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

YU PRIDE ALLIANCE, *et al.*,	Index No. 154010/2021
Plaintiffs,	(Kotler, J.)
v.	Motion Sequence No. 6
YESHIVA UNIVERSITY, *et al.*,	
Defendants.	

DEFENDANTS' SURREPLY IN FURTHER SUPPORT OF THEIR CONVERTED MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

Plaintiffs sued Yeshiva University as a "place of public accommodation" under the New York City Human Rights Law ("NYCHRL"). But the NYCHRL exempts corporations that are (1) "incorporated under the education law" and (2) "religious." After Yeshiva moved to dismiss on this ground, the Court converted the motion to one for summary judgment, stating it was "ripe" for adjudication. When Plaintiffs begged to first test the facts, the Court gave them time. Their plan failed, because discovery only underscored Yeshiva's exemption. It's indisputable that Yeshiva incorporated under the Education Law in 1967, and—as Plaintiffs put it most recently—"the University has a Jewish identity," one that is "deeply important to [its] *existence* and *activities*." (Emphases added.)

Trapped by their findings, Plaintiffs swapped theories. According to them, the facts are now irrelevant, as the Plaintiffs claim summary judgment for themselves as a matter of law. To plaintiffs, Yeshiva's religiosity can be ignored, because an organization is "religious" only if organized, or eligible to be organized, under the Religious Corporations Law (RCL). And since only houses of worship are eligible, Yeshiva is not exempt. It's a tidy theory. But it's nowhere in the NYCHRL, which exempts a religious corporation "incorporated under the education law ***or*** the religious corporations law," not one "incorporated, or eligible to be incorporated" under the RCL. Besides rendering the "education law" clause superfluous, Plaintiffs' theory would lead to absurd results: no separately incorporated religious school could ever be exempt, including Yeshiva's affiliated rabbinical seminary or hundreds of religious schools throughout the City.

Plaintiffs' other theories are equally untenable. Seeking to rewrite the statute's plain terms with legislative history, Plaintiffs insist that exempt religious corporations cannot be "public facing" or "large," and their charters must use the magic words "religious corporation." This is contrary to the ordinary meaning of the statute itself. That should end the case.

Even if the NYCHRL had no protection for religious corporations, the First Amendment does. Yet Plaintiffs' response to Yeshiva's First Amendment protections is as thin as the single sentence they devote to them. Among other things, the *Serio* case they rely on is on the ropes. The United

States Supreme Court has just ordered its reconsideration in light of *Fulton v City of Philadelphia*, a case holding 9-0 that a city's public-accommodations law could not be applied to a Catholic foster agency that, for religious reasons, could not provide foster-care certifications to same-sex couples. And even if *Serio* survives, it is inapposite.

Left with nothing else, Plaintiffs argue that, despite their own concessions of Yeshiva's "deeply important" religious identity, its Judaism is just a facade. This should not be taken seriously. Yeshiva is one of the nation's most overtly and thoroughly religious universities. The federal government knows it from Yeshiva's IRS 990. New York State and New York City know it when Yeshiva seeks their support. Students are told about it when they apply. Plaintiffs—current and former students—have admitted it. And national media touts it when discussing Yeshiva's accomplished men's basketball team. Yeshiva is a *Yeshiva*. If that is not a religious school, then there are no religious schools in New York City.

In short, the Court has been right all along: this case is "ripe for summary adjudication." And only one result can follow: Yeshiva is entitled to summary judgment.

ARGUMENT

I. Yeshiva is exempt from the NYCHRL's public accommodations provisions.

The NYCHRL exempts "distinctly private" organizations, and "a religious corporation incorporated under the education law" is "deemed" to meet that standard. (N.Y.C. Admin. Code § 8-102.) Here, it is undisputed Yeshiva is incorporated under the Education Law. And Plaintiffs have conceded what discovery confirmed: Yeshiva is religious. Summary judgment must follow.

A. Yeshiva is both "incorporated under the education law" and "religious."

Yeshiva's corporate documents show it incorporated under the Education Law in 1967. (Ex. A.)[1] That is undisputed. Thus, the only remaining question is whether Yeshiva is "religious." And Plaintiffs have conceded that point too. They acknowledge that "Judaism is deeply important to the University's existence and activities," (Doc. 229 at 11), and they chose to attend Yeshiva

[1] All cited exhibits accompany the Affirmation of Eric Baxter filed with this sur-reply.

specifically because it is a "religious community," (Doc. 23 ¶ 9), that would support their own "religious growth," (Doc. 25 ¶ 9.) On these concessions alone, the Court could grant summary judgment.

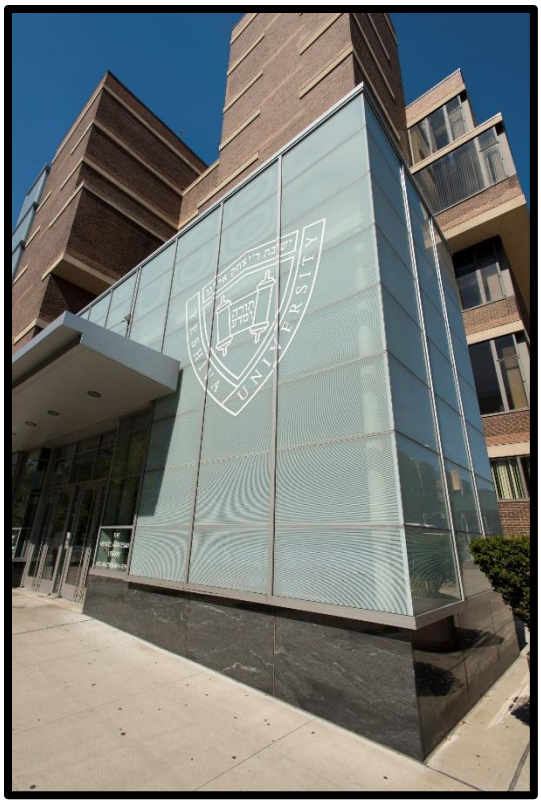
Moreover, the undisputed evidence from discovery compels the same result.[2] Whether a corporation is "religious" is determined by the "purpose for which it was organized" and its every-day "functions." (*Kittinger v Churchill*, 292 NYS 35, 41, 47 [Sup Ct, Erie County 1936].) These confirm that Yeshiva is deeply religious.

Plaintiffs do not dispute the overwhelming evidence of Yeshiva's obvious religious purpose. Yeshiva initially was formed as "The Rabbi Isaac Elchanan Theological Seminary Association" for a *purely* religious educational purpose: "to promote the study of Talmud and to assist in educating and preparing students of the Hebrew faith for the Hebrew Orthodox ministry." (Ex. B.) Over time, Yeshiva added secular degrees, changing its name first to "The Rabbi Isaac Elchanan Theological Seminary Association and Yeshiva College" in 1926, and then to "Yeshiva University" in 1945. Yeshiva never stopped "promot[ing] the study of Talmud" or "preparing students of the Hebrew faith for the Hebrew Orthodox ministry." (*See, e.g.*, Ex. C (Yeshiva's Rabbi President Berman: Yeshiva's "specific form and structure has shifted depending on times, needs and circumstances, but the core mission has always remained the same."); Ex. D 31:2-3 ("The mission of Yeshiva University has not changed.").)

[2] Plaintiffs' complaint that the testimony of Yeshiva's corporate representative is inadequate is baseless. *First*, Plaintiffs have repeatedly said "[t]here is no genuine dispute of material fact" remaining. (Doc. 272 at 5; *see also* Doc. 147 at 2-3 n 1 ("[T]he Court should resolve this question using traditional principles of statutory interpretation," with "little-to-no inquiry into Yeshiva's religious 'function.'").) *Second*, Plaintiffs spent the Yeshiva deposition—which they ended early—repeatedly asking questions about "the legal organization as a religious corporation under New York law." (Ex. D 127:22-24; *see also, e.g., id.* at 123:3-6, 124:5-6, 125:11-12, 126:14-24, 128:14-15, 129:15-21, 131, 132:3-7; 133:20-23, 136:7-11, 137:9-16, 155-156, 176:17-25, 178:18-21, 205-207; *id.* at 206:12-13 ("I feel like this question was asked like hours ago.").) There is no reason for additional fact discovery on the purely legal question of, as Plaintiffs' counsel put it, "how the law characterizes a corporation." (*Id.* at 129:3-4.)

Nor do Plaintiffs dispute that Yeshiva implements this religious mission in daily life. In everything it does, Yeshiva "operates with an understanding of [its] values," which "come from the Torah." (Ex. D 65:14-16; *see also* Doc. 71 at 2.) These values are embraced by the University's motto, Torah Umaddah (combining religious and secular studies), which is inscribed in Hebrew on the University's seal, along with the name of its affiliated rabbinic seminary.

To keep this mission at the forefront of university life, the seal is prominently displayed at the campus entrance and on virtually all public-facing materials. (*See Kroth v Congregation Chebra Ukadisha Bnai Israel Mikalwarie*, 430 NYS2d 786, 790 [Sup Ct, NY County 1980] (taking judicial notice of religious "inscriptions" on "the facade").)



Plaintiffs do not dispute that all undergraduates are strongly encouraged to begin their Yeshiva experience with intensive religious studies in Israel, with over 80% doing so for university credit. (Doc. 55 at 3; *see also* Ex. D at 26:14-15.) They do not dispute that all male students spend one to nearly six hours per day in Torah study, and all female students have religious instruction several hours a week. (*See id.* at 7:14-19; *see also* Ex. E; Ex. F.) Nor do Plaintiffs dispute that the Rabbi Isaac Elchanan Theological Seminary (RIETS) "sits on the same campus" as the undergraduate men's school, (Ex. D 60:13-14), or that "[t]hey don't really separate" undergraduates and seminary students for religious instruction in the *beit midrash* or "study hall," (*id.* 62:12-13) (pictured).

Plaintiffs further do not dispute that students living on campus agree "to live in accordance with halachic [Jewish law] norms and Torah ideals," or that Yeshiva complies fully with the laws of Shabbat and Kashrut in its undergraduate programs and encourages students to do the same. (Doc. 55 at 4; Ex. D 138:20–139:5 (students are "told … it's a religious campus, orthodox on campus, prayer, kashrut, [S]habbos"); Ex. G (elevators run automatically on Sabbath; provision prohibiting use of computers/electronics on Sabbath); Ex. H ("Shabbat Programming"); Ex. I (explaining to incoming undergrads that "[e]very week is a Shabbaton" on campus, with "[t]ailored programs").) Nor do they dispute that campuses, dorms, and prayers are sex-segregated consistent

with Torah law and tradition; that all campuses have synagogues; that all doors on campus have mezuzahs, even in administrative areas (pictured); that student government officers are charged to help "maintain the religious atmosphere on campus"; and that student activities are reviewed for religious compliance. (Doc. 71 at 2, 4-5, 10.)

Similarly, Yeshiva's faculty handbook describes "normal work hours" on Friday (the day Shabbat begins at sundown) as ending at 2:30 PM—while "normal" hours go to 5:30 every other weekday. (*See* Ex. J.) As the handbook also says, "Jewish holidays are observed, and offices will be closed, when the holiday falls on a workday." (Ex. K; *see also Yeshiva Undergraduate Academic Calendar Fall 2021*, available at https://perma.cc/LT7N-LHU5 (noting observance of Jewish religious holidays and fast days).)

Even undergraduate programs that are not explicitly religious rest on Torah values. Yeshiva's Sy Syms Real Estate Program is described as "following in Avraham's [Biblical Abraham's] footsteps." (Ex. L.) Throughout campus, there is a wide range of "spiritual guidance and programing" advertised to all undergraduates. (Ex. M (YU03004-YU03007).) "[E]ach" student has a *mashgiach ruchani,* or "spiritual advisor[ ]," some of which "are also faculty." (Ex. D 8:5-7, 11; *see also* Ex. N.) As the *Wall Street Journal* recently put it when profiling the Yeshiva men's basketball team (fittingly named the Maccabees), Yeshiva "began as a school primarily for Jewish studies" and sticks to its roots." (*See* Masada Siegel, *The Kippahs on the Yeshiva University Basketball Court,* WSJ, Nov. 26, 2021, available at https://perma.cc/KWB9-JDWA.)

Deans of Yeshiva's Undergraduate Torah Studies Program and the Sy Syms School of Business studying the Talmud during halftime of a Maccabees game.

Notably, Plaintiffs also do not dispute that, to its most salient public—future students and their families—Yeshiva is adamant regarding "what the campus life is really about." (Ex. D 138:22-139:3.) Students from its "feeder schools" are already "coming from generally Jewish religious background[s]." (*Id.* at 55:14-15.) Still, they are advised that while "[a]nyone is eligible to apply to Yeshiva University," they must be "willing and interested" in a rigorous religious education. (*Id.* at 138:22-139:3; *see also* Ex. M (YU03007).)

Indications of Yeshiva's religious character are found everywhere on campus. Spiritual guidance resources abound. (*See, e.g,* Ex. N (Beren Campus resources).) Yeshiva hosts a collection of "more than 10,000 artifacts reflecting 5,000 years of Jewish culture, art, and history from around

the world." (Ex. O.) There is "signage" throughout the dining halls indicating the "expect[ation]" of keeping kosher. (*See* Ex. D 77:17–78:2.) Campus garages are closed on the Jewish Sabbath and all Jewish holidays.

Under New York law, evaluating whether a corporation is "religious" requires "looking through the structure and determining what it actually is." (*Kittinger*, 292 NYS at 47.) Here, "view[ing] [Yeshiva] as it was intended to be, and actually is," (*id.* at 47-48), the undisputed, material facts establish what this Court already found: "Yeshiva University [is] an educational institution with a proud and rich Jewish heritage and a self-described mission to combine 'the spirit of Torah' with strong secular studies." (Doc. 115 at 1.) It is, therefore, a "religious corporation incorporated under the education law" exempt from the NYCHRL's public accommodations provisions. (N.Y.C. Admin. Code § 8-102.)

B. Plaintiffs' reading of the NYCHRL is untenable.

Because Plaintiffs do not—and cannot—dispute the overwhelming evidence of Yeshiva's religious character, they try rewriting the NYCHRL. Their reading pretends the language "under the Education Law" does not exist, ignores relevant case law, and distorts legislative history.

1. Plaintiffs' reading is atextual.

As this Court has held, "[Plaintiffs'] reading of the Administrative Code is contrary to the plain language of the statute." (Doc. 115 at 6.) Plaintiffs argue that Yeshiva could only be a "religious" corporation if it incorporated under the RCL. But this reading ignores the statutory text.

The NYCHRL unambiguously provides that a "religious" corporation qualifies if it is "incorporated under the education law ***or*** the religious corporation law." (N.Y.C. Admin. Code § 8-102 (emphasis added).) Plaintiffs' contrary reading violates basic interpretive principles, so it must be rejected—again. (*See Matter of Tonis v Bd. of Regents of Univ. of State of N.Y.*, 295 NY 286, 293 [1946] ("each word used" in a statutory enumeration must be understood "to express a distinct and different idea").)

If accepted, Plaintiffs' argument would produce absurd results. (Doc. 229 at 3-4.) On their theory, *no* separately-incorporated religious school in New York of any faith tradition—primary, secondary, college, or university—could ever be "religious" under the NYCHRL. Even RIETS—which trains and ordains rabbis—would be treated as a "public accommodation" because it is incorporated under the Education Law. This must be rejected. (*See, e.g.*, McKinney's Cons. Laws of N.Y., Book 1, Statutes § 145.)

Tellingly, Plaintiffs eventually concede that "[c]orporations incorporated under statutes other than the RCL"—such as the "Education Law"—"may be de facto 'religious corporations.'" (Doc. 229 at 5.) But then they argue this is possible "only if" that corporation can "satisfy" the RCL. (*Id.*) This argument is as defective as the first, as it also robs the phrase "under the education law" of any meaning and leads to the same absurd result.

Moreover, nothing in the NYCHRL supports Plaintiffs' RCL-only contention. None of Plaintiffs' cited cases construe the NYCHRL or suggest that a "religious corporation incorporated under the Education Law" *must* also qualify under the RCL—they state only that houses of worship incorporated under other laws *could* be subject to the RCL. (*See Temple-Ashram v Satyanandji* 84 AD3d 1158 [2d Dept 2011] (holding that RCL *could* be applied to Hindu Temple incorporated

under Not-For-Profit Law because it otherwise qualified); *Watt Samakki Dhammikaram, Inc. v Thenjitto*, 631 NYS2d 229, 231 [Sup Ct, Kings County 1995] (same for Buddhist Temple).)

New York cases confirm that religious corporations can incorporate under various statutes. Plaintiffs' lead case, *Matter of Watson*, itself held that the Young Men's Christian Association and a missionary organization—neither incorporated under the RCL—"were created for purposes so closely allied to religion that they may be *broadly classed* as religious corporations." (171 NY 256, 260 [1902] (emphasis added); *see also In re Moses*, 123 NYS 443, 446-447 [1910] (explaining how New York tax law was modified after *Watson* to confirm this reality).) Similarly, in *Matter of Lueken*, the court held that the "Not-For-Profit Corporation Law is intended as a general incorporating statute and clearly governs 'religious corporations.'" (97 Misc 2d 201, 203 [NY Sup Ct, Queens County 1978].) The Education Law, too, contemplates religious corporations independent of the RCL. It permits not-for-profit schools, via the Not-For-Profit Corporation Law, to possess "one or more" "educational" or "religious" purposes. (*See* N.Y. Not-for-Profit Corporation Law § 102 (3-b); N.Y. Educ. Law §§ 216-a(4), (5) (the Not-For-Profit Corporation Law governs education corporations where the Education Law is silent).) In fact, outside of a "clear and unavoidable conflict between the two statutes," it was the New York Legislature's "inten[t]" that "the Not-for-Profit Corporation Law," not the RCL, "would be controlling with respect to religious corporations." (*Rector, Church Wardens and Vestrymen of St. Bartholomew's Church v Committee to Preserve St. Bartholomew's Church, Inc.*, 84 AD2d 309, 314 [1st Dept 1982].)

Finally, and for similar reasons, Plaintiffs' suggestion that a corporation can only be religious if such purpose is clearly stated "in [its] governance documents," (Doc. 229 at 5), is unavailing. This argument rests on the mistaken assumption that a clearly-defined line exists between "religious" and "educational" purposes. But New York law has long rejected this parsing. (*See Rabbi Solomon Kluger Sch., Inc. v Town of Liberty*, 351 NYS2d 563, 566-567 [Sup Ct, Sullivan County 1974] ("the education and cultivation of the Jewish Religion" is a religious function); *In re Moses*, 123 NYS at 446-447 (religious association's work of "developing and cultivating the

various physical, intellectual, and moral faculties" was "[e]ducational").) As the U.S. Supreme Court recently said: "The religious education and formation of students is the very reason for the existence of most private religious schools." (*Our Lady of Guadalupe Sch. v Morrissey Berru*, 140 S Ct 2049, 2055 [2020].)

As for Yeshiva, its initial charter stated an *exclusively* religious purpose ("promote the study of Talmud"). (Ex. B.) And when Yeshiva "continued" as an Educational Corporation in 1967, the amended charter confirmed that it "*is and continues to be* organized and operated exclusively for educational purposes," indicating that the original religious education purposes carried through. (Ex. A (emphasis added).) Plaintiffs have no basis for concluding that Yeshiva's educational purposes are now exclusively secular.

Similarly, New York courts have long rejected any suggestion that a religious purpose must be apparent from specific words in a charter—or that a stated purpose is dispositive. In *Kittinger*, for example, the charter of a stock corporation "eliminated … any statements" showing religious intent. 292 NYS at 38. But the court held that the corporation was still, in its function, "a religious society," upholding the "actual intent of the incorporators." (*Id.* at 38, 48; *see also Kroth*, 430 NYS2d at 790 (identifying a religious corporation by "function," how "those in control" understood its purposes, religious "inscriptions" on the building's exterior, and the "subsequent history of … its function"); *In re Religious Corps. & Assns.—Divestment of Prop.*, 784 NYS2d 923 [Sup Ct, NY County 2003] (identifying religious corporation based on its "enabling legislation, corporate purposes and activities, position on this lawsuit," and "history").) The same is true under New York State's Human Rights Law. (*Scheiber v St. John's Univ.*, 84 NY2d 120, 126 [1994] (refusing to limit "status as a religious organization" to "only an entity organized pursuant to the Religious Corporations Law").)[3] Plaintiffs' attempt to reject this rule and impose a "magic word" test should be rejected.

[3] Plaintiffs' argument that the City's lawyers define "religious corporation" more narrowly under the NYCHRL is unavailing. (*See* Doc. 229 at 4 n.3 (discussing City's brief in *N.Y. State Club Assn., Inc. v City of N.Y.*, 487 US 1 [1988]); *see also* Doc. 249 (City's brief).) The thrust of the City's argument—and all the

2. Plaintiffs' reading upends the NYCHRL's legislative history and structure.

Plaintiffs' arguments regarding the NYCHRL's "legislative history" are also misguided. Their first argument—that "large" or "public facing" religious corporations cannot be exempt—is contradicted by the statute itself. The same sentence exempting religious corporations also exempts benevolent orders, many of which have thousands of members and many public-facing activities. (*See* N.Y. Benevolent Orders Law §§ 2, 7 (expressly including over 50 different benevolent orders with large memberships, including the Masons, the Knights of Columbus, the American Legion, and the Veterans of Foreign Wars).) Both religious corporations and benevolent orders are "*deemed* to be … distinctly private." (N.Y.C. Admin. Code § 8-102 (emphasis added); *accord Gifford v Guilderland Lodge*, 272 AD2d 721, 722-733 [4th Dept 2000] ("the exemption … is absolute and not subject to limitation").) Nothing about this sentence suggests a size or any other limit. Plaintiffs cannot credibly claim that a religious corporation like Yeshiva is "too large" to claim the exemption, when—in the very same sentence—much larger benevolent orders are exempted regardless of size.

Plaintiffs' second argument—that the NYCHRL did not intend to exclude "religiously-affiliated or identified entities"—also bears no resemblance to the text. (*See* Doc. 229 at 16.) Plaintiffs ignore that the statute gives religious institutions two layers of protection. First, the religious corporations mentioned in the definition of "public accommodation" (*i.e.*, those "incorporated under the education law or the religious corporation law") are deemed "distinctly private" and thereby categorically exempt. (N.Y.C. Admin. Code § 8-102.) Second, for other religious organizations, activities "calculated … to promote the religious principles for which [the organization] is established or maintained" are also exempt. (*See* N.Y.C. Admin. Code § 8-

U.S. Supreme Court later held—was that the RCL's existence gave the City a "rational basis" for the NYCHRL's public accommodations exclusion. (*See* 487 US at 16.) This does not mean that the RCL encompasses the universe of religious corporations. As the City said, that basis could be "imperfect" and still be rational. (*See* Doc. 249 at 18.) Moreover, the City also argued that exempting religious corporations from the NYCHRL's public accommodations provisions reflected the City's intention of being "quite sensitive to the constitutional issues raised by the legislation." (*Id.*) Just so here. *See infra* Part II (Yeshiva's First Amendment protections).

107(12).) Both exemptions protect Yeshiva. But more to the point, nothing about this statutory language—and nothing in the legislative history—supports cramping the NYCHRL's religious protections in line with Plaintiffs' semantics ("religious corporation" vs. "religiously-affiliated entity" vs. "religiously-identified entity" vs. "large religiously-affiliated corporations").

* * * *

As Plaintiffs themselves explain, the NYCHRL's "goal" was to "target" "clubs that refused to admit … traditionally excluded groups such as Jews." (Doc. 229 at 14.) When Yeshiva began, there were many "difficulties facing American Orthodox Jewry," including "mandatory Shabbos (Saturday) labor at the workplace, the assimilation of youth into secular American culture, and the lack of availability of Torah education." (*In re Religious Corps.*, 784 NYS2d at 923.) Yeshiva was founded—and exists today—to serve as a renowned home for Orthodox Jews who want to study Torah and use Torah values to engage the world. (*See, e.g.*, Rabbi Norman Lamm, *Torah Umadda* 28-31, 162-163 [3d ed. 2010].) It would be tragic if an institution that sustained Jews against discrimination, and had its growth fueled by Holocaust survivors, lost the freedom to remain Jewish—because of a statute intended to combat anti-Semitism. (*Cf.* W.E.B. Du Bois, Schools, 13 *The Crisis* 111, 112 [1917] ("We must rally to the defense of our schools. We must repudiate this unbearable assumption of the right to kill institutions unless they conform to one narrow standard.").)

C. Constitutional avoidance compels a ruling for Yeshiva.

The NYCHRL is clear. But even if there were ambiguity, the doctrine of constitutional avoidance would require the Court to interpret it to avoid "serious First Amendment questions." (*NLRB v Catholic Bishop of Chicago*, 440 US 490, 504 [1979]; *see infra* II (outlining First Amendment problems).) Unless there is "clear expression" to the contrary, the statute must be interpreted to avoid an unconstitutional result. (*Id.*) There is no such expression here. By contrast, Plaintiffs' construction would needlessly conjure a clear violation of First Amendment rights. This might explain why Plaintiffs prefer their own avoidance canon: avoid the Constitution. Their brief

gives the First Amendment just one sentence. The Court should take the hint. Plaintiffs have no response to the myriad First Amendment problems caused by their NYCHRL construction.

II. Plaintiffs' reading of the NYCHRL would violate the First Amendment.

Twisting the NYCHRL's religious exemption as Plaintiffs propose would make its public accommodation provisions unconstitutional. Citing the New York Court of Appeals' decision in *Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510 [2006], Plaintiffs' sole contrary argument is to blithely pronounce that the First Amendment does not apply to the NYCHRL. (Doc. 229 at 23.) Plaintiffs fail to mention that the U.S. Supreme Court recently ordered New York courts to reexamine (and likely overturn) *Serio* in light of *Fulton v Philadelphia*, 141 S Ct 1868 [2021]. (*See R.C. Diocese of Albany v Vullo*, 185 AD3d 11 [3d Dept 2020] (relying on *Serio* to reject religious organizations' First Amendment defenses to a New York state regulation), *and cert granted, judgment vacated sub nom. R.C. Diocese of Albany v Emami*, 142 S Ct 421 [2021] (ordering reconsideration).) A single sentence that clings to a case ordered for reconsideration by the U.S. Supreme Court is not an adequate response.

A. Plaintiffs' claims violate religious autonomy.

Under the religious autonomy doctrine,[4] the First Amendment guarantees religious schools like Yeshiva the right to "define their own doctrines, resolve their own disputes, and run their own institutions." (*Corp. of the Presiding Bishop v Amos*, 483 US 327, 341 [1987] (Brennan, J., concurring).) While "[t]his does not mean that religious institutions enjoy a general immunity from secular laws, … it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission." (*Our Lady*, 140 S Ct at 2060; *see also Kedroff v St. Nicholas Cathedral of Russian Orthodox Church*, 344 US 94, 119 [1952] (invalidating use of New York's Religious Corporations Law to override a religious decision).)

[4] Also known as "church autonomy," (*see, e.g.*, *Our Lady*, 140 S Ct at 2061), the doctrine applies not just to hierarchical church organizations but to "religious institutions" more generally, including religious schools. (*Id.* at 2055.)

Plaintiffs agree that the decision not to recognize their club was a decision concerning Yeshiva's internal religious affairs, made after lengthy deliberation by Yeshiva's *Roshei Yeshiva* concerning how to maintain a religious environment on campus consistent with Torah values. (*See, e.g.*, Doc. 1 ¶¶ 53, 58, 101, 110.) Under longstanding Supreme Court precedent, Yeshiva possesses the autonomy necessary to make this religious determination. (*See, e.g., Serbian E. Orthodox Diocese v Milivojevich*, 426 US 696, 729 [1976] (religious decisions "on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive").)

Even assuming it's still good law, *Serio* would not cabin Yeshiva's religious autonomy. There, the New York Court of Appeals held that church autonomy was "not at issue" because the Legislature, in requiring all employers to provide contraception coverage in healthcare plans, was "merely regulat[ing] one aspect of the relationship between plaintiffs and their employees" and had "not attempted … to 'lend its power to one or the other side in controversies over religious authority or dogma.'" (*Serio*, 7 NY3d at 524.) But here Plaintiffs' reading would subject *all* of Yeshiva's activities to the NYCHRL's public accommodation provisions and choose Plaintiffs' preferred "cultural changes" over Yeshiva's Torah values. (*See* Doc. 71 at 16-17.)

Moreover, post-*Serio*, the United States Supreme Court has repeatedly emphasized that religious autonomy is much broader than what *Serio* might suggest—any "government interference with an internal [religious] decision that affects the faith and mission" is prohibited. (*Hosanna-Tabor Evangelical Lutheran Church & Sch. v EEOC*, 565 US 171, 190 [2012]; *see also Our Lady*, 140 S Ct at 2060 ("[T]he Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion.") (cleaned up); *Kedroff*, 344 US at 116; N.Y.C. Admin. Code § 8-107(12) (providing statutory protection for internal religious affairs).) Because Yeshiva's decision indisputably concerned its internal religious affairs, religious autonomy prohibits the NYCHRL's application.

Plaintiffs' argument that religious autonomy extends no further than the ministerial exception, (Doc. 105 at 18), has also been directly refuted. (*Our Lady*, 140 S Ct at 2060-2061 (ministerial

exception just one "component" of broader religious autonomy, which is a "general principle" and not "exclusively concerned with the selection or supervision of clergy").)

B. Plaintiffs' claims violate the Free Exercise Clause.

If applied to Yeshiva, the NYCHRL's public accommodation provisions would also violate the Free Exercise Clause, because they are neither neutral to religion nor generally applicable. (*Fulton*, 141 S Ct at 1876.) Any law that categorically exempts certain secular organizations from its regulatory ambit, but does not do the same for religious organizations, is not generally applicable. (*See, e.g.*, *Tandon v Newsom*, 141 S Ct 1294, 1296 [2021].) This is true even if the law exempts *some* religious activity or organizations. (*Id.* at 1297.) A law is further not generally applicable if it contains a "formal mechanism for granting exceptions," even if no exemptions have yet been given. (*Fulton*, 141 S Ct at 1879.)

Here, a core part of Plaintiffs' (flawed) statutory argument is that the NYCHRL *does* make categorical exemptions—just not for religious universities like Yeshiva. (*See* Doc. 229 at 14-15 (the NYCHRL exempts "small private clubs, benevolent corporations, and religious corporations" but not all religious organizations).) Moreover, the NYCHRL expressly permits "the [Human Rights] commission" to "grant[ ] an exemption based on bona fide considerations of public policy" "with respect to … gender" based claims. (N.Y.C. Admin. Code § 8-107(4)(b).) So even if Plaintiffs' statutory arguments are right, under recent Supreme Court precedent, the NYCHRL is not neutral or generally applicable and is therefore subject to strict scrutiny. (*Fulton*, 141 S Ct at 1879.) And as previously explained, Plaintiffs' claims fail it. (*See* Doc. 71 at 16.) Indeed, as the *Fulton* court made clear, either the existence of undisputed exceptions or a system for creating exceptions "undermines the … contention that [a government's] non-discrimination policies can brook no departures," which is a requirement to satisfy strict scrutiny. (*Id.* at 1882.)

Moreover, *Fulton* explained that there is "incongruity in deeming a private religious [organization] a public accommodation" when it conducts "a customized and selective assessment that bears little resemblance to" traditional public accommodations. (*Id.* at 1880-1881.) This observation applies with full force here. Like the Catholic agency in *Fulton*, Yeshiva University

evaluates student clubs to ensure they conform to its Torah values before approval. (*See, e.g.*, Doc. 71 at 5-6.) Conflating that internal, religiously informed deliberation with the typical public accommodation has the same "incongruity."

C. Plaintiffs' claims violate the Free Speech and Assembly Clauses.

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].) And the Assembly Clause protects the freedom of private organizations, including religious organizations, to educate and form the next generation according to their particular tradition's religious vision. (*Our Lady*, 140 S Ct at 2055; *Thomas v Collins*, 323 US 516, 532 [1945].) Yet Plaintiffs seek to use the NYCHRL and this Court to force "cultural changes" both at Yeshiva and in the Orthodox Jewish community at large. (*See, e.g.*, Doc. 229 at 24.) The Free Speech and Assembly Clauses preclude such coercion. (Doc. 71 at 16-17.)

III. Yeshiva's religious identity has always been obvious.

Unable to refute the overwhelming evidence of Yeshiva's religious character, Plaintiffs try claiming it's all a facade. (Doc. 229 at 6 ("YU has never claimed to be a 'religious corporation' until this lawsuit.").) In support, Plaintiffs cherry-pick outdated and irrelevant material that has never been used to govern Yeshiva University. This is a fool's errand.

The record is replete with undisputed evidence that Yeshiva has always provided its undergraduate students with a rigorous religious education and maintained an undergraduate-campus environment that encourages religious belief and observance. *Supra* Part I. This includes Plaintiffs' concession that "Judaism is deeply important to the University's existence and activities." (Doc. 229 at 11.) And as one of Plaintiffs' own sources puts it, Yeshiva has "developed" "[m]echanisms" to ensure its "religious character would always be maintained." (Doc. 94 at 8 ("The Men and Women of Yeshiva").) Plaintiffs' contrary insinuations should be rejected.

A. Yeshiva's government forms confirm its religious mission.

Plaintiffs argue that, by identifying itself as an "educational institution" or a "not for profit" on certain government forms, or by representing that it would not use government funds for religious

purposes, Yeshiva has disavowed its religious identity. (Doc. 229 at 9-10.) This is wrong—and contradicted by undisputed evidence.

Specifically, Plaintiffs cite two government forms filled out by Yeshiva to suggest that its religious defenses are insincere. (*See* Doc. 229 at 8-10.) But the forms show no such thing. The first form Plaintiffs cite, the CHAR410 Schedule E, (*id.* at 9), instructs the responding party: "*Do **not** request exemptions that cannot be supported by the documentation required*." (*Id.*; *see also* Doc. 244 at 3.) For box 5, which Plaintiffs claim Yeshiva should have checked, the satisfactory documents include only (1) an official denominational directory such as the "Blue Directory" (a listing of Christian denominations with no Jewish equivalent); or (2) documents proving that the responding entity is "operated, supervised, or controlled by" another exempt organization. But Yeshiva is an independent Orthodox Jewish university that—unlike many Christian colleges—is not governed by a separate entity in the traditional sense. It would not, for example, show "control" in the same manner as a Christian college from a hierarchical tradition. (*See* Ex. D 115:16-17 ("Again, the word 'control' in Judaism is a hard word to document."); *see also* "*Halakhah*," Routledge Encyclopedia of Philosophy (E. Craig, ed.) [1998] (modern *Halakhah* Judaism is de-centralized, "where hardly any debate ends with an explicitly stated definitive conclusion").) America's legal traditions have long recognized every religion's freedom to employ "corporate powers" consistent with "their own religious duties." (*Terrett v Taylor*, 9 Cranch [13 US] 43, 49 [1815]; *see also Watson v Jones*, 13 Wall [80 US] 679, 726 [1871] (religious organizational structure "more or less intimately connected [to] religious views").) Here, Yeshiva had every right not to select box 5 because that box's options do not align with Yeshiva's religious structure. Instead, Yeshiva properly chose to rely upon its "educational institution" status.

The second form Plaintiffs highlight—a state Department of Homeland Security form (Doc. 229 at 10)—raises a similar issue. There Yeshiva chose to rely on its status as a "not for profit corporation," rather than identifying as "sectarian," a term that does not accurately describe any Jewish organization. (*See Mitchell v Helms*, 530 US 793, 828-829 [2000] (noting the historical association of the word "sectarian" with "Catholic"); Ex. D at 139:17-22; 172:20-173:3; 174:5-6;

194:7-13l.) Indeed, Yeshiva accepts students from all "different denominations of Jewish faith" and "anyone of any faith is eligible to apply," assuming they are sincerely open to Yeshiva's programs for religious formation. (*Id*. at 139:6-25.) Yeshiva objects to any suggestion that its own or any other branch of Judaism is properly considered a "sect."[5]

Plaintiffs also ignore the countless government filings where Yeshiva makes its religious nature explicitly clear. Take, for example, Yeshiva's IRS Form 990—the government filing most easily accessed by the public. Its Schedule O includes a detailed recitation of Yeshiva's core Torah values, (*see* Ex. Q), and goes on at length about Yeshiva's religious character:

> YESHIVA UNIVERSITY IS THE WORLD'S PREMIER JEWISH INSTITUTION FOR HIGHER EDUCATION. ROOTED IN JEWISH THOUGHT AND TRADITION, IT SITS AT THE EDUCATIONAL, SPIRITUAL AND INTELLECTUAL EPICENTER OF A ROBUST GLOBAL MOVEMENT THAT IS DEDICATED TO ADVANCING THE MORAL AND MATERIAL BETTERMENT OF THE JEWISH COMMUNITY AND BROADER SOCIETY, IN THE SERVICE OF GOD.

Other filings are likewise unequivocal. For example, Yeshiva sought $3.6 million in New York state funding to install security cameras in its pedestrian plaza, because "[g]iven the University's preeminence as a center of Jewish learning, it is a high profile terrorist target" for "extremists [who] rail against the very existence of the Jewish state and urge acts of violence against Jews and Jewish institutions." (Ex. R.) Yeshiva has also often discussed its religious nature in detail with New York City Council Members as it seeks government funding. (*See, e.g.*, Exs. S & T.) Yeshiva's applications to its accrediting agency are similar. For example, Yeshiva said its "serious, in-depth program in Torah Studies amounting to a second major" is "[m]ainly what distinguishes undergraduate education at YU." (Ex. U at 6.) Similarly, Yeshiva detailed its "Mazer Yeshiva Program, serving about 625 male undergraduates," which mostly consists of "traditional Talmud

[5] Plaintiffs have also discussed Yeshiva securing $90 million in DASNY bond financing. (Doc. 229 at 10.) But DASNY's restrictions do not prohibit aid to religious corporations. They only prohibited certain religious "use[s]." (Ex. P.) Yeshiva complied with those restrictions. (*See id.*) And in any case, those "restriction[s]," as the bond says, "shall not prohibit the free exercise of any religion." (*Id.*)

study," and leads "[m]any" participants to either further Jewish studies or to rabbinical ordination. (*Id*. at 10-11.) In sum, Yeshiva's public filings consistently affirm its religious nature.

B. Yeshiva's internal documents confirm its religious mission.

Plaintiffs' second attempt at arguing against Yeshiva's religious nature fares no better. They claim that a few documents, read in the worst possible light, suggest Yeshiva is faking its overtly public religious nature. Viewing these documents in context, that effort is defeated.

Plaintiffs first rely on a 1995 memo that discusses "gay student clubs" at "two *graduate* schools." (Doc. 234 at 2 (emphasis added).) But Plaintiffs ignore that this memo specifically disclaims its relevance to the undergraduate schools at issue here: "There are no gay clubs at any of YU's undergraduate schools, at its graduate schools in Jewish studies and Jewish education, or at its affiliated Rabbi Isaac Elchanan Theological Seminary." (*Id*.) This follows from Yeshiva's understanding of proper religious immersion and formation, as has already been explained. (*See, e.g.*, Doc. 55 at 13-14.) More importantly, Plaintiffs have not alleged, let alone identified any evidence, that Yeshiva ceased functioning as a religious corporation at the time of the memo.

Plaintiffs also highlight Yeshiva's corporate charter changes in 1967 and 1969. (Doc. 229 at 7-8.) But Yeshiva's corporate changes during that period actually confirm that Yeshiva's religious purposes, as the documents themselves say, "continued." *Supra* Part I.B.1. Yeshiva's corporate changes simply reflect—along with the many other charter amendments both before and after—its gradual progression from a religious membership corporation to a religious university. (*See* Ex. D 122-123.) Memorializing this change in Yeshiva's corporate charters in 1967 followed revisions to New York corporate law that generally required universities incorporated as membership corporations to reincorporate under the Education Law. (*See* 1963 N.Y. Laws 2406-2408 (enacted April 23, 1963); *see also* Doc. 71 at 4.)[6]

[6] Moreover, then-applicable case law suggested that governments could withhold public funds from "sectarian" schools. (*See, e.g., Comm. for Pub. Ed. & Relig. Lib. v Nyquist*, 413 US 756, 771 [1973].) The Supreme Court has now confirmed this rule violates the Free Exercise Clause. (*See Espinoza v Mont. Dept of Revenue*, 140 S Ct 2246 [2020]; *Trinity Lutheran Church of Columbia, Inc. v Comer*, 137 S Ct 2012 [2017].) Under current law then, New York's "sectarian" prohibitions cannot be justified. So even assuming

Nor do Plaintiffs get any mileage out of misconstruing language from Yeshiva's 1969 and 1967 petitions to the Board of Regents. (*See* Doc. 229 at 7.) The 1967 petition—by which Yeshiva "continued" from a membership corporation to an education corporation—did not suggest Yeshiva abandoned its religious purposes. It simply explained why its status *as a membership corporation* no longer made sense: "in light of the degree granting divisions and schools comprising the University," the "membership association" that originally formed the Rabbi Isaac Elchanan Seminary had "long ceased to function as an association or as part of the University." (Doc. 228 at 4.) The emphasis was on the dissolution of the membership association, not the seminary itself. Indeed, the very next paragraph expressly states that "the Rabbi Isaac Elchanan Theological Seminary continued as an affiliate of the University." (*Id.*) But rather than remaining a member-driven organization, the seminary by 1967 had become a division of the broader University, operated by Yeshiva's corporate leadership within Yeshiva's corporate structure.

Yeshiva's related request in the 1969 petition to drop some degrees was also consistent with Yeshiva's identity as a religious corporation. The degrees it sought to drop were degrees in Hebrew literature and religious education, which had been authorized by the Board under the heading of "Religious Education." (Doc. 238 at 5). The petition merely states there was low demand for the degrees and students chose to pursue similar courses of study under other degree programs. (*Id.*)[7]

* * * *

Plaintiffs' attempt to show Yeshiva is no longer religious rests on randomly selected forms and obscure memoranda—all construed without the context that Plaintiffs concede: "Judaism is deeply important to the University's existence and activities." (Doc. 229 at 11.) New York law has long

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Plaintiffs' theory—that Yeshiva structured itself to highlight its robust secular education—is correct, Yeshiva cannot be faulted for protecting its students' rights to receive government funding against unconstitutional funding restrictions.

[7] Contrary to Plaintiffs' suggestion that Yeshiva's Board is not religious, Yeshiva's Board operates "like many things in Judaism"—by tradition. (Ex. D 45:16-17.) The Board "officially operates" by "a tradition" of ensuring new members are committed to Yeshiva's Jewish mission. (*See id.* at 45:16-20; *see also id.* at 40:8-12.) In addition to the Board, overseeing this tradition of *halakah* Judaism at Yeshiva are the "*Roshei Yeshiva*," or senior rabbis, who are "very large influencers on campus" with "hundreds of students" learning Torah from them annually. (*Id.* at 60:22-61:3; *see also id.* at 65:14-17.)

refused to "suffer" pedantic formalism over "view[ing] the association as it was intended to be, and actually is." (*Kittinger*, 292 NYS at 47-48.) The Court should do the same here.

CONCLUSION

For all the foregoing reasons, Yeshiva's converted motion for summary judgment should be granted, Plaintiffs' cross-motion for summary judgment should be denied, and the case should be dismissed.

Date: January 20, 2022

Respectfully submitted,

THE BECKET FUND
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CERTIFICATION

Pursuant to the Court's December 9, 2021 Order limiting the parties' surreply papers to 7,000 words (Doc. 179), undersigned counsel hereby certifies that the above *Surreply in Further Support of Defendants' Converted Motion for Summary Judgment* has 6,868 words including picture captions and pictured text, but exclusive of the brief 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).

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