Yeshiva announced that it could not officially recognize Pride Alliance because doing so would be inconsistent with its Torah values. App.107 ¶¶ 98, 101. Yeshiva explained:

> The message of Torah on this issue is nuanced, both accepting each individual with love and affirming its timeless prescriptions. While students will of course socialize in gatherings as they see fit, forming a new club as requested under the auspices of YU will cloud this nuanced message.

App.121; App.107 ¶ 101.

Plaintiffs candidly acknowledge that the Torah's "timeless prescriptions" were the basis for this decision. See, *e.g.*, App.107 ¶ 101. In a recent YouTube interview, Plaintiff Meisels admitted that Yeshiva "said this forthrightly": "The reason why they will reject a club is because it clouds the nuance of the Torah." Statement of M. Meisels, YouTube, at 18:10, (May 10, 2021), https://bit.ly/3e4LKWE; see also App.199 ¶ 53.

Plaintiffs are equally candid about what they seek to accomplish through a Yeshiva Pride Alliance club. They want Yeshiva to "send[] a clear message" that Plaintiffs' own views of Judaism and sexuality are part of Yeshiva's message. App.168. Plaintiff Meisels has publicly stated that the lawsuit's goal is to force "cultural changes" at Yeshiva and to "make a statement," in hopes that its status as the flagship Jewish university will create a ripple effect within the broader Jewish community. Statement of M. Meisels, YouTube, at 26:22, (May 10, 2021), https://bit.ly/3e4LKWE. They hope that "establishment of a club really could change things" at Yeshiva by forcing change on the "people who are against the [LGBTQ] movement in the student body." *Ibid.* Plaintiffs came to Yeshiva because of its religious identity, see pp. 10-11, *supra*, and now they hope to change its religion.

D. Procedural History

In April 2021, Plaintiffs filed this action in the New York Supreme Court in Manhattan, alleging that Yeshiva is a place of public accommodation and that it violated the New York City Human Rights Law (NYCHRL), N.Y.C. Admin. Code 8-101, *et seq*., by deciding not to recognize a Pride Alliance club, allegedly "on account of gender and sexual orientation." App.114-116 (Counts 1-4). Plaintiffs sought

damages and a permanent injunction compelling Yeshiva to "officially recognize" a Pride Alliance club on the undergraduate campuses. App.117.

The trial court initially denied Plaintiffs' motion for a preliminary injunction, recognizing that Yeshiva is a "religious corporation" and therefore likely exempt under the "plain language" of the NYCHRL, which exempts all "religious corporation[s] incorporated under the education law." App.83; see N.Y.C. Admin. Code 8-102 (excluding "religious corporation[s] incorporated * * * under the religious corporations law" from the definition of "[p]lace or provider of public accommodation"); see also N.Y.C. Admin Code 8-107(12) ("religious principles" exemption). Nevertheless, the court converted Yeshiva's motion to dismiss into a motion for summary judgment and authorized discovery into the question of Yeshiva's religious character. App.84.

On June 14, 2022, the court changed course. It denied summary judgment to Yeshiva, granted Plaintiffs' cross-motion for summary judgment, and entered a permanent injunction ordering Yeshiva to "immediately" recognize a Yeshiva Pride Alliance. App.71.

The trial court rejected Yeshiva's statutory argument that, as a "religious corporation incorporated under the education law," it is exempt from the NYCHRL's public accommodation provisions. App.58; App.333-345. The court agreed that "[a]t first blush," App.56, Yeshiva was exempt. It recognized that "[t]here is no dispute" that Yeshiva is a corporation "incorporated under the education law," or that Yeshiva is "religious," at least as that term is ordinarily understood. App.56, App.58. Indeed, the trial court repeatedly acknowledged Yeshiva's deeply religious nature:

- "Yeshiva is an educational institution with a proud and rich Jewish heritage and a self-described mission to combine 'the spirit of Torah' with strong secular studies." App.56.

- "There is no doubt that Yeshiva has an inherent and integral religious character which defines it and sets it apart from other schools and universities of higher education." App.64.

- "Yeshiva's religious character [is] evidenced by required religious studies, observation of Orthodox Jewish law, [and] students' participation in religious services, etc." App.65.

Yet the trial court went on to disregard these findings, along with its own earlier conclusion that subjecting Yeshiva to the NYCHRL was "contrary" to the statute's "plain language." App.83. The court instead concluded that Yeshiva is *not* religious and did not satisfy the NYCHRL's specific understanding of a "religious corporation," because its "organizing documents" purportedly "do not expressly indicate that Yeshiva has a religious purpose." App.60, App.64-65. Although every Yeshiva undergraduate student is required to take religious studies, App.194 ¶ 6, the court further opined that Yeshiva offers too many "secular multi-disciplinary degrees" to be religious, App.60; App.65; see also App.63. Finally, the court found that students do not attend Yeshiva solely "for religious worship or some other function which is religious at its core," App.65, thus rejecting Yeshiva's *Torah Umadda* principles that call on Jews to uphold their Torah values *as* citizens of the secular world.

The trial court noted in passing that Yeshiva had raised a church autonomy defense, App.66-67, but then failed to address it. The court rejected Yeshiva's Free Exercise defense on the ground that the NYCHRL is a neutral and generally applicable law under the New York Court of Appeals' decision in *Catholic Charities of Diocese of Albany* v. *Serio*, 7 N.Y.3d 510 (2006). App.67-68. Finally, the court rejected Yeshiva's Free Speech and Freedom of Association arguments, concluding that—contrary to Yeshiva's own religious determination—giving Pride Alliance formal recognition would not "make a statement" or be "inconsistent with the purpose of Yeshiva's mission." App.68, App.69.

The conclusion of the court's order granted a permanent injunction ordering Yeshiva and Rabbi Berman to "immediately grant Plaintiff YU Pride Alliance" official club approval. App.71. The court's order was entered in the clerk's office on June 24, 2022. See App.51.

That same day, Yeshiva filed a Notice of Appeal with the New York Appellate Division, First Department. App.42. Yeshiva concurrently sought an emergency stay to preserve the status quo and to prevent Yeshiva from suffering grave and irreparable constitutional harm pending appeal. See App.40. Yeshiva filed its merits appeal in the Appellate Division on August 8, 2022; briefing is ongoing and oral argument is anticipated in October or November 2022.

On August 23, 2022, the Appellate Division denied without explanation Yeshiva's application for a stay of the permanent injunction pending appeal. App.40. Because Yeshiva had no appeal to the New York Court of Appeals as of right, it immediately sought leave from both the Appellate Division and the Court of Appeals to appeal the stay denial. App.23, App.6. On August 26, 2022, both the Appellate Division and the New York Court of Appeals denied further review of the motion for stay pending appeal. App.20, App.4. Yeshiva has no further avenue to interim or emergency relief in the New York courts.

The fall semester is now underway, and the student club application process has already begun and ends on September 12. Absent this Court's intervention, Yeshiva has been ordered to approve an official Pride Alliance club—which it cannot do consistent with its Torah values—on pain of contempt.

REASONS FOR GRANTING THE APPLICATION

Without an immediate stay of the permanent injunction issued below, the nation's leading Jewish university will be forced to give official recognition to a student organization in violation of its sincere religious beliefs and Torah values. This is an unprecedented intrusion into the autonomy of a religious organization and a gross

violation of the First Amendment. This Court should therefore stay the permanent injunction below or, in the alternative, grant certiorari and expedite merits consideration of this appeal.

I. A stay should be granted under 28 U.S.C. 2101 or 28 U.S.C. 1651.

There are two separate grounds on which this Court can and should protect Yeshiva's religious exercise and stay the permanent injunction.

First, under 28 U.S.C. 2101, "a justice of the Supreme Court" may stay the enforcement of "the final judgment or decree of any court" that is "subject to review by the Supreme Court on writ of certiorari." 28 U.S.C. 2101(f). A stay is appropriate under Section 2101 where there is (1) "a reasonable probability that certiorari will be granted"; (2) "a significant possibility that the judgment below will be reversed"; and (3) "a likelihood of irreparable harm * * * if the judgment is not stayed." *Barnes* v. *E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991).

Second, under 28 U.S.C. 1651, a Justice may issue "all writs necessary or appropriate in aid of" the Court's "jurisdiction[]." 28 U.S.C. 1651(a); see also Rule 23.1. To obtain relief under Section 1651, an applicant must carry the burden of making a "strong showing" that it is "likely to succeed on the merits," that it will be "irreparably injured absent a stay," that the balance of the equities favors it, and that a stay is consistent with the public interest. *Nken* v. *Holder*, 556 U.S. 418, 434 (2009). See also *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 66 (2020) (citing *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

Either path supports a stay pending appeal of the permanent injunction against Yeshiva. Because the considerations relevant to a stay under Sections 2101 and 1651 largely overlap and all point to the same outcome, they are discussed together below.

A. The issues in this case are worthy of certiorari.

As required by 28 U.S.C. 2101, it is at least reasonably probable that this Court will grant certiorari on the merits. Multiple critical questions of federal law are at stake. And the New York courts' override of Yeshiva's religious beliefs conflicts with the relevant decisions of other state and federal appeals courts, as well as this Court's own decisions. The crucial right of religious schools to shape their campus environments in ways consistent with their religious beliefs calls out for protection by this Court.

1. It is reasonably probable this Court will grant certiorari to protect Yeshiva's religious autonomy.

Certiorari is warranted to address the New York courts' unprecedented intrusion into Yeshiva's church autonomy. As this Court has repeatedly confirmed, the right of religious educational institutions to control the spiritual environment on their campuses is critical to their missions. For over 70 years, this Court has held that religious organizations have an "unquestioned" right to "organize" as they see fit "to assist in the expression and dissemination of any religious doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 114 (1952). More recently, this Court has confirmed "the right of churches and other religious institutions"—including religious educational institutions—to make "internal management decisions that are essential to [their] central mission." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (describing the importance of autonomy to Jewish and other religious schools). This broad "sphere" of autonomy, *id.*, covers a wide range of religious decisions, including the ability of religious institutions to "define their own doctrines, resolve their own disputes, and run their own institutions." *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring)). See also *Obergefell* v. *Hodges*, 576 U.S. 644, 679-680 (2015) (First Amendment

"ensures that religious organizations * * * are given proper protection as they seek to teach" their own beliefs regarding marriage and sexuality).

If the church autonomy doctrine means anything, it must protect the Nation's leading Jewish university from an order commanding it to recognize a student club promoting views that contradict its sincere religious beliefs and Torah values. And the trial court's ruling extends far beyond club recognition at Yeshiva. It subjects all religious schools to the full scope of the NYCHRL's public accommodation provisions, including its prohibition against religion-based decision-making. Yet religious decisions regarding hiring and admissions, curriculum and programming, and student conduct and formation "lie at the very core of the mission of a private religious school." *Our Lady*, 140 S. Ct. at 2064. "Any attempt" by a court—as here—to "scrutinize[e] 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). Because of this unprecedented intrusion into church autonomy—which violates numerous precedents from this Court and affects all religious schools—it is reasonably probable that this Court will grant certiorari.

2. It is reasonably probable this Court will grant certiorari to protect Yeshiva's free exercise rights.

This Court is also likely to grant certiorari to protect Yeshiva's free exercise rights. This case deepens an existing split—unresolved by *Fulton*—over whether the existence of comparable categorical exemptions suffices to negate general applicability under *Smith*. Indeed, three Justices have already voted to grant certiorari on an identical legal question in another case that came to this Court from the New York courts. And the case for certiorari now is even stronger, as additional decisions since *Fulton* have further entrenched the split, and the New York courts have continued to ignore this Court's precedent. Both because of the clear split of

authority and this Court's demonstrated interest in the issue presented, certiorari is reasonably probable.

The 4-4 split over how to understand the intersection of categorical exemptions and general applicability warrants plenary review and confirms that certiorari is reasonably likely. On one side stands decisions of the Third, Sixth, and Eleventh Circuits along with the Iowa Supreme Court.[2] Each of these courts considers the availability of categorical secular exemptions sufficient to demonstrate that a law is not generally applicable and thus triggers strict scrutiny. On the other side, the First, Second, Ninth, and Tenth Circuits require free exercise plaintiffs to show more than the existence of comparable secular exemptions to overcome general applicability.[3]

The decision below comes down decisively on the wrong side of the split and deepens it considerably. As the trial court recognized, the NYCHRL expressly exempts "distinctly private" clubs and "benevolent orders" from its coverage. N.Y.C. Admin. Code 8-102; App.82. Under New York precedent, this exemption is also "absolute and not subject to limitation." *Gifford* v. *Guilderland Lodge, No. 2480,*

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[2] See *Dahl* v. *Board of Trs. of W. Mich. Univ.*, 15 F.4th 728, 732 (6th Cir. 2021) (subjecting Michigan public university's vaccination mandate to heightened scrutiny because it discriminated against student religious objectors and in favor of other students); *Fraternal Ord. of Police* v. *City of Newark*, 170 F.3d 359, 365-366 (3d Cir. 1999), cert. denied, 528 U.S. 817 (1999) (medical exception triggered strict scrutiny under the Free Exercise Clause); *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1232-1233 (11th Cir. 2004), cert. denied, 543 U.S. 1146 (2005) (zoning ordinance not generally applicable because it provided a secular exemption for private clubs); *Mitchell County* v. *Zimmerman*, 810 N.W.2d 1, 3 (Iowa 2012) (highways regulation not generally applicable because it had secular exemptions).

[3] See *Does 1-6* v. *Mills*, 16 F.4th 20, 30 (1st Cir. 2021), cert. denied, 142 S. Ct. 1112 (2022) (medical exception to vaccine mandate did not trigger strict scrutiny); *We The Patriots USA, Inc.* v. *Hochul*, 17 F.4th 266, 280 (2d Cir. 2021), opinion clarified, 17 F.4th 368 (same); *Doe* v. *San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1182 (9th Cir. 2021) (vaccine mandate upheld despite categorical exemptions for 85% of all District students); *303 Creative LLC* v. *Elenis*, 6 F.4th 1160 (10th Cir. 2021) (cert. granted on other grounds Feb. 22, 2022) (exemptions for other "message-based refusals" did not trigger strict scrutiny).

B.P.O.E. Inc., 272 A.D.2d 721, 722-723 (N.Y. App. Div. 2000). The Third, Sixth, and Eleventh Circuits and the Iowa Supreme Court would all hold that these comparable secular exemptions are alone enough to trigger strict scrutiny. But siding with the First, Second, Ninth, and Tenth Circuits, the New York courts have now concluded that these secular exemptions are insufficient to overcome general applicability. App.5, App.84.

Were an entrenched split over important constitutional rights not enough, three Justices have also already voted to grant certiorari on this same legal issue within the past year. In *Roman Catholic Diocese of Albany* v. *Vullo,* the Appellate Division upheld New York State's insurance-plan abortion mandate as neutral and generally applicable, citing an earlier New York Court of Appeals decision in *Catholic Charities of Diocese of Albany* v. *Serio*, 7 N.Y.3d 510 (2006). See *Vullo*, 185 A.D.3d 11, 16-17 (N.Y. App. Div. 2020). This Court granted certiorari, vacated, and remanded *Vullo* for further consideration in light of *Fulton* v. *City of Philadelphia,* 141 S. Ct. 1868 (2021), with Justices Thomas, Alito, and Gorsuch voting to grant plenary review. See *Roman Catholic Diocese of Albany* v. *Emami*, 142 S. Ct. 421 (2021). On remand, the Appellate Division found *Fulton* inapplicable, concluding again that the abortion mandate is "generally applicable," despite admitted exemptions, because these exemptions were "based upon specified criteria" and not "entirely discretionary." *Roman Catholic Diocese of Albany* v. *Vullo*, 206 A.D.3d 1074, 1075 (N.Y. App. Div. 2022). The New York Court of Appeals is currently weighing whether it will hear an appeal of that decision.

This case thus presents the same legal issue raised in *Vullo*: whether categorical exemptions "preclude a law from being 'generally applicable.'" Pet. for Cert. at 16, *Roman Catholic Diocese of Albany* v. *Emami*, 142 S. Ct. 421 (2021) (No. 20-1501) (discussing split). And despite this Court's most recent precedent confirming that "[a] government policy will fail the general applicability requirement if it 'prohibits

religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,'" *Kennedy* v. *Bremerton School District*, 142 S. Ct. 2407, 2422 (2022), the New York courts (as in *Vullo*) have again resorted to *Serio* to hold that categorical exemptions alone cannot overcome general applicability. App.67; App.5; App.16; App.21; App.34.

Because this case presents an entrenched 4-4 split, and because this Court has already granted certiorari, vacated, and remanded once on this issue, with three Justices voting for certiorari, it is reasonably probable that certiorari will be granted.

B. Yeshiva is likely to succeed on the merits of its claims.

Under both 28 U.S.C. 2101 and 28 U.S.C. 1651, another factor in the stay analysis is the likelihood of success on the merits. See p. 17, *supra*. Here, this requirement is easily satisfied.

1. Forcing Yeshiva to recognize Pride Alliance violates the principles of church autonomy.

Church autonomy—which is rooted in both Religion Clauses—unquestionably bars civil courts from resolving religious disputes and interfering in the internal decision-making of religious organizations. See *Our Lady*, 140 S. Ct. at 2060 (describing roots and scope of church autonomy doctrine); *Kedroff*, 344 U.S. at 116 (Supreme Court precedent "radiates * * * a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."). Here, a New York state court told a deeply religious Jewish university how it must resolve a plainly religious question: whether recognizing a Pride Alliance student club is consistent with Yeshiva's sincere religious beliefs and Torah values. Yeshiva—in consultation with its *Roshei Yeshiva*—has already determined that its religious beliefs forbid it from recognizing a student club which, by its name and proposed activities, and as understood by the

culture at large, is not consistent with Yeshiva's Torah values. By attempting to override that religious determination about how Yeshiva conveys Torah values to its students, the decision below strikes at the heart of church autonomy: the ability of religious groups to make "internal management decisions that are essential to the institution's central mission." *Our Lady*, 140 S. Ct. at 2060 (applying church autonomy to Catholic schools).

The doctrine of church autonomy bars Plaintiffs' claims (1) because Yeshiva is an obviously religious organization and (2) because its decision not to recognize Pride Alliance was an internal religious decision essential to its religious mission. See *Our Lady*, 140 S. Ct. at 2060.

As both the trial court and Plaintiffs have repeatedly conceded, Yeshiva is deeply religious. Yeshiva serves as a worldwide beacon of Torah values. App.190; App.196-197. Jews from around the world look to Yeshiva for religious leadership and guidance. See *ibid*. There is thus no question that "educating young people in their [Jewish] faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core" of Yeshiva's mission. *Our Lady*, 140 S. Ct. at 2064. This comes as no surprise to Yeshiva's students, who are advised from the outset that they must be "willing and interested" in a rigorous religious education, and who in fact participate in religious instruction and follow Torah rules as routine aspects of daily student life. See pp. 7, 9, *supra*. Rather than address this overwhelming evidence of religiosity, the trial court ignored it—discussing only whether Yeshiva was a "religious corporation" under state law. App.56-66. But even had the court's understanding of state law been correct, see *Carson*, 142 S. Ct. at 2000 (rejecting "magic words" test for identifying religious organizations), the NYCHRL's definition of religious corporations has no bearing on the scope of First Amendment protections. This Court has repeatedly confirmed that religious schools like Yeshiva are protected by the doctrine of church autonomy. See *id.* at 2001; *Our Lady*, 140

S. Ct. at 2066; *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 565 U.S. 171, 194-195 (2012).

Yeshiva's decision not to recognize Pride Alliance also easily qualifies as both a decision on "matters of 'faith and doctrine'" and as a religious "internal management decision[]" that is "essential" to Yeshiva's "central mission," each of which triggers the protections of the church autonomy doctrine. *Our Lady*, 140 S. Ct. at 2060; *Hosanna Tabor*, 565 U.S. at 185. Yeshiva's central mission is to form and religiously support "each generation of undergraduate students in the Jewish faith." App.190. To that end, Yeshiva thoughtfully and prayerfully cultivates an intentionally religious environment on its undergraduate campuses that encourages students to grow in their faith in, devotion to, and understanding of the Torah. Yeshiva does this by, among other things, mandating religious instruction for all students, providing *mashgichim ruchani'im* (spiritual supervisors) to every student, and ensuring that Jewish laws are observed throughout its various campuses. See pp. 7-9, *supra*. As part of maintaining this intentionally religious environment, Yeshiva also cannot endorse any undergraduate student clubs or activities that would be inconsistent with its Torah values. As relevant here, this forecloses recognition of a Yeshiva Pride Alliance club. Plaintiffs and the New York courts may believe that Yeshiva ought to sponsor LGBTQ Shabbatons and the distribution of "Pride Pesach" packages for Passover, but whether to do so is an inherently religious decision about Yeshiva's religious environment. App.476.

While Plaintiffs disagree with Yeshiva's decision, even they acknowledge that the decision was a *religious* one based on Yeshiva's Torah values and made in consultation with Yeshiva's *Roshei Yeshiva*. See App.99 ¶ 53, App.100 ¶ 58, App.107 ¶¶ 98, 101, App.109 ¶ 110; see also App.383-384 at 60:22-61:3, App.385 at 65:14-17. Indeed, this religious disagreement is admittedly both the reason for Yeshiva's actions *and* the reason for Plaintiffs' lawsuit. As one Plaintiff put it: their reason for

"getting [the club] established" is that it "will lead to many cultural changes on campus." Statement of M. Meisels, YouTube, at 26:22 (May 10, 2021), https://bit.ly/3e4LKWE. Yet Yeshiva seeks to convey a more "nuanced" message that balances the Torah's twin commands to "accept[] each individual with love" without rejecting its "timeless prescriptions," App.121; see also App.191 ¶ 10. There can be no question that this religious decision implicates Yeshiva's internal management and goes to matters of faith and doctrine. Forcing Yeshiva to recognize and endorse beliefs contrary to its sincerely held religious convictions is plainly a matter of faith and doctrine and, by undermining the intentional religious community Yeshiva is seeking to form, the permanent injunction undermines a core component of Yeshiva's central religious mission. See generally *Fulton*, 141 S. Ct. at 1877 (recognizing that forced endorsement of beliefs contrary to an organization's religious values is a constitutional injury).

Because Yeshiva is patently a religious organization, and because the school's club approvals admittedly implicate its core religious mission, the principles of church autonomy bar the state courts from forcing Yeshiva to recognize Pride Alliance.

2. Forcing Yeshiva to recognize Pride Alliance violates the Free Exercise Clause.

The permanent injunction also violates the Free Exercise Clause by applying state law to force Yeshiva to abandon its religious decisions on how best to apply Torah values on its campus. Under this Court's precedent, laws that burden sincere religious beliefs and are not "neutral" and "of general application" are subject to strict constitutional scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). The "[c]ourt will find a First Amendment violation unless" the government can show that its policy "was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 142 S. Ct. at 2422.

a. The NYCHRL burdens Yeshiva's sincere religious exercise.

By requiring Yeshiva to violate its sincere religious beliefs and Torah values and endorse an organization promoting contrary beliefs, there is no question that the NYCHRL "burden[s] [Yeshiva's] sincere religious practice." *Kennedy*, 142 S. Ct. at 2421-2422. As the trial court acknowledged, "[t]here is no doubt that Yeshiva has an inherent and integral religious character which defines it." App.64. And there is no dispute that Yeshiva's intentional cultivation of a religiously formative undergraduate environment is part and parcel of its religious mission, or that this religious mission would be burdened if the school were forced to approve campus clubs that actively undermined those values. As this Court explained in *Fulton*, it is plainly a burden to put a religious institution "to the choice of curtailing its mission or approving relationships inconsistent with its beliefs." *Fulton*, 141 S. Ct. at 1876.

b. The NYCHRL is not generally applicable.

Under the Free Exercise Clause, laws that burden sincere religious exercise must be both neutral and generally applicable. "Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Kennedy*, 142 S. Ct. at 2422. The NYCHRL is not generally applicable because it "'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" See *ibid.* (quoting *Fulton*, 141 S. Ct. at 1877). As this Court has explained, when a law "treat[s] *any* comparable secular activity more favorably than religious exercise," that law is not generally applicable. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (emphasis in original); *Lukumi*, 508 U.S. at 545 (secular exemptions defeat general applicability). Here, the NYCHRL's public accommodations provision is not generally applicable because it permits both categorical and individualized exemptions.

Categorical Exemptions. The NYCHRL is not generally applicable because it exempts whole categories of secular groups from its requirements but still applies

those requirements with full force to Yeshiva. The NYCHRL expressly exempts from its public accommodations requirements both "distinctly private" clubs and "benevolent orders." N.Y.C. Admin. Code 8-102. These exemptions are "absolute and not subject to limitation." *Gifford*, 272 A.D.2d at 722-723. This means that hundreds of organizations—with hundreds of thousands of members—are not considered public accommodations in New York. See Ben. Ord. Laws 2, 7 (expressly listing exempt benevolent orders such as the Masons, the Knights of Columbus, the American Legion, and the Veterans of Foreign Wars). As interpreted by the New York courts, the exemption for *all* benevolent organizations is "absolute and not subject to limitation," but Yeshiva and other religious organizations are subject to the full scope of the NYCHRL. *Gifford*, 272 A.D.2d at 722-723.

The trial court concluded that the NYCHRL was nonetheless generally applicable because it exempted lots of other religious organizations too. App.67-68. But the scope of protections provided to favored religious organizations is hardly relevant. Yeshiva's religious exercise is admittedly being treated worse than whole categories of secular comparators. Treating other religious groups better does not resolve this disparity and thus still requires strict scrutiny. See *Tandon*, 141 S. Ct. at 1297-1298; *Kennedy*, 142 S. Ct. at 2422.

Individualized exemptions. The NYCHRL is not generally applicable for another reason: its public accommodations provisions "provid[e] a mechanism for individualized exemptions." *Fulton,* 141 S. Ct. at 1877; *Lukumi*, 508 U.S. at 537; *Employment Div.* v. *Smith*, 494 U.S. 872, 884 (1990). As this Court has previously held, anytime a law "invites the government to consider the particular reasons for a person's conduct" and make individualized decisions based on those reasons, that law is not generally applicable and is subject to strict scrutiny. 141 S. Ct. at 1877 (cleaned up); *id.* at 1879 ("a formal mechanism for granting exceptions renders a policy not generally applicable"); *Kennedy*, 142 S. Ct. at 2422.

Here, the NYCHRL on its face states that it "shall not apply, with respect to * * * gender * * * where the commission grants an exemption based on bona fide considerations of public policy." N.Y.C. Admin. Code 8-107(4)(b); see also 8-107(12) ("religious principles" exemption). Because the New York City Commission on Human Rights has discretionary authority under these provisions to grant individual exemptions, the NYCHRL is not generally applicable. Under *Fulton*, the mere *existence* of "a system of individual exemptions," even if never used, triggers strict scrutiny. 141 S. Ct. at 1877. Because the Commission retains discretion under Sections 8-107(4)(b) and 8-107(12) to grant individualized exemptions from the NYCHRL, the law is not generally applicable.

c. Plaintiffs cannot satisfy strict scrutiny.

Finally, *Fulton* also explains why the NYCHRL fails strict scrutiny when applied to Yeshiva. A law will only survive strict scrutiny against a religious burden if the government's burden on that specific religious exercise is the only way that the law's "interest[] of the highest order" can be achieved. *Fulton*, 141 S. Ct. at 1881. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, *it must do so*." *Ibid.* (emphasis added). The Court further held that "broadly formulated interests" like "ensuring equal treatment" do not suffice as a sufficiently compelling interest—they must be "properly narrowed" to "the asserted harm of granting specific exemptions to particular religious claimants." *Ibid.* But the NYCHRL's justifications have never been articulated in that narrow way. As such, there is no compelling interest here that justifies "denying an exception to [Yeshiva]." See *ibid.*

Given the NYCHRL's preexisting categorical and individualized exemptions, and what the trial court called Yeshiva's "inherent and integral religious character," App.64, Plaintiffs offer no basis to conclude that accommodating Yeshiva here would upend the NYCHRL's overall nondiscrimination interest. See *Lukumi*, 508 U.S. at

547 (compelling interest test not met when law "leaves appreciable damage to that supposedly vital interest unprohibited"). This is especially true considering that one of the NYCHRL's stated goals is to protect Jewish identity against American secularism. See App.344. Accordingly, Plaintiffs' attempt to apply the NYCHRL against Yeshiva fails strict scrutiny, and the Free Exercise Clause bars their claims.

C. The remaining equitable factors favor staying the permanent injunction.

Having shown "that their First Amendment claims are likely to prevail," Applicants need show only "that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest." *Diocese of Brooklyn*, 141 S. Ct. at 66 (citing *Winter*, 555 U.S. at 20).

Irreparable Harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Diocese of Brooklyn*, 141 S. Ct. at 67 (quoting *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976)). There is thus no question that Yeshiva will suffer an immediate and ongoing irreparable injury if this Court does not stay the permanent injunction ordering it to violate its sincere religious beliefs. But the irreparable harm here is also very tangible: Yeshiva has been ordered to "immediately" violate its sincere religious beliefs or suffer serious legal consequences. App.71. Absent this Court's intervention, a New York state court's injunction will override the conscientious religious decision of Yeshiva University, informed by its *Roshei Yeshiva*, regarding its religious mission and core religious obligation to form its students in Torah values. Yeshiva's rabbis opine on issues of Jewish law for Jews around the world, yet this injunction would bar their ability to do so within their own *yeshiva*. Forced compliance would immediately and irrevocably change the religious atmosphere at Yeshiva, permanently alter how Yeshiva understands its religious identity, and deny Yeshiva the final authority to make religious decisions core to how it fosters religious community and relates to its

undergraduate students. Once Yeshiva is forced by court order to comply, this violation of its First Amendment rights cannot be undone. No later reversal by this Court could change that.

Forcing Yeshiva to recognize a Yeshiva Pride Alliance, even for a minimal period of time, will irreparably injure Yeshiva's religious identity and reputation among its past, present, and future students and within the Jewish community more broadly. Students come to Yeshiva from all over the world expecting it to uphold Torah values. And much of the Jewish world similarly looks to Yeshiva as the standard-bearer for Torah values. Granting official recognition to the Pride Alliance club would send an irrevocable message inconsistent with those values. See *Tandon*, 141 S. Ct. at 1297.

By contrast, Plaintiffs will suffer no prejudice from a stay. Three have already graduated from Yeshiva and could not participate in a Yeshiva Pride Alliance. And all four chose to come to Yeshiva in full recognition of its religious character. While their beliefs may have changed, they cannot now use state law to dictate how Yeshiva lives out *its* religion simply because they disagree with it. Plaintiffs seek to upend the status quo and violate Yeshiva's constitutional rights in favor of their alleged statutory ones; they therefore face an uphill battle to show that a temporary stay of the state court's order while this Court considers whether to review this case on its merits would cause them irreparable harm.

Public interest. Protecting constitutional and religious rights is always in the public interest. See *Diocese of Brooklyn*, 141 S. Ct. at 68. And there is no question that here, protecting Yeshiva's constitutional religious rights would do just that. Staying the trial court's permanent injunction would preserve the status quo while this Court carefully considers the legal arguments presented by this case, whereas denying a stay would nullify Yeshiva's appeal rights and impose a government-enforced and "immediate" change to its religious character. As with Plaintiffs

themselves, the public generally has no legal interest in seeing New York's government imposing its own values on Yeshiva.

II. In the alternative, the Court should treat the application as a petition for certiorari and grant certiorari now.

In the alternative to entering an injunction pending appeal, the Court should treat this application as a petition for certiorari and grant certiorari, with an interim stay that would allow Yeshiva to manage its own religious affairs, including student club approval. Certiorari is warranted due to the importance of the federal questions at issue, the conflicts with this Court's precedents, and the decision's contribution to the growing split in authority over how to construe general applicability. See p. 18, *supra*.

Finally, should the Court decide to grant plenary review, it should consider the third question presented—whether to overrule *Employment Division* v. *Smith*. As the lower court's faulty decision amply demonstrates, *Smith* is a terrible foundation for free exercise jurisprudence. It asks the wrong questions and gives the wrong answers, even when addressing what ought to be some of the most obvious issues in First Amendment law. That jurisprudence will continue to malfunction, and deeply religious individuals and institutions like Yeshiva will continue to suffer, as long as the foundation is not repaired. Indeed, *Smith*'s misdirection of the lower courts has forced many religious litigants, like Yeshiva, to seek urgent relief on this Court's emergency docket. Therefore, if the Court decides to grant plenary review it should also decide whether *Smith* should be replaced with a standard that hews more closely to the text, history, and tradition of the Free Exercise Clause.

CONCLUSION

The Court should stay the trial court's permanent injunction against Yeshiva pending appeal. Alternatively, the Court should treat this application as a petition for a writ of certiorari, grant the writ, and immediately set the appeal for briefing and argument.

Respectfully submitted.

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