NO. 22A184

IN THE
Supreme Court of the United States

YESHIVA UNIVERSITY AND PRESIDENT ARI BERMAN,

Applicants,

v.

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

Respondents.

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

MOTION OF ASSOCIATION OF CLASSICAL CHRISTIAN SCHOOLS, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, INTERNATIONAL ALLIANCE FOR CHRISTIAN EDUCATION, ASSOCIATION FOR BIBLICAL HIGHER EDUCATION, AND AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS WITHOUT 10 DAYS' NOTICE AND IN PAPER FORMAT

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The Association of Classical Christian Schools, Association of Christian Schools International, International Alliance for Christian Education, Association for Biblical Higher Education, and American Association of Christian Schools move for leave to file the attached brief as *amici curiae* in support of applicants, without 10 days' notice to the parties of their intent as the rules ordinarily require. *Amici* also move to file this brief in unbound format on 8½-by-11-inch paper. These requests are necessary due to the urgent nature of applicants' application. But *amici* nonetheless notified counsel for applicants and respondents to obtain their position on *amici*'s request to file this motion and attached brief. All parties consented.

Amici are leaders in Christian education. They represent thousands of religious schools that enroll over a million students. These associations and their members seek to promote biblical community, scholarship, and training. But they face threats from those who disagree with their religious views on issues like marriage, sexuality, and gender. They vigorously advocate for the right of religious educational institutions to operate free from government intrusion, consistent with First Amendment guarantees. This Court's strong commitment to religious autonomy ensures the schools' ability to sponsor groups who share their faith and cultivate a religious environment suitable for passing their faith to the next generation.

The proposed brief will show the error below and increasing threats to religious autonomy. *Amici* ask this Court to grant its motion and accept its brief as filed.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Association of Classical Christian Schools represents more than 400 classical Christian schools. These schools practice classical education in a Christian context and from a Christian worldview. ACCS provides member-schools educational resources that help them fulfill their mission to provide a Christian classical education, including accreditation services, public advocacy, and staffing support.

The Association of Christian Schools International is a nonprofit association providing support to 24,000 Christian schools in over 100 countries. It serves over 5,300 member-schools worldwide, including 2,200 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States, 160 Christian international schools, and over 3,000 Christian global schools. ACSI member-schools educate over five million children. ACSI accredits Protestant pre-K–12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing, and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. ACSI's calling spurs from a vibrant Christian faith that embraces all of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it.

The International Alliance for Christian Education promotes biblical orthodoxy, scholarship, and cultural witness at all levels of education. It serves diverse entities, including seminaries, colleges and universities, parachurch organizations, and other education providers. IACE helps member-schools promote biblical leadership, foster intellectual discipleship, and cultivate worldview formation.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties consent to this filing.

The American Association of Christian Schools is an association of 40 state, regional, and international associations working together to promote high-quality Christian education and to produce Christlike students. AACS represents more than 750 primary and secondary schools, which enroll close to 100,000 students. It provides educational services to its member-schools, including teacher certification, improvement resources, and accreditation, all of which aim to integrate the Christian faith into scholarship and form the next generation of Christian leaders.

Finally, the Association for Biblical Higher Education seeks to advance biblical higher education for lasting kingdom impact. It is an association of more than 150 institutions of biblical higher education, which enroll more than 63,000 students. ABHE offers undergraduate and graduate educational opportunities through traditional residential, extension, and distance learning models. Its member-schools have diverse histories, ethnicity, and denominational affiliations. But they are centered on promoting a Christian education and a biblical worldview in their students.

These associations and their members care deeply about preserving their religious autonomy. They advocate for the right of religious educational institutions to operate free from government intrusion, consistent with First Amendment guarantees. And they contend that courts should defer to a religious institution's view of whether the institution or its activities are religious. The associations' members increasingly face challenges from those with contrary religious views on marriage, sexuality, and gender, endangering their religious mission. This Court's strong commitment to religious autonomy ensures the members' ability to sponsor groups who share their faith and mission and cultivate a religious environment suitable for passing their faith to the next generation of Christian leaders. In this case, the associations and their members seek to ensure that Yeshiva University—a distinctly Jewish school—can make religious decisions free from government punishment.

SUMMARY OF THE ARGUMENT

Yeshiva University is a distinctly Jewish place of higher education. Indeed, it is the flagship Jewish university. Yeshiva serves as a beacon for Torah values. It exists to teach the Jewish faith and train students to live out that faith publicly. All students who attend Yeshiva must be willing to receive a rigorous religious education. And they know this education will affect their whole campus experience. To further its mission, Yeshiva requires religious instruction for students, assigns them spiritual advisors, and ensures that Jewish laws are observed throughout campus. Yeshiva also requires that official student groups do not impair its faith and mission. Yet Plaintiffs seek to erase Yeshiva's Jewish identity and change its culture.

Plaintiffs applied to start an official Yeshiva Pride Alliance, which will promote religious beliefs that thwart Yeshiva's own. Yeshiva denied the application, citing different religious views on issues the club seeks to address. The students sued, claiming that Yeshiva violated the New York City Human Rights Law. The trial court entered a permanent injunction, forcing Yeshiva to immediately sponsor Pride Alliance. It held that Yeshiva was not religious enough to warrant statutory or constitutional protection. The court held this despite finding that Yeshiva has a rich Jewish heritage, has a religious character that sets it apart from other schools, and requires many religious activities—including attendance at religious services, religious instruction, and adherence to Jewish law on campus. Perhaps because the court did not consider Yeshiva sufficiently religious, it did not address the school's religious autonomy defense. It also rejected Yeshiva's free-exercise defense, holding the NYCHRL is neutral and generally applicable. Yeshiva was denied a stay everywhere below.

This ruling gravely endangers religious schools. On the lower court's logic, a school could be a flagship religious institution, seek to educate young people in the faith, teach religious doctrine, require chapel attendance, hire only teachers who

share its faith, run a seminary, enforce religious laws and customs on campus, and ensure their students agree to learn in a religious environment, yet not be considered "religious enough" for First Amendment protection. That logic contradicts this Court's precedents. But due to the lower court's error, thousands of religious schools and hundreds of religious colleges around the country face uncertainty. Must they sponsor a Satanist club aiming to shake students' faith? Promote the club in campus newspapers? Or hire a teacher who does not share its faith? Surely not. But the ruling below clouds once-clear answers to these questions. This Court should grant Yeshiva's application, affirm its religious autonomy, and stay the order below.

ARGUMENT

I. Forcing Yeshiva to endorse Pride Alliance, a student group that seeks to thwart its religious mission, violates the First Amendment.

A. Coercing Yeshiva violates its religious autonomy.

For over 150 years, the First Amendment has stopped courts from deciding religious disputes and punishing the religious decisions of religious organizations. *Our Lady of Guadalupe Sch.* v. *Morrisey-Berru*, 140 S. Ct. 2049, 2060 (2020). This means the government cannot decide "theological controvers[ies]" or direct religious groups to obey a "standard of morals." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 733 (1871). Indeed, such autonomy ensures that religious groups are free "from secular control or manipulation," and can answer their own "questions of discipline, … faith, … ecclesiastical rule, custom[,] or law." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 115-16 (1952) (cleaned up).

Here, Plaintiffs seek to dictate a religious decision that belongs only to Yeshiva University—whether to endorse and promote a student club that seeks to thwart the University's faith and mission. The religious autonomy doctrine reserves this decision for Yeshiva because (1) Yeshiva is a distinctly religious organization and (2) such a

decision affects its "central mission." *Our Lady*, 140 S. Ct. at 2060. No one doubts that Yeshiva is a deeply religious university. App. in Supp. of Emergency Appl. for Stay Pending Appellate Review (App.) 190, 196-97. And on counsel from its *Roshei Yeshiva*, the University decided that its religious beliefs forbid it from endorsing a student club that seeks to promote beliefs and values about marriage, sexuality, and gender that contradict Yeshiva's own. This is just the kind of "internal management decision[ ]" that Yeshiva alone should make without fear of government punishment. *Our Lady*, 140 S. Ct. at 2060.

Yeshiva's central mission is to form and support "each generation of … students in the Jewish faith." App. 190. The University seeks to cultivate a religious educational environment in which students can grow in their faith, devotion, and understanding of the Torah. It does this in part by mandating religious instruction for students, assigning them spiritual advisors, and ensuring that Jewish laws are observed throughout campus. As at other schools, campus groups affect the culture at Yeshiva—often quite significantly. There is freedom for such groups to flourish at Yeshiva, but within that freedom, the University ensures that no official group undermines its central faith and values. The Pride Alliance seeks to force Yeshiva to change its beliefs by sponsoring LGBTQ Shabbatons and the distribution of "Pride Pesach" packages for Passover. The University's faith forbids that.

Unlike unofficial campus groups or even individual students, official campus groups "personify [the University's] beliefs." *Hosanna-Tabor Evangelical Lutheran Church and Sch.* v. *EEOC*, 565 U.S. 171, 188 (2012). They receive Yeshiva's official stamp of approval—signaling to the public that the University associates with, supports, and sponsors the group's message and purpose. Cf. *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 564-66 (2005) (recognizing injury from compelled association with a message). By forcing Yeshiva to sponsor Pride Alliance, New York seeks to

change the University's central faith and message. Indeed, Plaintiffs filed this suit for that express purpose. 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 at 26:22, YouTube (May 10, 2021), https://bit.ly/3e4LKWE. Forcing Yeshiva to promote beliefs contrary to its central faith and mission violates the First Amendment. *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

As this Court has held, "[r]eligious education is a matter of central importance in Judaism." *Our Lady*, 140 S. Ct. at 2065. It "is an obligation of the highest order." *Ibid.* Because Yeshiva believes student-group "certification is tantamount to endorsement" of the group's beliefs and mission, such decisions must align with the University's faith. *Fulton*, 141 S. Ct. at 1876. Any devout school would require the same. While Plaintiffs reject Yeshiva's faith and would change its Jewish identity, neither they nor New York can make that call; the First Amendment ensures it. *Our Lady*, 140 S. Ct. at 2060 ("State interference" with a religious group's "faith and doctrine" violates "the free exercise of religion."); *Fulton*, 141 S. Ct. at 1876-77. This Court should immediately restore Yeshiva's religious autonomy pending review.

B. Coercing Yeshiva violates its free exercise of religion.

By forcing Yeshiva to violate its sincere religious beliefs and endorse a student group that promotes beliefs contrary to its faith, the New York City Human Rights Law "burden[s] [Yeshiva's] sincere religious practice." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22 (2022). As this Court has held, forcing religious groups to choose between "curtailing [their] mission or approving relationships inconsistent with [their] beliefs" plainly burdens their religious exercise. *Fulton*, 141 S. Ct. at 1876. And while this coercion violates Yeshiva's rights without balancing interests, *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990), it also triggers strict scrutiny because the NYCHRL is not generally applicable. *Kennedy*, 142 S. Ct. at 2422.

While the NYCHRL lacks general applicability because it exempts whole categories of secular groups from its requirements, Emergency Application for Stay Pending Appellate Review 26-27, it also allows many "individualized exemptions," which trigger strict scrutiny. *Fulton*, 141 S. Ct. at 1877; *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 537 (1993). For example, New York allows individualized exemptions for activities that affect but do not discriminate against protected classes. It allows businesses to deny services that would change their service. *N.Y. Roadrunners Club* v. *State Div. of Hum. Rts.*, 432 N.E.2d 780, 781 (N.Y. 1982) (per curiam) (no discrimination when "a marathon footrace" excluded those on "wheelchairs, skateboards, bicycles or other extraneous aids"). And it allows speakers to decline projects concerning protected classes for non-religious reasons. Br. of Mass., et al. as Amici Curiae in Supp. of Resp'ts at *28, *29 n.15, *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5127307 (joined by New York). The mere *existence* of this "system of individualized exemptions" triggers strict scrutiny—even if it were never used. *Fulton*, 141 S. Ct. at 1877.

The NYCHRL is also not generally applicable because it treats "comparable secular activity more favorably than" Yeshiva's religious exercise. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Comparability is measured "against the asserted government interest that justifies the regulation." *Ibid.* The NYCHRL allows case-by-case exemptions for sex discrimination "based on bona fide considerations of public policy." N.Y. Exec. Law § 296(2)(b); see also 1971 N.Y. Op. Att'y Gen. No. 32, *1 (Nov. 30, 1971), 1971 WL 216933 (noting Division "may grant an exemption" to hairdressers and cosmetologists under this provision). And because "sex" includes "gender identity," the public policy exemption applies to gender-identity discrimination too. 9 N.Y.C.R.R. § 466.13(d)(1). While New York may seek to erase discrimination, that interest uniformly applies to sexual-orientation, sex, disability, and

other discrimination. Yet the NYCHRL's exemptions are substantially underinclusive to this interest. Because these exemptions endanger New York's interest to a "greater degree than" Yeshiva's religious exercise, Yeshiva cannot be punished for obeying its faith. *Lukumi*, 508 U.S. at 543; see *Tandon*, 141 S. Ct. at 1297.

The NYCHRL's coercion of Yeshiva fails strict scrutiny. A law will only pass strict scrutiny against a religious burden if the government proves the burden is necessary to achieve an "interest[ ] of the highest order." *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.* "[B]roadly formulated interests" like "ensuring equal treatment" do not suffice; they must be "properly narrowed" to "the asserted harm of granting specific exemptions to particular religious claimants." *Ibid.* Because the NYCHRL's application has not been so narrowly justified here, there is no compelling interest to "deny[ ]" Yeshiva "an exception." *Ibid.* This is especially true given that one of NYCHRL's stated goals is to protect Jewish identity against American secularism. App. 344. Accordingly, the NYCHRL cannot be constitutionally applied to force Yeshiva to change its faith by endorsing Pride Alliance.

II. Forcing religious groups to make religious decisions against their faith will shutter their religious identity and mission.

New York courts have put Yeshiva to a cruel choice: forfeit your faith, shutter your school, or face punishment. This harm is imminent. And it spurs from courts deciding for themselves how Yeshiva University—a distinctly Jewish school—should answer religious questions. Such state-court interference with religious autonomy is both trending and alarming, and it is done without regard for this Court's precedents or even serious consideration of religious autonomy.

Take two recent examples of this—*Gordon College* v. *DeWeese-Boyd* and *Seattle's Union Gospel Mission* v. *Woods*; then consider how this case somehow raises the alarm even more. This Court should stop that trend here.

A. Courts have decided who may teach the faith at a religious college.

Just last term, this Court declined interlocutory review of *Gordon College* v. *DeWeese-Boyd*, 142 S. Ct. 952 (2022) (Mem.), where a religious college sought the freedom to decide who will teach its faith to students. Gordon College aims "to graduate men and women distinguished by intellectual maturity and Christian character." *Id.* at 953 (Alito, Thomas, Kavanaugh, Barrett, JJ., statement respecting the denial of certiorari). Indeed, it is "dedicated" to promoting "biblical faith," integrated Christian scholarship, and the spiritual formation of its students. *Ibid.* And it requires all faculty "to sign a 'Christian Statement of Faith,'" to teach their "disciplines from the perspectives of the Christian faith," and to "participate actively in the spiritual formation of its students." *Ibid.* The college handbook even says "the most important task of the 'Christian educator' is the 'integration' of faith and learning." *Ibid.*

In 1998, the college hired respondent to teach "social work." *Ibid.* The respondent's application highlighted her "Christian missionary work" and "advanced degree in theology." *Ibid.* At the time, respondent affirmed both her "agreement" with the college's statement of faith and her commitment to Christian scholarship. *Ibid.* Ten years later, the respondent "submitted a paper titled 'Reflections on Christian Scholarship' that discussed her 'integration of the Christian faith into her work.'" *Ibid.* Then in 2016, respondent "applied for promotion to full professor," explaining in her application that the "'work of integration' required 'pursuing scholarship that is faithful to the mandates of Scripture, the vocational call of Christ, and the dictates of conscience.'" *Ibid.* But the college denied her promotion, citing an overall "lack of

scholarly productivity." *Ibid.* The respondent sued, alleging that the college had actually denied it due to her "vocal opposition" to its religious beliefs. *Ibid.* (citing *DeWeese-Boyd* v. *Gordon College*, 163 N.E.3d 1000, 1003 (Mass. 2021)).

The parties cross-moved for summary judgment on whether the ministerial exception barred respondent's claims. *Id.* at 954. The trial court ruled for respondent, the college appealed, and the Massachusetts Supreme Judicial Court granted direct review. *Ibid.* That court affirmed, holding that respondent "was not a 'minister'" because she "did not 'undergo formal religious training, pray with her students,'" "lead religious services, take … students to chapel …, or teach a religious curriculum." *Ibid.* While the court did recognize that respondent "was required to 'integrate the Christian faith into her teaching, scholarship, and advising,' the court reasoned that this teaching was 'different in kind' from religious instruction." *Ibid.* In other words, the respondent's ministry was not "religious enough" for the lower court.

When the college petitioned this Court for review, it declined. But four justices cited the petition's prematurity, expressed "doubts" about the ruling below, and said that the ruling below "reflects a troubling and narrow view of religious education" because what "many faiths conceive of as 'religious education' includes much more than instruction in explicitly religious doctrine or theology." *Id.* at 954–55. Meanwhile, the ruling stands and religious colleges nationwide face uncertainty about whether they or the government can decide who may teach its faith to students.

B. Courts have decided who may be missionaries for a ministry.

Likewise, just last term, this Court declined to review at an interlocutory stage *Seattle's Union Gospel Mission* v. *Woods*, 142 S. Ct. 1094 (2022) (Mem.), where a religious nonprofit serving the homeless sought the freedom to hire only those who share its faith and mission. Seattle's Union Gospel Mission has offered "hope to

hurting people for almost 90 years." Pet. for Writ of Cert. at 6, *Seattle's Union Gospel Mission* v. *Woods*, No. 21-144 (U.S. Aug. 2, 2021). The Mission is a "[p]assionate community of people who follow Christ." *Ibid.* It staffs "over 20 ministries" that seeks "to serve rescue, and transform those in greatest need through the grace of Jesus Christ." *Ibid.* And to fulfill this mission, it provides "food, shelter, addiction-recovery, job placement, and legal services" to Seattle's most vulnerable. *Ibid.* The Mission expresses its religious beliefs and accomplishes its religious purpose through its full-time employees, who serve as its hands, feet, and voice. *Id.* at 7.

One of the Mission's ministries is Open Door Legal Services, a legal-aid clinic where staff attorneys and volunteers help resolve warrants, child support orders, debt collection, and other issues impacting Seattle's homeless. *Id.* at 8. Staff attorneys are "the primary contact and form[ed] ongoing relationships with Mission clients, collaborating with Mission caseworkers." *Ibid.* Like all Mission employees, "staff attorneys talk about their faith, often pray with clients, and tell them about Jesus." *Ibid.* "They also participate in regular Mission worship services, prayer meetings, staff meetings…, trainings, and other events." *Ibid.* Staff attorneys' legal work is "intricately intertwined with [the Mission's] spiritual ministry" and "their personal relationship with Jesus is essential to th[e] job." *Ibid.* To qualify for this role, staff attorney applicants must affirm the Mission's statement of faith, adhere to its religious-lifestyle requirements, actively attend church, and more. *Id.* at 9.

In 2016, the Mission posted a new staff attorney position. *Ibid.* After learning this, the respondent contacted a Mission attorney, disclosed he identified as bisexual, and asked whether that posed an obstacle to employment. *Ibid.* The attorney told the respondent about the Mission's religious-lifestyle requirements and recommended that he contact Open Door's director with questions. *Ibid.* The respondent emailed the director, noted the Mission's expectation that employees "live by a Biblical moral

code that excludes homosexual behavior," disclosed that he had a boyfriend and intended to enter a same-sex marriage, and asked if this would affect his employment opportunities at the Mission. *Ibid.* The director explained that the respondent was correct about the Mission's lifestyle expectations, and though the respondent was not "able to apply," the director wished him well and expressed a desire to meet. *Ibid.* The respondent applied anyway to "protest" the Mission's religious beliefs and lifestyle requirements. *Id.* at 10. He described no personal relationship with Jesus Christ and asked the Mission to "change" its religious practices. *Ibid.*

After the Mission moved forward with another candidate who agreed with its faith, the respondent sued, claiming that the Mission had violated a state law forbidding sexual orientation discrimination. *Ibid.* He did this despite the law exempting nonprofit "religious or sectarian organization[s]." *Ibid.* And he argued that this religious exemption was unconstitutional because the staff attorney job is "wholly unrelated to [the Mission's] religious practices or activities." *Id.* at 11. The Mission answered that the religious exemption protected its employment decision and that the First Amendment forbids government from punishing the Mission for hiring those who share its faith. *Ibid.* The Mission moved for summary judgment, the trial court granted it, and the respondent appealed. *Ibid.* The Washington Supreme Court later ruled that the Mission did not fit the religious exemption, narrowing the statute to cover only ministerial-exception claims. It then held that the First Amendment did not protect the Mission's decision to hire only those who share its faith. *Id.* at 12. The Mission petitioned this Court for review, but that petition was denied.

This time, two Justices of this Court cited the petition's prematurity but again expressed concern about the lower court's ruling: "If States could compel religious organizations to hire employees who fundamentally disagree with them, many religious non-profits would be extinguished from participation in public life—perhaps by

those who disagree with their theological views most vigorously. Driving such organizations from the public square would not just infringe on their rights to freely exercise religion but would greatly impoverish our Nation's civic and religious life." 142 S. Ct. at 1096. Regrettably, it appears that the plaintiff in this case will simply dismiss his complaint, preventing any further review by this Court or *any* court and locking in a state supreme court ruling that radically reduces the Religion Clauses' guarantee of church autonomy as it applies to hiring only those who share a religious group's faith—i.e., those who can credibly voice and advance its religious goals.

These two state-court rulings are hardly outliers. In *Roman Catholic Diocese of Albany* v. *Vullo*, 185 A.D.3d 11 (N.Y. App. Div. 2020), *vacated and remanded sub nom. Roman Catholic Diocese of Albany* v. *Emami*, 142 S. Ct. 421 (2021), a New York state court held that it was not unconstitutional to require a Catholic Diocese to include abortion services in its health-insurance benefits, contrary to the Catholic Church's religious beliefs. And in *Mast* v. *County of Fillmore*, No. A19-1375, 2020 WL 3042114 (Minn. Ct. App. June 8, 2020), *vacated and remanded*, 141 S. Ct. 2430 (2021), a Minnesota state court approved local government officials forcing an Amish community to adopt certain modern technologies that violated their faith or risk jail and losing their farms. Only this Court can definitively stop such blatant and ongoing violations of the Religion Clauses.

C. The ruling below allows even more meddling into religious missions.

In the cases just discussed, rogue state courts accepted that a religious college, a religious homeless ministry, a Catholic Diocese, and a religious community were religious groups entitled to religious autonomy. The courts simply declared such autonomy to encompass very little. No one questioned the religious group's identity.

This case is worse. The lower court held that Yeshiva University is not *religious enough* as a legal matter and did not even address its religious autonomy claim. App. 60, 64-65. It then held that the First Amendment fails to protect Yeshiva's decision not to sponsor a student group organized with the specific intent to thwart Yeshiva's faith and mission. App. 69. Both holdings are wrong and leave religious groups uncertain whether they can live out their faith and mission without fear of government punishment—just as a new academic year begins.

Consider the impact. First, the lower court incorrectly held that Yeshiva is not religious because its "organizing documents" supposedly "do not expressly indicate that Yeshiva has a religious purpose." App. 60, App. 64-65. That holding ranks form over substance, and this Court rejects a "magic words" test for identifying religious groups. *Carson* v. *Makin*, 142 S. Ct. 1987, 2000 (2022). This case shows why. The lower court held that Yeshiva was not religious enough despite finding that:

- "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.

What religious group could feel safe? On the lower court's logic, a religious school could be a flagship religious institution, seek to educate young people in the faith, teach religious doctrine, require chapel attendance, hire only teachers who share its faith, run a seminary, enforce religious laws and customs on campus, and ensure their students agree to learn in a religious environment, yet not be considered

"religious enough" for First Amendment protection. Maybe they forgot to check a box on some form, or a court thinks they offer too many so-called secular degrees. App. 60, App. 64-65. Poof. Their constitutional protection disappears.

That is not how the First Amendment works. This Court has repeatedly held that religious schools like Yeshiva have protected religious autonomy—no matter what boxes they check or subjects they teach. See *Carson*, 142 S. Ct. at 2000; *Our Lady*, 140 S. Ct. at 2066; *Hosanna-Tabor*, 565 U.S. at 194-95. Those holdings "turned on … substance," not form. *Carson*, 142 S. Ct. at 2000. The court below took "a troubling and narrow view of religious education." *Gordon College*, 142 S. Ct. at 944 (Alito, Thomas, Kavanaugh, Barrett, JJ., statement respecting the denial of certiorari). "What many faiths conceive of as 'religious education' includes much more than instruction in explicitly religious doctrine or theology." *Ibid.* And checking a box does not change that. This Court should correct the lower court's mistake.

Second, the lower court incorrectly held that the First Amendment fails to protect Yeshiva's decision not to sponsor a student group organized intentionally to undermine Yeshiva's faith and mission. App. 69. The trial court second-guessed both Yeshiva's religious character and the threat Pride Alliance posed to its religious mission. Yet it should have deferred to Yeshiva on this latter point. *Hosanna-Tabor*, 565 U.S. at 187. A religious school's "definition and explanation" of what it sees as a "vital part in carrying out [its] mission" is critically "important." *Our Lady*, 140 S. Ct. at 2066; cf. *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 653 (2000) (requiring "deference to an association's view of what would impair its expression" for expressive association claims). This is especially true given that courts cannot "resolve a religious controversy." *Jones* v. *Wolf*, 443 U.S. 595, 604 (1979); see *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981). Such deference is well justified here anyway. Emergency Application for Stay Pending Appellate Review 24-25 (showing harm to Yeshiva's mission).

The lower court's meddling in religious affairs poses grave harm to religious groups. In addition to facing uncertainty about their religious status, they now lack clarity about what religious decisions will be punished. Take Yeshiva for example. Would the lower court require Yeshiva to sponsor a Satanist club aiming to shake students' faith? Or force Yeshiva to publish promotional content for Pride Alliance in a campus newspaper? How about the campus yearbook? What if Yeshiva does this for other student groups? Is Yeshiva's religious-service requirement now off-limits? What if services promote Yeshiva's views about marriage? Can Yeshiva decide who speaks in services? Who serves as chaplain? Who teaches doctrine in class? Data shows there are over 30,000 religious schools and over 500 religious colleges in the United States. Nat'l Ctr. for Educ. Statistics, *Private School Universe Survey*, https://bit.ly/3B4oEIE (last accessed Sept. 1, 2022); DIY College Rankings, *Colleges with Religious Affiliations*, https://bit.ly/3TxK7AS (last accessed Sept. 1, 2022). Those schools deserve clarity on these critical questions. This Court should give it.

CONCLUSION

This Court should grant Yeshiva's emergency application for relief.

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