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 SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

Yeshiva University is the nation's flagship Jewish university rooted in Torah values. Along with giving a first-class secular education, its purpose is to pass Torah values to each new generation of undergraduate students, the overwhelming majority of whom are Orthodox Jews. This case is about whether the government can compel Yeshiva to give official recognition to Plaintiff YU Pride Alliance, a club that—as described by Plaintiffs and as understood by the culture at large—is not consistent with Torah values. It cannot. As a religious institution, Yeshiva's right to manage its internal religious affairs without government interference is protected by the First Amendment's religion clauses. And the Free Exercise Clause, the Free Speech Clause, and the Assembly Clause also preclude the government from telling Yeshiva how to shape its religious environment and apply its Torah values.

Plaintiffs invoke the public-accommodation provisions of the New York City Human Rights Law ("NYCHRL") to argue that Yeshiva must recognize the Pride Alliance. But the doctrine of constitutional avoidance requires that—wherever possible—statutes be read to avoid constitutional conflicts. Here, that's easy. The statute itself categorically exempts "a religious corporation incorporated under the education law." N.Y.C. Admin. Code § 8-102. That's Yeshiva. As New York courts hold, this exemption is "absolute and not subject to limitation." Because Yeshiva is a religious education corporation, the NYCHRL does not apply and the First Amendment protects Yeshiva in managing its own religious affairs. All of the claims against the individual Defendants similarly turn on Yeshiva being a public accommodation. Because it is not, all claims against all Defendants must be dismissed as a matter of law.

Plaintiffs' claims against Defendant Chaim Nissel must be dismissed for an additional reason. The NYCHRL applies only to employees with decision-making authority over the alleged misconduct. But the Complaint acknowledges that Nissel doesn't have that authority. Accordingly, the Court should grant Defendants' motion and dismiss this case in its entirety.

FACTUAL BACKGROUND

Yeshiva's Religious Character

By its very name, Yeshiva University makes clear it is a university with religious values. Its slogan of Torah Umadda reflects its mission to combine "the spirit of Torah" with strong secular studies ("*madda*"). Nissel Aff. Ex.3 at 2 (2020 Mission Statement).[1] *See also* Sher Aff. Ex.4 ¶¶ 1, 5 (hereinafter "Complaint") (Yeshiva offers "a dual curriculum of Jewish scholarship and academics"); ¶ 75 (referencing "YU and the Orthodox community"). It is both ranked among the best national universities, 2021 Best National University Rankings | U.S. News & World Report (https://www.usnews.com), and deeply religious, Berman Aff. ¶¶ 3-4. All students are required to engage in religious studies—for most male undergraduates, often several hours per day.

Yeshiva carefully structures its undergraduate program to instill Torah values. 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. As at most post-high-school yeshivas and Jewish seminaries, the University's undergraduate campuses are sex-segregated, with several campus-specific student leadership organizations. Nissel Aff. ¶ 11.

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 Yeshiva's undergraduate programs. 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

[1] When considering a motion to dismiss under CPLR 3211(a)(7), a defendant may submit evidence via affidavits showing "that the plaintiff has no cause of action." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group., Inc.*, 980 NYS2d 21, 26-27 & n.4 [1st Dept 2014]).

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 its dining facilities prepare and serve only kosher food. Nissel Aff. ¶ 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). For Plaintiffs, Yeshiva's religiosity is a feature, not a bug.

Yeshiva's Corporate Charter

Yeshiva (originally named RIETS) started in 1897 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. Its corporate status gradually evolved, 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 as "an educational corporation under the Education Law" in 1967. Doc. 14. 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 incorporated as 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 corporations. While nondenominational and nonsectarian in admitting students from any Jewish or other faith tradition, Yeshiva's 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; Complaint ¶ 98. To that end, it has long distinguished undergraduates "socializ[ing] in gatherings as they see fit" from putting its seal of approval on clubs that appear not consistent with Torah values. Doc. 11; *see also* Nissel Aff. ¶¶ 7, 18, 36, 44.

Official club recognition (or revocation) starts with Yeshiva's Student Government. *See* Complaint ¶¶ 29-36; Nissel Aff. Ex.4 (Male Student Government Constitution, art. V § 1(c), (i)); Nissel Aff. 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 Aff. Ex.4 at 2 (Men's Constitution, "Preamble"); *see also* Nissel Aff. 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 Aff. 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 Aff. 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.

If a proposed club raises especially complex issues, the Director of Student Life will discuss the approval with Chaim Nissel, Vice Provost for Students and University Dean of Students at Yeshiva. Nissel Aff. ¶¶ 1, 38. On particularly difficult issues, especially those affecting Yeshiva's religious mission, the Director of Student Life and Vice Provost Nissel may additionally consult with Yeshiva's religious leadership and other senior administrators. Nissel Aff. ¶ 40. Even after a club has been approved, all its activities and speakers must be approved via the same process to help provide a student experience steeped in Torah values. Nissel Aff. ¶ 45.

This standardized process was followed with respect to Pride Alliance. Over the past several years, senior religious and administration officials at Yeshiva have engaged in regular discussions with LGBTQ students over forums or clubs that can explore issues of interest to LGBTQ individuals within a Torah framework. *Id.* ¶ 46; Complaint ¶ 1. That has included discussions concerning students' requests for Yeshiva to put its imprimatur on the YU Pride Alliance and, before that, a Gay-Straight Alliance. Nissel Aff. ¶ 46; Complaint ¶ 43. When Plaintiffs submitted their most recent request for official approval of YU Pride Alliance in February 2019, Plaintiffs requested to meet with a senior administrator and Nissel. Complaint ¶¶ 45-46, 90. But as Nissel had repeatedly informed Plaintiffs, he lacked the authority to decide an issue so intertwined with Yeshiva's religious mission and "needed to speak to more senior administrators." *Id.* ¶ 43.

As the Complaint itself alleges, Plaintiffs next elevated discussions beyond Nissel to those with decision-making authority. *Id.* ¶ 53. A panel of rabbis and educators was established to review the issues surrounding the request for formal recognition, *id.* ¶ 58, and there were ongoing meetings with student representatives to discuss the same, *id.* ¶¶ 62-71. On September 3, 2020, after conversations among Yeshiva's senior officials and religious leaders, Yeshiva announced that it would not officially recognize Pride Alliance because doing so would not be consistent with Torah values. *Id.* ¶¶ 98, 101. Nissel was not personally involved in making this decision. *Id.* ¶¶ 98, 103 (alleging that other Yeshiva administrators and religious officials, not Nissel, authorized this decision). Nor did he sign the letter. Doc. 11. And his own recounting of these events confirms Plaintiffs' allegations, demonstrating that Nissel's only role in this process was as a messenger, "communicat[ing] the decision to the students as it was conveyed to [him]." Nissel Aff. ¶ 57. He "was not personally involved" in making the final decision." *Id.* ¶ 54; Doc. 11. Rather, "[g]iven the religious ramifications of their request, this was not a decision [he] had authority to make." Nissel Aff. ¶ 56.

It is undisputed that Yeshiva's decision was a decision based upon religious values and principles. Plaintiffs acknowledge that "timeless prescriptions" in the Torah are the basis for this decision. *See, e.g.*, Complaint at ¶ 101. 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; *see also* Nissel Aff. ¶ 53; Doc. 11.

Yeshiva's decision not to recognize YU Pride Alliance is consistent with how it has evaluated other student groups. 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.

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 deeply care for its 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. But Plaintiffs' disagreement with Yeshiva's religious decision is not sufficient to state a claim for relief.

ARGUMENT

Under New York law, a cause of action must be dismissed if there is documentary evidence of a defense or if the complaint fails to state a cause of action. CPLR 3211(a)(1), (7). "[F]actual claims inherently incredible or flatly contradicted by documentary evidence" do not suffice. (*Caniglia v Chi. Tribune-N.Y. News Syndicate, Inc.*, 204 AD2d 233, 233-34 [1st Dept 1994]).

Here, Plaintiffs' claims against all Defendants must be dismissed 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. Because every claim—including those against the individual Defendants—require Yeshiva to be a "public accommodation," which it is not, each claim fails as a matter of law.

Second, construing the NYCHRL otherwise would lead to constitutional problems—violating the principle of constitutional avoidance. If the NYCHRL applies here, then Plaintiffs' claims are

forbidden by the First Amendment.[2] 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 undergraduate students according to its own religious beliefs, free from government interference.

Plaintiffs' claims against Nissel must be dismissed for an additional reason. As a mere conduit with no decision-making authority over Plaintiffs' desired club, Nissel is not subject to liability under the NYCHRL.

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

A. 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* Complaint at ¶¶ 142-156. 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]).

This plain reading 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). As the NYCHRL's legislative history states, the law was only directed toward "business purposes, employment, and professional advancement." Local Law No. 63 [1984] of the City of New York § 1. When amending the NYCHRL to apply certain other, non-public accommodation provisions

[2] The First Amendment requires resolving claims that impact internal religious affairs at the outset. (*See, e.g.*, *Fratello v Archdiocese of N.Y.*, 863 F3d 190, 198 [2d Cir 2017] (resolving whether the "ministerial exception" applied at the motion to dismiss stage); (*see also NLRB v Catholic Bishop*, 440 US 490, 502 [1979] ("very process of inquiry" into internal religious affairs can "impinge on rights guaranteed by the Religion Clauses").

to private organizations, the City Council expressly exempted religious organizations "[b]ecause small clubs, benevolent orders and religious corporations have not been identified . . . as places where business activity is prevalent." *Id.*; (*see also N. Y. State Club Ass'n, Inc. v City of New York*, 487 US 1, 16-17 [1988]). Yeshiva's entire existence centers not on "business activity," but on infusing secular ("madda") studies with Torah values. *Supra* 2. "Madda" without "Torah" is not Yeshiva. Berman Aff. ¶¶ 4, 7, 10.

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.

B. Yeshiva University is a religious organization.

Yeshiva is a "religious corporation incorporated under the education law," making it "distinctly private" under the NYCHRL.

1. 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], *affd*, 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.").

2. 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* 2-3, 5. 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.

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. Complaint at ¶¶ 20,22. Rather, the certificate 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* 9-10 (citing *Watt* and *Kittinger*). Concluding otherwise would violate the First Amendment. *Supra* 10 (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." N.Y.C. Admin. Code § 8-102.

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. A

central 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 campus life is designed to imbue Torah values in its students. Indeed, as Plaintiffs 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 Aff. ¶ 53; *supra* 6. 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.*, Complaint ¶ 5. But none of these statements is inconsistent with Yeshiva's status as a religious organization.

Consistent with the strictures of the Education Law, *supra* 4, 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 (Complaint at ¶ 23) 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.

* * * *

Because Yeshiva is a "religious corporation incorporated under the education law," it is exempt from the NYCHRL's public accommodation provisions. Every claim, against both Yeshiva and the individual Defendants, depend on this faulty premise. Because it is wrong as a matter of law, the claims against all Defendants must be dismissed.

II. Plaintiffs' reading of the NYCHRL 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.

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[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.

A. 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); (*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* 7. But "the First Amendment has struck the balance" already. (*Hosanna-Tabor Evangelical Lutheran Church & Sch. v EEOC*, 565 US 171, 196 [2012]). Yeshiva "alone" has the right and the duty to decide those religious questions. *Id.* at 195.

B. 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.

[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 Gay Rights Coal. of Georgetown Univ. Law Ctr. v Georgetown Univ.*, 536 A.2d 1, 5 [DC 1987]) (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.

Here, 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 applies to private entities, it exempts some religious activities but not others. (*See, e.g.*, N.Y.C. 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* 7 (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, 679-680 [2015]).

C. 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* 7. 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).

D. 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 679-680). 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 Collins*, 323 US at 531-532.

III. Nissel is not subject to liability under the NYCHRL.

Defendants Nissel and Berman should be dismissed along with Yeshiva because Yeshiva is not a public accommodation and thus not subject to the public accommodation provisions of the NYCHRL. If Yeshiva cannot be liable, neither can its employee or officer.

The Complaint's own allegations confirm that Defendant Nissel must also be dismissed because he lacked authority to decide whether to approve Plaintiffs' desired club—"he needed to speak to more senior administrators." Complaint ¶ 43. The NYCHRL primarily affects businesses and organizations; it extends liability to employees of said organizations only "under limited circumstances," (*Palmer v Cook*, 64 Misc 3d 1222(A), 2019 NY Slip Op 51228[U], *4 [Sup Ct, Queens County 2019]), and does not apply to employees where they do not "act with or on behalf of" their employer (*i.e.*, "in some agency or supervisory capacity"), (*Priore v New York Yankees*, 307 AD2d 67, 74 [2003]) (addressing identical language in a related provision of the NYCHRL).[5] To be liable, an employee "must be found to possess the power to do more than simply carry out . . . decisions made by others." (*Id.*) (holding that this rationale under the NYSHRL also applies to the NYCHRL). As such, where a plaintiff "does not allege that [a defendant] possessed any

[5] An earlier case from the Second Department, *Murphy v ERA United Realty*, 251 AD2d 469, 471 [1998], held without analysis that any employee can be held liable under the NYCHRL. However, *Priore* confirms that the First Department expressly rejects that analysis. (*See* 307 AD2d at 74).

supervisory authority," that plaintiff "cannot sustain a cause of action against [that defendant] pursuant to NYCHRL." (*Palmer*, 2019 NY Slip Op 51228[U], *4). Merely possessing a leadership title is not sufficient—if the employee accused under the NYCHRL did not have the authority to make decisions over the alleged conduct, that employee cannot be liable under the NYCHRL. (*Mitra v State Bank of India*, 2005 WL 2143144, *3 [SD NY Sept. 6, 2005, No. 03 CIV. 6331]) (dismissing NYCHRL claims against supervisor defendants because plaintiffs did not allege they had authority to make relevant personnel decisions).

Here, the Complaint fails to allege Nissel had any decision-making authority over whether to approve the Gay-Straight Alliance or, later, the YU Pride Alliance. Rather, Plaintiffs consistently allege that Nissel did ***not*** have that authority. For example, Plaintiffs allege Nissel told them "that he needed to speak to more senior administrators" because he lacked authority to recognize YU Pride Alliance. Complaint ¶ 43. They further allege that Plaintiffs themselves elevated discussions over club approval to other Yeshiva administrators and religious leaders with real authority. *Id.* ¶ 53. Indeed, Plaintiffs acknowledge that a senior administrator, not Nissel, was tasked with convening a committee to assist Yeshiva in deciding whether to officially acknowledge YU Pride Alliance. *Id.* ¶¶ 58, 62-71. From the face of the Complaint, Nissel lacks the requisite authority for NYCHRL liability.

While the Complaint alone demonstrates the need to dismiss Nissel, his own testimony further confirms it. *See* Nissel Aff. ¶ 56 ("Given the religious ramifications of their request, this was not a decision I had authority to make on my own."). Nissel was merely a conduit, relaying the students' concerns and the administration's decisions between them. *See, e.g.*, *id*. ¶¶ 54 ("I was not personally involved in making the decision [to deny official recognition]."); ¶ 55 ("As Plaintiffs acknowledge at paragraph 43 of their complaint, I relayed to them that I 'needed to speak to more senior administrators.'"), ¶ 57 ("My only role was to communicate the decision to the students as it was conveyed to me."). Vice Provost Nissel has never taken any actions against Plaintiffs and, to the contrary, is well-known to be an ally and supporter of Yeshiva's LGBTQ community. He has attended LGBTQ events at Yeshiva in the past and continues to support various

LGBTQ initiatives on campus. Nissel Aff. ¶ 58-59, 63. Nissel has also written personal letters of recommendation for various members of the YU Pride Alliance and has continued to do so even after this lawsuit was filed. *Id.* ¶ 64.

In sum, Nissel has not taken any action against YU Pride Alliance and lacks the authority to do so. Because he did not have the authority to "den[y]" Plaintiffs their desired recognition, he therefore cannot be held liable under Counts I, II, or IV. *See* Complaint ¶¶ 145, 148, & 156. Similarly, Nissel cannot be held liable under Count III, which turns on him "communicat[ing] [his] intent to refuse, withhold from, and/or deny" Plaintiffs their desired recognition. *Id.* ¶ 152. The communication that Plaintiffs point to—Yeshiva's September 3, 2020 letter (*id.*)—is one that Nissel did not sign. Complaint at ¶ 98 (listing signatories); *see also* Nissel Aff. ¶¶ 53-56. Indeed, the fact that Yeshiva communicated this decision without Nissel at all confirms that he cannot be liable under Count III. Nissel is therefore well outside the NYCHRL's ambit. All causes of action against Nissel must be dismissed.

CONCLUSION

Applying the NYCHRL's public accommodation provisions against Yeshiva would not simply stretch the statute beyond its plain words and purpose. It would allow the government to intervene in all aspects of Yeshiva's application of its religious values, as well as its religious programming. Beyond sexual orientation, the public accommodation provisions also prohibit distinctions based on "creed" and "gender." Thus, if Yeshiva were deemed a public accommodation, any of its Torah-based actions—including its religious curriculum requirements, its sex-segregated campuses and classes, its efforts to maintain a kosher campus, and its observance of the Sabbath and Jewish holidays—would all be subject to challenge in the courts. Neither the NYCHRL nor the First Amendment permits this result. Both protect Yeshiva's right to control its internal religious affairs and shape its religious environment. The Court thus should dismiss Plaintiffs' case in its entirety.

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' Motion to Dismiss Complaint has 6888 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