No. 22A184

IN THE
Supreme Court of the United States

YESHIVA UNIVERSITY AND PRESIDENT ARI BERMAN,
Applicants,
v.
YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL WEINREICH, AMITAI MILLER, AND ANONYMOUS,
Respondents.

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

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF APPLICANTS

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QUESTIONS PRESENTED

1. Whether, under the First Amendment's Religion Clauses, the New York City Human Rights Law can be applied to override Yeshiva University's religious judgment about which student organizations to officially recognize on campus consistent with its Torah values.

2. Whether, under *Employment Division v. Smith*, the New York City Human Rights Law, which categorically exempts hundreds of organizations from its reach and allows individualized exceptions for "bona fide reasons of public policy," is "neutral" and "generally applicable."

3. Whether *Employment Division v. Smith* should be overruled.

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INTEREST OF THE *AMICUS CURIAE*

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other forms of advocacy.[1]

The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as free exercise of religion, due process of law, and the right to be tried in front of impartial judges who provide their independent judgments on the meaning of the law. Yet these selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because executive agencies and even the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the modern administrative state. Although Americans still enjoy a shell of their Republic, a very different sort of government has developed within it—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by the possibility that the judgment below—entering a permanent injunction violating Yeshiva University's and President Ari

[1] No counsel for a party authored any part of this brief. No one other than the *Amicus Curiae*, its members, or its counsel financed the preparation or submission of this brief. The parties received notice of the filing of this Brief. The Applicants and Respondents have consented to the filing of this brief.

Berman's First Amendment rights—will not be deemed sufficiently final to warrant a stay pending appellate review or grant of the requested alternative relief. The constitutional harms stemming from the injunction are substantial and will continue possibly for years while the case reaches absolute finality. In such circumstances, particularly when First Amendment concerns are at stake, justice delayed is justice denied. *See* Apps. Br. at 2-3. NCLA takes a special interest in defending individual liberties where they may be curtailed by the denial of timely judicial review.

SUMMARY OF THE ARGUMENT

The denial of one's First Amendment rights, even for short periods constitutes irreparable harm and necessitates correction by the courts. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67–68 (2020); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). The trial court's permanent injunction, App.71, violates Yeshiva University's and its President's First Amendment rights by infringing their religious liberty and free speech interests. And where, as here, the highest state appellate court has denied a party's request for leave to appeal the denial of a stay of such an injunction, this Court has jurisdiction under its 28 U.S.C. § 1257 precedents, the All Writs Act, 28 U.S.C. § 1651, and 28 U.S.C. § 2101.

REASONS FOR GRANTING A STAY

I. THE DECISION BELOW IS FINAL UNDER 28 U.S.C. § 1257 BECAUSE THE UNIVERSITY'S FIRST AMENDMENT CONCERNS ARE THE CONTROLLING QUESTION

Since the Founding era, "Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which

judgment could be had has rendered a final judgment or decree." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476–77 (1975) (internal citations omitted). And while 28 U.S.C. § 1257 has preserved that final-judgment limitation, the Court has declined to "mechanical[ly]" administer the rule. *Id.* at 477. Instead, the Court has recognized "circumstances in which there has been 'a departure from this requirement of finality for federal appellate jurisdiction.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).[2]

As the Court has interpreted it, 28 U.S.C. § 1257 does not necessarily "preclude review of federal questions which are in fact ripe for adjudication when tested against the [statute's] policy." *Pope v. Atl. Coast Line R. Co.*, 345 U.S. 379, 382 (1953). Thus, when a case comes to the Court and "the federal question is the controlling question; 'there is nothing more to be decided.'" *Id.* (quoting *Clark v. Williard*, 292 U.S. 112, 118 (1934)). In such circumstances, there really is finality notwithstanding what appears on "the 'face of the judgment[,]'" and the Court "[has] jurisdiction over the cause" and may "reach the merits[.]" *Id.* (citation omitted). Indeed, this interpretation of section 1257 serves important ends by avoiding "inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court" and "completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Mills v. State of Ala.*, 384 U.S. 214, 217–18 (1966).

[2] Although 28 U.S.C. § 2101 provides another available avenue for interim relief, amicus does not elaborate that point in this brief. *See* Apps. Br. at 17-22.

As the Court identified in *Cox Broadcasting*, there are "at least four categories … of cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of [28 U.S.C. § 1257] and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. The cases that fall into these categories—including this matter, which, at a minimum, falls into the first category where further proceedings may yet occur—involve "proceedings [that] would not require the decision of other federal questions that might also require review by the Court at a later date." *Id.*

The Court has also recognized—in a similar procedural posture to this case—that where the highest state appellate court has denied a request for stay of an injunction, an application for stay may also be treated as a petition for certiorari and the denial of the request for stay may be reversed. *See Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43, 44 (1977) (per curiam). As the *Skokie* Court recognized, the state court's order denying a request for stay "is a final judgment for purposes of our jurisdiction, since it involve[s] a right 'separable from, and collateral to' the merits[.]" *Id.* (quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949)). This is particularly true when, as here, the state court imposed and tacitly upheld a prior restraint on speech without providing "strict procedural safeguards" including "immediate appellate review[.]" *Id.* (citing *Freedman v. Maryland*, 380 U.S. 51 (1965) and *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1327 (1975) (Blackmun, J., in chambers)).

While *Amicus* agrees with Applicants that the decision below falls into *Cox Broadcasting* categories three and four, this case also fits squarely within the first category *Cox* recognized—a "case[] in which there are further proceedings—even entire trial[]—[may be] yet to occur in the state court[] but where … the federal issue is conclusive [and] the outcome of further proceedings preordained." 420 U.S. at 479. Yeshiva University seeks to vindicate its First Amendment rights, with this Court being its only opportunity for relief. *See* Apps. Br. at 3. So, reversal of the New York Appellate Division's denial of Yeshiva University's motion for stay is warranted. *See Skokie*, 432 U.S. at 44.

If a stay is not granted for want of jurisdiction under 28 U.S.C. § 1257, Yeshiva University and its President will be forced to "immediately" comply with the trial court's order thus infringing their religious liberty and free speech interests. The permanent injunction is a prior restraint on Yeshiva University's and its President's speech and unconstitutionally compels them to engage in speech which contradicts their sincerely held religious beliefs. *See* App.71 (permanent injunction). The injunction constitutes a prior restraint because it in effect precludes Yeshiva University from unambiguously communicating its view of how homosexuality must be treated under Jewish law. It also constitutes compelled speech because by requiring that the University extend formal recognition to the Pride Alliance, the University is forced to indicate official approval of a religious and ethical stance that it does not approve.

As the Court has long recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *see also*, *Diocese of Brooklyn*, 141 S. Ct. at 67–68. Absent a stay, Yeshiva University will suffer irreparable injury for an unknown amount of time, likely years. *See Skokie*, 432 U.S. at 44.

Because Yeshiva University's First Amendment claims have been conclusively adjudicated (and improperly rejected) by New York courts, and because a proper resolution of these claims would fully resolve this matter, the decision appealed from is a final judgment within the meaning of 28 U.S.C. § 1257. Accordingly, this Court has jurisdiction to entertain an application for stay or a petition and should exercise that jurisdiction to prevent irreparable and gratuitous injury to Yeshiva University's First Amendment rights.

II. THE ALL WRITS ACT PROVIDES THIS COURT ONE JURISDICTIONAL BASIS TO STAY THE INJUNCTION

The All Writs Act, 28 U.S.C. § 1651, provides a further jurisdictional basis for this Court to issue a stay of the injunction entered by the Supreme Court for New York County. Concededly, a stay of a state court order can issue only under an "extraordinary circumstance." *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers). Nevertheless, this Court has never shied away from exercising its powers under the Act when orders below threatened rights under the First Amendment.

For example, in *Davis*, the trial-level court in South Dakota "enjoined CBS

from 'disseminating, disclosing, broadcasting, or otherwise revealing' any footage of" the interior of a meat processing plant owned by Federal Beef Processors, Inc. 510 U.S. at 1316. The Supreme Court of South Dakota denied an application to stay the injunction, but at least (unlike here) ordered an expedited argument on CBS's petition for a writ of mandamus. In granting CBS's application for a stay, Justice Blackmun explained that abridgment of First Amendment rights is necessarily irreparable, at least where the order sought to be stayed not merely "chill[s]" speech, but "freezes it at least for the time." *Id*. at 1317 (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976)). In his order granting a stay, Justice Blackmun explicitly cited the All Writs Act, because, in his view, a) decisions of South Dakota courts "conflict[ed] with the prior decisions of this Court," and b) "there [was] a reasonable probability that the case would warrant *certiorari*." *Id.* at 1318.

All the factors cited by Justice Blackmun apply here. First, as discussed *ante*, pp. 5-6, the injunction entered by the New York trial court is, in effect, a prior restraint on speech because forcing Yeshiva University to recognize a Pride Alliance club prevents it from delivering a consistent message that certain homosexual mores conflict with the precepts of Jewish religious law. In other words, until the present litigation runs its course (and it is worth reemphasizing that New York courts have thus far refused to expedite the matter), Yeshiva University's speech and religious expression will remain "frozen."[3] If the Court does not act, Yeshiva University will

[3] In contrast, the speech of students who wish to start the Pride Alliance club will not be "frozen" if the injunction is stayed. These students will continue to be able to meet,

not be able to teach its consistent vision of Torah values for as long as the case proceeds.

Second, as more fully explained in Yeshiva University's own briefs, the decisions of New York courts "conflict[] with the prior decision of this Court." Apps. Br. at 18, 31. It is undisputed that the central mission of Yeshiva University is "promot[ing] the study of Talmud" and "preparing students of the Hebrew faith for the Hebrew Orthodox ministry." Apps. Br. at 5 (quoting App.358; App.376 at 31:2-3). And though graduates of the University may go on to have secular rather than rabbinical careers, that doesn't differentiate Yeshiva University from any religious primary or secondary school that has a mission of inculcating religious values and understanding to all its students, even if the vast majority of graduates do not join the priesthood. Just two Terms ago, this Court reaffirmed that "a Roman Catholic primary school" enjoyed untrammeled freedom to select who would instruct its students even in the face of anti-discrimination laws that would otherwise cabin the school's discretion. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2056 (2020). As the Court explained, the First Amendment protects "[t]he independence of religious institutions in matters of 'faith and doctrine.'" *Id.* at 2060.

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discuss, and debate any topic of their choosing. (Indeed, discussion and debate lie at the very heart of the Jewish tradition. *See* Talmud, Gittin 6b). To the extent that the students suffer some financial damages from not being able to make use of the same resources to which a "recognized" club has access, the students can be made whole once the litigation runs its course, if successful. *See Davis*, 510 U.S. at 1318 ("If CBS has breached its state law obligations, the First Amendment requires that Federal [Beef Processors, Inc.] remedy its harms through a damages proceeding rather than through suppression of protected speech.").

Indeed, the Court specifically recognized that "[r]eligious education is a matter of central importance in Judaism[, because] the Torah is understood to require Jewish parents to ensure that their children are instructed in the faith." *Id.* at 2065 (citing to "briefs submitted by Jewish organizations" and Deuteronomy 6:7, 11:19). The New York courts simply ignored this Court's understanding of First Amendment doctrine generally, and its recognition of the importance of "*religious* education" to observant Jews in particular. Thus, the decision below "conflicts with the prior decisions of this Court." *Davis*, 510 U.S. at 1318.

Third, there is substantial likelihood that four Members of the Court would vote to grant *certiorari* in this matter. Although the Court doesn't usually grant review to correct "the misapplication of a properly stated rule of law," *Taylor v. Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring) (quoting Sup. Ct. R. 10), the Court has not been shy to summarily reverse decisions of both state and federal courts that defied clear precedent. *See, e.g.*, *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016) (per curiam) (granting *certiorari* and summarily vacating the decision of the Massachusetts Supreme Judicial Court because "the explanation the Massachusetts court offered for upholding the [challenged] law contradict[ed] this Court's precedent.").[4] This case is no different. Because the reasons for ordering Yeshiva

[4] It is worth noting that *Caetano* was decided by a unanimous Court, even though the precedents that the Massachusetts Court ignored were *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 742 (2010)—a pair of highly contested 5-4 decisions addressing very novel legal questions. This result illustrates the principle that however divergent the views of the Members of this Court may be on any particular legal question, no other court is free to disregard or attempt to

University to formally recognize a Pride Alliance student club "contradict this Court's precedent," Apps. Br. at 18, 31, it is likely that not only will this Court grant *certiorari*, but it will also vacate (summarily or after full briefing) the judgment below.

Finally, exercising the Court's powers under the All Writs Act is consistent with *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014) (per curiam) (granting an application to enjoin the requirement that a religiously affiliated college submit a government-mandated form respecting health insurance coverage of contraceptives); *id.* at 2808 (Sotomayor, J., dissenting) (noting that the relief provided was pursuant to the All Writs Act). In that case, the Court acted to allow Wheaton College to continue to adhere to its own view of religious obligations while the litigation was pending. The Court did so, because it recognized that if Wheaton College were to be required to file the government-mandated form, the harm to it could not be undone by a subsequent decision in its favor. The Court coupled its injunction with an admonition that it should not be read as "affect[ing] the ability of the applicant's employees and students to obtain, without cost, the full range of FDA approved contraceptives." *Id.* at 2807. The same approach is available here. While a stay of New York courts' order requiring Yeshiva University to recognize the Pride Alliance student club is warranted, such a stay need not (and should not) be read as affecting the ability of Yeshiva's students to actually communicate with each other, meet, or discuss topics related to sexuality, gender, and the like. *See ante*, pp. 7-8, n.3.

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evade the clear judgments of this Court. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

CONCLUSION

For all of these reasons, the Court has and should exercise jurisdiction under the All Writs Act, and having done so, it should stay the injunction entered by the Supreme Court of the State of New York, County of New York.

Respectfully submitted,

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