

New York County Clerk's Index No. 154010/2021

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



YU PRIDE ALLIANCE, *ET AL.*,

Plaintiffs-Respondents,

against

YESHIVA UNIVERSITY, *ET AL.*,

Defendants-Appellants.

**Case No.
2022-02726**

**MOTION FOR LEAVE TO FILE BRIEF OF COUNCIL
FOR CHRISTIAN COLLEGES & UNIVERSITIES,
THE ASSOCIATION OF CATHOLIC COLLEGES
AND UNIVERSITIES, THE CARDINAL NEWMAN
SOCIETY, AND 15 INDIVIDUAL RELIGIOUS SCHOOLS
AS *AMICI CURIAE***

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September 6, 2022

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

YU PRIDE ALLIANCE, *et al.*,

Plaintiffs-Respondents,

v.

YESHIVA UNIVERSITY, PRESIDENT
ARI BERMAN,

Defendants-Appellants,

VICE PROVOST CHAIM NISSEL,

Defendant.

Case No.: 2022-02726

New York County Supreme
Court Index No: 154010/2021

**NOTICE OF UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS
BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS**

PLEASE TAKE NOTICE, that upon the annexed affirmation of Erik S. Jaffe sworn to on September 6, 2022, and all exhibits attached thereto, including a copy of the proposed brief of *amici curiae*, the undersigned will move this Court at 27 Madison Avenue, New York, New York, at 10:00 a.m. on September 19, 2022, or as soon thereafter as is practicable, for an order granting leave to the Council for Christian Colleges & Universities, the Association of Catholic Colleges and Universities, the Cardinal Newman Society, and 15 individual religious colleges & universities to file with this Court an *amicus* brief in support of Defendants-Appellants in this case. Because the parties consent to the filing of the brief, the

motion is unopposed. *Amici* thus move for leave to file their brief, and request that this unopposed motion be granted.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b), answering affidavits and cross-motions, if any, are to be served at least two (2) days prior to the return date of this motion.

Dated: September 6, 2022

Respectfully submitted,



By: _____

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

YU PRIDE ALLIANCE, *et al.*,

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v.

YESHIVA UNIVERSITY, PRESIDENT ARI
BERMAN,

Defendants-Appellants,

VICE PROVOST CHAIM NISSEL,

Defendant.

Case No.: 2022-02726

New York County Supreme
Court Index No:
154010/2021

**AFFIRMATION OF ERIK S. JAFFE IN SUPPORT OF
UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLANTS**

Erik S. Jaffe, an attorney duly admitted to the practice of law in the courts of this state, affirms under the penalties of perjury:

1. I am counsel for Proposed *Amici Curiae* Council for Christian Colleges & Universities, the Association of Catholic Colleges and Universities, the Cardinal Newman Society, and 15 individual religious colleges (collectively “*Amici*”). On behalf of *Amici*, I submit this affirmation in support of the motion for leave to file the attached brief as *amici curiae* in support of Defendants-Appellants. The parties have consented to the filing of the brief via email communications among counsel.
2. This case raises an important issue of whether the lower court correctly held that Yeshiva University is a religious corporation

3. *Amici curiae* Council for Christian Colleges & Universities represents some 140 faith-based institutions in the United States. CCCU is joined by the Association of Catholic Colleges and Universities, which serves as the collective voice of Catholic higher education, and the Cardinal Newman Society, which exists to promote and defend faithful Catholic education. Those organizations are also joined by the 15 individual religious schools listed in the brief of *amici curiae*.

4. The proposed *Amici* seek to participate in this case because, if affirmed, the decision below will impose significant hardships on religious education.

5. *Amici* cannot achieve their sacred goals unless they can choose the religious standards governing campus life. They thus have a powerful interest in protecting their right to create—free from government interference—a community of students, staff and faculty who are aligned with the institution’s religious missions.

6. The proposed brief of *amici curiae* is attached to this affirmation as **Exhibit A**. The proposed brief should be allowed because it supplements the brief of Appellants-Defendants by elaborating on the religious-liberty issues that may otherwise escape the Court’s consideration. *First*, it summarizes the importance of religious-higher education, both for students at the various religious colleges and universities and for the communities in which those schools are found. *Second*, it

expands on the constitutional-avoidance questions summarized by Appellants-Defendants.

7. For these reasons, *Amici* respectfully seek the Court's permission to file the attached *amici curiae* brief.

Dated: September 6, 2022

A handwritten signature in blue ink, appearing to read "Erik S. Jaffe".

Erik S. Jaffe
Counsel for Proposed Amici Curiae

EXHIBIT A

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



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LIST OF *AMICI*
ORGANIZATIONS

Council for Christian Colleges & Universities, Washington, DC

Association of Catholic Colleges and Universities, Washington, DC

The Cardinal Newman Society, Manassas, VA

SCHOOLS

Baylor University, Waco, TX

Bethel University, Mishawaka, IN

Biola University, La Mirada, CA

Brigham Young University, Provo, UT

Colorado Christian University, Lakewood, CO

John Brown University, Siloam Springs, AR

Le Tourneau University, Longview, TX

Liberty University, Lynchburg, VA

Moody Bible Institute of Chicago, Chicago, IL

Northwestern College, Orange City, IA

Southeastern University, Lakeland, FL

Southern Adventist University, Collegedale, TN

Spring Arbor University, Spring Arbor, MI

Walsh University, North Canton, OH

Wheaton College, Wheaton, IL

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PRELIMINARY STATEMENT AND INTEREST OF *AMICI CURIAE*

By finding that Yeshiva University (Yeshiva), the premier Jewish institution of higher education in New York, cannot invoke the religious exemption that the city council included in the New York City Human Rights Law (NYCHRL), the Supreme Court reached a conclusion that not only conflicts with the statute and the First Amendment, but also seriously harms not only Yeshiva, but religious higher education generally.

Fortunately, the First Amendment provides a clear and strong bulwark protecting the right of Yeshiva and other religious colleges to determine which student organizations it recognizes. The First Amendment's safeguards include the freedom of association, the free exercise of religion, the right of religious autonomy, and the right to be free from inquiries that entangle governments in decisions about religious matters. Contrary to the lower court's decision, Yeshiva retains these rights both because of its status as a religious institution and because of its status as a religious institution of higher education.

These freedoms are important to the entire gamut of religious higher education. In a typical religious college, community members are expected to live according to a set of guidelines required by the community's shared faith. Those standards are critical to the unique service these schools offer their students: the opportunity to develop and learn within a religious community defined by adherence

to particular theological understandings. Graduates of these religious schools become the next generation of civic and religious leaders, whose work will sustain their communities and the faith that binds those communities. *E.g., Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).

Moreover, a school's religious practices are not merely additive to the school's educational offerings. For religious schools, religion is the oxygen that gives their educational communities life. For example, Jewish colleges like Yeshiva serve the larger Jewish community by maintaining a space where students and teachers agree to live according to the teachings of the Torah. For many religious colleges, as for Yeshiva, faithful living according to religious standards is thus a continuing condition of membership in the community.

Because this case threatens to deprive religious schools of their ability to shape their communities according to their beliefs, it is of great concern to *Amici*, who represent a wide swath of American religious higher education. Specifically, *Amici* include the Council for Christian Colleges & Universities (CCCCU), which represents some 140 faith-based institutions in the United States, the Association of Catholic Colleges and Universities (ACCU), which serves as the collective voice of Catholic higher education, and the Cardinal Newman Society, which exists to promote and defend faithful Catholic education. *Amici* also include the 15 individual religious colleges and universities listed above.

Like Yeshiva, CCCU's and ACCU's member schools and the *amici* schools cannot achieve their sacred goals unless they can choose the standards governing campus life. They thus have a powerful interest in protecting their right to create—free from government interference—a community of students, staff, and faculty aligned with the institution's religious missions. To ensure that these First Amendment rights continue to protect Yeshiva and other religious schools, the decision below should be reversed.

STATEMENT

This case began after senior rabbis at Yeshiva University—an expressly Jewish institution of higher education—made the decision not to recognize YU Pride Alliance, an LGBT student group, as an official campus club. (R. 65-67, ¶¶ 98-113.) That decision was made after those rabbis concluded that placing Yeshiva's imprimatur on the Alliance would be inconsistent with the Torah. (R. 65, ¶¶ 98, 101.) The Alliance sued, arguing that Yeshiva's decision violated the NYCHRL. Although the NYCHRL expressly excludes "religious corporations incorporated under the education law," the Supreme Court found that Yeshiva did not qualify for the exemption and that it must recognize the Alliance.

At bottom, then, this case asks whether Yeshiva University can reject student clubs that are, or appear to be, inconsistent with Torah values. While *Amici* emphatically agree with Yeshiva's interpretation of the NYCHRL, this brief will focus primarily on what will be lost if the injunction is not dissolved, as well as

elaborating some of the key reasons why the federal First Amendment requires that result.

ARGUMENT

I. New York City Receives Enormous Benefits From Religious Colleges And Universities That Would Be Lost If Institutions Like Yeshiva Were Not Considered Religious Corporations.

Before addressing the constitutional issues, it is important to understand the practical impact of the question presented. New York City is home to several world-class religious colleges, including Yeshiva. Those colleges provide excellent secular educations to their students. But it would be a mistake to recognize religious schools only for their academics or to try to shoehorn such colleges into being either secular *or* religious. They can be—and are—both.

Religious colleges, moreover, provide significant benefits to the communities they serve and to the world at large. The decision below threatens to undermine those benefits by stripping Yeshiva and New York City's other religious schools of the very thing that makes them religious: the freedom to govern themselves according to truths they consider sacred free from secular interference. Any decision from this Court should be guided not only by the statutory points persuasively made by Yeshiva in its brief (at 17-35), but also by a clear understanding of the harms that weakening religious protections to religious institutions of higher learning will impose on New York City.

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

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

1. As noted earlier, the promise a religious college or university makes to students and their families is the opportunity to study academic disciplines of interest to the student through the lens of faith. For Christian colleges, for example, faith, learning, life and work all come under “the Lordship of Jesus Christ,” as famously discussed by statesman, journalist and theologian Abraham Kuyper.¹ Religious colleges from other faith traditions also strive for a similar integration of faith and learning.² And, for religious students and families, the faith-learning integration is

¹ Abraham Kuyper: A Centennial Reader 488 (James D. Bratt ed., 1998).

² Jewish Theological Seminary, *About JTS*, <https://www.jtsa.edu/about-jts/> (accessed Aug. 29, 2022) (“JTS [in New York City] is a preeminent institution of Jewish higher education, training thoughtful, innovative leaders—rabbis, cantors, educators, lay leaders, and scholars—who strengthen our communities with a vision of Judaism that is deeply grounded in the Jewish past and thoroughly engaged with contemporary society.”).

immensely valuable and is often the very thing that draws students to religious colleges in the first place.³

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

Indeed, studies show that more students at religious colleges devote time to community service than students at secular colleges, public or private. At schools

³ The benefits that flow from this integration have practical long-term effects on both religious and secular communities, as graduates of religious schools often serve as community and religious leaders after graduation.

that belong to *Amicus* CCCU, for example, 35.2 percent of students participate in community service compared to only 25.7 percent of college students nationally.⁴

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

Thus, for instance, a sociology major at Yeshiva might find inspiration in the Book of Exodus to study and address the plight of refugees from war-torn lands.⁷ Or a student in a Muslim school might be inspired by the Qur'an to investigate the factors influencing immigration, then look for opportunities to serve local

⁴ CCCU, *The Case for Christian Higher Education 2* (2020), <https://tinyurl.com/39sjcb4a> (accessed Aug. 29, 2022); see also Elizabeth Weiss Ozorak, *Love of God and Neighbor: Religion and Volunteer Service Among College Students*, 44 Rev. Religious Rsch. 285, 289-291 (Mar. 2003) (religious college students were far more likely to engage in volunteer activity).

⁵ See, e.g., *Deuteronomy* 10:18-19 (RSV) ("Love the sojourner, therefore; for you were sojourners in the land of Egypt."); *Matthew* 25:40 (King James) ("Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me."); *The Qur'an* 16:90 (Sahih Int'l) ("Allah orders justice and good conduct and giving to relatives and forbids immorality and bad conduct and oppression."); *Mosiah* 2:17 (Book of Mormon) ("[W]hen ye are in the service of your fellow beings ye are only in the service of your God.").

⁶ See, e.g., *Luke* 12:15 (ESV) ("[O]ne's life does not consist in the abundance of his possessions.").

⁷ See, e.g., *Exodus* 22:20, Chabad.org, <https://tinyurl.com/ChabadExodus> (accessed Aug. 29, 2022) ("And you shall not mistreat a stranger, nor shall you oppress him, for you were strangers in the land of Egypt.").

immigrants.⁸ Or a student at a Catholic law school might be moved by the New Testament to provide *pro bono* assistance to unwed mothers or foster children.⁹

Students at religious colleges and universities, moreover, often pause their formal educations for domestic or overseas public service.¹⁰ This too is by design: Institutional policies and accommodations provide deferment options to encourage such service without detrimentally affecting the student's education.¹¹

It is also common for students who don't serve traditional (evangelizing) missions to serve as humanitarian volunteers in foreign countries while studying abroad.¹² All such humanitarian work not only benefits the religious groups of which the students are a part, but also reduces cultural divides between nations and religions. Students and the world community benefit from these ongoing humanitarian activities.

⁸ See, e.g., *The Qur'an* 17:26 (“Give . . . to the needy and the wayfarer.”).

⁹ See, e.g., *Matthew* 25:35-40; *James* 1:27.

¹⁰ See Kathryn A. Tuttle, *The Effects of Short-term Mission Experienced on College Students' Spiritual Growth and Maturity*, 4 *Christian Educ. J.* 123 (2000); Tad Walch, *BYU sees dramatic jump in number of returned missionaries*, *Deseret News* (Apr. 4, 2016), <https://tinyurl.com/yc356x6c>.

¹¹ See La Sierra Univ., *Spiritual Life, Long-Term Missions*, <https://tinyurl.com/2p8wnhmc> (accessed Aug. 29, 2022); Andrews Univ., Ctr. for Faith Engagement, *Missions*, <https://tinyurl.com/2nwdyac9> (accessed Aug. 29, 2022); Brigham Young Univ., Enrollment Servs., *Missionaries*, <https://tinyurl.com/5d6597bs> (accessed Aug. 29, 2022).

¹² See R. Michael Paige et al., *Study Abroad for Global Engagement: The Long-Term Impact of Mobility Experiences*, 20 *Intercultural Educ.* S29 (2009); Princeton Rev., *The Gap Year Experience: A Life-Changing Opportunity*, <https://tinyurl.com/365fk53s> (accessed Aug. 29, 2022).

The schools themselves, moreover, often provide key services to the less fortunate to enhance their surrounding communities. Multiple religious schools, including several schools belonging to *Amicus* CCCU—Campbell University, Indiana Wesleyan University, and Southern Wesleyan University¹³—are even now participating in a program administered by the Department of Education that serves to “help incarcerated individuals access educational programs . . . to support reentry, empower formerly incarcerated persons, enhance public safety, and strengthen our communities and our economy.”¹⁴ Many other religious colleges have participated in the program.¹⁵

3. Religious colleges and universities also provide increased physical safety for learning and academic inquiry. For instance, in a 2016 study of campus safety, Regent University, Summit University, and Brigham Young University—all private,

¹³ U.S. Dep’t of Educ., Experimental Sites Initiative, *New Institutions Invited to Participate in the Second Chance Pell (SCP) experiment* (Apr. 26, 2022), <https://tinyurl.com/ymf8xkuj> (accessed Aug. 29, 2022).

¹⁴ Press Release, U.S. Dep’t of Educ., *U.S. Department of Education Announces Expansion of Second Chance Pell Experiment and Actions to Help Incarcerated Individuals Resume Educational Journeys and Reduce Recidivism* (Apr. 26, 2022), <https://tinyurl.com/3se7ccph> (accessed Aug. 29, 2022).

¹⁵ U.S. Dep’t of Educ., Experimental Sites Initiative, *New Institutions Invited to Participate in the Second Chance Pell (SCP) experiment* (Apr. 24, 2020), <https://tinyurl.com/25datmsk> (accessed Aug. 29, 2022) (Calvin University, Eastern University, and University of the Southwest); U.S. Dep’t of Educ., *Institutions selected for participation in the Second Chance Pell experiment in the 2016-2017 award year* (July 8, 2016), <https://tinyurl.com/nzt59kvb> (accessed Aug. 29, 2022) (North Park University and Nyack University).

religious institutions—were named the safest in the nation.¹⁶ Indeed, in that study of the top twenty-five safest universities, eighteen (or 72 percent)—including several *amici* such as Liberty University—were religious.¹⁷ Such trends continue even today.¹⁸ And one important aspect of that enhanced safety for students is that religious colleges consistently report much lower rates of sexual assault than secular schools.¹⁹

Accordingly, for students and parents concerned about physical safety, religious colleges and universities are an attractive option.²⁰ And the mere existence of such options in the higher education market helps ensure that other institutions place greater emphasis on student safety. If Yeshiva and New York City’s other religious universities lose the ability to self-identify as religious and receive religious protections, the city may lose the safety these institutions bring.

¹⁶ Tanza Loudonback, *The 25 safest college campuses in America*, Bus. Insider (Jan. 12, 2016), <https://tinyurl.com/5fwnmsvb>.

¹⁷ *Id.*

¹⁸ See Niche, *2022 Safest College Campuses in America*, <https://tinyurl.com/5n8wuex4> (accessed Aug. 29, 2022).

¹⁹ E.g., James R. Vanderwoerd & Albert Cheng, *Sexual Violence on Religious Campuses*, 47 Canadian J. of Higher Ed. 1, 9 (2017), <https://tinyurl.com/bdfp4hka> (accessed Aug. 29, 2022) (multiple studies of secular schools showed average “incidence of unwanted sexual contact at higher rates” than a study of the same topic at religious schools).

²⁰ Indeed, though there are few American colleges in the Islamic faith tradition, Muslim students are increasingly flocking to universities run by other faiths. See, e.g., Richard Pérez-Peña, *Muslims From Abroad Are Thriving in Catholic Colleges*, N.Y. Times (Sept. 2, 2012), <https://tinyurl.com/mrycny4> (accessed Aug. 29, 2022).

4. Religious colleges also contribute substantially to the viewpoint diversity of American higher education. In most religious traditions, the call to faith is a challenge to think and live differently from the rest of society: From the Islamic command to “[b]e in the world as if you were a stranger or traveler”²¹ to Jesus’s command that his disciples be “a light [to] the world,”²² people of faith are encouraged to transcend the cultures in which they live. Thus, it should come as no surprise that educational institutions founded and run by religious groups offer perspectives and emphases that differ, sometimes dramatically, from those offered by other educational institutions.

Yeshiva, for example, promises that “five core Torah values comprise [its] moral compass and guide [it] toward a better future.”²³ Thus it tells its students that its distinct way of life—guided by Mosaic law—will permeate all aspects of campus life. Yeshiva’s ability to be both religious *and* educational attracts students year after year and has helped it to become one of the best colleges in the Nation.²⁴

²¹ See *Sahih al-Bukhari* 6416, Sunnah.com, <https://tinyurl.com/3ay964y4> (accessed Aug. 29, 2022) (“Be in this world as if you were a stranger or a traveler.”).

²² *Matthew* 5:14; see also *Romans* 12:2 (ESV) (“Do not be conformed to this world, but be transformed by the renewal of your mind, that by testing you may discern what is the will of God, what is good and acceptable and perfect.”).

²³ Yeshiva, *Values*, <https://www.yu.edu/about/values> (accessed Aug. 30, 2022).

²⁴ U.S. News, *Yeshiva University*, <https://tinyurl.com/mueext5k> (accessed Sept. 1, 2022) (ranking Yeshiva as the 68th best university in the nation).

Religious schools also offer students greater non-religious viewpoint diversity in their faculty. For example, the most comprehensive available study addressing the political leanings of university faculties confirms that religious colleges and universities have value in part because they attract professors and students from across the political spectrum. The study found that, at non-religious, public universities, 65.7 percent of faculty across disciplines self-identify as either “liberal” or “far left,” while only 7.8 percent identify as “conservative” or “far right.”²⁵ By contrast, in Protestant religious colleges, only 42.6 percent identify as “liberal” or “far left” while 25.9 percent of professors identify as “conservative” or “far right”²⁶—still a minority, but nearly four times the percentage of faculty at non-religious institutions.

As a result, religious colleges are more likely than others to provide students extensive exposure to divergent political views. And that includes not only the more “conservative” views that, for whatever reason, are largely underrepresented in many secular institutions, but also more progressive views leavened by religious perspectives.²⁷

²⁵ Ellen B. Stolzenberg et al., *Undergraduate Teaching Faculty: The HERI Faculty Survey, 2016-2017*, at 38, Higher Educ. Rsch. Inst. at UCLA (2019), <https://tinyurl.com/428n8t93> (accessed Aug. 29, 2022).

²⁶ *Id.* at 38.

²⁷ CCCU, *The Case for Christian Higher Education* 12 (Jan. 2018), <https://tinyurl.com/4yw2spb5> (accessed Aug. 29, 2022) (67 percent of CCCU students report that their courses “often” or “very often” provide “diverse perspectives (political, religious, racial/ethnic, gender, etc.)” compared to a national average of only 56 percent).

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

In short, Congress has recognized that viewpoint diversity *among* educational institutions is valuable in higher education. This Court should follow Congress’s lead by recognizing and valuing the many benefits—including diversity—that religious schools in New York City bring to New York and to academia nationwide.

B. The lower court’s approach would substantially diminish the unique benefits that Yeshiva and other religious schools provide.

One reason why this case is so important is because it threatens to substantially diminish the benefits that Yeshiva and other religious schools bring to their communities. Indeed, the lower court’s interpretation of the NYCHRL, together with its decision to ignore First Amendment protections, will impose serious adverse consequences for religious higher education unless squarely rejected by this Court. Indeed, Appellants are correct (at 30-34) that multiple schools in New York City, such as King’s College and St. John’s University, could lose their religious identities if the decision below is affirmed.

If schools in New York City lose their ability to make their own religious decisions, many of the benefits that religious colleges provide precisely because of their religious character would be lost. Indeed, as U.S. Circuit Judge James Ho recently recognized, with religious institutions, as with secular ones, “personnel is policy.” *McRaney v. N. Am. Mission Bd. of S. Baptist Convention, Inc.*, 980 F.3d 1066, 1067 (5th Cir. 2020) (Ho, J., dissenting).

The same is self-evidently true of clubs that seek to form within a religious community. If a religious institution is obligated to recognize internal groups that fail to follow the chosen standards of the broader religious community, then religious communities will lose the spiritual glue that has historically held them together, and that their sacred texts teach them to value.²⁸ Without those strong bonds preserving a religious institution’s identity and character, the benefits that religious institutions offer to the broader community—be it from community service, increased viewpoint diversity, etc.—will likely fall as well.

II. The First Amendment Allows Religious Schools Like Yeshiva To Apply Their Own Standards For Belief, Membership and Conduct.

Because of the harm religious colleges in New York City face from the lower court’s interpretation of the NYCHRL, that court should not have ignored the First Amendment principles that, properly understood, govern this case. This Court

²⁸ See, e.g., *Galatians* 5:9 (NIV) (“A little yeast works through the whole batch of dough.”); *Proverbs* 27:17 (NIV) (“As iron sharpens iron, so one person sharpens another.”); *Matthew* 12:25 (NKJV) (“[E]very city or house divided against itself will not stand.”).

should reach those issues, which the lower court expressly declined to reach (*see* R. 11), and resolve them in Yeshiva’s favor.

Any reading of NYCHRL’s religious exemptions that prevents Yeshiva from making its own decisions about on-campus groups would run headlong into two of the First Amendment’s key protections. *First*, it would punish Yeshiva (and by extension other religious colleges) for exercising its First Amendment right, as an expressive association, to determine with which messages and organizations it wishes to associate. *Second*, such a decision would improperly allow civil courts to second-guess a religious organization’s decision about what groups, activities, or beliefs are in tension with its religious teachings—decisions that are themselves fully protected by the Religion Clauses. Under the doctrine of constitutional avoidance, these concerns provide ample reasons to interpret the statute in Yeshiva’s favor. *See People v. Viviani*, 36 N.Y.3d 564, 579 (2021). But regardless, these First Amendment constraints require that the decision below be reversed.

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

The First Amendment protects the rights of religious colleges like Yeshiva to form a religious community designed to further its expressive, religious goals.

1. The U.S. Supreme Court has long recognized that the First Amendment protects the “freedom to engage in association for the advancement of beliefs and ideas,” and that such association “is an inseparable aspect of the ‘liberty’ assured”

by the First and Fourteenth Amendments. *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). This freedom of expressive association is especially important for the right of “effective advocacy” of “public and private points of view, particularly controversial ones,” and has caused the Court to see the “close nexus between the freedoms of speech and assembly.” *Id.* The Supreme Court has explained that this freedom “is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (citations omitted). Accordingly, the right of association safeguards a space for the formation of particular traditions—a right fundamental to religious schools like Yeshiva.

Critically, the right to associate protected by the First Amendment necessarily includes the right *not* to associate:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984). The doctrine of expressive association thus forbids the government from forcing or pressuring expressive groups, such as religious schools, to include either an unwanted group or even an “unwanted person in a group” if doing so affects “the group’s ability to advocate

public or private viewpoints.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). This First Amendment right to freely associate for expressive ends is so fundamental that it prevents governments from applying public-accommodation laws in a way that interferes with an expressive association’s ability to control its own message. *Id.* at 644; *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995) (holding states may not “require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey”).

That right of association, moreover, extends to “educational, religious, *and* cultural” points of view. *Roberts*, 468 U.S. at 622 (emphasis added). Indeed, the right of association is at its strongest when exercised by religious institutions, given the additional protections of the First Amendment’s Religion Clauses. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022) (recognizing the “double protection” afforded to “religious expression”). Both clauses protect the right of all religious organizations, including religious colleges and universities, to decide for themselves what beliefs and practices will define those who “ought to be members,” teachers, and leaders of their religious communities. *Bouldin v. Alexander*, 82 U.S. [15 Wall.] 131, 139-140 (1872); *see also Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 33 (D.D.C. 1990) (government may not interfere with the “fundamental ecclesiastical concern of determining who is and who is not” a church member); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189

(2012) (courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions); *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060 (recognizing a “sphere” of autonomy regarding “internal management decisions” of religious organizations).

2. Properly understood, religious schools, such as Yeshiva, are expressive associations, even if they also grant degrees. The schools exist, to borrow from Justice Brennan, to foster an “ongoing tradition of shared beliefs.” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment). Many such schools—both in and out of New York City—have beliefs on human sexuality and gender that depart, often substantially, from secular or contemporary understandings.²⁹ Yet the First Amendment fully protects those beliefs, even if they are unpopular. *Dale*, 530 U.S. at 660; *accord Obergefell v. Hodges*, 576 U.S. 644 (2015) (emphasizing First Amendment protections for traditional Jewish and Christian beliefs on marriage and sexuality). This is so because any “requirement that [those schools] retain” student groups that advocate views contrary to the schools’ beliefs “would significantly burden [their] right to oppose or disfavor” conduct or messaging that violates their

²⁹ *E.g.*, The King’s College, *Student Handbook 2022-2023*, at 99 (2022), <https://tinyurl.com/KingsHandbook> (accessed Aug. 29, 2022) (“[W]e are bound by the historic Christian tradition regarding sexuality, gender, and marriage. We believe that God intends sexual relations to be reserved for marriage between a man and a woman.”).

organizational views. *Dale*, 530 U.S. at 659. Accordingly, the First Amendment forbids the government from imposing such a requirement. *Id.*

In short, the decision below interprets NYCHRL in a way that hinders Yeshiva from choosing the messages it conveys, the organizations it supports, and the religious mission it follows. Because the First Amendment protects Yeshiva's right to freely make those choices, the decision below should be reversed.

B. The Religion Clauses independently allow religious schools to decide what standards of belief, membership, and conduct determine community membership and privileges.

In addition to protecting Yeshiva's freedom of expressive association, the First Amendment, through its Religion Clauses, also protects Yeshiva's right to freely exercise its religion and to make religious decisions free from excessive government entanglement. Because the injunction harms both rights, they too provide independent reasons to reverse.

1. The Supreme Court has repeatedly affirmed that the "First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055 (internal quotation marks and citation omitted). This doctrine, known as the church- or religious-autonomy doctrine, is grounded in and compelled by the both the Free Exercise Clause and the

Establishment Clause. *Id.*³⁰ It requires the government—including the courts—to respect the authority of each religious organization to set religious conduct standards within its community, including by exercising ultimate control about what groups are allowed to form within the community itself. As one federal appellate court has put it, “[c]ourts generally do not scrutinize closely the relationship among members (or former members) of a church. Churches are afforded great latitude when they impose discipline on members or former members.” *Paul v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 819 F.2d 875, 883 (9th Cir. 1987). And the same principles obviously apply to any organizations a religious institution’s members wish to form and have formally recognized within the broader community.

Courts, moreover, must defer to a religious organization’s determination about its internal affairs because “secular tribunals ‘lack the power to answer some questions—religious questions—whose resolution is, under an appropriately pluralistic political theory, left to other institutions.’” *Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013) (quoting Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 Notre Dame L. Rev. 837, 861 [2009]).

The question of what religious conduct and beliefs may be embraced and practiced by a group within a religious community is purely ecclesiastical. As Justice

³⁰ The First Amendment “clearly [protects] organizations less pervasively religious than churches.” *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 620 n.15 (9th Cir. 1988).

Brennan recognized, for many, “religious activity derives meaning in large measure from participation in a larger religious community” that “represents an ongoing tradition of shared beliefs.” *Amos*, 483 U.S. at 342 (Brennan, J., concurring in the judgment). The question of who can help form or shape those beliefs, either as a leader, a teacher, or an ordinary member, is solely for the organization to decide.

For this reason, Yeshiva’s right to make the decisions it has made here is well grounded in American jurisprudence. By as early as 1850, the Massachusetts Supreme Court recognized that the “powers and privileges” of religious organizations had been “established by long and immemorial usage.” *Farnsworth v. Storrs*, 59 Mass. [5 Cush.] 412, 415 (1850). And included in those “established” powers were the “authority to deal with . . . members” or groups who violate the community’s norms, and “to administer proper punishment by way of rebuke, censure, suspension and excommunication.” *Id.*

Many other courts have also recognized the authority of religious organizations to decide such questions without judicial interference.³¹ Indeed, the U.S. Supreme Court recognized the complete autonomy of religious organizations over membership decisions more than 140 years before it formally recognized, in

³¹ See *Shannon v. Frost*, 42 Ky. [3 B. Mon.] 253, 258 (1842) (“This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision.”); *Harmon v. Dreher*, 17 S.C. Eq. 87, 120 (S.C. App. Eq. 1843) (“It belongs not to the civil power to enter into or review the proceedings of a Spiritual Court” of a religious group of which the person was a “voluntary member”).

Hosanna-Tabor, that the “ministerial exception” protects the rights of religious organizations to choose their ministers. In *Watson v. Jones*, the Supreme Court held that courts could “exercise no jurisdiction” over a “matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.” 80 U.S. [13 Wall.] 679, 733 (1871). Mere months later, the Court stated expressly what it implied in *Watson*—that courts “cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off.” *Bouldin*, 82 U.S. [15 Wall.] at 139-140. Consistent with that principle, requiring a religious organization to formally recognize subgroups that seek to form not only *within* the religious organization, but also with the organization’s blessing would violate the First Amendment.

Thus, as the Eleventh Circuit recently held, “matters of church governance, administration, and membership” are “part and parcel of ecclesiastical concerns.” *Eglise Baptiste Bethanie De Ft. Lauderdale, Inc. v. Seminole Tribe of Fla.*, 824 F. App’x 680, 683 (11th Cir. 2020), *cert denied* 141 S. Ct. 2622 (2021). And even though courts have addressed some issues involving religious organizations—such as property disputes, *e.g.*, *Jones v. Wolf*, 443 U.S. 595, 602 (1979)—by applying neutral principles of law, there is “no neutral principle of law that could assist in evaluating whether” a subgroup of members within a religious community or “a member lives his or her life in a manner consistent with church doctrine.” *Askew v.*

Trustees of Gen. Assembly of Church of the Lord Jesus Christ of the Apostolic Faith Inc., 684 F.3d 413, 419 (3d Cir. 2012).

By applying the NYCHRL against Yeshiva, an expressly religious college, the lower court violated these constitutional principles and “str[uck] at the very heart of the First Amendment’s guarantee of religious liberty.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). When Yeshiva declined to recognize the Alliance, it exercised a right afforded by the Religion Clauses to all religious organizations: It declined to recognize within its community a group that it believed, as a matter of religious faith, would be inconsistent with its religious standards—and would, perhaps, advocate for conduct contrary to those standards. The religious-autonomy doctrine ensures that the authority to make such membership decisions, and decisions about which privileges members are entitled to exercise, is the religious institution’s alone: “Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be.” *Paul*, 819 F.2d at 883 (citation omitted); *see also Hosanna-Tabor*, 565 U.S. at 194-195 (similar). For this reason, religious exemptions like those at issue here are constitutionally *required* whenever a would-be student group at a religious college or university challenges that institution’s religious decision not to formally recognize that group.

2. Applying the religious-autonomy doctrine here would also prevent courts from engaging in the excessive entanglement that the Establishment Clause forbids.

See, e.g., NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502-504 (1979) (noting that “the very process of inquiry” into a religious school’s interactions with its teachers could “impinge upon rights guaranteed by” the Establishment Clause); *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341-1343 (D.C. Cir. 2002) (similar). Indeed, any judicial inquiry into whether a religious organization is “truly religious” or “sufficiently religious” to warrant a religious exemption from a statute is fraught with entanglement concerns. *See, e.g., Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022) (“Any attempt to . . . scrutinize[e] whether and how a religious school pursues its educational mission would . . . raise serious concerns about state entanglement with religion and denominational favoritism.”). One reason is that, as the U.S. Supreme Court explained in *Corporation of Presiding Bishop v. Amos*, the “line” between what is “religious” and “secular . . . is hardly a bright one, and an organization might understandably be concerned that a judge” charged with making such a determination “would not understand its religious tenets and sense of mission.” 483 U.S. at 336. That is one reason respected jurists have said that religious organizations should generally be granted a great deal of deference on such questions. *See, e.g., id.* at 345 (Brennan, J., concurring) (explaining the importance of allowing a “sphere of deference with respect to those activities most likely to be religious”); *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066 (explaining the importance of deferring to a “religious institution’s explanation” of its beliefs and the roles of its members).

The risk of inappropriate entanglement is apparent from the facts of this case: Yeshiva’s response to the Alliance’s claim that it violated the NYCHRL by refusing to recognize them as an official club was that its decision was based on its long-standing and well-known commitments to the Jewish faith—that is, that the decision was based on bona fide religious concerns. Yet the lower court here questioned that conclusion, in part, by questioning whether Yeshiva could properly be characterized as a “religious” corporation—despite recognizing that Yeshiva openly promotes the “study of Talmud.” R. 12. Rather than looking at the ways that Yeshiva furthers the Jewish faith, for example, the court instead focused on all the ways it felt it didn’t. *See* R. 10-13. That in turn allowed an analysis in which Yeshiva’s secular purposes were allowed to eclipse its religious identity.³²

In its analysis, the court ignored the conclusions of Yeshiva’s senior rabbis, relying instead on assertions made by Yeshiva professors at one of Yeshiva’s graduate schools. R. 12. The court also cited a handful of internal documents that, among other things, recognized the existence of LGBT clubs at Yeshiva’s graduate schools on separate campuses, in an apparent attempt to suggest that Yeshiva’s policies were internally inconsistent. R. 13. The lower court thus conducted what amounted to an improper inquiry into whether Yeshiva had checked enough

³² And that says nothing of the fact that it allowed a secular court to impermissibly define for Yeshiva where its religiosity ends and its educational mission begins—even though Yeshiva itself views its educational pursuits *as* religious pursuits.

religious boxes to qualify for constitutional and statutory protections. *Compare, e.g., University of Great Falls*, 278 F.3d at 1341-1343.

The Establishment Clause exists in part to prevent secular courts from making such an inquiry. Yeshiva's religious identity is, at bottom, itself a religious decision. And a court necessarily becomes excessively entangled with religion when, based on what it—with its limited understanding—perceives as logical inconsistencies, it second-guesses either a religious school's religious character or its religious judgments. *Compare, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (cautioning against judicial second-guessing of religious beliefs on complicity in acts the faith views as immoral). That is why, unlike the lower court here, other courts have explained that they are not just forbidden from answering ecclesiastical questions about what groups are “really” religious and who should be allowed into a religious community; they are forbidden from even *asking* such questions. *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1578 (1st Cir. 1989) (explaining that “[b]y its very nature, the inquiry” into religious practices would thrust civil courts “into a maelstrom of Church policy, administration, and governance”).

To be sure, courts may inquire into the sincerity of religious beliefs to determine (for example) whether an alleged religious belief is merely a pretext to cover an otherwise discriminatory or unlawful act. But once sincerity is established, or when, as here, there is no serious question of sincerity, courts cannot inquire into

the reasonableness, validity, or legitimacy of that belief. *See, e.g., Hobby Lobby*, 573 U.S. at 724 (although courts may review sincerity, they have “no business” deciding “whether the religious belief . . . is reasonable”). For reasons stated previously, this necessarily includes a religious community’s decisions about what groups can and cannot appropriately be part of the community, consistent with the community’s own religious standards. It also extends to the religious judgment of whether students who are further along in their religious training—like Yeshiva’s graduate students—can appropriately form and be part of a club that those who are less experienced and grounded in the faith cannot.

In short, the questions of which individuals or groups can be part of a religious community, and how those decisions can appropriately be made, are ecclesiastical. Because the First Amendment forbids secular courts from answering ecclesiastical questions, the NYCHRL constitutionally cannot apply against religious colleges and universities for exercising their rights to make those decisions.³³

CONCLUSION

The Supreme Court incorrectly concluded that Yeshiva University was not a “religious corporation incorporated under the education law.” As Appellants explained in their opening brief, that conclusion is wrong under a straightforward

³³ *See also Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-718 (1981) (Religion is substantially burdened when the government “conditions receipt of an important benefit upon conduct prescribed by a religious faith, or . . . denies such a benefit because of conduct mandated by religious belief[.]”).

reading of the statute. But there are other powerful reasons for reversal—including the harms the decision below would impose on religious higher education and, most importantly, the serious federal First Amendment questions raised by the Supreme Court’s unduly narrow interpretation of NYCHRL’s religious exemption.

Respectfully submitted,

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