SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

YU PRIDE ALLIANCE, *et al.*, Plaintiffs, v. YESHIVA UNIVERSITY, *et al.*, Defendants.	Index No. 154010/2021 (Kotler, J.)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Yeshiva University is the nation's flagship Jewish university rooted in Torah values. Its commitment to preserving Torah tradition across generations hearkens back to G-d's command to Joshua upon Moses' death: "This book of the Torah shall not leave your mouth; you shall meditate therein day and night, in order that you observe to do all that is written in it . . . ." Tanach, Nevi'im, Yehosua (Joshua) 1:8. For nearly 125 years, Yeshiva has participated in this now-millennia-old tradition of passing Torah values to each new generation.

The Torah values Yeshiva seeks to uphold include nuanced views on how the Jewish faithful should respond to LGBTQ-related questions in light of the Torah's commands regarding sexual behavior and "lov[ing] your neighbor as yourself." Tanach, Torah, Vayikra (Leviticus) 19:18. Yeshiva has taken great care to harmonize these religious mandates. Recently, this effort has led to extensive dialogue with undergraduate LGBTQ students; reemphasis on antidiscrimination policies and protections; updated diversity, inclusion, and sensitivity training; and enhanced support services through a clinician with specific LGBTQ experience. Yeshiva remains committed to helping LGBTQ students feel more welcomed on campus in ways that reflect Torah values. These developments are the result not of crisis conditions that could justify the emergency relief sought here, but of thorough, thoughtful, and ongoing dialogue between Yeshiva and its undergraduate students.

But for Plaintiffs, Yeshiva's Torah-based response is not enough. They want the Court to compel Yeshiva to recognize an official student club, the YU Pride Alliance, where students can pursue *their* mission without regard for Yeshiva's understanding of Torah values. But all student groups on campus are subject to Yeshiva's oversight, and here, Yeshiva has concluded that hosting a student club called "YU Pride Alliance," as described by Plaintiffs and as understood by the culture at large, is not consistent with Torah values.

This case is about whether Yeshiva or the secular courts get to shape Yeshiva's religious environment. The law is straightforward: a healthy separation of church (or synagogue) and state precludes civil courts from adjudicating internal religious disputes. Thus, the New York City

Human Rights Law ("NYCHRL"), on which Plaintiffs stake their claims, expressly exempts any "religious corporation incorporated under the education law." That's Yeshiva University. And the First Amendment compels the same result. Applying the NYCHRL to force Yeshiva to place its stamp of approval on the Pride Alliance against its own religious convictions would render the law unconstitutional. The NYCHRL exempts religious organizations specifically to avoid that outcome. Constitutional avoidance principles require the same result. That is enough for this Court to deny Plaintiffs' motion and let Yeshiva and its students continue their good-faith dialogue over how best to move forward consistent with Torah values.

FACTUAL BACKGROUND

Yeshiva's Religious Character

Founded in 1897 as "The Rabbi Isaac Elchanan Theological Seminary Association," Yeshiva University was formed "to promote the study of Talmud and to assist in educating and preparing students of the Hebrew faith for the Hebrew Orthodox ministry." Sher Aff. Ex.1 at 26 (1897 Certificate of Incorporation). Firmly within a 3,000 year tradition of rabbinic teaching, Yeshiva University today embraces this heritage through its commitment to *Torah Umadda*—"harmoniously combin[ing] the best of modern culture with the learning and the spirit of Torah." Nissel Aff. Ex.3 at 2 (2020 Mission Statement) (quoting Dr. Bernard Revel, Yeshiva's first president). Indeed, *Torah Umadda* is present on every official Yeshiva document as part of Yeshiva's seal:[1]

[1] The writing at the top of the seal is Hebrew for "Yeshivat R. Yitzchak Elchanan" (the Hebrew name for Yeshiva's affiliated rabbinic seminary, which shares a campus, and is deeply integrated, with Yeshiva's undergraduate programs). The writing in the middle is Hebrew for "Torah Umaddah."

As a center of religious Torah studies *and* a nationally-ranked academic institution, the combination of *Torah* and *Madda* ("secular studies") defines daily life at Yeshiva. Berman Aff. ¶¶ 3-4. Over 80% of Yeshiva undergraduates begin their Yeshiva experience with a year abroad in the University's Israel program, where they are often engaged full time in intense Torah studies at yeshivot and seminaries in Israel. Nissel Aff. ¶ 5; *see also* Guide to Israel Schools | Yeshiva University (yu.edu). On the men's campus, students spend two to nearly six hours a day studying Torah. Nissel Aff. ¶ 6; *see also* Jewish Living and Learning | Yeshiva University (yu.edu). Women must take two Jewish studies courses each semester, which meet twice a week for a total of five hours. At the same time, the University is a world-renowned center of secular academic studies—most recently ranked by the U.S. News & World Report as #76 among national universities. 2021 Best National University Rankings | U.S. News & World Report (https://www.usnews.com).

Yeshiva carefully structures undergraduate life to instill Torah values in its students. All of Yeshiva's presidents have been Orthodox Jews and many, including the current president, have been ordained rabbis. Yeshiva's employee handbook directs employees to "bring wisdom to life by combining the finest, contemporary, academic education with the timeless teachings of Torah." Nissel Aff. Ex.1 at 9 (Employee Handbook). As at most post-high school yeshivas and Jewish seminaries, the University's undergraduate campuses are sex-segregated. Nissel Aff. ¶ 11. Indeed, male and female students have their own campuses with many of their own student leadership organizations. Nissel Aff. ¶ 11; *see also* Nissel Aff. Ex.4 and Ex.5 (male and female student councils).

The Rabbi Isaac Elchanan Theological Seminary ("RIETS"), one of the nation's largest Orthodox rabbinical seminaries, is housed on the Yeshiva men's campus and is intertwined with the University's undergraduate programs. Yeshiva (originally named RIETS) started as a membership corporation. Over time, the seminary became a division within the University. *See* Sher Aff. Ex.1 at 26; *see also* Doc. 16. Consistent with New York law, Yeshiva eventually was "continued" as an education corporation, while, a few years later, RIETS was separated and also incorporated as an educational corporation. *See id*. In practice, they remain highly integrated. They

have the same Executive Officers, partial overlap in their boards of trustees, and an express affiliation that, among other things, allows undergraduates to take courses in the Seminary and vice-versa. *See* Berman Aff. ¶ 6. RIETS faculty also provide much of the undergraduates' Torah studies. *Id*.

Synagogues are located throughout both the men's and women's campuses so that students may participate in the regular prayers and other religious services required by Jewish law. Yeshiva faithfully observes, and asks undergraduates to observe, Orthodox Jewish laws throughout campus life. Its offices and classes are closed on Shabbat and Jewish holidays and it prepares and serves only kosher food in its dining facilities. Nissel ¶ 17. Undergraduate dorms are also governed by Torah values. Male and female undergraduates live in separate dormitories. Nissel Aff. ¶ 19. Men may live on campus only if they are "enrolled in one of the Jewish studies divisions and enrolled for at least 12 credits each semester or are a full-time 'semicha' (or seminary) student." Nissel Aff. ¶ 20; Men's Housing | Yeshiva University (yu.edu) ("Eligibility"). They must agree "to live in accordance with halachic [Jewish law] norms and Torah ideals." Nissel Aff. ¶ 21. All dormitories are governed by a policy of public Shabbat observance. Nissel Aff. ¶ 22; *see also* Women's Housing | Yeshiva University (yu.edu). Elevators are set to run automatically and electronic appliances may be confiscated if used in blatant violation of the rules of Shabbat, and the students involved may be "subject to disciplinary action." Nissel Aff. ¶ 23

Yeshiva has long sought to "[p]romote a Jewish community that champions Torah Umadda, love for humankind, and support for the State of Israel" and to "enabl[e] communities to turn to Yeshiva for guidance on contemporary halachic and hashkafic matters." Nissel Aff. ¶ 24; Nissel Aff. Ex.2 at 2, 12.

Plaintiffs' Recognition of Yeshiva's Religious Character

Plaintiffs admit that Yeshiva is deeply religious. One supporting declaration states, "I love Torah learning and came to YU to further my religious growth *just like any other student who chooses YU*." Doc. 25 ¶ 9 (Jane Doe affidavit) (emphasis added). Plaintiff Miller states that "YU was a religious community for me too." Doc. 23 ¶ 9. Events requested by Plaintiffs include

LGBTQ "shabbatons," or LGBTQ programming as part of celebrating the Sabbath. *See, e.g.*, *id.* ¶ 21; Doc. 24 ¶ 32. Even Plaintiffs' critiques of Yeshiva are rooted in Yeshiva's religious views. Plaintiff Weinreich, for example, "published an article in one of the student newspapers" criticizing Yeshiva for its *religious* approach to LGBTQ issues. Doc. 22 ¶ 16 (citing https://yucommentator.org/2019/09/walking-the-walk-of-empathy). And Plaintiff Anonymous sought anonymity because [redacted].For Plaintiffs, Yeshiva's religiosity is a feature, not a bug.

Yeshiva's Corporate Charter

Yeshiva's corporate status has evolved since 1897, with many amendments to expand its academic offerings, change its corporate name, and increase its number of trustees. *See generally* Sher Aff. Ex.1. Revisions to the Education Law in 1963 confirmed that absent "the consent of the commissioner of education," membership corporations had to be incorporated under the Education Law. Sher Aff. Ex.2 at 4, 1963 N.Y. Laws 2406-2408 (enacted April 23, 1963). Consistent with the Education Law, Yeshiva "continued" the University in 1967 as "an educational corporation under the Education Law" in 1967. Doc. 14.[2] RIETS followed suit by separately incorporating "as an educational corporation" in 1970. Doc. 16. The general requirement to incorporate as an education corporation remains today. *See* N.Y. Educ. Law § 216. Thus, neither Yeshiva nor RIETS has ever been a "religious corporation" within the meaning of the New York Religious Corporations Law. N.Y. Religious Corporations Law § 2. But despite New York's compelled classification, both institutions have always *functioned* as religious entities. While

[2] Plaintiffs date this amendment to 1969. The font is difficult to read, but the document is actually dated 1967. *See* Doc. 14. This is confirmed by the only amendment Yeshiva made to its corporate charter in 1969. *See* Sher Ex.1 at 13 (June 27, 1969 charter amendment, discussing "1967 amendment").

nondenominational and nonsectarian in admitting students from any Jewish or other faith tradition, Yeshiva's entire undergraduate program is designed to encourage all students to embrace Torah-based Jewish beliefs. *See* Berman Aff. ¶ 7.

Decision Not To Approve Pride Alliance

In its effort to "establish[] a caring campus community that is supportive of all its members," Yeshiva is "wholly committed to and guided by Halacha and Torah values." Doc. 11. To that end, it has long drawn a distinction between undergraduates "socializ[ing] in gatherings as they see fit" and putting its seal of approval on clubs that appear not consistent with Torah values. *Id.*; *see also* Nissel Aff. ¶¶ 7, 18, 36, 44.

Official club recognition (or revocation) starts with Yeshiva's Student Government. *See* Nissel Ex.4 (Male Student Government Constitution, art. V § 1(c), (i)); Nissel Ex.5 (Women's Student Government Constitution art. VI, §1(b). The Student Government is specifically tasked by Yeshiva to uphold Torah values and "enrich the religious atmosphere on campus." *See, e.g.*, Nissel Ex.4 at 2 (Men's Constitution, "Preamble"); *see also* Nissel Ex.5 at 2 (Women's Constitution, art. II §1). Indeed, every elected male student leader is charged to "maintain the religious atmosphere on campus." Nissel Ex.4 at 8. Men's Constitution, art. III § 6(3). Similarly, the Women's Student Council can only authorize a club charter if it "embod[ies] the Halachic tradition." Nissel Ex.5 at 10 (Women's Constitution, art. II A). These decisions are also subject to review by Yeshiva's Director of Student Life, who is responsible for ensuring that club approvals comply with Yeshiva's religious values and other standards. Nissel Aff. ¶ ¶ 36, 38. On questions affecting Torah values, the Director of Student Life may confer with other senior officials. Nissel Aff. ¶ 40. Even after a club has been approved, all of its activities and speakers must be approved via the same process to help provide a student experience in an environment steeped in Torah values. Nissel Aff. ¶ 45.

This is the same process that has been followed with respect to Pride Alliance and all other groups. Specific to the Pride Alliance, the University has decided—conferring with its *Roshei Yeshiva* ("senior rabbis")—that it cannot put its imprimatur on an organization that appears not

consistent with Torah values. Nissel Aff. ¶ 53; Doc. 11. Plaintiffs acknowledge that Yeshiva's "religious tenets and foundations" are the basis for this decision. *See, e.g.*, Doc. 28 at 7 (quoting Doc. 12 at 1); *see also id.* ("'timeless prescriptions' in the Torah" prohibit Yeshiva from approving Pride Alliance) (citation omitted); Doc. 22 ¶ 30 (Yeshiva's Chief Human Resource Officer "impl[ied] that the proposed club . . . was . . . religiously prohibited"). In a recent YouTube interview, Plaintiff Meisels agreed that "they said this forthrightly. The reason why they will reject a club is because it clouds the nuance of the Torah." Plaintiff Meisels YouTube Statement at 18:10.

Yeshiva's decision not to recognize YU Pride Alliance is consistent with how it has treated other students groups based on their appearance of being not consistent with Torah values. For example, Yeshiva has declined to approve the Jewish "AEPi" fraternity. Nissel Aff. ¶ 43. Although Yeshiva appreciates the fraternity's commitment to certain Jewish values, it has concluded that other aspects of fraternity life are not consistent with Yeshiva's Torah values. Nissel Aff. ¶ 43. Similarly, Yeshiva declined to approve proposed gaming and gambling clubs. Nissel Aff. ¶ 44.

While Yeshiva cannot approve the proposed YU Pride Alliance in its current form, Yeshiva's commitment to its students has led it to take multiple, public steps to support students who identify as LGBTQ. For example, Yeshiva has established "a team of administrators, psychologists and rabbanim" to create policies promoting the undergraduate university's "commit[ment] to Torah and commit[ment] to each other." Doc. 11. These policies have included "reaffirm[ing]" Yeshiva's longstanding policies against "harassment or discrimination"; updating sensitivity training to include sexual orientation and gender identity; adding a clinician in Yeshiva's counseling center "with specific LGBTQ+ experience"; and creating support groups that allow a safe space for LGBTQ students to gather in the counseling center. Yeshiva remains committed to ongoing dialogue toward the creation of activities and events that promote inclusivity and are consistent with Torah values. Nissel ¶ 50.

Following its *Torah Umadda* commitment, Yeshiva has also provided Plaintiffs multiple avenues to explore LGBTQ issues within a Torah framework. Plaintiffs acknowledge that Yeshiva's Office of Student Life would allow "a club addressing tolerance" (Doc. 28 at 6), and

University officials have encouraged Plaintiffs to advocate for social issues important to LGBTQ people through the Jewish Activism Club (*id.* at 8); *see also* Doc. 27 ¶ 6 (affidavit of Jewish Activism Club's president, explaining that "one" of the group's "goals . . . is to give representation and visibility to the LGBTQ+ community at YU"). Indeed, within the past year, Yeshiva has held at least four events on LGBTQ issues, including: (1) counseling center training from a Fordham University psychologist on LGBTQ issues; (2) a discussion on what helps and hurts on LGBTQ issues and mental health with Dr. Sarah Gluck sponsored by the Jewish Activism Club; (3) an event on "sensitivity and specificity when discussing LGBTQ+ topics" put on by the Jewish Activism Club; and (4) a library book talk on "Before Trans: Three Gender Stories from Nineteenth-Century France." Nissel Aff. ¶ 62.

Plaintiffs are candid as to what more they seek to accomplish through a YU Pride Alliance. They want Yeshiva to "send[] a clear message" that Plaintiffs' own views of Judaism on human sexuality "belong at YU." Doc. 28 at 5, 9. Plaintiff Meisel has confirmed that the lawsuit's goal is to force "cultural changes" at Yeshiva. Plaintiff Meisels YouTube Statement at 26:22. Plaintiffs want Yeshiva to "make a statement." *Id.* And they hope that "an establishment of a club really could change things" at Yeshiva, including changing the "people who are against the movement in the student body." *Id.*

Yeshiva's senior administrators, faculty, rabbis, and student body of course love and welcome LGBTQ students. And the University is similarly committed to seeing all its students, including its LGBTQ students, succeed. Nissel Aff. ¶¶ 63-65. Yeshiva thus is committed to continuing this conversation with its students within the context of Torah values.

ARGUMENT

Preliminary injunctions must be issued "cautiously and in accordance with appropriate procedural safeguards." (*Uniformed Firefighters Assn. of Greater New York v City of New York*, 79 NY2d 236, 241 [1992]). Thus, a party requesting such relief must demonstrate "a clear right to relief, a balancing of equities in their favor and irreparable harm if the injunction is not granted." (*Danae Art Intl. Inc. v. Stallone*, 557 NYS2d 338, 339 [1st Dept 1990]). *See also* (*106 & 108*

Charles LLC v. Hohn, 946 NYS2d 165, 166 [1st Dept 2012] ("Because plaintiff's motion seeks an order mandating specific conduct, plaintiff must show a clear right to relief.")). Here, this standard cannot be met, because all factors weigh decidedly in Yeshiva's favor. Plaintiffs' motion for preliminary injunction must be denied.

I. Plaintiffs cannot show a clear right to relief.

Plaintiffs cannot meet their burden to show a "clear right to relief" for two reasons: *First*, Yeshiva is exempt from the NYCHRL's public accommodation provisions because, as a "religious corporation incorporated under the education law," it is "distinctly private." N.Y.C. Admin. Code § 8-102. *Second*, construing the NYCHRL otherwise would lead to constitutional problems—violating the principle of constitutional avoidance. If the NYCHRL applies here, Plaintiffs' claims are forbidden by the First Amendment. The Free Exercise, Establishment, Free Speech, and Assembly Clauses all protect Yeshiva University's freedom to carry out its religious mission and form the next generation of students according to its own religious beliefs, free from government interference.

A. Plaintiffs have failed to state a claim under the NYCHRL.

1. The public accommodation provisions do not apply to religious organizations.

Plaintiffs have sued Yeshiva as a "place or provider of public accommodation." N.Y.C. Admin. Code § 8-107(4); *see also* Compl. ¶¶ 142-156; Doc. 28 at 11. But the NYCHRL's definition of "place or provider of public accommodation" deliberately excludes "distinctly private" organizations. N.Y.C. Admin. Code § 8-102. Religious corporations expressly fall within this exclusion—and not only those incorporated under New York's Religious Corporations Law. *See id.* Rather, the NYCHRL explicitly states that "a religious corporation incorporated under the education law" is "distinctly private." *Id.* "A plain reading of the statute reveals that the exemption" "is absolute and not subject to limitation." (*Gifford v Guilderland Lodge, No. 2480, B.P.O.E. Inc.*, 707 NYS2d 722, 723-724 [3d Dept 2000]). It also accords with both the NYCHRL's "legislative intent" and "the construction of the statute adopted by other appellate courts." *Id.*

(citing cases); *see also* N.Y.C. Admin. Code § 8-107(12) (protecting religious schools even outside of the public accommodations context).

In short, because Yeshiva is "a religious corporation incorporated under the education law," it is distinctly private" and not subject to the NYCHRL's public accommodations provisions.

2. Yeshiva University is a religious organization.

Plaintiffs' claims turn on Yeshiva being a place of *public* accommodation. It's not, and that's fatal. Yeshiva is a "religious corporation incorporated under the education law," making it "distinctly private" under the NYCHRL.

a. Religious status is based on overall character, not corporate form.

When assessing whether an organization is religious under the NYCHRL, "courts engage in a robust analysis of the facts that arguably demonstrate the religious character of the organization and its work." (*Jing Zhang v Jenzabar, Inc.*, 2015 WL 1475793, *9 [ED NY Mar. 30, 2015, No. 12-CV-2988]). There is no "particular test or measure to define a religious organization." *Id.* Factors to consider include evidence of the organization's "founding," "key documents purporting to represent [its] religious nature," its "public presentation," and whether "by the time" of the relevant events, the organization has "evolved" such that it is religious in nature. *See id.* at *9-11. Focusing on function means that the "corporation's certificate of incorporation" is not dispositive; "the actual practices of the organization" are what count. (*Watt Samakki Dhammikaram, Inc. v Thenjitto*, 631 NYS2d 229, 231 [Sup Ct, Kings County 1995]). Courts can be led astray if they myopically let one document gloss over a religious organization's functions. (*Kittinger v Churchill*, 292 NYS 35, 46-47 [Sup Ct, Erie County 1936], *aff'd*, 292 NYS 51 [4th Dept 1936]) ("Although the Churchill Evangelistic Association, Inc., has the form of a stock trading corporation, it is patent that it is … a religious society."). By focusing on function, a court can assess the organization "as it was intended to be, and actually is." *Id.* at 48.

This function-based approach is required by the U.S. Constitution. The U.S. Supreme Court has long held that even "independent organization[s]" possess "full, entire, and practical freedom for all forms of religious belief and practice." (*Watson v Jones*, 80 US 679, 724-728 [1871]). This

is because a religious organization's chosen legal form "is more or less intimately connected [to its] religious views" and understanding of "ecclesiastical government." *Id.* at 726. "Fear of potential liability" cannot be allowed to drive how a religious organization forms and operates. (*Corp. of Presiding Bishop v Amos*, 483 US 327, 336 [1987]). Accordingly, the "definition and explanation" a religious organization provides of its religious functions "is important"; the nation's religious diversity precludes judges from "hav[ing] a complete understanding and appreciation of . . . a particular role in every religious tradition." (*Our Lady of Guadalupe Sch. v Morrissey-Berru*, 140 S Ct 2049, 2066 [2020]; *see also Amos*, 483 US at 341) (Brennan, J., concurring) (First Amendment guarantees religious organizations freedom to "define their own doctrines, resolve their own disputes, and run their own institutions.").

b. Yeshiva's overall character is deeply religious.

Yeshiva's functions confirm it is deeply religious. All undergraduates are strongly encouraged to begin their Yeshiva experience with intensive religious studies in Israel, with over 80% doing so for University credit. On campus, students spend one to nearly six hours per day in Torah study with rabbis or other religious educators—a requirement that is facilitated by Yeshiva being home to one of the nation's largest Orthodox seminaries (RIETS); students living on campus agree "to live in accordance with halachic [Jewish law] norms and Torah ideals"; Yeshiva complies fully with the laws of Shabbat and Kashrut and encourages students to do the same; campuses, dorms, and prayers are sex-segregated consistent with Torah law and tradition; student government officers are charged to help "maintain the religious atmosphere on campus"; and all student activities are subject to University approval for religious compliance. (*Supra* 2-7). For Yeshiva, Judaism is not a matter of intellectual curiosity. It is the heart of what Yeshiva is.

Plaintiffs admit that Yeshiva is renowned for its religious character. Plaintiff Miller states that "YU was a religious community for [him] too." Doc. 23 ¶ 9. Declarant Jane Doe acknowledges that "any . . . student who chooses YU" does so because they "love Torah learning and came to YU to further [their] religious growth." Doc. 25 ¶ 9. [redacted]

[redacted]

see also Doc. 26 ¶ 16 (Emma Doe affidavit, claiming that "Being a part of the YU community is such a big thing in the Jewish community . . . .").

Moreover, Plaintiffs unapologetically seek to change Yeshiva's Torah-based understanding of LGBTQ issues. This is why Plaintiff Weinreich published an article asking students to "stop either pretending or being under the delusion that any of the dominant issues are halachic." Doc. 22 ¶ 16 (citing https://perma.cc/JWC9-9VDC). This is why Plaintiffs want Pride Alliance to be allowed to host "shabbaton" events on Yeshiva's premises. *See, e.g.*, Doc. 23 ¶ 21; Doc. 24 ¶ 32. And it is why Plaintiffs ask this Court to force Yeshiva to approve the Pride Alliance: Doing so will force Yeshiva to "make a ***statement***," which "could really change things" at Yeshiva, including the minds of "people who are against the movement in the student body." Plaintiff Meisels YouTube Statement at 26:22 (emphasis added). Plaintiffs disagree with Yeshiva's view that "the proposed club . . . was somehow religiously prohibited." Doc. 22 ¶ 30. And they think Yeshiva's "forthright[]" "reason why they will reject a club"—*i.e.*, that "it clouds the nuance of the Torah"—is simply wrong. Plaintiff Meisels YouTube Statement at 18:10. None of this makes any sense if Yeshiva is non-religious.

Despite this overwhelming and undisputed evidence, Plaintiffs claim that two stray documents—from 1967 and 1995—negate Yeshiva's deeply religious character. Neither does.

1967 amendment to certificate of incorporation. Plaintiffs claim that Yeshiva's 1967 amended certificate of incorporation shows that Yeshiva is not religious. Doc. 28 at 15. It shows that, in 1967, Yeshiva modified its corporate status from "membership corporation under the laws of the State of New York" to "educational corporation under the Education Law of the State of New York." Doc. 14. And in 1970, RIETS was separately incorporated under the Education Law as well. Doc. 16. This did not make Yeshiva non-religious.

First, corporate status does not determine religious character. (*Supra* 10-11) (citing *Watt* and *Kittinger*). Concluding otherwise would violate the First Amendment. (*Supra* 11) (citing *Watson*, *Amos*, and *Our Lady*). In any event, Plaintiffs' view leads to obviously wrong results. On Plaintiffs'

reasoning, not even Yeshiva's affiliated *rabbinical seminary* would be religious, because, like Yeshiva itself, RIETS is currently incorporated "as an educational corporation" and before 1970 was a "membership corporation." Doc. 16; Sher Aff. Ex.1 at 26. Function is the proper analysis here, and Yeshiva's functions are infused with religious exercise.

Second, the 1963 revision to the Education Law confirmed that, absent contrary written approval, all colleges, universities, and other higher educational institutions *must* incorporate as educational corporations. Sher Aff. Ex.2. It therefore cannot be the law that a corporation is "religious" only when incorporated under the Religious Corporations Law. That would be inconsistent with every New York corporate law case cited above. It would also render meaningless the NYCHRL's specific exemption for "any religious corporation incorporated under the education law." NYC Admin. Code § 8-102. Plaintiffs offer no authority to rewrite the NYCHRL's definition of public accommodation or upend decades of New York corporate law.

1995 "fact sheet." Plaintiffs also point to a 1995 "fact sheet" addressing "the gay student clubs" at some of Yeshiva's graduate schools. Doc. 6 at 2. But this "fact" sheet does not override Yeshiva's religious character for three reasons:

First, whatever advice Yeshiva leaders were given nearly three decades ago, it does not change the fact that—long before 1995 and continuing ever since—Yeshiva has always been a deeply religious institution. Berman Aff. ¶¶ 2-4. While nondenominational in the sense that it welcomes students of all faiths, Yeshiva does so for the purpose of teaching them Judaism. And the 1995 "fact" sheet itself repeatedly confirms that Yeshiva "has not, by virtue of any of its actions, abandoned moral principles"; that Yeshiva "make[s] a unique and vital contribution to the Jewish community and society at large" by preserving the integration of its rabbinical training into university life; and that Yeshiva "makes every effort to . . . remain true to the history and traditions of the institution," such as in keeping kosher and observing Shabbat. Doc. 6 at 3-5. A function-focused analysis must situate the 1995 "fact" sheet within Yeshiva's 124-year institutional religious history and 3,000-year-old religious tradition—neither of which could be, or ever has been, trumped by a PR "fact" sheet.

Second, the 1995 "fact" sheet distinguishes Yeshiva's graduate schools from its undergraduate and seminary programs, a distinction that aligns with Yeshiva's religious beliefs and practices. The purpose of the undergraduate and seminary programs is to help students grow in their observance of the Torah and to enable them to take Torah into their chosen professions. Berman Aff. ¶¶ 4, 7. All undergraduate students spend hours each day studying Torah. Nissel Aff. ¶ 6. And all of campus life is designed to imbue Torah values in its students. Indeed, as Plaintiffs and their declarants admit, spiritual formation is why students choose to attend Yeshiva—usually after spending a full gap year in Israel studying Torah full time. Nissel Aff. ¶ 5. While Yeshiva's graduate schools are also structured to enable religious observance, their emphasis shifts from religious formation to greater professional development. Berman Aff. ¶ 8. The University's decision to allow at the graduate level what it does not at the undergraduate level reflects its mission to form students' faith during their most impressionable years. Berman Aff. ¶¶ 7-8.

Third, while there is no evidence that Yeshiva has ever retreated from the religious mission of its undergraduate program for any reason, including to get public funding (as Plaintiffs allege), it is undisputed that Yeshiva *today* is deeply religious. Under the NYCHRL, what counts is whether an organization is religious at the time of the events giving rise to the cause of action. *See Jenzabar*, 2015 WL 1475793, at *11 (under NYCHRL, "[n]othing prohibits an entity from evolving in such a way as to affect its status as a religious organization.") (*Kroth v Congregation Kadisha*, 105 Misc. 2d 904, 910 [Sup Ct, NY County 1980]) (organization can "metamorphose[ ] into a de facto religious corporation"). Plaintiffs do not dispute that Yeshiva's decision not to approve of Pride Alliance has *always* been a religious decision. Berman Aff. ¶ 11; Nissel ¶ 53; *supra* 7. Plaintiffs may disagree with that decision, but it simply is "not within the judicial function and judicial competence to inquire whether [Plaintiffs] or [Yeshiva] more correctly perceive[ ] the commands of their common faith. Courts are not arbiters of scriptural interpretation." (*Thomas v Review Bd. of Indiana*, 450 US 707, 716 [1981]).

Yeshiva's receipt of public aid does not change the analysis. Plaintiffs argue that, in applying for state and federal funding, Yeshiva has often represented itself as not being a "religious

corporation" and as being "nondenominational" and "nonsectarian." *See, e.g.*, Doc. 28 at 15-16. But none of these statements is inconsistent with Yeshiva's status as a religious organization. Consistent with the strictures of the Education Law, *supra* 5, Yeshiva is not incorporated under the Religious Corporations Law, but under the Education Law. Moreover, Yeshiva accepts students from all Jewish denominations, and indeed from all faiths, making it both nondenominational and nonsectarian.[3]

None of this precludes Yeshiva from being a religious institution with a religious mission. Indeed, the NYCHRL's public accommodations provisions expressly recognize that an organization incorporated under the Education Law can still be "religious." N.Y.C. Admin. Code § 8-102. Nor does it disqualify Yeshiva from receiving public funding. The U.S. Supreme Court has twice held recently that religious organizations cannot be denied generally available funding based on their religious status. (*Espinoza*, 140 S Ct at 2259; *Trinity Lutheran Church of Columbia, Inc. v Comer*, 137 S Ct 2012, 2021 [2017]). Reflecting this reality, the DASNY bond that Plaintiffs refer to (Doc. 28 at 16 n.9) makes clear that its use restriction "shall not prohibit the free exercise of any religion." Sher Aff. Ex.3 at 108. Plaintiffs' argument that Yeshiva forfeited its religious identity by applying for public funding is simply wrong.

B. Plaintiffs' reading of the NYCRHL would violate the First Amendment.

A plain reading of the NYCHRL's exemption for religious corporations avoids constitutional conflict. By contrast, ignoring the exemption would make the NYCHRL's public accommodation provisions unconstitutional.

1. Plaintiffs' NYCHRL claims violate religious autonomy.

The First Amendment ensures religious organizations can "define their own doctrines, resolve their own disputes, and run their own institutions." *Amos*, 483 US at 341 (Brennan, J., concurring);

[3] Many churches refer to themselves as "nondenominational" despite their obvious religiosity. And the U.S. Supreme Court has held that "sectarian" as used in funding restrictions is "code for Catholic" and a term "born of bigotry." (*See Espinoza v Montana Dept. of Revenue*, 140 S Ct 2246 [2020]; *Mitchell v Helms*, 530 US 793, 828-829 [2000].) Moreover, Judaism is not a "sect" in any sense of the word.

see also Our Lady, 140 S Ct at 2060 (holding that religious schools possess a "sphere" of "autonomy" to make "internal management decisions that are essential to the institution's central mission"). Therefore, a civil court cannot "intrude for the benefit of one segment of a [religious organization] the power of the state." (*Kedroff v St. Nicholas Cathedral of Russian Orthodox Church*, 344 US 94, 119 [1952]). Yet Plaintiffs' claims require exactly that.

If the Court were to accept Plaintiffs' NYCHRL construction, then it would have to tell Yeshiva how to construe and apply its religious mission and values when deciding to approve a club. Indeed, Plaintiffs admit this goal. (*Supra* 8). But "the First Amendment has struck the balance" already. (*Hosanna-Tabor Evangelical Lutheran Church & Sch. v EEOC*, 565 US 171, 196 [2012]). The right and the duty to decide those religious questions belongs to Yeshiva "alone." *Id.* at 195.

2. Plaintiffs' NYCHRL claims violate the Free Exercise Clause.

Plaintiffs wrongly claim that the NYCHRL satisfies the Free Exercise Clause simply because it is not targeted toward religious beliefs or crafted "'because of religious motivation.'" Doc. 28 at 19.[4] But the "Free Exercise Clause is not limited to acts motivated by religious hostility." (*Cent. Rabbinical Congress v New York City Dept. of Health & Mental Hygiene*, 763 F3d 183, 197 [2d Cir. 2014]) (cleaned up). Rather, "Government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny … whenever they treat *any* comparable secular activity more favorably than religious exercise." (*Tandon v Newsom*, 141 S Ct 1294, 1296 [2021]). With the NYCHRL, that is clearly the case.

Here, for example, it is undisputed that the NYCHRL exempts "distinctly private" clubs and benevolent orders. (*Gifford*, 707 NYS2d at 723-724). Similarly, in instances where the NYCHRL

[4] Plaintiffs also claim that Yeshiva giving its imprimatur to the Pride Alliance "does not burden [its] religious exercise at all." Doc. 28 at 19. But that claim is undermined by one of their own cases. *See Georgetown Univ.*, 536 A.2d at 5 (recognizing a student club on a religious campus "carr[ies] an intangible 'endorsement'"). Forcing Yeshiva to "make a statement" contrary to Yeshiva's understanding of the Torah is precisely what Plaintiffs want. *See, e.g.*, Plaintiff Meisels YouTube Statement at 26:22.

applies to private entities, it exempts some religious activities but not others. (*See, e.g.*, NY Admin. Code § 8-107(12)). These distinctions alone, to say nothing of the NYCHRL's other exemptions, require strict scrutiny under *Tandon*. And Plaintiffs' desired goal—forcing Yeshiva to make "cultural changes" to its religious environment and "make a ***statement***" (*supra* 8) (emphasis added)—cannot satisfy what strict scrutiny requires: a compelling governmental interest pursued in the least-restrictive way. "The First Amendment ensures that religious organizations … are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." (*Obergefell v. Hodges*, 576 US 644, 679-80 [2015]).

3. Plaintiffs' NYCHRL claims violate the Free Speech Clause.

The Free Speech Clause prohibits compelling a private party "to be an instrument for fostering public adherence to an ideological point of view." (*Wooley v Maynard*, 430 US 705, 715 [1977]).

Here, this is exactly what Plaintiffs want. They admit—both in their briefing and in public interviews—that the point of this lawsuit is to force "cultural changes" onto Yeshiva and send a different "statement" than the one Yeshiva's Torah values produce. (*Supra* 8). The First Amendment prohibits courts from imposing "what shall be orthodox in . . . religion . . . or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (*W. Virginia Bd. of Educ. v Barnette*, 319 US 624, 642 [1943]). (*See also Hurley v Irish-American Gay, Lesbian & Bisexual Group*, 515 US 557, 579 [1995]) (government "is not free to interfere with speech for no better reason than promoting an approved ***message*** or discouraging a disfavored one, however enlightened either purpose may strike the government") (emphasis added).

4. Plaintiffs' NYCHRL claims violate the Assembly Clause.

The Assembly Clause protects the freedom of private organizations to form their members in ways of life that are "indispensable to the effective and intelligent use of the processes of popular government." (*See Thomas v Collins*, 323 US 516, 532 [1945]). This freedom includes the right of religious organizations to "educat[e] and form[ ]" the next generation according to their particular

tradition's religious vision. (*Our Lady*, 140 S Ct at 2055; *Obergefell*, 576 US at 679-80). The freedom of assembly protects the right of distinct religious communities to unite in witness against the "hydraulic insistence on conformity to majoritarian standards." (*Wisconsin v Yoder*, 406 US 206, 217 [1972]).

Here, Plaintiffs seek to employ secular judicial power to turn Yeshiva away from its 3,000-year-old religious tradition toward Plaintiffs' preferred religious message. But "our constitutional tradition" flatly forbids such an infringement. *See Thomas*, 323 US at 531-532.

II. Plaintiffs are not suffering irreparable harm.

Plaintiffs here cannot claim *any* legal injury due to Yeshiva's decision to withhold its stamp of approval, let alone *irreparable* injury, because the NYCHRL expressly exempts Yeshiva from any obligation. (*See Dodd v Middletown Lodge (Elks Club) No. 1097*, 264 AD2d 706, 706, 695 NYS2d 115, [2d Dept 1999]) (where law "exclude[d] benevolent organizations, . . . plaintiff was not even 'colorably aggrieved'"). There cannot be irreparable harm when Plaintiffs do not even have a claim to vindicate.

Moreover, Plaintiffs need to "clearly demonstrate[] the necessity and urgency for the relief in advance of trial, including . . . irreparable harm." *Mindel by Mindel v Educational Testing Service*, 559 NYS2d 95, 98 [1st Dept. 1990]. Here there is plainly no urgency. Plaintiffs themselves speak of a years-long history regarding these issues. Moreover, three of the named Plaintiffs are now alumni—meaning that they could not join Pride Alliance even if it were approved, because all student groups are limited to current students. And Yeshiva has treated every student with respect—one Plaintiff, for example, was a student council president, another was editor-in-chief of the student newspaper, while at least two have had their pictures appear in University publications. Nissel Aff. ¶ 64. Moreover, Plaintiffs attended a religious university, at least in part, *because* it is religious. The fact that they have a religious disagreement with Yeshiva cannot create irreparable harm.

III. The balance of equities favors protecting Yeshiva University's religious identity.

If Yeshiva University is forced to violate its 3,000-year old understanding of Torah, "for even [a] minimal period[] of time," it will be irreparably harmed. (*Tandon*, 141 S Ct at 1297) (loss of free-exercise rights "for even minimal periods of time" constitutes irreparable harm). Indeed, the public interest favors applying statutes as written, consistently protecting constitutional rights, avoiding constitutional conflicts with important statutes like the NYCHRL, and letting religious groups decide for themselves how best to live out their faith. (*Trump v Trump*, 69 Misc. 3d 285, 298, 128 NYS3d 801, 813-814 [Sup Ct, Dutchess County 2020]) ("balancing of the equities" precluded injunction against book publisher because it would operate as a prior restraint in violation of First Amendment rights). All those public interests will be harmed if an injunction is entered.

CONCLUSION

As required by the First Amendment, the NYCHRL's *public* accommodation provisions were never intended to let courts reach inside a "distinctly private" organization like Yeshiva to resolve a sensitive religious dispute. Yeshiva is not a movie theater or a grocery store; it is a university rooted in Torah values with a mission to continuously convey its faith on to the next generation. Violating the separation of synagogue and state by telling Yeshiva it cannot follow this 3,000-year-old tradition not only creates an avoidable constitutional conflict between the NYCHRL and the First Amendment—it is counterproductive. A court-imposed resolution would inevitably provoke religious defensiveness, rather than encourage the compassion and respect necessary to building consensus. Torah provides a path for Yeshiva to convey its own religious views, which includes loving and respecting all its students. Plaintiffs' motion for a preliminary injunction should thus be denied not only to comply with the NYCHRL and the First Amendment, but also to ensure that Yeshiva and its students can continue working together to find common ground within the Torah values that guide them all.

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 202-8-b(c) of the Uniform Civil Rules for the Supreme Court, undersigned counsel hereby certifies that the above Defendants' Memorandum Of Law In Opposition To Plaintiffs' Motion For Preliminary Injunction has 6,801 words, exclusive of the caption, table of contents, table of authorities, and signature block, and thus complies with the word limit set forth in Civil Rule 202-8-b(a).

/s/ Brian M. Sher