SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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YU PRIDE ALLIANCE, et al.,

Plaintiffs,

Index No.: 154010/2021
Kotler, J.

-against-

YESHIVA UNIVERSITY, et al.,

Defendants.
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PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Defendants' motion to dismiss Plaintiffs' complaint, with the exception of an inapt argument to dismiss Defendant Vice Provost Nissel, treads the same flawed ground as their opposition to Plaintiffs' preliminary injunction motion. Defendants concede that the complaint adequately alleges that Defendants Yeshiva University ("YU") and President Berman refused to recognize Plaintiffs' LGBTQ student organization because of sexual orientation and gender. Defendants also do not dispute that Section 8-107(4) of the New York City Human Rights Law ("NYCHRL") prohibits educational institutions from denying students equal access to "facilities, accommodations, advantages or privileges of any kind" because they are members of a protected class.

Instead, Defendants stake their entire motion on the theory that YU is not a place or provider of public accommodation, but is instead a "religious corporation" exempt from the NYCHRL. Defendants' argument fails on every level. First, Plaintiffs allege sufficient facts in their detailed, 31-page, 156-paragraph complaint to establish that YU—a private educational institution incorporated under the New York Education Law for 50 years—*is* a provider of public accommodation for purposes of stating a cognizable discrimination claim under Section 8-107(4). This ends the inquiry at the motion-to-dismiss stage. Second, it is well-settled that whether an entity is a public accommodation is a question of fact, not amenable to resolution on a motion to dismiss. Third, Defendants fail to carry their burden to establish conclusively as a matter of law that YU is a "religious corporation," which New York law defines as a place of worship or religious observance. Yeshiva is a large research university with 3,000 undergraduates; it is not a private place of worship. YU supports its claim to be a "religious corporation" by listing the various ways that Judaism is a part of life at YU. Plaintiffs do not dispute this. Plaintiffs and Defendants agree that YU's Jewish character is to be celebrated. But

YU remains a public accommodation, subject to the same laws as other educational institutions offering undergraduate degrees to college students and training them to enter myriad professional and employment fields in New York City and beyond.

At this early stage of the litigation, the Court must accept as true all facts alleged in the complaint regarding YU's status as a public accommodation, draw all reasonable inferences in Plaintiffs' favor, and grant Defendants' motion only if they conclusively establish their defense that YU is a "religious corporation" as a matter of law. Defendants cannot meet this heavy burden. Plaintiffs have adequately alleged that YU is an educational institution covered by the public accommodation protections of the NYCHRL, and that YU has improperly denied Plaintiffs equal access to its advantages and facilities because of sexual orientation and gender, thereby stating a cognizable cause of action. Defendants' motion to dismiss must be denied.

I. FACTS

Plaintiffs are the YU Pride Alliance, the University's unofficial student group for LGBTQ students and their allies, and current and former YU student members of the group. ¶¶ 1, 8-12.[1] YU has repeatedly refused to recognize the Pride Alliance as an official student organization because the University does not want an LGBTQ student group to operate on campus with the same privileges and advantages as other student groups. ¶¶ 2, 41-116.

YU recognizes 116 undergraduate student clubs that reflect the vast interests of its student body—spanning categories such as "Art," "Business," "Health and Wellness," "Sports and Fitness," and "Politics and Activism." ¶¶ 26-27. Defendants have denied Plaintiffs access to numerous advantages, services, facilities, and privileges that YU provides to these 116 recognized groups. ¶ 140. Plaintiffs may not hold meetings on campus and must travel off-

[1] All references to "¶ __" refer to the Complaint, Dkt. 1.

campus for meetings; they receive no funding and have had to fundraise from outside sources; they are not listed on YU's student group list; and they are not invited to the annual club fairs for new students. ¶ 120.

Yeshiva's unequal treatment has harmed Plaintiffs significantly. Without a club, Plaintiffs have been deprived a safe space to create a community of people facing these same challenges and experiences as LGBTQ Jewish individuals at YU, causing feelings of fear, isolation, and rejection. *Id*. They have also been deprived of the ability to access formal organizational spaces that facilitate student success by enabling students to develop leadership, civic engagement skills, and peer mentoring networks. ¶ 123.

II. LEGAL STANDARD

"On a CPLR 3211 motion to dismiss, the court will 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Nonnon v. City of New York*, 9 N.Y.3d 825, 827 (2007) (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994)). Where the complaint, so construed in Plaintiffs' favor, establishes a cognizable cause of action, a motion to dismiss under CPLR 3211(a)(7) based on documentary evidence submitted by Defendants "will seldom if ever warrant the relief the defendant seeks unless such evidence conclusively establishes that plaintiff has no cause of action." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 134 (1st Dep't 2014) (cleaned up) (quoting *Rovello v. Orogino Realty Co.*, 40 N.Y.2d 633, 636 (1976)).

A motion under CPLR 3211(a)(1) asserting that an action is barred by documentary evidence faces a similarly high bar and may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002).

III. PLAINTIFFS HAVE SUFFICIENTLY PLEADED THAT YU IS A PUBLIC ACCOMMODATION UNDER SECTION 8-102 OF THE NYCHRL

Plaintiffs allege that YU is a private educational institution, a category which the NYCHRL has recognized as a place or provider of public accommodation for 30 years. In 1991, the City Council established that "[t]he term 'place or provider of public accommodation' would now include both public and private educational institutions." Report of the Committee on General Welfare on Local Law 39, Section-by-Section Analysis, at 4 (1991) ("Local Law 39 Committee Report"), http://www.antibiaslaw.com/sites/default/files/all/LL39Committee Report.pdf. This covers *all* educational institutions, including "colleges, universities," and "all other educational facilities." N.Y.C. Admin. Code § 8-102. This expansion of the NYCHRL was based on the City's "independent and overriding interest in routing out discrimination from its schools." Local Law 39 Committee Report at 4.

Plaintiffs allege the following facts which establish that YU is an educational institution and therefore a public accommodation covered by Section 8-102 of the NYCHRL:

- YU is a private research university in New York City that enrolls more than 3,000 undergraduate students and "offer[s] a unique dual curriculum comprising Jewish studies and liberal arts and sciences courses." ¶ 1.
- YU has been registered with the New York State Department of State's Division of Corporations as a domestic not-for-profit corporation, subject to the New York Education Law, since December 15, 1969. ¶¶ 13, 20.
- Fifty years ago, YU elected to register as a non-sectarian corporation to benefit from government funding unavailable to entities organized as religious corporations. Since then, it has received hundreds of millions of dollars in New York State funds and benefits. ¶ 5.
- YU has obtained millions of dollars in tax-exempt bond financing through the Dormitory Authority of the State of New York ("DASNY"). In 2011, YU issued a $90 million bond through the DASNY. DASNY prohibits bond issuers from using these funds for a religious purpose. ¶ 23.
- YU describes itself as "the country's oldest and most comprehensive institution combining Jewish scholarship with academic excellence and achievement in the

liberal arts and sciences, medicine, law, business, social work, psychology, Jewish studies, education, and research." ¶ 24.

- YU's official "Non-Discrimination and Anti-Harassment Policy & Complaint Procedures" document recognizes as unlawful and prohibits discrimination "based on . . . sex . . . sexual orientation, [and] gender identity and expression." ¶ 127.

- YU's "Undergraduate Student Bill of Rights and Responsibilities" states that "[s]tudents who are otherwise qualified have the right to participate fully in the University community without discrimination as defined by federal, state, and local law," claiming no exemption from the NYCHRL. ¶ 129.

- The same document includes provisions that allow students to "organize and join clubs and participate in events in all cases in accordance with applicable rules and procedures." ¶ 129; *see also* ¶¶ 131-41.

Taken together, these detailed allegations establish that YU is a private educational institution that meets the definition of a public accommodation under Section 8-102, easily meeting the threshold of stating a "cognizable legal theory." *Nonnon*, 9 N.Y.3d at 827.

IV. DEFENDANTS FAIL TO CARRY THEIR HEAVY BURDEN AT THE MOTION TO DISMISS STAGE

Defendants cannot overcome Plaintiffs' well-pleaded allegations that YU is a public accommodation under the NYCHRL. Defendants neither utterly refute these allegations nor establish conclusively as a matter of law that YU is an exempt "religious corporation," as CPLR 3211(a)(1) and (a)(7) require for them to establish a defense through documentary evidence at the motion to dismiss stage.

A. Defendants Identify No Document Conclusively Establishing That They Are a Religious Corporation Exempt from Section 8-102

Defendants' motion to dismiss on the grounds that they are an exempt "religious corporation" fails for a simple reason: none of the documents they submit with their motion refute the complaint's allegations that YU is a public accommodation, or conclusively establish that YU is "a religious corporation incorporated under the education law or the religious corporation law that is deemed to be in its nature distinctly private" and therefore exempt from

the NYCHRL's definition of a public accommodation. *See* N.Y.C. Admin. Code § 8-102.

Instead, the documents confirm the complaint's allegations that YU is an educational institution covered by Section 8-102. They are:

- Articles of Incorporation and Charter Amendments establishing YU's status as an "educational corporation under the Education Law" since 1969. Dkt. 73 at 15; *accord* ¶¶ 13, 20.

- YU's DASNY bond financing, which states the funds "shall not be used for sectarian religious instruction or as a place of religious worship or in connection with any part of a program of a school or department of divinity of any religious denomination." Dkt. 75 at 108; *accord* ¶ 23.

- Affidavits from Defendants Berman and Nissel, which state ways that Judaism is a part of life at YU but do not speak to its corporate status. Dkts. 77, 83.[2]

- An Employee Handbook that includes a message from former President Richard Joel calling YU "one of North America's premier centers of academic achievement." Dkt. 78 at 3.

- YU's 2016-2020 Strategic Plan that sets forth five primary strategic goals focused on advancing YU's academics, professional development, research, and community engagement. Dkt. 79 at 2.

- The "Mission and History" section of YU's website, which states YU's "commitment to academic excellence in Jewish and secular studies." Dkt. 80 at 3; *accord* ¶ 1.

- Undergraduate Student Council Constitutions that set forth the rules for recognition of student clubs. Dkts. 81-82.

Unable to "utterly refute" the allegations in the complaint or "conclusively establish[] [their] defense as a matter of law," *Goshen*, 98 N.Y.2d at 326, Defendants cannot prevail.

[2] In any event, "[a]ffidavits are not documentary evidence and are not appropriate proof on a CPLR 3211(a)(1) motion to dismiss." *Johnson v. Asberry*, 190 A.D.3d 491, 492 (1st Dep't 2021).

B. Defendants Ask the Court to Decide a Question of Fact Not Amenable to Resolution on a Motion to Dismiss

Lacking conclusive evidence of their status as a religious corporation, Defendants ask the Court to conduct a fact-laden, "function-based" analysis to determine whether YU is a public accommodation. Dkt. 71 at 9-14. This request ignores the First Department's clear teaching that "the question of whether a facility is such a place or provider of public accommodation is ordinarily an issue of fact that cannot be determined on a motion to dismiss." *Carmelengo v. Phoenix Houses of N.Y., Inc.*, 54 A.D.3d 652, 652 (1st Dep't 2008). Indeed, courts engage in rigorous factual analysis to determine whether an organization is a public accommodation. *Matter of U.S. Power Squadrons v. State Human Rights Appeal Bd*., 59 N.Y.2d 401, 412-13 (1983) (to determine whether a boating organization was a "distinctly private" entity or a covered place of public accommodation, factfinder analyzed multiple issues about its practices and operations); *see also Matter of Castle Hill Beach Club v. Arbury*, 2 N.Y.2d 596, 604 (1957) (beach club is a public accommodation because patrons "were not limited to any geographical area" or by "occupational category," "age group," or "social or economic status"). The First Department's guidance that "whether a facility is such a place or provider of public accommodation is ordinarily an issue of fact" is particularly well-taken here, since Plaintiffs' well-pleaded complaint states a cognizable cause of action, and there is no need for the Court to engage in further fact-finding at this time.

C. YU Is Not a "Religious Corporation" Under Section 8-102

Given its fact-intensive nature, a decision on the merits of whether YU is a public accommodation would therefore convert Defendants' motion to dismiss into a motion for summary judgment under CPLR 3211(c). *See* Siegel N.Y. Prac. § 265 (6th ed. June 2021).

Defendants have not requested this treatment from the Court.[3] Even if the Court is nonetheless inclined to reach this issue, YU's proffered evidence fails to establish—much less conclusively—that it is an exempt religious corporation under Section 8-102. Defendants' proposed "religious character" test has no basis in law, and were the Court to apply it, YU would still not qualify as a religious corporation on the evidence submitted.

1. NYCHRL Exemptions Are Narrowly Construed

As an educational institution, YU is covered by the NYCHRL's public accommodations provision, which was "designed as a law enforcement tool with no tolerance for discrimination in public life." Committee Report of the Governmental Affairs Division, Proposed Introductory Bill No. 805-A (March 8, 2016). Consistent with that broad purpose, the NYCHRL provides exemptions to its public accommodations law for *only* "distinctly private" clubs, which include certain small clubs and "religious corporation[s] incorporated under the education law or religious corporation law." N.Y.C. Admin. Code § 8-102.

The language "distinctly private" is intentionally narrow. *Kiwanis Club of Great Neck, Inc. v Bd. of Trustees of Kiwanis Int'l*, 52 A.D.2d 906, 914 n.5 (2d Dep't 1976) (discussing statute's inclusion of word "distinctly" in definition of "private" clubs).

The NYCHRL specifically instructs courts that "[e]xceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct." N.Y.C. Admin. Code § 8-130(b). Courts must construe the NYCHRL

[3] As the Court is aware, before the Court converts a CPLR 3211(a) motion into a summary judgment motion, it must give "adequate notice to the parties." CPLR 3211(c); *Kelly Masonry Corp. v. Presbyterian Hosp. in City of N.Y.*, 160 A.D.2d 192, 193 (1st Dep't 1990). If the Court wishes to decide the merits of YU's status as a public accommodation, a question of fact, Plaintiffs are entitled to receive notice in order to give them an opportunity to respond to Defendants' documentary evidence with their own evidence.

"broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Bennett v. Health Mgmt. Sys., Inc*., 92 A.D.3d 29, 34 (1st Dep't 2011) (cleaned up). Thus, the Court must evaluate YU's claim for an exemption within (1) the statute's command that it be interpreted expansively to prevent discrimination; (2) the law's express rule of narrow construction of exemptions; and (3) the plain language of Section 8-102 that the exemption only applies to a "distinctly private" club or like entity. The burden of proving this exemption applies lies squarely with the party seeking it. *D'Amico v. Commodities Exch., Inc.*, 235 A.D.2d 313, 315 (1st Dep't 1997). YU not only fails this burden, it never even mentions the statutory framework.

2. YU Is Not Organized as a "Religious Corporation"

YU attempts to style itself as an exempt "religious corporation" to avoid the mandates of the NYCHRL. But YU concedes it is not organized under New York law as a "religious corporation." YU is an educational institution and is legally organized accordingly. Dkt. 73 at 15 ("[YU] is hereby continued as an educational corporation under the Education Law."). YU's claim that it is an exempt religious corporation, although not legally organized as such under New York law, fails.

3. Even Adopting YU's "Functional" Approach, YU Is Not Exempt

YU wrongly urges the Court to exempt it as a "religious corporation" (although it is not one) and adopt a novel "religious character" test. Dkt. 71 at 9-11. YU then claims to be an exempt "religious organization"—a category that does not exist in the NYCHRL's public accommodation law. Even applying YU's invented test, however, YU is still not exempt.

YU's purpose is not to serve as a "religious corporation" under the Religious Corporations Law ("RCL"). YU is a large research university, not a place of worship or religious observance. Section 8-102(11)'s exemption for "religious corporations" refers to

houses of worship, as defined in the RCL, N.Y. Relig. Corp. Law § 2 (defining a "religious corporation" as a "corporation created for religious purposes"). The purpose of a "religious corporation" is "to meet for divine worship or other religious observances." *Id.*

The structure of the RCL confirms that a "religious corporation" refers specifically to meeting places for worship and religious observance. The overwhelming majority of the law (Articles 3-24) describes rules specific to the incorporation of "churches" associated with various denominations and religions. *Id.* §§ 40-489. The law's provisions for Jewish religious corporations refer to "Jewish congregation[s]," *e.g.*, *id.* §§ 195, 207, i.e., "a group of people who have come together in a religious building for worship or prayer."[4] That is not YU.

The New York Court of Appeals has held that the term "religious corporation" means places of worship only: "Section 2 of the Religious Corporations Law defines a religious corporation to be a corporation organized for religious purposes. We are not much the wiser for this definition, but an examination of the statute shows that its provisions are devoted to the organization and government of the various denominational churches." *In re Watson's Estate*, 171 N.Y. 256, 259-64 (1902). The vague "religious purpose" test proposed by Defendants, untethered to any definition of what actually constitutes a religious corporation, ignores the clear meaning of the term in the RCL.

Defendants wrongly suggest that YU is an exempt "religious corporation under the education law." YU is not organized as a religious corporation under any law. Even if the Court were to analyze whether YU qualified as a "religious corporation under the education law"—a term Defendants do not attempt to even define—the analysis would still compel the conclusion that YU is not one.

[4] https://dictionary.cambridge.org/us/dictionary/english/congregation.

First, despite staking their entire opposition on a claimed exemption under Section 8-102, Defendants overlook that the Supreme Court examined Section 8-102's exemption in *New York State Club Ass'n, Inc. v. City* of *New York.*, 487 U.S. 1 (1988) ("*NYSCA III*") and recognized that the meaning of "religious corporation" in Section 8-102 is found in the RCL—and not the Education Law. *Id.* at 16–17 ("New York State law indicates" that "religious corporations are unique" because they receive "special treatment" under a "separate body of legislation."); *N.Y. State Club Ass'n v. City of N.Y.*, 118 A.D.2d 392, 395 (1st Dep't 1986) ("It is not without significance that religious corporations are subject to a distinct body of law, the Religious Corporations Law."); *see also* Nancy Kornblum, *Redefining the Private Club*, 36 Wash. U. J. Urb. & Contemp. L. 249, 251 n.15 (1989) (*NYSCA III* "cited N.Y. Relig. Corp. Law § 2, which defines religious corporations as those created for purposes of group worship or religious observance").

Second, although the Education Law does not define the term "religious corporation," its definition of a "religious or denominational educational institution"—its closest analogue to "religious corporation"— accords with the RCL and does *not* include YU. *See* Educ. Law § 313(2)(b) ("[A]n educational institution which is operated, supervised or controlled by a religious or denominational organization and which has certified to the state commissioner of education that it is a religious or denominational educational institution.").

YU is not operated or controlled by a house of worship, nor is it registered with the Commissioner of Education as a religious institution. YU has no claim that it is a "religious corporation under the education law" under Section 8-102.

Defendants' cases confirm YU is not a religious corporation. Defendants' sparse case law examines small religious entities incorporated under statutes other than the RCL and

concludes they are religious corporations *because* their purpose is to be places of worship or religious observance. *Watt Samakki Dhammikaram, Inc. v. Thenjitto*, 631 N.Y.S.2d 229, 231 (Sup. Ct. Kings Cnty. 1995) ("temple/residence" that "advance[s] the religious interests and serve[s] the Cambodian and Buddhist population in Brooklyn" is a religious corporation); *Kroth v. Congregation Kadisha, Sons of Israel*, 105 Misc. 2d 904, 911 (Sup. Ct. N.Y. Cnty. 1980) (synagogue incorporated as a mutual benefit society is de facto religious corporation because it "acted exclusively as a synagogue" and "trustees[] held it out to be a religious corporation"); *Kittinger v. Churchill*, 292 N.Y.S. 35, 46-47 (Sup. Ct. Erie Cnty. 1936) (stock corporation formed for sole purpose of facilitating Reverend engaging in "evangelistic work" is religious corporation).[5] Unlike these entities, YU is not a house of worship. *None* of these cases concerns a corporation incorporated under the education law, let alone one remotely comparable to a large research university like YU.

YU's separation from RIETS illustrates that YU is not a religious corporation. YU argues that it was "compelled" by changes to New York Law for "membership corporations" to re-organize as an educational corporation in 1969, implying that, but for this statutory change, YU would exist as a "religious corporation." YU has its facts wrong. YU's own documents make clear that it re-organized itself in 1969 to formally separate RIETS, the religious seminary,

[5] Defendants' citation to *Jing Zhang v. Jenzabar, Inc.*, No. 12 Civ. 2988, 2015 WL 1475793 (E.D.N.Y. Mar. 30, 2015) is inapposite— *Jing Zhang* interprets Section 8-107(12) and does not even mention Section 8-102. *Id.* at *9-11. Defendants do not argue for a Section 8-107(12) exemption and acknowledge it does not apply in the public accommodations context. Dkt. 71 at 8. Because Section 8-107(12) applies to housing, employment, and admissions only, it uses very different language than Section 8-102 to define exempt institutions. Rather than exempting "religious corporations," it exempts "religious or denominational institution[s] or organization[s] or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization." N.Y.C. Admin. Code § 8-107(12).

from YU, which now awards only secular degrees. *See* Dkt. 73 at 13 ("deleting [YU's] authorization" to award six degrees in "Hebrew Literature" and "religious education"); *Id.* at 14 (establishing RIETS under separate charter to award same six degrees). Indeed, the Charter Amendment establishing YU as a separate corporation does not mention religion except to state that religion should play *no role* in its governance: "[p]ersons of every religious denomination shall be equally eligible to offices and appointments" at YU. *Id.* at 15, ¶ 8.

Back in 1995, YU's lawyers advised YU in the clearest possible terms that the argument it urges today in this motion was baseless: "The attorneys firmly believe that that YU would not qualify for a religious exemption, based on its charter and its actions over the course of decades, including representations that have been made concerning the University's legal status as a nondenominational institution." Dkt. 6 at 4.

4. The NYCHRL's Legislative History Confirms It Covers YU

The NYCHRL's public accommodations protections are intentionally broad: they ensure equal access to "advantages or privileges of any kind" where "extended, offered, sold or otherwise made available." N.Y.C. Admin. Code § 8-102(11). As part of full participation in campus life, YU extends and makes available to student organizations many significant "advantages" and "privileges," including use of campus space, advertising, funding, and participation in student fairs. The statute's purpose is only effectuated by the Alliance's inclusion.

Section 8-102 protects professional development opportunities. The City Council expanded the NYCHRL's public accommodations protections to "eliminate discrimination in clubs that are not distinctly private" based on its "compelling interest in providing its citizens . . . a fair and equal opportunity to participate in the business and professional life of the city" so that they "may be unfettered in availing themselves of employment opportunities." Local Law 63 at

1 (1984); *see also NYSCA III*, 487 U.S. at 16 ("The City Council [] limited the Law's coverage to large clubs and excluded smaller clubs, benevolent orders, and religious corporations because the latter associations have not been identified in testimony before the Council as places where business activity is prevalent." (cleaned up)).

YU prepares students for professional life. YU's 2016-2020 Strategic Plan, submitted by Defendants, demonstrates that preparing students for professional life is essential to YU's mission: "YU prides itself on preparing students for success in the lives they lead and the careers they build." Dkt. 79 at 4. It establishes as its first "Strategic Priority" to "Enhance Student Success and Wellbeing—Academic, Professional and Personal," and implement this priority by "[c]reat[ing] individualized and integrated academic . . . and career/professional programs." *Id.* at 2-4. Exempting YU from the NYCHRL's public accommodations provision would flout the City Council's intent to ensure historically marginalized groups have access to equal educational and professional opportunities, and to target segregation and subordination within the market and public life.

YU's statutory reading would eviscerate the NYCHRL. YU's suggestion that a large university educating thousands of students can "self-exempt" from the NYCHRL's public accommodations protections by claiming to be a "religious corporation," although not organized as such and not a place of worship, would gut those protections. The statute *has* an exemption related to the religious mission of an organization in Section 8-107(12), which allows limited "religiously motivated discrimination exclusively" in housing, employment, and admissions. Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 St. Louis Univ. L.J. 531, 655-56 (2016). This religious exemption, generally understood to permit preferences in favor of co-religionists, stands in "contrast" to Section 8-102, which permits no

such exemption for "religiously motivated discrimination." *Id.* No parallel exemption exists in the NYCHRL's public accommodations provision. If the legislature had intended to allow a broad "religiously motivated" discrimination exemption in the public accommodations section, it knew how to create one. But it did not.

5. Defendants' Rejection of a Fraternity and Gaming Clubs Is Nothing Like Their Rejection of the Pride Alliance

Defendants' rejection of the AEPi fraternity and gaming and gambling clubs, which they claim are "consistent" with their rejection of the Pride Alliance, Dkt. 71 at 6, in fact draw a stark contrast that reveals their discrimination against Plaintiffs. Defendants rejected the fraternity and gaming clubs because of the clubs' *conduct*—"fraternity life" (partying) and "gaming" that did not accord with the YU's values. Dkt. 77 ¶¶ 43-44. Here, however, Defendants do not articulate any objection to the Pride Alliance's proposed conduct—hosting speakers and building a safe space for students to meet and support each other. ¶¶ 43, 45, 94. They object instead to the sexual orientation and gender identity of its members and mission.

6. The Constitutional Avoidance Canon Has No Role Here

Defendants' invocation of the constitutional avoidance canon—another legal concept they fail to define—to argue that the Court should interpret Section 8-102 to exempt them from the definition of a public accommodation to avoid constitutional issues, Dkt. 71 at 7, is entirely misplaced. The canon "is a tool for choosing between competing plausible interpretations of a statutory text" where one interpretation "raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). But, as set forth above, Defendants' interpretation that YU is a "religious corporation" under Section 8-102(11) is not a plausible one. And, as set forth below, requiring Defendants to comply with the law raises no constitutional doubts—much less serious ones.

V. YU HAS NO FIRST AMENDMENT RIGHT TO CONTINUE TO VIOLATE THE NYCHRL

The Court must apply rational basis review to Defendants' First Amendment arguments, under which a city law is presumptively constitutional unless "the city could not reasonably believe" that the law furthered a legitimate government interest. *NYSCA III*, 487 U.S. at 16 (applying rational basis review to constitutional challenge to Section 8-102). The test applies to each of Defendants' cursory First Amendment challenges, whether facial or as applied. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019).

Defendants' claim that the NYCHRL's anti-discrimination provisions generally violate the Free Exercise Clause fails. In the case of a Free Exercise challenge, a law is valid when it is neutral and generally applicable. *Emp. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 878 (1990). Because the NYCHRL is a neutral law of general applicability, it cannot violate the Free Exercise Clause unless there is no rational basis for the statute. Here, the rational basis is clear. The NYCHRL prohibits discrimination based on protected characteristics, such as gender and sexual orientation, in places of public accommodation, to promote full participation in public life and the economy for all New Yorkers. "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Cath. Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 521 (2006) (quoting *Smith*, 494 U.S. at 879). The NYCHRL is such a law; it is valid and applicable to Defendants.[6]

[6] Defendants erroneously claim strict scrutiny applies to their Free Exercise challenge rather than rational basis. Perplexingly, Defendants claim Section 8-102's exemption for "distinctly

Under the applicable standard, a party "can only succeed in a facial challenge by establishing that no set of circumstances exists under which the [law] would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (cleaned up). Of course, that is not the case here. Far from unconstitutional in all applications, the Supreme Court has already held that at least one of the challenged exemptions is valid. *See NYSCA III*, 487 U.S. at 16 (Section 8-102 valid as written).

Defendants' remaining First Amendment arguments all fail.

First, recognizing a student club is not compelled speech for YU. As a major university preparing students for professional, business, and public life, YU provides a range of privileges and advantages to its students, including resources for student organizations based on common interests. Defendants do not claim that recognizing any of these organizations commits them to being "instrument[s] for fostering public adherence to an ideological point of view." Dkt. 71 at 16. Nor could they. The Supreme Court has cited approvingly to its decision in *NYSCA III* that the NYCHRL "compelled access to the benefit [of membership in a private club and] did not trespass on the organization's message itself." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 580 (1995). Here too, equal treatment of the Pride Alliance to YU's 100+ other clubs does not imply YU's approval of any particular club's point of view.

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private" clubs—including religious corporations—and Section 8-107(12)'s protection of religious principles violate the Free Exercise Clause by favoring secular activity, even as both provisions protect *religious* activity. *See* Dkt. 71 at 15-16. Unlike *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), where California limited religious gatherings more strictly than secular gatherings, the NYCHRL is *less* restrictive towards religious corporations—it exempts religious corporations from compliance with certain provisions that govern secular institutions. N.Y.C. Admin. Code §§ 8-102, 8-107(12). Defendants have no Free Exercise claim, and strict scrutiny does not apply.

Defendants' only other "free speech" argument is a convoluted complaint that Plaintiff Meisels expressed in an interview that she hoped an LGBTQ club would foster a more inclusive YU. Plaintiff Meisels' comments to a reporter are irrelevant to YU's legal obligation to recognize the Pride Alliance under the NYCHRL—and whether that recognition ultimately creates "cultural change" at YU does not affect that obligation.

Second, Defendants' free assembly rights are not implicated here. Defendants do not identify any legal basis for their assertion that refusing to recognize a student club violates YU's constitutionally protected right of assembly. Defendants cite *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020) and *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972)—neither case even references the Assembly Clause, much less establishes a right under it to deny students equal access to a university's benefits. Defendants' claim that Plaintiffs are attempting to "turn" YU "toward Plaintiffs' preferred religious message," Dkt. 71 at 17, is not only incorrect, it is also entirely unrelated to Defendants' right to assemble.

Finally, Defendants' offhand invocation of the "religious autonomy" case law has no application here. The United States Constitution does not prove an independent right to "religious autonomy." Rather, as Defendants' cited cases show, the Supreme Court has recognized that a "ministerial exception" applies to protect religious institutions from employment discrimination claims based on an employee's non-adherence to the employer's religion. *See, e.g.*, *Our Lady*, 140 S. Ct. at 2060. This protection is not implicated by Plaintiffs' claims.

VI. PLAINTIFFS ALLEGE SUFFICIENT FACTS TO STATE A CLAIM THAT DEFENDANT NISSEL IS LIABLE TO PLAINTIFFS

Plaintiffs have sufficiently alleged that Defendant Nissel is individually liable to Plaintiffs for his violation of Sections 8-107(4)(a)(1) and (2).

A. Plaintiffs Allege That Defendant Nissel Denied Recognition of the YU Pride Alliance and Its Predecessor in Violation of Section 8-107(4)(a)(1).

Plaintiffs allege that Defendant Nissel is an agent and employee of Yeshiva University, a provider of public accommodation under Section 8-102. ¶¶ 13, 14 (Nissel "has been employed as the Vice Provost of Student Affairs from August 2020 to the present," "was previously employed as the University Dean of Students from 2012 to August 2020," and is also "the University's Title IX Coordinator."). As such, he is subject to the provisions of Section 8-107(4).

Plaintiffs further allege that on at least two occasions, Nissel refused, withheld from, or denied Plaintiffs the full and equal enjoyment, on equal terms and conditions, of the accommodations, advantages, services, facilities, and privileges available to Yeshiva University students. Specifically, Plaintiffs allege that, in or around late February 2019, Defendant Nissel denied the formation of an LGBTQ club. ¶ 50 (Nissel "verbally informed Plaintiff Miller that an LGBTQ club would not be allowed to form, stating, in sum and substance, that while a club addressing general student tolerance on campus would be allowed, a club specifically addressing LGBTQ inclusion would not.") Plaintiffs further allege that one year later, Defendant Nissel withheld approval of the YU Pride Alliance's club application until it was too late for the club to be approved. ¶¶ 90-91. Plaintiffs allege that on each occasion, Nissel's decision was based on Plaintiffs' real or perceived gender identity or sexual orientation. ¶ 117. Thus, Nissel's conduct—as pled in the Complaint—constitutes impermissible denials of equal access to a public accommodation under Section 8-107(4)(a)(1). ¶¶ 145, 148, 152, 156.

Nissel's affidavit in support of Defendants' motion, which attempts to distance Nissel from his own decisions, is entitled to no weight at this stage. Factual affidavits by a defendant generally may not be considered on a motion to dismiss under CPLR 3211(a)(1) or (7). *Johnson*,

190 A.D.3d at 492 ("Affidavits are not documentary evidence and are not appropriate proof on a CPLR 3211(a)(1) motion to dismiss); *Basis Yield Alpha Fund (Master)*, 115 A.D.3d at 134 (documentary evidence "seldom if ever" considered on CPLR 3211(a)(7) motion "unless such evidence conclusively establishes that plaintiff has no cause of action" (cleaned up)); *see also Miglino v. Bally Total Fitness of Greater New York, Inc*., 20 N.Y.3d 342, 351 (2013) (declining to consider party affidavits at the motion-to-dismiss stage).

Even if the Court converts Defendants' CPLR 3211(a) motion to a motion for summary judgment under CPLR 3211(c) for the purpose of considering Nissel's affidavit, *Rovello*, 40 N.Y.2d at 636 (requiring conversion of motion from CPLR 3211(a) to CPLR 3211(c) to consider defendants' affidavit), the affidavit *supports* Plaintiffs' allegation that Nissel denied approval of the YU Pride Alliance. Nissel admits that his responsibilities include "overseeing Yeshiva's Office of Student life, which manages all student clubs," Nissel Aff. ¶ 28, and that he and the Director of Student Life "discuss the approval" of proposed clubs that raise "especially complex issues." *Id.* ¶ 37. Plaintiffs allege that precisely such a discussion occurred in February 2020 prior to when Nissel withheld approval of the YU Pride Alliance. ¶¶ 90-91. Tellingly, Nissel's affidavit is silent on this exercise of his oversight of the YU Pride Alliance's club application. Plaintiffs have alleged more than sufficient facts to state a claim against Nissel under Section 8-107(4)(a)(1) for his ongoing role in refusing and withholding official recognition from the YU Pride Alliance.

If the Court nonetheless finds that the Complaint alleges insufficient facts to state a claim that Defendant Nissel committed discrimination in violation of Section 8-107(4)(a)(1), Plaintiffs respectfully request the Court's leave to amend the Complaint to cure any perceived deficiencies and to state a separate cause of action against Defendant Nissel for aiding and abetting in

Defendant Yeshiva University's denial of a public accommodation to Plaintiffs pursuant to N.Y.C. Admin. Code § 8-107(6). *See Artis v. Random House, Inc*., 34 Misc. 3d 858, 868 (Sup. Ct. N.Y. Cnty. 2011) (separate Section 8-107(6) aiding and abetting claim against defendants who "excused and acquiesced in the racial and sexual harassment of plaintiff").

B. Plaintiffs Allege That Defendant Nissel Repeatedly Stated to Plaintiffs that YU Pride Alliance and Its Predecessor Club Would Not Be Officially Recognized

In addition to repeatedly denying Plaintiffs' requests to form an LGBTQ club, Plaintiffs allege that Defendant Nissel further violated Section 8-107(4)(a)(2) by stating to Plaintiffs and at least one other YU student that Defendants had denied, and would continue to deny, official recognition to an LGBTQ club.

Under Subsection (a)(2), Defendant Nissel may not "make any declaration" that the "accommodations, advantages, facilities and privileges of" Yeshiva University "shall be refused, withheld from or denied to any person on account of . . . gender [or] sexual orientation." N.Y.C. Admin. Code § 8-107(4)(a)(2)(a). Plaintiffs allege that Defendant Nissel declared on multiple occasions that YU would not permit an LGBTQ club because of its LGBTQ status. *See* ¶ 50 ("Defendant Nissel verbally informed Plaintiff Miller that an LGBTQ club would not be allowed to form . . . :"), ¶¶ 90-91 (Nissel refused to give YU Pride Alliance a timely answer on club approval, constructively denying the club), ¶ 112 (Nissel informed a YU student that YU had decided not to approve the YU Pride Alliance). Indeed, Nissel stated in his own affidavit that his role "was to communicate the decisions to the students." Nissel Aff. ¶ 57. Plaintiffs allege a cognizable cause of action that Nissel repeatedly declared that an LGBTQ student organization could not receive formal recognition from YU, in violation of Section 8-107(4)(a)(2).

C. Nissel's Purported Lack of Authority Is Irrelevant

Defendant Nissel now claims that he "lacked authority" to approve the YU Pride Alliance. Defendant Nissel's statement is incredible because he is and was a highly senior administrator at YU, acting as Vice Provost or Dean at all applicable times. In any event, Section 8-107(4) does not require that an agent or employee have any particular "authority" or "decision-making" power to be liable for discrimination in withholding or denying equal access to a public accommodation, and Defendants cite no cases for this proposition. The statute states simply that:

> It shall be an unlawful discriminatory practice for any person who is the . . . agent or employee of any or provider of public accommodation: (1) Because of any person's actual or perceived . . . gender . . . sexual orientation . . . directly or indirectly: (a) To refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation.

Here, Plaintiffs allege that Nissel repeatedly refused and withheld official recognition of an LGBTQ student club, because of Plaintiffs' actual or perceived gender or sexual orientation.

None of Defendants' citations are to the contrary. In each cited case, all of which examine employment discrimination claims, the court looked to a defendant employee's supervisory responsibilities (or lack thereof) to determine the employee's liability to a co-employee for employment discrimination. *See Palmer v. Cook*, Index No. 718697/2018, 2019 WL 3686889, at *4 (Sup. Ct. Queens Cnty. Aug. 5, 2019) ("NYCHRL extends liability to co-employees under limited circumstances . . . for an employer's discriminatory practices" against another employee, per established multi-part test determining imputed liability on employment discrimination claims); *Priore v. New York Yankees*, 307 A.D.2d 67, 74 (2003) ("[Section 8-107(1)(a)] includes fellow employees under the tent of liability, but only where they act . . . in

some agency or supervisory capacity."); *Mitra v. State Bank of India*, No. 03 Civ. 6331, 2005 WL 2143144, at *3 (S.D.N.Y. Sept. 6, 2005).

These cases interpreting New York State and City employment discrimination provisions have no bearing on the individual liability of an agent or employee of a provider of a *public accommodation* under Section 8-107(4). Plaintiffs squarely alleges that Defendant Nissel violated these obligations through his conduct alleged in the Complaint. Acting as Vice Provost and Dean, he repeatedly withheld official recognition from the YU Pride Alliance, and publicly stated that the YU Pride Alliance would not be recognized because of its LGBTQ status.

Defendants' motion should be denied in its entirety.

Date: June 17, 2021
New York, NY

Respectfully Submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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YU PRIDE ALLIANCE, et al.,

Index No.: 154010/2021

Plaintiffs,

-against-

YESHIVA UNIVERSITY, et al.,

Defendants.
---------- X

CERTIFICATION

Pursuant to Rule 202-8-b(c) of the Uniform Civil Rules for the Supreme Court, undersigned counsel hereby certifies that the above Plaintiffs' Memorandum of Law in Further Support of Preliminary Injunction has 6,992 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).

Date: June 17, 2021
New York, NY

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