Appellate Division – First Department Case No. 2022-02726

New York Supreme Court

Appellate Division – First Department

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

Plaintiffs-Respondents,

– against –

YESHIVA UNIVERSITY and PRESIDENT ARI BERMAN,

Defendants-Appellants,

and

VICE PROVOST CHAIM NISSEL,

Defendant.

Case No. 2022-02726

PROPOSED BRIEF OF *AMICI CURIAE* NEW YORK CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION, AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF PLAINTIFFS-RESPONDENTS

Rose A. Saxe
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, N.Y. 10004

Daniel Mach
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St. N.W.
Washington, D.C. 20005

Gabriella Larios
Robert Hodgson
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, N.Y. 10004

Richard B. Katskee
Bradley Girard
Gabriela Hybel
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1310 L Street N.W., Suite 200
Washington, D.C. 20005

Counsel for Proposed Amici Curiae

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New York, N.Y.

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PRELIMINARY STATEMENT

In this appeal, defendant-appellant Yeshiva University ("YU") argues that the doctrine of church autonomy bars any inquiry into whether YU qualifies for a statutory exemption to the New York City Human Rights Law ("NYCHRL") reserved for religious corporations, and further argues that these same principles of church autonomy forbid application of any secular laws that it asserts conflict with its religious beliefs. The Constitution does not bar a court from considering whether a statutory exemption to a nondiscrimination law applies to a particular entity claiming that exemption, nor does it preclude New York's courts from applying a neutral, generally applicable civil law except in limited circumstances not present in this case. *Amici* submit this brief to urge this Court to reject YU's arguments and affirm the lower court's decision.

STATEMENT OF INTEREST OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over two million members dedicated to defending the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the ACLU, with more than 85,000 members across the state. Through its LGBTQ & HIV Project and its Program on Freedom of Religion and Belief, the ACLU works both to protect lesbian, gay, bisexual, transgender, and

queer ("LGBTQ") people from discrimination and to uphold the First Amendment's protections for religious liberty.

The ACLU and NYCLU have appeared as either counsel-of-record or *amicus curiae* in many state and federal cases involving an alleged conflict between laws protecting people from discrimination and religious liberty (*see e.g. Fulton v City of Philadelphia, Pennsylvania,* 141 S Ct 1868 [2021] [ACLU represented intervening defendants in challenge to city policy requiring grantees to abide by nondiscrimination protections]; *Masterpiece Cakeshop*, *Ltd. v Colorado Civ. Rights Commn.*, 138 S Ct 1719 [2018] [ACLU represented gay couple refused service by a Colorado business because of the owner's religious objection]; *Franciscan Alliance, Inc. v Becerra*, 47 F4th 368 [5th Cir 2022] [ACLU represented intervening defendants in a challenge to federal healthcare discrimination protections by religiously affiliated hospital system and eight states]; *Matter of Gifford v McCarthy*, 137 AD3d 30 [3d Dept 2016] [NYCLU and ACLU represented private respondents in discrimination case involving refusal to rent a wedding venue to a same-sex couple]; *Carpenter v James*, No. 22-75 [2d Cir 2022] [NYCLU and ACLU as *amici* in case involving challenge to New York State anti-discrimination laws by religious wedding photographer]; *Weichman v Weichman,* 199 AD3d 865 [2d Dept 2021] [NYCLU as *amicus* in case involving

First Amendment's Religion Clauses in context of child custody and visitation]; *Weisberger v Weisberger*, 154 AD3d 41 [2d Dept 2017] [same]).

Americans United for Separation of Church and State ("Americans United") is a national, nonpartisan organization committed to preserving religious freedom. To that end, Americans United works to ensure that the right of religious organizations to choose their religious messages remains secure, while at the same time, it does not become a blanket excuse to discriminate. In our constitutional order, religious freedom is a shield to protect the ability of each of us to practice a faith, or not, according to the dictates of conscience, not a sword to harm others. Americans United frequently represents parties who suffer harm that is defended through misuse of the church-autonomy doctrine and the ministerial exception (*see e.g. Gordon Coll. v DeWeese-Boyd*, No. 21-145 [US 2021]; *Belya v Kapral*, No. 21-1298 [2d Cir 2021]; *Tucker v Faith Bible Chapel Intl.*, No. 20-1230 [10th Cir 2020]; *Fitzgerald v Roncalli High Sch.*, No. 19-cv-4291 [SD Ind 2019]).

Because the arguments raised by YU in this appeal regarding the doctrine of church autonomy have broad implications for the enforceability of civil rights laws in New York and nationwide, *Amici* collectively have a strong interest in the outcome of this case.

BACKGROUND

YU holds itself out as welcoming all students, including LGBTQ students.[1] It announces a commitment to nondiscrimination in its student handbook.[2] And in connection with this litigation, YU President Berman has stated publicly that "as our commitment to and love for our LGBTQ students are unshakeable, we continue to extend our hand in invitation to work together to create a more inclusive campus life consistent with our Torah values."[3] At least one of YU's graduate schools already has an official LGBTQ student organization (*see* brief for plaintiffs-respondents ["Respondents' Br."] at 51) and, as long ago as 1995, YU's then-president acknowledged that YU was subject to the New York City Human Rights Law (*see id.* at 39). Yet YU has refused to allow undergraduate students at Yeshiva College to form an LGBTQ student organization, leaving the students

[1] *See e.g.* NY St Cts Elec Filing (NYSCEF) Doc No. 57, Supplemental Record on Appeal at 1 ("Today, we are announcing concrete additional steps to ensure that our undergraduate campus environments continue to be supportive of all our students, with the goal of fostering an inclusive community of belonging. . . . [O]ur initial initiatives will focus on increased support for our students who have raised concerns regarding sexual orientation and gender identity.").

[2] *Non-Discrimination and Anti-Harassment Policy & Complaint Procedures (including Title IX Sexual Harassment, Sexual Abuse/Assault, Stalking, Domestic Violence, Dating Violence, and Other Sexual Misconduct)*, Yeshiva University (Aug. 2022) at 4-5, available at https://www.yu.edu/sites/default/files/inline-files/Non-Discrimination%20and%20Anti-Harassment%20Policy%20-%20August%202022_1.pdf (last accessed Oct. 13, 2022).

[3] Joe Hernandez, *The Supreme Court rules Yeshiva University must recognize student LGBTQ group for now*, NPR (Sept. 15, 2022, 2:30 p.m.), https://www.npr.org/2022/09/15/1123173389/yeshiva-university-lgbtq-group-supreme-court.

without even access to the university's Zoom account to meet virtually during the COVID-19 pandemic or any place to gather safely on campus.[4]

The plaintiffs-respondents have summarized the factual and procedural history of this appeal (*see* Respondents' Br. at 2-17). Relevant to this *amicus* brief, following discovery, the lower court held that YU was not exempt from the NYCHRL's statutory requirement that places of public accommodation not discriminate based on sexual orientation, that these nondiscrimination protections prohibited YU from denying the student plaintiffs' petition to be recognized as an official student organization, and that the First Amendment to the United States Constitution does not require that such discrimination be permitted. (*YU Pride Alliance v Yeshiva Univ.*, No. 154010/21, 2022 WL 2158381 [Sup Ct, NY County 2022].)

ARGUMENT

On appeal, YU argues that, as a "religious corporation incorporated under the education law," it is exempt from the NYCHRL's requirement that places of public accommodation not discriminate based on sexual orientation (*see* New York City Administrative Code § 8-102). In the alternative, YU suggests that New York courts are constitutionally forbidden from even determining whether or not it qualifies for the statutory exemption because such an inquiry requires courts "to

[4] NYSCEF Doc No. 57, Supplemental Record on Appeal at 53.

make intrusive, subjective judgments about how much religion is enough." (*see* brief for defendants-appellants ["Appellants' Br."] at 41.) YU also claims that application of the NYCHRL to bar discrimination on the basis of sexual orientation and require it to allow the student plaintiffs the benefits of official recognition is constitutionally forbidden because it violates the doctrine of "church autonomy." (*Id.* at 37-38.) YU's arguments are not supported by the authorities it cites. For the reasons set forth below, *Amici* urge this Court to reject YU's efforts to dramatically expand the constitutional protections for religious exercise to authorize discrimination.

I. The Church Autonomy Doctrine Does Not Bar Courts From Determining Whether A Statutory Exemption Applies Or From Applying The New York City Human Rights Law Here.

The church autonomy doctrine establishes important limitations on civil courts' ability to adjudicate certain religious disputes, but those limits are narrow and do not reach the lower court's decision here, which merely applied neutral principles of law to resolve a dispute about statutory construction. Contrary to YU's urging (*see* Appellants' Br. at 35-43), church autonomy does not go so far as to prevent courts from determining whether a university meets the NYCHRL's standard for the statutory exemption, or to bar this action.

The church autonomy doctrine grants religious associations "independence in matters of faith and doctrine and in closely linked matters of internal

government." (*Our Lady of Guadalupe Sch. v Morrissey-Berru*, 140 S Ct 2049, 2061 [2020].) The Supreme Court has explained that to allow anyone "aggrieved by" certain decisions of a religious association to "appeal to the secular courts and have [those decisions] reversed" harms the ability of religious entities to retain independence in matters of faith, doctrine, and internal government. (*Kedroff v St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 US 94, 114-15 [1952].) This doctrine is grounded in the First Amendment's Religion Clauses and provides "constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes." (*Gen. Council on Fin. & Admin. of the United Methodist Church v Superior Ct. of Cal., County of San Diego*, 439 US 1369, 1372 [1978].) To effectuate these protections, the doctrine bars civil courts from resolving disputes involving "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." (*Watson v Jones*, 80 US 679, 733 [1871].)

At the same time, courts have long recognized that this doctrine does not provide religious entities with blanket immunity from civil action. (*see e.g. Catholic Charities Diocese of Albany v Serio*, 7 NY3d 510, 524 [2006] [doctrine of church autonomy not implicated in dispute regarding whether employers must provide insurance coverage for contraception because the challenged law "merely

regulates one aspect of the relationship between plaintiffs and their employees," and does not "'lend its power to one or the other side in controversies over religious authority or dogma'"] [*quoting Employment Div., Dept. of Human Resources of Oregon v Smith*, 494 US 872, 877 [1990]].) "Civil disputes involving religious parties or institutions may be adjudicated without offending the First Amendment as long as neutral principles of law are the basis for their resolution." (*Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007].) As the Second Circuit recently explained: "When a case can be resolved by applying well-established law to secular components of a dispute, such resolution by a secular court presents no infringement upon a religious association's independence. Thus, simply having a religious association on one side of the 'v' does not automatically mean a district court must dismiss the case or limit discovery." (*Belya v Kapral*, 45 F4th 621, 630 [2d Cir 2022].)

Here, the relevant provision of the NYCHRL has three statutory exemptions, including for "religious corporation[s] incorporated under the education law or the religious corporation law." (Administrative Code of City of NY § 8-102.) Determining whether or not YU qualifies for this exemption does not require any adjudication of religious law or an examination of the tenets of its faith. The factual analysis the trial court engaged in here is no different than examining facts to determine whether a membership association is "in its nature distinctly private,"

or whether an entity is "incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state." (*Id.*) Applying the NYCHRL does not involve "intrusive, subjective judgments about how much religion is enough," as YU argues. (Appellants' Br. at 41.) Determining that some entities qualify for the exemption, while others do not, is the opposite of "lawlessness" (*cf. id.*); it is precisely the kind of application of "neutral principles" that the United States Supreme Court and New York courts have made clear is permissible (*see e.g. Jones v Wolf*, 443 US 595 [1979] [adopting a neutral principles analysis to resolve church property dispute]; *Park Slope Jewish Center v Congregation B'nai Jacob*, 90 NY2d 517, 524 [1997] [claim for ejectment resolvable by application of neutral principles without resolving underlying controversies over religious doctrine]).[5]

The Second Circuit's decision in a tort case involving allegations against a Catholic Diocese for its role in covering up sexual abuse by one of the Diocese's priests illustrates the appropriate limits of church autonomy, and the proper application of "neutral principles of law." In *Martinelli v Bridgeport Roman Catholic Diocesan Corporation* (196 F3d 409 [2d Cir 1999]), the court held that

[5] Somewhat ironically, YU also devotes over a dozen pages of its briefing before this Court to arguing for a "functional test" to determine whether an entity qualifies for the NYCHRL exemption (*see* Appellant's Br. at 20-35) that would do far more to involve courts in ascertaining "how much religion is enough" than the trial court's analysis below.

the church autonomy doctrine did not bar the case because the jury was not asked to resolve any "disputed religious issue." (*Id.* at 431.) While a "proposition advanced by a particular religion . . . cannot be considered by a jury to assess its truth or validity or the extent of its divine approval or authority, [it] may be considered by the same jury to determine the character of the relationship between a parishioner and his or her bishop." (*Id.*) Ultimately, the court concluded that the plaintiff's claim could proceed because it "neither relied upon nor sought to enforce the duties of the Diocese according to religious beliefs, nor did it require or involve a resolution of whether the Diocese's conduct was consistent with them." (*Id.*)

These principles apply with equal, if not greater, force here, where the question is whether YU qualifies for a statutory exemption offered to three different types of "distinctly private" entities under the NYCHRL. Facts about YU's character, including its choice about how to incorporate under New York law and how to hold itself out in its organizing documents, may properly be considered to assess whether it qualifies for the exemption. (*See Congregation Yetev Lev D'Satmar*, 9 NY3d at 286 ["courts may rely upon internal documents, such as a congregation's bylaws," as long as "those documents do not require interpretation of ecclesiastical doctrine"].)

YU's argument boils down to an assertion that because it would prefer—for reasons rooted in faith—to continue to deny the benefits of official recognition to the student plaintiffs, the Constitution gives it *carte blanche* to do so. That is not and has never been the law. (*Cf. Bollard v California Province of the Socy of Jesus*, 196 F3d 940, 948 [9th Cir 1999] [noting, in the course of rejecting argument that church autonomy doctrine precluded a novice's sexual harassment claim against Jesuit order, that "while we recognize that applying any laws to religious institutions necessarily interferes with the unfettered autonomy churches would otherwise enjoy, this sort of generalized and diffuse concern for church autonomy . . . does not exempt them from the operation of secular laws"].) Under YU's expansive reasoning, the inquiry would end any time a religious entity asserted a religious justification for violating any secular law, leaving injured parties with no recourse.

Our Lady of Guadalupe v Morrissey-Berru, which YU quotes selectively to support its sweeping argument that it must enjoy a "broad 'sphere' of 'autonomy'" (Appellants' Br. at 36), interpreted the ministerial exception applicable to teachers at religious schools and provides no support for YU's arguments. (140 S Ct 2049 [2020].) While faith traditions do have different ways of organizing their leadership and ministry, whether an entity itself qualifies for the statutory exemption as a religious corporation under the NYCHRL is not a subjective matter

that varies depending on religious tradition. It is a neutral inquiry that involves looking at the facts but does not require any weighing of the merits of religious doctrine. There is thus no basis for giving deference to an institution's claim that it is entitled to the statutory exemption.

Similarly, allowing the student members of an LGBTQ student club the same basic benefits of recognition that YU offers other student clubs as varied as the College Democrats and the College Republicans does not infringe on YU's autonomy to control how YU teaches its faith, or dictate its understanding of Jewish doctrine. YU argues that "[t]he Court's Order requires Yeshiva to 'immediately' disregard its own understanding and interpretation of Torah" (Appellants' Br. at 43), and resolves an ecclesiastical dispute in favor of the LGBTQ student club. (*Id*.) But the Supreme Court's order granting the students recognition as an official club does no such thing. It does not require YU to adopt or express any views about sexual conduct, sexual orientation, or LGBTQ individuals more broadly, nor does it resolve any disputed ecclesiastical issues. Rather, the Supreme Court's decision simply requires YU not to discriminate and to allow a *student-led* undergraduate *student organization* to meet on the same terms as other student groups on campus.

II. If Accepted, YU's Expansion Of The Church Autonomy Doctrine Would Undermine Nationwide Civil Rights Protections And Open The Door To Unfettered Discrimination.

The consequences of accepting YU's sweeping church autonomy argument would be extreme. The United States Supreme Court has suggested that this doctrine is not limited to houses of worship or religious schools. In fact, in a recent case, the Supreme Court indicated that a religiously affiliated legal services provider might be able to assert the doctrine along with a ministerial exception defense to a state law employment discrimination case brought by a lawyer who was refused a job because he is bisexual. (*See Seattle's Union Gospel Mission v Woods*, 142 S Ct 1094 [2022].) If the church autonomy doctrine were expanded to reach *any and all decisions motivated by faith*—rather than limited to the ability of religious institutions to choose their faith leaders or teachers and to adjudicate internal ecclesiastical disputes free from government interference—it could allow religiously affiliated hospitals, universities, social service agencies and other providers that receive significant government funding to discriminate against members of the public without recourse.

Like New York's state and city nondiscrimination laws, federal civil rights laws including Title VII, the Fair Housing Act, the Americans with Disabilities Act, and Title IX contain varied religious exemptions, reflecting differing congressional determinations of which entities are appropriately exempt from

which types of claims.[6] Those statutes do not provide a blanket exemption in all contexts for all organizations that claim to be religious; rather, they grant *some* religious organizations *some* exemptions, frequently allowing them to prefer co-religionists when it comes to hiring, housing or other protected activity. Barring courts from considering whether an entity qualifies for those exemptions under the doctrine of church autonomy—and then allowing those entities to engage in all religiously-motivated discrimination under the mantle of "church autonomy"—would open the door to widespread discrimination and undermine longstanding civil rights protections.

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[6] *See e.g.* Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-1 ("This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); 42 USC § 2000e-2 (e) (2) ("[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."); Fair Housing Act, 42 USC § 3607 (a) ("Nothing in this subchapter shall prohibit a religious organization, association, or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association, or society, from limiting the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin."); Americans with Disabilities Act, 42 USC § 12187 ("The provisions of this subchapter shall not apply to . . . religious organizations or entities controlled by religious organizations, including places of worship."); Title IX of the Civil Rights Act of 1964, 20 USC § 1681 (a) (3) ("[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.").

Indeed, were YU's argument correct, *any* entity merely asserting that it is religious and that it has a religious justification for the discrimination it wishes to engage in would be able to claim exemptions from all of our nation's civil rights laws because courts could not even inquire whether the entity meets the statutory qualifications for an exemption. Courts, however, routinely make those determinations. (*See e.g. United States v Columbus Country Club*, 915 F2d 877, 882 [3d Cir 1990] [holding that a private seasonal housing community had not demonstrated that it was operated "in conjunction with" a religious organization and therefore did not qualify for the Fair Housing Act's religious exemption, despite the fact that it had been founded by the Knights of Columbus, required its members to be members of a Roman Catholic church, had an agreement with the Archbishop of Philadelphia to hold Mass weekly on the premises, and some members recited the rosary nightly together]; *Hall v Baptist Memorial Health Care Corp.*, 215 F3d 618, 624 [6th Cir 2000] [noting that "[i]n determining whether the College qualifies for [Title VII's] statutory exemption, the court must look at all the facts to decide whether the College is a religious corporation or educational institution. It is appropriate to consider and weigh the religious and secular characteristics of the institution."]; *Doe v Abington Friends Sch.*, 480 F3d 252, 258 [3d Cir 2007] ["Whether Abington qualifies for the ADA's religious exemption is a

mixed question of law and fact, the answer to which depends, of course, on the existence of a record sufficient to decide it."].)

YU was free to choose how to define itself legally in its incorporation papers under the Education Law, and it recognized more than twenty years ago that it was subject to the NYCHRL nondiscrimination provisions as a result. YU's sweeping arguments to the contrary now cannot be squared with the existing caselaw, and this Court should not accept YU's invitation to massively expand the reach of church autonomy doctrine to the detriment of every vulnerable population protected by New York City's civil rights laws.

CONCLUSION

For the reasons set forth in plaintiffs-respondents' brief, and for the reasons set forth above, *Amici* urge this Court to affirm the lower court's decision and to reject the arguments made by YU on appeal.

Dated: October 14, 2022
New York, N.Y.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

Gabriella Larios
Robert Hodgson
125 Broad Street, 19th Floor
New York, New York 10004
Tel: 212-607-3300
glarios@nyclu.org
rhodgson@nyclu.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Rose A. Saxe
125 Broad Street, 18th Floor
New York, New York 10004
Tel: 212-549-2500
rsaxe@aclu.org

Daniel Mach
915 15th Street, N.W.
Washington, D.C. 20005
Tel: 202-548-6604
dmach@aclu.org

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

Richard B. Katskee
Bradley Girard
Gabriela Hybel
1310 L Street N.W., Suite 200

Washington, D.C. 20005
Tel: 202-466-3234
katskee@au.org

Counsel for Proposed Amici Curiae

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