

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

YU PRIDE ALLIANCE, *et al.*,

Plaintiffs-Respondents,

v.

YESHIVA UNIVERSITY, *et al.*,

Defendants-Appellants.

Docket No.: 2022-02726

New York County

Index No.: 154010/2021

**NOTICE OF MOTION FOR
LEAVE TO APPEAL TO THE
COURT OF APPEALS**

COUNSELORS:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Eric S. Baxter, Esq., dated the 13th day of January, 2023, and upon all the pleadings and proceedings heretofore had and held herein, the undersigned, on behalf of Defendants-Appellants, YESHIVA UNIVERSITY and PRESIDENT ARI BERMAN (collectively, Yeshiva), will move this Court located at 27 Madison Avenue, New York, NY, 10010, on the 6th day of February, 2023 at 10:00 AM, or as soon thereafter as counsel can be heard, for an Order, pursuant to CPLR 5602(b)(1), Rule 1250.16(d) of the Appellate Division's Practice Rules, and this Court's inherent powers, granting Appellants' motion for leave to appeal to the New York Court of Appeals the Decision and Order of the Appellate Division, First Department dated December 15, 2022 ("Order") and certifying the following question: Was the opinion and order of this Court properly made?

Pursuant to CPLR 2214(b) Defendants demand that any answer affidavits with supporting papers, if any be served no later than January 30, 2023.

Dated: January 13, 2023
Washington, D.C.

To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of this paper and the contentions herein are not frivolous as that term is defined in Part 130 of the Court Rules.

Respectfully,

THE BECKET FUND FOR RELIGIOUS LIBERTY



By: Eric S. Baxter, Esq.

Attorneys for Defendant

YESHIVA UNIVERSITY

PRESIDENT ARI BERMAN

1919 Pennsylvania Ave NW, Suite 400

Washington, D.C. 20006

202-349-7221

To: EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP
Attorneys for Plaintiffs
600 Fifth Avenue, 10th Floor
New York, NY 10020
krosenfeld@ecbawm.com
Phone: (212) 763-5000
Fax: (212) 763-5001

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

YU PRIDE ALLIANCE, *et al.*,

Plaintiffs-Respondents,

v.

YESHIVA UNIVERSITY, *et al.*,

Defendants-Appellants.

Docket No.: 2022-02726

New York County

Index No.: 154010/2021

**AFFIRMATION
IN SUPPORT**

I, ERIC S. BAXTER, an attorney admitted *pro hac vice* to practice law for this matter in the State of New York, hereby affirm the following to be true under the penalties of perjury:

1. I am an attorney with the law firm The Becket Fund for Religious Liberty, counsel for defendants YESHIVA UNIVERSITY and PRESIDENT ARI BERMAN (collectively “Yeshiva”), and I am fully familiar with the facts and circumstances of this matter.

2. This affirmation is submitted in support of Yeshiva’s notice of motion pursuant to CPLR 5602(b)(1) for leave to appeal this Court’s December 15, 2022 (“Order”) to the New York Court of Appeals.

3. Following discovery, on June 24, 2022, the trial court entered an order denying Yeshiva’s motion for summary judgment, granted Plaintiffs’ cross-motion for summary judgment, and issued an order enjoining Yeshiva to “immediately” recognize Plaintiff YU Pride Alliance as an official campus club. (Ex. A.)¹ This ran directly contrary to Yeshiva’s religious determination, made in consultation with its senior rabbis, that granting official recognition would not be consistent with Yeshiva’s Torah values. A copy of the trial court’s order is attached as (Exhibit A (trial court order).)

¹ All page numbers referenced for Exhibit A pertain to pdf-generated page numbers.

4. Yeshiva appealed the injunction to this court (Exhibit B.) Yeshiva's appeal was perfected on August 8, 2022.

5. While its appeal was pending, Yeshiva sought a stay of the trial court's injunction. When no viable path appeared available to obtain that relief in the New York courts, Yeshiva sought emergency relief in the United States Supreme Court.

6. On September 15, 2022, a majority of five Justices held that Yeshiva still had two options "for expedited or interim state court relief." (Ex. C at 1.) In its opinion, the U.S. Supreme Court concluded that "[i]f applicants seek and receive neither expedited review nor interim relief from the New York courts, they may return" to the Supreme Court for a stay. (Ex. C at 1-2.) Four Justices dissented because they would have granted Yeshiva immediate relief. (*Id.* at 2-6) The dissenting Justices further stated that "if Yeshiva's First Amendment arguments are rejected on appeal," the Court is "likely to vote to grant certiorari," and "Yeshiva would likely win." (*Id.* at 3-4.)

7. Following the U.S. Supreme Court's decision, the First Department granted Yeshiva's application to expedite its motion for reargument. (Ex. D.) The parties then stipulated to stay the injunction pending conclusion of the lawsuit. (Ex. E.) Based on the parties' consent, the Court then entered an order granting Yeshiva's motion for a stay. (Ex. F.)

8. On the merits appeal, on December 15, 2022, this Court affirmed the trial court's injunction. (Ex. G.) Defendants now seek leave to appeal directly to the Court of Appeals.

9. Under Rule 1250.16(d)(1), this motion is timely. It is being filed on January 17, 2023. Thirty days after the Appellate Division's December 15, 2022 order was Saturday, January 14. January 17 was the next business day. Rule 1250.1(c)(5). The undersigned provided notice to Plaintiffs' counsel, Katherine Rosenfeld, Esq., consistent with CPLR 2214(b) and CPLR 2103(a)(b)(7). Plaintiffs' counsel indicated they oppose this motion.

10. This Court should grant the motion. "[L]eaveworthy cases are ones in which 'the issues are novel or of public importance, present a conflict with prior decisions of [the New York Court of Appeals], or involve a conflict among the departments of the Appellate Division.'" (*Matter of*

City of New York v 2305-07 Third Ave., LLC, 142 AD3d 69, 75 [1st Dept 2016] (quoting 22 NYCRR 500.22(b)(4)).) This case satisfies each requirement.

11. It involves three novel state law issues. This is the first case to ever determine what it means under the New York City Human Rights Law (“NYCHRL”) to be a “religious corporation incorporated under the education law.” (Administrative Code § 8-102.) It is also the first case to interpret the scope of that law’s “religious principles” exception. (Administrative Code § 8-107(12).) And it is the first case to explain how these NYCHRL provisions must be construed in light of the First Amendment.

12. Further, this case involves issues of significant public importance—both to Yeshiva and to every religious school nationwide. Four U.S. Supreme Court Justices—enough to grant certiorari—have said that “[a]t least four of us are likely to vote to grant certiorari if Yeshiva’s First Amendment arguments are rejected on appeal, and Yeshiva would likely win if its case came before us.” (Ex. C at 3.) But this Court disagreed with each of the Justices’ conclusions. This Court held that “providing the Pride Alliance with full and equal access to public accommodations does not intrude on Yeshiva’s asserted right ‘to decide matters of faith and doctrine.’” (Ex. G at 6.) But four U.S. Supreme Court Justices said the Court would grant review and likely hold the opposite: “requir[ing] [Yeshiva] to recognize the Alliance as an official student group and to grant it all the privileges extended to other such groups” would be a “loss of First Amendment rights.” (Ex. C at 4.) By itself, this dispute confirms that Yeshiva’s constitutional claims merit Court of Appeals review—Yeshiva “need not prevail on the merits [in this Court] to support an appeal on constitutional grounds.” (See Clerk’s Office, N.Y. Court of Appeals, *The New York Court of Appeals Civil Jurisdiction and Practice Outline*, at 4-5 [2020], 2-3 (2011), <https://perma.cc/33D5-WH43> (“Substantiality”).) The importance of Yeshiva’s constitutional claims—both for its ability to maintain its own religious identity, and for the countless religious institutions watching this case worldwide—merit leave to appeal to the Court of Appeals. (Cf. Docket Page at U.S. Supreme Court, *Yeshiva University, et al. v. YU Pride Alliance, et al.*, No. 22A184, [3](https://perma.cc/H8GU-</p></div><div data-bbox=)

9TAB (12 *amicus* briefs filed in support of Yeshiva University, including from Chief Rabbis around the world, law professors, myriad religious schools, colleges, and universities).)

13. Moreover, this Court’s opinion is inconsistent with Court of Appeals precedent. The Court of Appeals has held that “even if [the NYCHRL’s] legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation, the NYCHRL must be interpreted based on its plain meaning.” (*Makinen v City of New York*, 30 NY3d 81, 88 [2017] (cleaned up).) But here, this Court replaced the NYCHRL’s plain terms (“religious corporation incorporated under the education law”) a “control” requirement from different terms in a different statute. (*See* Ex. G at 4 (evaluating instead whether Yeshiva is a “[r]eligious or denominational educational institution” under the Education Law).) The result of that importation is to deny decentralized and non-hierarchical religious traditions—like Judaism—any protection under the NYCHRL. (*See* Dkt. 67 at 4 (Brief of Agudath Israel stating that “Jewish schools across New York City” “are incorporated as educational institutions”). By its plain terms, the NYCHRL does not require this result. What’s more, this result creates another First Amendment problem: “denominational favoritism” that protects hierarchical, but not freestanding, institutions.

14. Further still, this Court’s decision created a split with the Third Department. The Third Department has held that “the amendment deeming religious corporations and benevolent orders to be ‘distinctly private’” “is absolute and not subject to limitation.” (*Gifford v Guilderland Lodge*, 707 NYS2d 722, 722-723 [3d Dept 2000].) But here, this Court held that “the exemption for benevolent orders [does not] affect the general applicability of the City HRL” to Yeshiva. (Ex. E at 7.)

15. Finally, granting immediate leave to appeal will service judicial economy. Yeshiva will appeal this Court’s ruling after damages are assessed. Forcing Yeshiva to proceed with the indignity of damages discovery—especially as Plaintiffs are seeking punitive damages against Yeshiva for asserting its religious liberty (Rec 76)— would create further First Amendment problems and additional U.S. Supreme Court review. (*See NLRB v Catholic Bishop of Chi.*, 440 US 490, 502 [1979] (“It is not only the conclusions” a civil court reaches that may “impinge on

rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions”).) By granting leave to appeal now, the statutory and constitutional defenses can be reviewed on appeal before the constitutionality of the proposed discovery has to be broached.

16. For all these reasons, the Court should grant leave to appeal.

ARGUMENT

17. In reaching its ruling, this Court made five legal conclusions of first impression that are of significant public importance and/or in conflict with the Court of Appeals or other Departments of the Appellate Division. Each of these legal conclusions thus warrants immediate review by the Court of Appeals.

I. Statutory Exemption – Religious Corporation

18. The interpretation of the NYCHRL’s religious corporation exemption presents a question of first impression—and on a statute considered to show New York’s “traditional leadership in civil rights.” (*See* Comm. On Gen. Welfare, *The Council Report of the Governmental Affairs Div.* at 2, [Aug. 17, 2005] quoting Mayor David Dinkins, available at <https://perma.cc/TD7U-AJYK>.)

19. The NYCHRL statutorily “deem[s]” a “religious corporation incorporated under the education law” distinctly private and not a public accommodation. (Administrative Law § 108-2.) The City Council thus plainly intended to exempt religious institutions of higher education, consistent with requirements of the First Amendment. (*See also* Brief for Appellees in *New York State Club Assn., Inc. v City of New York*, 108 S Ct 2225 [1986], available at 1988 WL 1026276, at *36-37 (“an association organized for religious . . . purposes could have a more serious claim of ‘expressive association’ than the typical downtown businessmen’s club.”).) Before this lawsuit, no court has had opportunity to define “a religious corporation incorporated under the education law.”

20. This Court’s interpretation introduces a new requirement: that the religious school be “operated, supervised or controlled by a religious or denominational organization” and be certified as such to the State Education Commissioner. (Ex. G at 4 (cleaned up).) This interpretation protects

some religious educational institutions, but not others, solely based on how they structure their religious decision-making.

21. Even if that definition applied, Yeshiva should have prevailed. It is undisputed that Yeshiva—at minimum—is “supervised” by its *Roshei Yeshiva*, or “Senior Rabbis,” who are world-renown religious authorities on Jewish law. (Ex. G at 5 (“assuming that religious officials at RIETS exercise some influence over Yeshiva”).) Although informally organized, they qualify as a “religious or denominational organization.” As the U.S. Court of Appeals for the Ninth Circuit recently concluded about a nearly identical religious exemption in the federal Title IX: “Although the statute does not define the term ‘religious organization’ or address whether it must be legally separate from the ‘educational institution’ it controls, the ordinary meaning of ‘organization’ is broad enough to encompass an entity that is wholly contained within another entity.” (*Maxon v Fuller Theol. Seminary*, 2021 WL 5882035, at *1 [9th Cir Dec. 13, 2021, No. 20-56156].)

22. This Court’s contrary conclusion raises a new First Amendment violation. Now, no religious school based in a tradition that lacks a hierarchical structure—including Judaism, most sects of Islam, and many protestant denominations—has an exemption from the NYCHRL’s public accommodations provisions.

23. This result means the NYCHRL permits denominational favoritism. But “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” (*Larson v Valente*, 456 US 228, 244 [1982].) “Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would ... raise serious concerns about state entanglement with religion and denominational favoritism.” (*Carson v Makin*, 142 S Ct 1987, 2001 [2022] (citations omitted).) A conclusion that the NYCHRL treats religious institutions differently based solely on their structure is alone a reason to grant leave to appeal.

24. In short, no court has directly interpreted the NYCHRL’s exemption for religious corporations incorporated under the education law. And this Court’s ruling re-roots the NYCHRL

in denominational favoritism. An issue of such public importance—and in conflict with the Court of Appeals and the Third Department—warrants leave to appeal.

II. Statutory Exemption – Religious Principles

25. Similarly, this case presents the first opportunity to interpret the NYCHRL’s religious principles exemption, which also carries profound public importance.

26. The NYCHRL expressly allows both “*any* religious . . . organization,” and separately, “any organization operated for charitable or educational purposes . . . by *or in connection with* a religious organization” to “mak[e] such selection as is calculated by [the] organization to promote the religious principles for which it is established or maintained.” (Administrative Code § 8-107(12) (emphases added).)

27. Yeshiva is “any religious organization.” Indeed, it is one of the world’s foremost institutions, attested to by Chief Rabbis around the world. (*See* amicus brief of international Chief Rabbis in *Yeshiva University v YU Pride All.*, No. 22A184 (SCOTUS Sept. 2, 2022); *see also supra* ¶ 12 (U.S. Supreme Court amicus briefs).) Its secular studies are intertwined with religious values. As Supreme Court said, “Yeshiva has an inherent and integral religious character which defines it and sets it apart from other schools and universities of higher education.” (Rec 15.) What’s more, Yeshiva is also an “organization operated for . . . educational purposes” that is “connect[ed] with a religious organization.” (Ex. G. at 5 (“assuming that religious officials at RIETS exercise some influence over Yeshiva”); *see also* Br. 2-9; 24-30 (detailing religious nature and integration with RIETS).) Nor is there any dispute that Yeshiva’s club review process is “such selection as is calculated . . . to promote the religious principles for which [Yeshiva] is established or maintained.” (*See* Rec 92, 100, 1751-1752.)

28. This Court nonetheless concluded that this “religious principles” exception (Administrative Code § 8-107(12)) is only applicable to “to employment, housing, and student admissions.” (Ex. G at 5.) This conclusion came even as the NYCHRL protects the “religious principles” exception with separate provision, allowing for “such selection as is calculated . . . to promote the religious principles for which [the organization] is established or maintained.” (*Id.*)

29. For two reasons, this Court’s decision is an issue of “public importance” and thus merits leave to appeal. (*Matter of City of New York*, 142 AD3d at 75; *supra* ¶ 12 (U.S. Supreme Court amicus support).)

30. First, section 8-107(12) serves a key function in the NYCHRL. This section recognizes that “any religious . . . organization,” even if otherwise subject to the NYCHRL, may make decisions and selections that are intended to promote its religious principles. Indeed, the Court agreed that this provision would protect religious schools that decide, for religious reasons, to entirely exclude LGBTQ students from “admission.” Yet, based on this Court’s decision, that same religious school is prohibited from making religious decisions on the far less drastic question of whether to give official recognition to an LGBTQ club. Concluding that the NYCHRL requires such a stark disparity warrants immediate consideration by the Court of Appeals.

31. Second, this is a novel legal question. (*See Id.*) Before this lawsuit, no appellate division had interpreted the NYCHRL’s religious principles exception. The Court of Appeals should be allowed to opine on its scope before this Court’s decision infringes the religious exercise of religious educational institutions in New York City.

32. In short, whether the religious principles exception applies here is an important and novel question of law, and this Court’s decision stands in tension with a prior Court of Appeals decision. Therefore, this Court should grant Yeshiva leave to appeal.

III-V. The First Amendment

33. This Court’s final three legal conclusions are all on the First Amendment. (Ex. G at 6-8.) Those conclusions contradict the views of four U.S. Supreme Court Justices, who have already said they would “vote to grant certiorari if Yeshiva’s First Amendment arguments are rejected on appeal, and Yeshiva would likely win if its case came before us.” (Ex. C at 3-4.) This statement alone confirms the obvious: If Yeshiva’s First Amendment arguments constitute “compelling reasons” for enough Justices to announce that the U.S. Supreme Court would grant review (*see* Sup. Ct. R. 10), then Yeshiva’s arguments also possess sufficient public importance to warrant direct review by the Court of Appeals. Indeed, Yeshiva’s “constitutional argument[s] need not

[have] prevailed on the merits” in this Court or in the Supreme Court “to support an appeal on constitutional grounds.” (See Clerk’s Office, *Practice Outline*, at 4-5,2-3 (2011), available at <https://perma.cc/33D5-WH43>.) Rather, they are “substantial” because of the “constitutional interest[s] at stake, the novelty of [Yeshiva’s] constitutional claim[s],” and the “merit” found in them by four U.S. Supreme Court Justices. (*See id.*)

34. As those Justices said, “[t]he Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith.” (Ex. C at 4.) And that protection means “the First Amendment [does not] permit a State to force a Jewish school to instruct its students in accordance with an interpretation of Torah that the school, after careful study, concluded is incorrect.” (*Id.* at 2.); (*see also id.* (“surely ‘no’.”)) By contrast, this Court held that “in light of Yeshiva’s corporate purpose as an institution of higher education, . . . denial of recognition for the Pride Alliance is not ‘essential’ to Yeshiva’s ‘central mission.’” (Ex. G at 6 (citation omitted).)

35. This Court’s views are thus in conflict with those of enough U.S. Supreme Court Justices to grant review—Justices who also said that Yeshiva would “likely win if its case came before us.” (Ex. C at 4.) Thus, beyond questions of denominational favoritism discussed above (*supra* ¶ 24 (citing *Carson*); (*see also* Ex. C at 4 (same))), the First Amendment’s “special solicitude to the rights of religious organizations” is also at issue. (*See Hosanna-Tabor Evangelical Lutheran Church & Sch. v EEOC*, 565 US 171, 189 [2012]; *see also* Ex. C at 4 (citing *Hosanna-Tabor*).) Those questions—along with others regarding the NYCHRL’s general applicability and Yeshiva’s freedom of speech and association rights—together make this case filled with novel questions worthy of Court of Appeals review. (*Matter of City of New York*, 142 AD3d at 75.)

CONCLUSION

36. At the core of this case are a handful of plaintiffs trying to force the nation’s flagship Jewish university—respected as a religious leader around the world—to do something that its rabbinic authorities concluded as violating Yeshiva’s Torah values. Unsurprisingly then, everyone in this case—including enough Justices of the U.S. Supreme Court to grant review and reverse this Court’s decision—see its public importance. Failing to grant leave to appeal simply because the

Plaintiffs want to punish Yeshiva with money damages is as offensive to Yeshiva as it is to the First Amendment principles at stake. Leave to appeal is therefore warranted.

WHEREFORE, it is respectfully requested that this Court grant Yeshiva leave to appeal to the Court of Appeals and certify the question of whether the June 24, 2022 order of Supreme Court, as affirmed by this Court's December 15, 2022 order, was properly made.

Dated: Washington, D.C.
January 13, 2023

To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of this paper and the contentions herein are not frivolous as that term is defined in Part 130 of the Court Rules.


Eric S. Baxter

EXHIBIT A

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

-----X
YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL
WEINREICH, AMITAI MILLER, and ANONYMOUS,

Index No.: 154010/2021

Plaintiffs,

NOTICE OF ENTRY

-against-

YESHIVA UNIVERSITY, VICE PROVOST CHAIM
NISSEL, and PRESIDENT ARI BERMAN,

Defendants.

-----X

COUNSELORS:

PLEASE TAKE NOTICE, that the within is a true copy of the Order executed by
the Honorable Lynn R. Kotler of the within named court on June 14, 2022 and entered
on the 24th day of June, 2022.

Dated: New York, New York
June 24, 2022

To the best of my knowledge, information and belief, formed after an inquiry reasonable
under the circumstances, the presentation of this paper or the contentions herein are
not frivolous, as that term is defined in Part 130 of the Court Rules.

Yours, etc.,

KAUFMAN BORGEESE & RYAN LLP

By: 

David Bloom, Esq.
Samantha R. Montrose, Esq.
Kenneth Abeyratne, Esq.
120 Broadway, 14th Floor
New York, New York 10271
Tel.: (212) 980-9600
dbloom@kbrlaw.com

smontrose@kbrlaw.com
kabeyratne@kbrlaw.com

Eric S. Baxter (*pro hac vice*)
William J. Huan (*pro hac vice*)
Abigail E. Smith Esq.
BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave NW, Suite 400
Washington, DC 20006-3404
Tel.: (202) 796-0209
ebaxter@becketlaw.org
whaun@becketlaw.org
asmith@becketlaw.org

Attorneys for Defendants
**YESHIVA UNIVERSITY,
VICE PROVOST CHAIM NISSEL and
PRESIDENT ARI BERMAN**

TO: VIA NYSCEF
EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP
Attorneys for Plaintiffs
600 Fifth Avenue, 10th Floor
New York, New York 10020
Tel.: (212) 763-5000
krosenfeld@ecbawm.com

MORRISON & FOERSTER LLP
Attorneys for Non-Party
Lesbian and Gay Law Association Foundation of Greater New York
250 W. 55th Street
New York, New York 10019-9710
Tel.: (212) 336-4482
tfoudy@mofo.com

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.
Justice

PART 8

YU PRIDE ALLIANCE et al.

INDEX NO. 154010/21

-v-

MOTION DATE _____

MOTION SEQ. NO. 6 and 13

YESHIVA UNIVERSITY et al.

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: June 14, 2022



J.S.C. J.S.C.
HON. LYNN R. KOTLER
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

-----X
YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL
WEINREICH, AMITAI MILLER, and
ANONYMOUS,

DECISION/ORDER

INDEX No.: 154010/21
MOT SEQ: 006 AND 013

Plaintiff(s),

-against-

YESHIVA UNIVERSITY, VICE PROVOST CHAIM
NISSEL, and PRESIDENT ARI BERMAN,

Present:
Hon. Lynn R. Kotler, J.S.C.

Defendant(s).

-----X
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Motion Sequence 006	
N/Motion, exhs, Memo of Law	70-83
Aff in opp, exhs, Memo of Law in opp	105
Reply Aff, exhs	107
Decision/Order and Interim Order dated 8/18/21	117
Affirm in opp, exhs	188-229
N/X-mot, affirm, exhs, Memo of Law.....	230-272
Sur-reply, Memo of Law	277-300
2/10/22 Transcript	325
 Motion Sequence 013	
N/Motion, exhs, <i>amicus</i> brief	308-324

Two motions are pending in this action (sequence 6 and 13) and are hereby consolidated for consideration and disposition in this single decision/order. Previously, in a decision/order and interim order dated August 8, 2021 (the "prior decision"), the court converted defendants' motion to dismiss (sequence 6) to a motion for summary judgment pursuant to CPLR § 3211(c). Plaintiffs then cross-moved for partial summary judgment and a determination that defendant Yeshiva University ("Yeshiva") is not a

“religious corporation” as the term is used in Admin. Code § 8-102’s definition of a “Place or provider of public accommodation”. In motion sequence 13, The Lesbian and Gay Law Association Foundation of Greater New York (“LeGaL”) moves for leave to submit a brief of *amicus curiae*. LeGaL’s motion is submitted without opposition and is granted. As for sequence 6, defendants’ motion is denied, and plaintiffs’ cross-motion is granted as follows.

The prior decision is herein incorporated by reference. As the court stated therein, Yeshiva refuses to formally recognize plaintiff YU Pride Alliance, an LGBTQ student organization. The remaining plaintiffs are former students and an anonymous current student. The remaining defendants are Vice Provost Chaim Nissel and President Ari Berman of Yeshiva.

The prior decision was issued in the context of plaintiffs’ application for a preliminary injunction for an order compelling Yeshiva to officially recognize the YU Pride Alliance as an LGBTQ student organization. The court denied plaintiffs’ motion for injunctive relief because plaintiffs had failed to demonstrate a likelihood of success on the merits at that juncture. In tandem, defendants argued that plaintiff’s claims were untenable under the New York City Human Rights Law, Admin Code § 8-101, *et seq.* (the “NYCHRL”), because Yeshiva falls within an exception to its application. Defendants further argued that if the NYCHRL applies to them, such application is unconstitutional. However, defendants’ motion was based upon facts and proof which could not be properly considered on a CPLR § 3211 motion to dismiss. After limited discovery, the issue of whether the NYCHRL applies to Yeshiva is ripe for summary adjudication and the present motion sequence is now before the court.

Discussion

Applicable standard of review

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Is Yeshiva a Religious Corporation under Admin Code § 8-102?

This motion turns on whether Yeshiva is a religious corporation within the meaning of the NYCHRL. At first blush, the answer to this question may seem obvious given Yeshiva 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. However, the court must examine the precise language of the NYCHRL exemption which Yeshiva relies on, Admin Code § 8-102, as well as the legislative intent, and determine whether Yeshiva is a religious corporation exempt under the statute as the

legislature intended.

Plaintiffs have sued Yeshiva as a "place or provider of public accommodation" pursuant to Admin Code § 8-107(4) and (20). This statute provides in relevant part as follows:

4. Public accommodations.

a. It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation:

1. Because of any person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or immigration or citizenship status, 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; ...

...

20. Relationship or association. The provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation, uniformed service or immigration or citizenship status of a person with whom such person has a known relationship or association.

Meanwhile, Admin Code § 8-102, which sets forth the definitions of terms used under the NYCHRL, defines place or providers of public accommodation as follows:

The term "place or provider of public accommodation" includes providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. Such term

does not include any club which proves that it is in its nature distinctly private. A club is not in its nature distinctly private if it has more than 400 members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business. **For the purposes of this definition, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporation law is deemed to be in its nature distinctly private.** No club that sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements is a private exhibition within the meaning of this definition.

(Emphasis added.)

The NYCHRL expressly excludes "a religious corporation incorporated under the education law" from application of the NYCHRL prohibition of discrimination by places or providers of public accommodation. Yeshiva asserts that it is a religious corporation incorporated under the education law. If that is the case, then plaintiffs do not have a claim under the NYCHRL against Yeshiva for failure to officially recognize YU Pride Alliance.

There is no dispute that Yeshiva is incorporated under the education law. Thus, the court must determine whether Yeshiva is a religious corporation as defendants contend. This court finds that it is not. Defendants' position conflicts with the fact that Yeshiva's own Amendment to its Charter adopted December 15, 1967 provides as follows:

1. This corporation, incorporated as The Rabbi Isaac Eichanan Theological Seminary Association under the Membership Corporations Law of the State of New York on March 20, 1897, the name of which was subsequently changed by the Regents of the

University of the State of New York to Yeshiva University, is hereby continued as an **educational corporation under the Education Law** of the State of New York...

...

9. Yeshiva University is and continues to be organized and operated **exclusively for educational purposes**...

(Emphasis added).

Defendants would have this court look beyond its own organizing documents and examine its functions and attributes to determine that it is a "religious" corporation as that term is used in the Section 8-102 exemption. Meanwhile, plaintiffs point to the Religious Corporations Law definition of a religious corporation. Defendants correctly assert that the RCL definition is not outcome determinative since it would render the exemption duplicative insofar as it exempts both religious corporations organized under either the RCL or Educational Law. The court cannot ignore, however, the RCL definition or caselaw that seeks to define religious corporations.

A Religious Corporations Law corporation is a corporation created for religious purposes (RCL § 2). RCL § 2 further defines incorporated and unincorporated churches, clergyman and ministers and funeral entities. Both types of churches are defined as enabling people to meet for divine worship or other religious observances. Two Second Department cases have also defined corporations as religious when the certificate of incorporation specifies religious purposes such as "a place of worship" (*Temple-Ashram v. Satyanandji*, 84 AD3d 1158 [2d Dept 2011]) and "to provide religious services and services to senior citizens" (*Agudist Council of Greater N.Y. v. Imperial Sales Co.*, 158 AD2d 683 [2d Dept 1990]).

Yeshiva's organizing documents do not expressly indicate that Yeshiva has a religious purpose. Rather, Yeshiva organized itself as an "educational corporation" and for educational purposes, exclusively. Defense counsel's arguments about the implications of this court's ruling are overblown. Every school with a religious affiliation or association is not necessarily affected by this court's determination that Yeshiva is not exempt from the NYCHRL. Rather, the inquiry must focus on the purpose of the institution, which is typically expressed in a corporation's organizing documents. There may be schools organized under the education law that have stated a religious purpose so that they are exempt from the NYCHRL under Section 8-102. Since Yeshiva has not done so, the court does not need to reach this issue.

Indeed, defendants concede that Yeshiva's amended charter represented a departure from its initial charter which stated an exclusively religious purpose, to wit, "to promote the study of Talmud". Then, in 1967, Yeshiva amended its charter to state that it "is and continues to be organized and operated exclusively for educational purposes". The court rejects defendants' contention that Yeshiva's amended charter confirmed "that the original religious education purposes carried through". Yeshiva itself broadened the scope of education it was to provide; pursuant to the amended charter Yeshiva was now authorized by the State of New York to confer degrees of: [1] Doctor of Hebrew Literature; [2] Bachelor of Arts; [3] Bachelor of Science; [4] Doctor of Humane Letters; [5] Doctor of Laws; [6] Bachelor of Hebrew Literature; [7] Master of Hebrew Literature; [8] Bachelor of Religious Education; [9] Master of Religious Education; [10] Master of Science; [11] Doctor of Philosophy; [12] Doctor of Medicine; [13] Doctor of Dental Surgery; [14] Master of Art; [15] Doctor of Education; [16] Master of Social Work; [17]

Associate in Arts; and [18] Doctor of Religious Education. The court finds that Yeshiva's educational function, evidenced by its ability to now confer many secular multi-disciplinary degrees, thus became Yeshiva's primary purpose. Even if Yeshiva still "promote[d] the study of Talmud", that does not necessarily make Yeshiva a religious corporation as that term was intended by the City Council when it enacted Section 8-102.

In a letter dated April 27, 2021 from faculty members of the Benjamin N. Cardozo School of Law to defendant Berman, the authors write:

As members of the Yeshiva University community, the fifty-one undersigned faculty members of Benjamin N. Cardozo School of Law write to express our dismay at the University's continued refusal not to allow undergraduate students to form a group devoted to building community and support for LGBTQ+ students.

...

... Indeed, at Cardozo, where LGBTQ+ students are a vital part of our community, with an active and engaged student group, no such discrimination is practiced or tolerated. We find it unacceptable that our parent University would adopt such a hurtful policy towards the undergraduate student body.

The University's decision also is unlawful under federal, state, and city civil rights laws, all of which prohibit discrimination on the basis of sex and sexual orientation. **As a non-sectarian institution of higher education, the University must abide by these proscriptions.** We understand that the University came to the same conclusion more than 25 years ago – concluding that it was required by antidiscrimination laws to afford equal treatment to LGBTQ+ students – and the legal protections for LGBTQ+ people have significantly strengthened since that time.

Faculty members, law professors even, within Yeshiva's own community recognize that Yeshiva is not a religious corporation and is subject to the NYCHRL.

Further, Yeshiva itself has long acknowledged that it was subject to the NYCHRL.

A 1995 fact sheet about gay student organizations at Yeshiva prepared by Yeshiva as per a September 5, 1995 letter from David M. Rosen, Director of Yeshiva's Department of Public Relations, provides in pertinent part as follows:

1. I've read that there are "gay student clubs" at some of Yeshiva University's graduate schools. Is this true?

Yes. A handful of students at two graduate schools have formed organizations – sometimes referred to as "clubs" – to discuss issues of concern to the gay community.

2. Which schools have these clubs? How many students are involved? What do they do?

Gay student clubs exist at Benjamin N. Cardozo School of Law and Albert Einstein College of Medicine. Informal groups with similar interests have met sporadically at Wurzweiler School of Social Work and Ferkauf Graduate School of Psychology. The student bodies of these graduate-level, professional schools are co-educational and diverse ethnically, religiously, and racially. Altogether about three dozen out of YU's 5,000 students are involved. Their activities generally involve informational and educational meetings. They do not proselytize. These groups have existed for years but went largely unnoticed prior to the recent spate of distorted media reports.

...

4. Given the strong prohibition against homosexual behavior in Jewish law, why does YU permit gay groups on campus?

Yeshiva University is subject to the human rights ordinance of the City of New York, which provides protected status to homosexuals. Under this law, YU cannot ban gay student clubs. It must make facilities available to them in the same manner as it does for other student groups.

At oral argument, defense counsel proffered "Yeshiva would be happy to stipulate to adding a more direct statement of religious purpose in its charter if plaintiffs would agree to dismiss the case." This assertion concedes the point. Yeshiva's charter is not merely form over substance. Its corporate purpose is the basis for licensure and receipt of grants and other public funding. As plaintiffs learned during the course of limited

discovery, Yeshiva submitted various forms to governmental agencies which belie its contention in this action that it is a religious corporation. In 2018, Yeshiva reported in Form CHAR410 to the New York State Department of Law, Charities Bureau, that it was an “educational institution, museum or library incorporated under the NY State Education Law or by special act” rather than an “organization [] incorporated under the religious corporations law or is another type of organization with a religious purpose or is operated, supervised or controlled by or in connection with a religious organization” (emphasis in original). Yeshiva’s Director of Tax & Compliance, Alan Kruger, testified that Yeshiva registered as an educational corporation and not a religious corporation because “it would be difficult” to produce documents showing entitlement to the latter exemption.

In a letter dated February 16, 2021, Jon Greenfield, Director of Government Relations at Yeshiva, wrote to Senator Robert Jackson requesting New York State capital construction funding. Greenfield identified Yeshiva as a “501[c][3] not-for-profit institution of higher learning...”, not a religious corporation. How Yeshiva represents itself is not merely “form over substance” as defense counsel argues. Rather, the term “religious corporation” as the City Council intended neatly squares with how the term is used in other legal and/or formal applications and settings. Yeshiva is either a religious corporation in all manners or it is not. Yeshiva’s decision to amend its charter in 1967 and otherwise hold itself out as non-sectarian since then must be accorded. Thus, the record shows that Yeshiva is not a “religious corporation” on paper, does not hold itself out to be a “religious corporation” and at least 27-years ago knew that it was not exempt from the NYCHRL and was otherwise bound by its antidiscrimination mandates.

The court also does not need to contort itself to ascertain the intent of the legislature when it enacted the NYCHRL, commonly known as one of the most protective anti-discrimination laws in the country. The legislative intent is no better stated than in Admin Code § 8-130, entitled "Construction":

- a. The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.
- b. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

While the 1965 NYCHRL excluded "colleges and universities" from classification as a place of public accommodation, in 1991, the City Council removed this exemption from the NYCHRL. Thus, the court's determination that Yeshiva is not exempt from the NYCHRL is wholly consistent with the legislative intent of the NYCHRL, which requires that exemption from it be narrowly construed in order to minimize discriminatory conduct.

Even if the court were to adopt Yeshiva's religious function test, the court would reach the same result. Plaintiffs' counsel correctly characterizes defendants' argument on this point: defendants want this court to find that Yeshiva is a religious corporation in the same manner an ordinary person would describe themselves as a religious person. There is no doubt that Yeshiva has an inherent and integral religious character which defines it and sets it apart from other schools and universities of higher education. However, Yeshiva must fit within the term "religious corporation" as the legislature intended the term to mean in the NYCHRL. Yeshiva is a university which provides

educational instruction, first and foremost. Yeshiva's religious character evidenced by required religious studies, observation of Orthodox Jewish law, students' participation in religious services, etc. are all secondary to Yeshiva's primary purpose. "[A] religious corporation should be one formed primarily for religious purposes; exercising some ecclesiastical control over its members, having some distinct form of worship and some method of discipline for violation thereof" (*Naarim v. Kunda*, 7 Misc.3d 1032(A) [NY Sup Ct, Kings Co 2005]). Defense counsel's assertion that "[y]ou cannot step onto the campus or into a batei midrash without recognizing that this is a sacred space for students who are studying there" undercuts defendants' argument. The record shows that the purpose students attend Yeshiva is to obtain an education, not for religious worship or some other function which is religious at its core. Thus, religion is necessarily secondary to education at Yeshiva.

Defendants' reliance on *Scheiber v. St. John's University* (84 NY2d 120 [1994]) is misplaced. In that case, the Court of Appeals found that St. John's University ("SJU") was a "religious institution" within the meaning of the New York State Human Rights Law, to wit Exec. Law § 296(11). Chief Judge Judith Kaye concluded that although SJU was "conceived with the intent of fulfilling a secular educational role, SJU has not abandoned its religious heritage and plainly falls within the exemption for entities that are 'operated, supervised or controlled by or in connection with a religious organization'". Exec. Law § 296(11) is more expansive than Admin Code § 8-102 in that the former exempts "any religious or denominational institution or organization, or any organization operated for charitable or education purposes, which is operated, supervised or controlled by or in connection with a religious organization..." Since SJU was "an

educational organization operated in connection with the Vincentian order – a religious institution or organization – SJU is itself a “religious institution” within the language of Executive Law § 296(11)”. That fact has no bearing on whether Yeshiva is a “religious corporation” within the meaning of the NYCHLR. Therefore, contrary to defense counsel’s contention, *Scheiber* is not on point and this court does not need to “contradict the Court of Appeals to rule in plaintiffs’ favor.”

Accordingly, the court finds that Yeshiva is not a “religious corporation” as the term is used in Admin Code § 8-102. Defendants’ motion on this point is denied and plaintiffs’ cross-motion for partial summary judgment is granted to the extent that the court finds that the defendant Yeshiva is not a “religious corporation” as the term is used in the Admin Code § 8-102 exemption of a “Place or provider of public accommodation”.

First Amendment implications

The court now must consider whether the NYCHRL as applied to Yeshiva violates Yeshiva’s First Amendment rights. The First Amendment to the US Constitution, as applied to the States via the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, ... or the right of the people peaceably to assemble...”

Defense counsel quotes *Obergefell v Hodges*, (576 US 644, 679-680 [2015]) and claims that “[t]he First Amendment ensures that religious organizations ... are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.” Defendants argue that plaintiffs’ claims as applied to

Yeshiva violate Yeshiva's religious autonomy, the Free Exercise Clause, the Free Speech Clause and the Assembly Clause. Meanwhile, plaintiffs assert that the NYCHRL does not violate defendants' First Amendment rights because "[i]t is a law of general applicability, and the Council's intent to prohibit discrimination in places of public accommodation provides a rational basis for its enactment" citing *Catholic Charities of Diocese of Albany v. Serio*, 7 NY3d 510 [2006].

The NYCHRL and the First Amendment are not incompatible (see *i.e. Salemi v. Gloria's Tribeca Inc.*, 116 AD3d 569 [1st Dept 2014]). In *Catholic Charities*, the Court of Appeals explained that the First Amendment does not protect an individual from valid and neutral laws of general applicability, even when those laws forbid or compel conduct which goes against the grain of a religion. *Catholic Charities* cited *Employment Div., Dept of Human Resources of Oregon v. Smith*, 494 US 872 [1990], in which the Supreme Court upheld a state law of general applicability against a free exercise challenge. In response to *Employment Division*, Congress enacted the Religious Freedom Restoration Act of 1993, which was then held unconstitutional in 1997 by the Supreme Court in *City of Boerne v. Flores*, 521 US 507. Thus, *Employment Division* is good precedent (see *i.e. Matter of Gifford v. McCarthy*, 137 AD3d 30 [3d Dept 2016]).

Defense counsel argues that *Catholic Charities* is no longer good precedent because of *Fulton v. City of Philadelphia, Pennsylvania*, 141 SCt 1868 [2021]). That case, however, found a foster care contract was not generally applicable and thus was subject to strict scrutiny. Nor do cases involving secular exemptions apply, since Section 8-102 contains a very broad exemption for religious corporations organized under the RCL or Education Law and a smaller exception for private organizations.

Assuming *arguendo* that Yeshiva's refusal to recognize an LGBTQ student group is part of its exercise of religion, the NYCHRL's impact on Yeshiva's exercise of religion is only incidental to the NYCHRL's ban on discrimination. There can be no dispute that the NYCHRL is a neutral law of general applicability. It does not target religious practice, its intent is to deter discrimination, only, and it applies equally to all places of public accommodation other than those expressly exempted as distinctly private or a religious corporation organized under the education or religious corporations law. Indeed, the religious corporation carve-out under Section 8-102 was an attempt by the City Council to ensure that the NYCHRL will not be unconstitutionally applied to religious organizations. Thus, Yeshiva's Free Exercise argument is rejected.

The court further finds that Yeshiva's Free Speech rights will not be violated by application of the NYCHRL. Formal recognition of a student group does not equate to endorsement with that group's message (see *e.g. Bd. Of Educ. of Westside Community Schools v. Mergens By and Through Mergens*, 496 US 226, 250 [1990]). What plaintiffs seek is simply equal access to the tangible benefits that Yeshiva affords other student groups on its campus. By following the law and granting the YU Pride Alliance formal recognition and equal access, Yeshiva need not make a statement endorsing a particular viewpoint as defense counsel posits. Moreover, Yeshiva's Graduate Schools have LGBTQ student groups, which undercuts Yeshiva's arguments regarding compelled speech when LGBTQ student groups are already a formally recognized part of the Yeshiva community and have been so for nearly 30 years. Thus, the record shows that Yeshiva knows that formal recognition of LGBTQ student groups does not equate endorsement (see the 1995 Fact Sheet).

Finally, the court is unpersuaded by defendants' association argument, as Yeshiva has not come forward with any evidence that formal recognition of an LGBTQ student group and/or the grant of accommodations, advantages, facilities, and privileges at Yeshiva is inconsistent with the purpose of Yeshiva's mission and will impermissibly infringe on Yeshiva's assembly rights (*Matter of Gifford, supra* at 42 "[t]here is nothing in this record to indicate that petitioners' wedding business was 'organized for specific expressive purposes'"). The Supreme Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* is illustrative. In that case, the Court explained that law schools could not deny military recruiters equal access to their campuses on a theory that such access "impairs their own expression by requiring them to associate with the recruiters" because "just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, [] so too a speaker cannot erect a shield against laws requiring access simply by asserting that mere association "would impair its message" (547 US 47, 69 [2006] [internal quotations and citations omitted]).

Based on the foregoing, defendants' motion to dismiss plaintiff's complaint on grounds that the NYCHRL as applied to Yeshiva violates the First Amendment is denied.

Remaining issues

The court next considers defendants' motion for dismissal of the claims against Vice Provost Chaim Nissel on the grounds that he is not a decision-maker, but rather, a messenger. There is no opposition to that branch of the motion. Since there is no dispute that VP Nissel is not a proper defendant, that branch of defendants' motion is granted.

In addition to moving for partial summary judgment, plaintiffs request "such other

and further relief as may be just and proper” in their notice of cross-motion. In light of the court’s finding that Yeshiva is not a “religious corporation” as the term is used in Admin Code § 8-102, the court finds that plaintiffs are entitled to a permanent injunction restraining Yeshiva and President Ari Berman from continuing their refusal to officially recognize the YU Pride Alliance as a student organization because of the members’ sexual orientation or gender and/or YU Pride Alliance’s status, mission, and/or activities on behalf of LGBTQ students. There is no dispute on this record that Yeshiva is a place or provider of public accommodation within the meaning of the NYCHRL and that Yeshiva withheld and denied plaintiffs the full and equal enjoyment, on equal terms and conditions, of its accommodations, advantages, services, facilities or privileges because of plaintiffs’ actual or perceived sexual orientation. Thus, there is no dispute on this record that Yeshiva’s failure to grant such access to the YU Pride Alliance violates the NYCHRL. Therefore, plaintiffs are further entitled to an order directing Yeshiva to provide YU Pride Alliance the full and equal accommodations, advantages, facilities, and privileges of all other student groups at Yeshiva.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the motion by the Lesbian and Gay Law Association Foundation of Greater New York for leave to submit a brief of *amicus curiae* is granted without opposition and said brief is considered by the court in connection with motion sequence 6; and it is further

ORDERED that defendants’ converted motion for summary judgment (sequence 6) is granted only to the extent that plaintiffs’ claims against defendant Vice Provost

Chaim Nissel are severed and dismissed; and it is further

ORDERED that plaintiffs' cross-motion for partial summary judgment is granted to the extent that the court finds that the defendant Yeshiva University is not a "religious corporation" as the term is used in Admin Code § 8-102's definition of a "Place or provider of public accommodation"; and it is further

ORDERED and ADJUDGED that defendants Yeshiva University and President Ari Berman are permanently restrained from continuing their refusal to officially recognize the YU Pride Alliance as a student organization because of the members' sexual orientation or gender and/or YU Pride Alliance's status, mission, and/or activities on behalf of LGBTQ students; and it is further

ORDERED and ADJUDGED that defendants Yeshiva University and President Ari Berman are directed to immediately grant plaintiff YU Pride Alliance the full and equal accommodations, advantages, facilities, and privileges afforded to all other student groups at Yeshiva University; and it is further

ORDERED that the balance of defendants' motion sequence 6 is denied; and it is further

ORDERED that the parties are directed to submit a joint letter to the court on or before July 19, 2022 advising as to the status of this action.

This constitutes the decision and order of the court.

Dated: New York, New York
June 14, 2022

So Ordered:



Hon. Lynn R. Kotler, J.S.C.

EXHIBIT B

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

-----X
YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL
WEINREICH, AMITAI MILLER, and ANONYMOUS,

Index No.: 154010/2021

Plaintiffs,

NOTICE OF APPEAL

-against-

YESHIVA UNIVERSITY, VICE PROVOST CHAIM
NISSEL, and PRESIDENT ARI BERMAN,

Defendants.

-----X

COUNSELORS:

PLEASE TAKE NOTICE, that the defendants, **YESHIVA UNIVERSITY** and **PRESIDENT ARI BERMAN**, hereby appeal to the Appellate Division, First Department, from so much of an Order in the above-entitled action of the Honorable Lynn R. Kotler, of the Supreme Court, New York County, dated June 14, 2022 and entered in the Office of the Clerk of said Court on the 24th day of June, 2022, as denied their converted motion for summary judgment, granted plaintiffs' cross-motion for summary judgment, permanently restrained YESHIVA UNIVERSITY and PRESIDENT ARI BERMAN from refusing to officially recognize plaintiff YU Pride Alliance as a student organization and directed these defendants to immediately grant plaintiff YU Pride Alliance the full and equal accommodations, advantages, facilities and privileges afforded to all other student groups at YESHIVA UNIVERSITY.

This Appeal is being taken from each and every part of said Order by which the defendants are aggrieved, and from the whole thereof.

Dated: New York, New York
June 24, 2022

To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of this paper or the contentions herein are not frivolous, as that term is defined in Part 130 of the Court Rules.

Yours, etc.,

KAUFMAN BORGEEST & RYAN LLP

By: 

David Bloom, Esq.
Samantha R. Montrose, Esq.
Kenneth Abeyratne, Esq.
120 Broadway, 14th Floor
New York, New York 10271
Tel.: (212) 980-9600
dbloom@kbrlaw.com
smontrose@kbrlaw.com
kabeyratne@kbrlaw.com

Eric S. Baxter (*pro hac vice*)
William J. Huan (*pro hac vice*)
Abigail E. Smith Esq.
BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave NW, Suite 400
Washington, DC 20006-3404
Tel.: (202) 796-0209
ebaxter@becketlaw.org
whaun@becketlaw.org
asmith@becketlaw.org

Attorneys for Defendants
**YESHIVA UNIVERSITY,
VICE PROVOST CHAIM NISSEL and
PRESIDENT ARI BERMAN**

TO: VIA NYSCEF
EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP
Attorneys for Plaintiffs
600 Fifth Avenue, 10th Floor
New York, New York 10020
Tel.: (212) 763-5000
krosenfeld@ecbawm.com

MORRISON & FOERSTER LLP
Attorneys for Non-Party
Lesbian and Gay Law Association Foundation of Greater New York
250 W. 55th Street
New York, New York 10019-9710
Tel.: (212) 336-4482
tfoudy@mofo.com

Supreme Court of the State of New York

Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance
YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL WEINREICH, AMITAI MILLER, and ANONYMOUS <p style="text-align: center;">- against -</p> YESHIVA UNIVERSITY, VICE PROVOST CHAIM NISSEL, and PRESIDENT ARI BERMAN		Date Notice of Appeal Filed
Case Type		Filing Type
<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278 <input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review
Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.		
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation
		<input checked="" type="checkbox"/> Torts

Informational Statement - Civil

Appeal

Paper Appealed From (Check one only):

If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

- | | | | |
|--|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgement | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court: Supreme Court ☐County: New York ☐

Dated: 06/14/2022

Entered: 06/24/2022

Judge (name in full): Hon. Lynn R. Kotler

Index No.: 154010/2021

Stage: ☒ Interlocutory ☐ Final ☐ Post-FinalTrial: ☐ Yes ☒ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ☒ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court

County: Choose County

Judge (name in full):

Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court

County: Choose County

Judge (name in full):

Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Plaintiffs commenced this action alleging NYCHRL violations and seeking a declaratory judgment and order compelling defendants to recognize YU Pride Alliance as a student organization representing LGBTQ students and to give full and equal access to the same accommodations and advantages given to other student clubs. This is an appeal from so much of the Order of the Supreme Court, New York County, as denied defendants' converted motion for summary judgment, granted plaintiffs' cross-motion for summary judgment, permanently restrained Yeshiva University and President Ari Berman from refusing to officially recognize YU Pride Alliance as a student organization and directed these defendants to immediately grant YU Pride Alliance the full and equal accommodations, advantages, facilities and privileges afforded to all other student groups at Yeshiva University.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The issues proposed to be raised on this appeal include, but are not limited to: whether the lower court committed reversible error in finding that Yeshiva University is not a "religious corporation" within the meaning of NYCHRL; whether the lower court incorrectly denied Defendants-Appellants' converted motion for summary judgment and granted plaintiffs' cross-motion for summary judgment; whether the lower court abused its discretion by permanently restraining Defendants-Appellants from refusing to officially recognize YU Pride Alliance as a student organization and directing Defendants-Appellants to immediately grant YU Pride Alliance the full and equal accommodations, advantages, facilities and privileges afforded to all other student groups at Yeshiva University; whether the lower court's order violates Defendants-Appellants' First Amendment rights; and such other issues as may exist upon further review of the Record on Appeal.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	YU PRIDE ALLIANCE	Plaintiff	Respondent
2	MOLLY MEISELS	Plaintiff	Respondent
3	DONIEL WEINREICH	Plaintiff	Respondent
4	AMITAI MILLER	Plaintiff	Respondent
5	ANONYMOUS	Plaintiff	Respondent
6	YESHIVA UNIVERSITY	Defendant	Appellant
7	VICE PROVOST CHAIM NISSEL	Defendant	None
8	PRESIDENT ARI BERMAN	Defendant	Appellant
9	Lesbian and Gay Law Association Foundation of Greater New York	Nonparty	Amicus Curiae
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

Informational Statement - Civil

Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP

Address: 600 Fifth Avenue, 10th Floor

City: New York

State: New York

Zip: 10020

Telephone No: (212) 763-5000

E-mail Address: krosenfeld@ecbawm.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1, 2, 3, 4, 5

Attorney/Firm Name: BECKET FUND FOR RELIGIOUS LIBERTY

Address: 1919 Pennsylvania Ave NW, Suite 400

City: Washington

State: DC

Zip: 20006-3404

Telephone No: (202) 796-0209

E-mail Address: ebaxter@becketlaw.org

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☒ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 6, 7, 8

Attorney/Firm Name: KAUFMAN BORGEESE & RYAN LLP

Address: 120 Broadway, 14th Floor

City: New York

State: New York

Zip: 10271

Telephone No: (212) 980-9600

E-mail Address: dbloom@kbrlaw.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 6, 7, 8

Attorney/Firm Name: MORRISON & FOERSTER LLP

Address: 250 W. 55th Street

City: New York

State: New York

Zip: 10019-9710

Telephone No: (212) 336-4482

E-mail Address: tfoudy@mofo.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 9

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

City:

State:

Zip:

Telephone No:

E-mail Address:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

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

-----X
YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL
WEINREICH, AMITAI MILLER, and ANONYMOUS,

Index No.: 154010/2021

Plaintiffs,

NOTICE OF ENTRY

-against-

YESHIVA UNIVERSITY, VICE PROVOST CHAIM
NISSEL, and PRESIDENT ARI BERMAN,

Defendants.

-----X

COUNSELORS:

PLEASE TAKE NOTICE, that the within is a true copy of the Order executed by
the Honorable Lynn R. Kotler of the within named court on June 14, 2022 and entered
on the 24th day of June, 2022.

Dated: New York, New York
June 24, 2022

To the best of my knowledge, information and belief, formed after an inquiry reasonable
under the circumstances, the presentation of this paper or the contentions herein are
not frivolous, as that term is defined in Part 130 of the Court Rules.

Yours, etc.,

KAUFMAN BORGEESE & RYAN LLP

By: 

David Bloom, Esq.
Samantha R. Montrose, Esq.
Kenneth Abeyratne, Esq.
120 Broadway, 14th Floor
New York, New York 10271
Tel.: (212) 980-9600
dbloom@kbrlaw.com

smontrose@kbrlaw.com
kabeyratne@kbrlaw.com

Eric S. Baxter (*pro hac vice*)
William J. Huan (*pro hac vice*)
Abigail E. Smith Esq.
BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave NW, Suite 400
Washington, DC 20006-3404
Tel.: (202) 796-0209
ebaxter@becketlaw.org
whaun@becketlaw.org
asmith@becketlaw.org

Attorneys for Defendants
**YESHIVA UNIVERSITY,
VICE PROVOST CHAIM NISSEL and
PRESIDENT ARI BERMAN**

TO: VIA NYSCEF
EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP
Attorneys for Plaintiffs
600 Fifth Avenue, 10th Floor
New York, New York 10020
Tel.: (212) 763-5000
krosenfeld@ecbawm.com

MORRISON & FOERSTER LLP
Attorneys for Non-Party
Lesbian and Gay Law Association Foundation of Greater New York
250 W. 55th Street
New York, New York 10019-9710
Tel.: (212) 336-4482
tfoudy@mofo.com

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.
Justice

PART 8

YU PRIDE ALLIANCE et al.

INDEX NO. 154010/21

-v-

MOTION DATE _____

MOTION SEQ. NO. 6 and 13

YESHIVA UNIVERSITY et al.

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: June 14, 2022



J.S.C. J.S.C.
HON. LYNN R. KOTLER
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

-----X
YU PRIDE ALLIANCE, MOLLY MEISELS, DONIEL
WEINREICH, AMITAI MILLER, and
ANONYMOUS,

DECISION/ORDER

INDEX No.: 154010/21
MOT SEQ: 006 AND 013

Plaintiff(s),

-against-

YESHIVA UNIVERSITY, VICE PROVOST CHAIM
NISSEL, and PRESIDENT ARI BERMAN,

Present:
Hon. Lynn R. Kotler, J.S.C.

Defendant(s).

-----X
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers	Numbered
Motion Sequence 006	
N/Motion, exhs, Memo of Law	70-83
Aff in opp, exhs, Memo of Law in opp	105
Reply Aff, exhs	107
Decision/Order and Interim Order dated 8/18/21	117
Affirm in opp, exhs	188-229
N/X-mot, affirm, exhs, Memo of Law.....	230-272
Sur-reply, Memo of Law	277-300
2/10/22 Transcript	325
Motion Sequence 013	
N/Motion, exhs, <i>amicus</i> brief	308-324

Two motions are pending in this action (sequence 6 and 13) and are hereby consolidated for consideration and disposition in this single decision/order. Previously, in a decision/order and interim order dated August 8, 2021 (the "prior decision"), the court converted defendants' motion to dismiss (sequence 6) to a motion for summary judgment pursuant to CPLR § 3211(c). Plaintiffs then cross-moved for partial summary judgment and a determination that defendant Yeshiva University ("Yeshiva") is not a

“religious corporation” as the term is used in Admin. Code § 8-102’s definition of a “Place or provider of public accommodation”. In motion sequence 13, The Lesbian and Gay Law Association Foundation of Greater New York (“LeGaL”) moves for leave to submit a brief of *amicus curiae*. LeGaL’s motion is submitted without opposition and is granted. As for sequence 6, defendants’ motion is denied, and plaintiffs’ cross-motion is granted as follows.

The prior decision is herein incorporated by reference. As the court stated therein, Yeshiva refuses to formally recognize plaintiff YU Pride Alliance, an LGBTQ student organization. The remaining plaintiffs are former students and an anonymous current student. The remaining defendants are Vice Provost Chaim Nissel and President Ari Berman of Yeshiva.

The prior decision was issued in the context of plaintiffs’ application for a preliminary injunction for an order compelling Yeshiva to officially recognize the YU Pride Alliance as an LGBTQ student organization. The court denied plaintiffs’ motion for injunctive relief because plaintiffs had failed to demonstrate a likelihood of success on the merits at that juncture. In tandem, defendants argued that plaintiff’s claims were untenable under the New York City Human Rights Law, Admin Code § 8-101, *et seq.* (the “NYCHRL”), because Yeshiva falls within an exception to its application. Defendants further argued that if the NYCHRL applies to them, such application is unconstitutional. However, defendants’ motion was based upon facts and proof which could not be properly considered on a CPLR § 3211 motion to dismiss. After limited discovery, the issue of whether the NYCHRL applies to Yeshiva is ripe for summary adjudication and the present motion sequence is now before the court.

Discussion

Applicable standard of review

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Is Yeshiva a Religious Corporation under Admin Code § 8-102?

This motion turns on whether Yeshiva is a religious corporation within the meaning of the NYCHRL. At first blush, the answer to this question may seem obvious given Yeshiva 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. However, the court must examine the precise language of the NYCHRL exemption which Yeshiva relies on, Admin Code § 8-102, as well as the legislative intent, and determine whether Yeshiva is a religious corporation exempt under the statute as the

legislature intended.

Plaintiffs have sued Yeshiva as a "place or provider of public accommodation" pursuant to Admin Code § 8-107(4) and (20). This statute provides in relevant part as follows:

4. Public accommodations.

a. It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation:

1. Because of any person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or immigration or citizenship status, 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; ...

...

20. Relationship or association. The provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived race, creed, color, national origin, disability, age, sexual orientation, uniformed service or immigration or citizenship status of a person with whom such person has a known relationship or association.

Meanwhile, Admin Code § 8-102, which sets forth the definitions of terms used under the NYCHRL, defines place or providers of public accommodation as follows:

The term "place or provider of public accommodation" includes providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. Such term

does not include any club which proves that it is in its nature distinctly private. A club is not in its nature distinctly private if it has more than 400 members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business. **For the purposes of this definition, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporation law is deemed to be in its nature distinctly private.** No club that sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements is a private exhibition within the meaning of this definition.

(Emphasis added.)

The NYCHRL expressly excludes "a religious corporation incorporated under the education law" from application of the NYCHRL prohibition of discrimination by places or providers of public accommodation. Yeshiva asserts that it is a religious corporation incorporated under the education law. If that is the case, then plaintiffs do not have a claim under the NYCHRL against Yeshiva for failure to officially recognize YU Pride Alliance.

There is no dispute that Yeshiva is incorporated under the education law. Thus, the court must determine whether Yeshiva is a religious corporation as defendants contend. This court finds that it is not. Defendants' position conflicts with the fact that Yeshiva's own Amendment to its Charter adopted December 15, 1967 provides as follows:

1. This corporation, incorporated as The Rabbi Isaac Eichanan Theological Seminary Association under the Membership Corporations Law of the State of New York on March 20, 1897, the name of which was subsequently changed by the Regents of the

University of the State of New York to Yeshiva University, is hereby continued as an **educational corporation under the Education Law** of the State of New York...

...

9. Yeshiva University is and continues to be organized and operated **exclusively for educational purposes**...

(Emphasis added).

Defendants would have this court look beyond its own organizing documents and examine its functions and attributes to determine that it is a "religious" corporation as that term is used in the Section 8-102 exemption. Meanwhile, plaintiffs point to the Religious Corporations Law definition of a religious corporation. Defendants correctly assert that the RCL definition is not outcome determinative since it would render the exemption duplicative insofar as it exempts both religious corporations organized under either the RCL or Educational Law. The court cannot ignore, however, the RCL definition or caselaw that seeks to define religious corporations.

A Religious Corporations Law corporation is a corporation created for religious purposes (RCL § 2). RCL § 2 further defines incorporated and unincorporated churches, clergyman and ministers and funeral entities. Both types of churches are defined as enabling people to meet for divine worship or other religious observances. Two Second Department cases have also defined corporations as religious when the certificate of incorporation specifies religious purposes such as "a place of worship" (*Temple-Ashram v. Satyanandji*, 84 AD3d 1158 [2d Dept 2011]) and "to provide religious services and services to senior citizens" (*Agudist Council of Greater N.Y. v. Imperial Sales Co.*, 158 AD2d 683 [2d Dept 1990]).

Yeshiva's organizing documents do not expressly indicate that Yeshiva has a religious purpose. Rather, Yeshiva organized itself as an "educational corporation" and for educational purposes, exclusively. Defense counsel's arguments about the implications of this court's ruling are overblown. Every school with a religious affiliation or association is not necessarily affected by this court's determination that Yeshiva is not exempt from the NYCHRL. Rather, the inquiry must focus on the purpose of the institution, which is typically expressed in a corporation's organizing documents. There may be schools organized under the education law that have stated a religious purpose so that they are exempt from the NYCHRL under Section 8-102. Since Yeshiva has not done so, the court does not need to reach this issue.

Indeed, defendants concede that Yeshiva's amended charter represented a departure from its initial charter which stated an exclusively religious purpose, to wit, "to promote the study of Talmud". Then, in 1967, Yeshiva amended its charter to state that it "is and continues to be organized and operated exclusively for educational purposes". The court rejects defendants' contention that Yeshiva's amended charter confirmed "that the original religious education purposes carried through". Yeshiva itself broadened the scope of education it was to provide; pursuant to the amended charter Yeshiva was now authorized by the State of New York to confer degrees of: [1] Doctor of Hebrew Literature; [2] Bachelor of Arts; [3] Bachelor of Science; [4] Doctor of Humane Letters; [5] Doctor of Laws; [6] Bachelor of Hebrew Literature; [7] Master of Hebrew Literature; [8] Bachelor of Religious Education; [9] Master of Religious Education; [10] Master of Science; [11] Doctor of Philosophy; [12] Doctor of Medicine; [13] Doctor of Dental Surgery; [14] Master of Art; [15] Doctor of Education; [16] Master of Social Work; [17]

Associate in Arts; and [18] Doctor of Religious Education. The court finds that Yeshiva's educational function, evidenced by its ability to now confer many secular multi-disciplinary degrees, thus became Yeshiva's primary purpose. Even if Yeshiva still "promote[d] the study of Talmud", that does not necessarily make Yeshiva a religious corporation as that term was intended by the City Council when it enacted Section 8-102.

In a letter dated April 27, 2021 from faculty members of the Benjamin N. Cardozo School of Law to defendant Berman, the authors write:

As members of the Yeshiva University community, the fifty-one undersigned faculty members of Benjamin N. Cardozo School of Law write to express our dismay at the University's continued refusal not to allow undergraduate students to form a group devoted to building community and support for LGBTQ+ students.

...

... Indeed, at Cardozo, where LGBTQ+ students are a vital part of our community, with an active and engaged student group, no such discrimination is practiced or tolerated. We find it unacceptable that our parent University would adopt such a hurtful policy towards the undergraduate student body.

The University's decision also is unlawful under federal, state, and city civil rights laws, all of which prohibit discrimination on the basis of sex and sexual orientation. **As a non-sectarian institution of higher education, the University must abide by these proscriptions.** We understand that the University came to the same conclusion more than 25 years ago – concluding that it was required by antidiscrimination laws to afford equal treatment to LGBTQ+ students – and the legal protections for LGBTQ+ people have significantly strengthened since that time.

Faculty members, law professors even, within Yeshiva's own community recognize that Yeshiva is not a religious corporation and is subject to the NYCHRL.

Further, Yeshiva itself has long acknowledged that it was subject to the NYCHRL.

A 1995 fact sheet about gay student organizations at Yeshiva prepared by Yeshiva as per a September 5, 1995 letter from David M. Rosen, Director of Yeshiva's Department of Public Relations, provides in pertinent part as follows:

1. I've read that there are "gay student clubs" at some of Yeshiva University's graduate schools. Is this true?

Yes. A handful of students at two graduate schools have formed organizations – sometimes referred to as "clubs" – to discuss issues of concern to the gay community.

2. Which schools have these clubs? How many students are involved? What do they do?

Gay student clubs exist at Benjamin N. Cardozo School of Law and Albert Einstein College of Medicine. Informal groups with similar interests have met sporadically at Wurzweiler School of Social Work and Ferkauf Graduate School of Psychology. The student bodies of these graduate-level, professional schools are co-educational and diverse ethnically, religiously, and racially. Altogether about three dozen out of YU's 5,000 students are involved. Their activities generally involve informational and educational meetings. They do not proselytize. These groups have existed for years but went largely unnoticed prior to the recent spate of distorted media reports.

...

4. Given the strong prohibition against homosexual behavior in Jewish law, why does YU permit gay groups on campus?

Yeshiva University is subject to the human rights ordinance of the City of New York, which provides protected status to homosexuals. Under this law, YU cannot ban gay student clubs. It must make facilities available to them in the same manner as it does for other student groups.

At oral argument, defense counsel proffered "Yeshiva would be happy to stipulate to adding a more direct statement of religious purpose in its charter if plaintiffs would agree to dismiss the case." This assertion concedes the point. Yeshiva's charter is not merely form over substance. Its corporate purpose is the basis for licensure and receipt of grants and other public funding. As plaintiffs learned during the course of limited

discovery, Yeshiva submitted various forms to governmental agencies which belie its contention in this action that it is a religious corporation. In 2018, Yeshiva reported in Form CHAR410 to the New York State Department of Law, Charities Bureau, that it was an "educational institution, museum or library incorporated under the NY State Education Law or by special act" rather than an "organization [] incorporated under the religious corporations law or is another type of organization with a religious purpose or is operated, supervised or controlled by or in connection with a religious organization" (emphasis in original). Yeshiva's Director of Tax & Compliance, Alan Kruger, testified that Yeshiva registered as an educational corporation and not a religious corporation because "it would be difficult" to produce documents showing entitlement to the latter exemption.

In a letter dated February 16, 2021, Jon Greenfield, Director of Government Relations at Yeshiva, wrote to Senator Robert Jackson requesting New York State capital construction funding. Greenfield identified Yeshiva as a "501[c][3] not-for-profit institution of higher learning...", not a religious corporation. How Yeshiva represents itself is not merely "form over substance" as defense counsel argues. Rather, the term "religious corporation" as the City Council intended neatly squares with how the term is used in other legal and/or formal applications and settings. Yeshiva is either a religious corporation in all manners or it is not. Yeshiva's decision to amend its charter in 1967 and otherwise hold itself out as non-sectarian since then must be accorded. Thus, the record shows that Yeshiva is not a "religious corporation" on paper, does not hold itself out to be a "religious corporation" and at least 27-years ago knew that it was not exempt from the NYCHRL and was otherwise bound by its antidiscrimination mandates.

The court also does not need to contort itself to ascertain the intent of the legislature when it enacted the NYCHRL, commonly known as one of the most protective anti-discrimination laws in the country. The legislative intent is no better stated than in Admin Code § 8-130, entitled "Construction":

- a. The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed.
- b. Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct.

While the 1965 NYCHRL excluded "colleges and universities" from classification as a place of public accommodation, in 1991, the City Council removed this exemption from the NYCHRL. Thus, the court's determination that Yeshiva is not exempt from the NYCHRL is wholly consistent with the legislative intent of the NYCHRL, which requires that exemption from it be narrowly construed in order to minimize discriminatory conduct.

Even if the court were to adopt Yeshiva's religious function test, the court would reach the same result. Plaintiffs' counsel correctly characterizes defendants' argument on this point: defendants want this court to find that Yeshiva is a religious corporation in the same manner an ordinary person would describe themselves as a religious person. There is no doubt that Yeshiva has an inherent and integral religious character which defines it and sets it apart from other schools and universities of higher education. However, Yeshiva must fit within the term "religious corporation" as the legislature intended the term to mean in the NYCHRL. Yeshiva is a university which provides

educational instruction, first and foremost. Yeshiva's religious character evidenced by required religious studies, observation of Orthodox Jewish law, students' participation in religious services, etc. are all secondary to Yeshiva's primary purpose. "[A] religious corporation should be one formed primarily for religious purposes; exercising some ecclesiastical control over its members, having some distinct form of worship and some method of discipline for violation thereof" (*Naarim v. Kunda*, 7 Misc.3d 1032(A) [NY Sup Ct, Kings Co 2005]). Defense counsel's assertion that "[y]ou cannot step onto the campus or into a batei midrash without recognizing that this is a sacred space for students who are studying there" undercuts defendants' argument. The record shows that the purpose students attend Yeshiva is to obtain an education, not for religious worship or some other function which is religious at its core. Thus, religion is necessarily secondary to education at Yeshiva.

Defendants' reliance on *Scheiber v. St. John's University* (84 NY2d 120 [1994]) is misplaced. In that case, the Court of Appeals found that St. John's University ("SJU") was a "religious institution" within the meaning of the New York State Human Rights Law, to wit Exec. Law § 296(11). Chief Judge Judith Kaye concluded that although SJU was "conceived with the intent of fulfilling a secular educational role, SJU has not abandoned its religious heritage and plainly falls within the exemption for entities that are 'operated, supervised or controlled by or in connection with a religious organization'". Exec. Law § 296(11) is more expansive than Admin Code § 8-102 in that the former exempts "any religious or denominational institution or organization, or any organization operated for charitable or education purposes, which is operated, supervised or controlled by or in connection with a religious organization..." Since SJU was "an

educational organization operated in connection with the Vincentian order – a religious institution or organization – SJU is itself a “religious institution” within the language of Executive Law § 296(11)”. That fact has no bearing on whether Yeshiva is a “religious corporation” within the meaning of the NYCHLR. Therefore, contrary to defense counsel’s contention, *Scheiber* is not on point and this court does not need to “contradict the Court of Appeals to rule in plaintiffs’ favor.”

Accordingly, the court finds that Yeshiva is not a “religious corporation” as the term is used in Admin Code § 8-102. Defendants’ motion on this point is denied and plaintiffs’ cross-motion for partial summary judgment is granted to the extent that the court finds that the defendant Yeshiva is not a “religious corporation” as the term is used in the Admin Code § 8-102 exemption of a “Place or provider of public accommodation”.

First Amendment implications

The court now must consider whether the NYCHRL as applied to Yeshiva violates Yeshiva’s First Amendment rights. The First Amendment to the US Constitution, as applied to the States via the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, ... or the right of the people peaceably to assemble...”

Defense counsel quotes *Obergefell v Hodges*, (576 US 644, 679-680 [2015]) and claims that “[t]he First Amendment ensures that religious organizations ... are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.” Defendants argue that plaintiffs’ claims as applied to

Yeshiva violate Yeshiva's religious autonomy, the Free Exercise Clause, the Free Speech Clause and the Assembly Clause. Meanwhile, plaintiffs assert that the NYCHRL does not violate defendants' First Amendment rights because "[i]t is a law of general applicability, and the Council's intent to prohibit discrimination in places of public accommodation provides a rational basis for its enactment" citing *Catholic Charities of Diocese of Albany v. Serio*, 7 NY3d 510 [2006].

The NYCHRL and the First Amendment are not incompatible (see *i.e. Salemi v. Gloria's Tribeca Inc.*, 116 AD3d 569 [1st Dept 2014]). In *Catholic Charities*, the Court of Appeals explained that the First Amendment does not protect an individual from valid and neutral laws of general applicability, even when those laws forbid or compel conduct which goes against the grain of a religion. *Catholic Charities* cited *Employment Div., Dept of Human Resources of Oregon v. Smith*, 494 US 872 [1990], in which the Supreme Court upheld a state law of general applicability against a free exercise challenge. In response to *Employment Division*, Congress enacted the Religious Freedom Restoration Act of 1993, which was then held unconstitutional in 1997 by the Supreme Court in *City of Boerne v. Flores*, 521 US 507. Thus, *Employment Division* is good precedent (see *i.e. Matter of Gifford v. McCarthy*, 137 AD3d 30 [3d Dept 2016]).

Defense counsel argues that *Catholic Charities* is no longer good precedent because of *Fulton v. City of Philadelphia, Pennsylvania*, 141 SCt 1868 [2021]). That case, however, found a foster care contract was not generally applicable and thus was subject to strict scrutiny. Nor do cases involving secular exemptions apply, since Section 8-102 contains a very broad exemption for religious corporations organized under the RCL or Education Law and a smaller exception for private organizations.

Assuming *arguendo* that Yeshiva's refusal to recognize an LGBTQ student group is part of its exercise of religion, the NYCHRL's impact on Yeshiva's exercise of religion is only incidental to the NYCHRL's ban on discrimination. There can be no dispute that the NYCHRL is a neutral law of general applicability. It does not target religious practice, its intent is to deter discrimination, only, and it applies equally to all places of public accommodation other than those expressly exempted as distinctly private or a religious corporation organized under the education or religious corporations law. Indeed, the religious corporation carve-out under Section 8-102 was an attempt by the City Council to ensure that the NYCHRL will not be unconstitutionally applied to religious organizations. Thus, Yeshiva's Free Exercise argument is rejected.

The court further finds that Yeshiva's Free Speech rights will not be violated by application of the NYCHRL. Formal recognition of a student group does not equate to endorsement with that group's message (see *e.g. Bd. Of Educ. of Westside Community Schools v. Mergens By and Through Mergens*, 496 US 226, 250 [1990]). What plaintiffs seek is simply equal access to the tangible benefits that Yeshiva affords other student groups on its campus. By following the law and granting the YU Pride Alliance formal recognition and equal access, Yeshiva need not make a statement endorsing a particular viewpoint as defense counsel posits. Moreover, Yeshiva's Graduate Schools have LGBTQ student groups, which undercuts Yeshiva's arguments regarding compelled speech when LGBTQ student groups are already a formally recognized part of the Yeshiva community and have been so for nearly 30 years. Thus, the record shows that Yeshiva knows that formal recognition of LGBTQ student groups does not equate endorsement (see the 1995 Fact Sheet).

Finally, the court is unpersuaded by defendants' association argument, as Yeshiva has not come forward with any evidence that formal recognition of an LGBTQ student group and/or the grant of accommodations, advantages, facilities, and privileges at Yeshiva is inconsistent with the purpose of Yeshiva's mission and will impermissibly infringe on Yeshiva's assembly rights (*Matter of Gifford, supra* at 42 "[t]here is nothing in this record to indicate that petitioners' wedding business was 'organized for specific expressive purposes']"). The Supreme Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* is illustrative. In that case, the Court explained that law schools could not deny military recruiters equal access to their campuses on a theory that such access "impairs their own expression by requiring them to associate with the recruiters" because "just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, [] so too a speaker cannot erect a shield against laws requiring access simply by asserting that mere association "would impair its message" (547 US 47, 69 [2006] [internal quotations and citations omitted]).

Based on the foregoing, defendants' motion to dismiss plaintiff's complaint on grounds that the NYCHRL as applied to Yeshiva violates the First Amendment is denied.

Remaining issues

The court next considers defendants' motion for dismissal of the claims against Vice Provost Chaim Nissel on the grounds that he is not a decision-maker, but rather, a messenger. There is no opposition to that branch of the motion. Since there is no dispute that VP Nissel is not a proper defendant, that branch of defendants' motion is granted.

In addition to moving for partial summary judgment, plaintiffs request "such other

and further relief as may be just and proper” in their notice of cross-motion. In light of the court’s finding that Yeshiva is not a “religious corporation” as the term is used in Admin Code § 8-102, the court finds that plaintiffs are entitled to a permanent injunction restraining Yeshiva and President Ari Berman from continuing their refusal to officially recognize the YU Pride Alliance as a student organization because of the members’ sexual orientation or gender and/or YU Pride Alliance’s status, mission, and/or activities on behalf of LGBTQ students. There is no dispute on this record that Yeshiva is a place or provider of public accommodation within the meaning of the NYCHRL and that Yeshiva withheld and denied plaintiffs the full and equal enjoyment, on equal terms and conditions, of its accommodations, advantages, services, facilities or privileges because of plaintiffs’ actual or perceived sexual orientation. Thus, there is no dispute on this record that Yeshiva’s failure to grant such access to the YU Pride Alliance violates the NYCHRL. Therefore, plaintiffs are further entitled to an order directing Yeshiva to provide YU Pride Alliance the full and equal accommodations, advantages, facilities, and privileges of all other student groups at Yeshiva.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that the motion by the Lesbian and Gay Law Association Foundation of Greater New York for leave to submit a brief of *amicus curiae* is granted without opposition and said brief is considered by the court in connection with motion sequence 6; and it is further

ORDERED that defendants’ converted motion for summary judgment (sequence 6) is granted only to the extent that plaintiffs’ claims against defendant Vice Provost

Chaim Nissel are severed and dismissed; and it is further

ORDERED that plaintiffs' cross-motion for partial summary judgment is granted to the extent that the court finds that the defendant Yeshiva University is not a "religious corporation" as the term is used in Admin Code § 8-102's definition of a "Place or provider of public accommodation"; and it is further

ORDERED and ADJUDGED that defendants Yeshiva University and President Ari Berman are permanently restrained from continuing their refusal to officially recognize the YU Pride Alliance as a student organization because of the members' sexual orientation or gender and/or YU Pride Alliance's status, mission, and/or activities on behalf of LGBTQ students; and it is further

ORDERED and ADJUDGED that defendants Yeshiva University and President Ari Berman are directed to immediately grant plaintiff YU Pride Alliance the full and equal accommodations, advantages, facilities, and privileges afforded to all other student groups at Yeshiva University; and it is further

ORDERED that the balance of defendants' motion sequence 6 is denied; and it is further

ORDERED that the parties are directed to submit a joint letter to the court on or before July 19, 2022 advising as to the status of this action.

This constitutes the decision and order of the court.

Dated: New York, New York
June 14, 2022

So Ordered:



Hon. Lynn R. Kotler, J.S.C.

AFFIRMATION OF SERVICE

DAVID BLOOM, ESQ., an attorney duly admitted to practice law in the Courts of the State of New York, hereby affirms the following, pursuant to the penalties of perjury:

The undersigned hereby affirms that on June 24, 2022, a true and correct copy of the foregoing **Notice of Appeal, Informational Statement and Order with Notice of Entry** were served upon the following attorneys for the respective parties in this action, by NYSCEF e-filing, to:

EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP
Attorneys for Plaintiffs
600 Fifth Avenue, 10th Floor
New York, New York 10020
Tel.: (212) 763-5000
krosenfeld@ecbawm.com

MORRISON & FOERSTER LLP
Attorneys for Non-Party
Lesbian and Gay Law Association Foundation of Greater New York
250 W. 55th Street
New York, New York 10019-9710
Tel.: (212) 336-4482
tfoudy@mofo.com

Dated: New York, New York
June 24, 2022

To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of this paper or the contentions herein are not frivolous, as that term is defined in Part 130 of the Court Rules.

Yours, etc.,

KAUFMAN BORGEESE & RYAN LLP



By: David Bloom, Esq.
Attorneys for Defendants
**YESHIVA UNIVERSITY,
VICE PROVOST CHAIM NISSEL and
PRESIDENT ARI BERMAN**
200 Summit Lake Drive
Valhalla, New York 10595
Tel.: (914) 449-1000
KBR File No.: 811.1349

EXHIBIT C

ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 22A184

**YESHIVA UNIVERSITY, ET AL. v. YU PRIDE
ALLIANCE, ET AL.**

ON APPLICATION FOR STAY

[September 14, 2022]

The application for stay pending appeal of a permanent injunction entered by the New York trial court, presented to JUSTICE SOTOMAYOR and by her referred to the Court, is denied without prejudice to applicants again seeking relief from this Court if, upon properly seeking expedited review and interim relief from the New York courts, applicants receive neither. The order heretofore entered by JUSTICE SOTOMAYOR is vacated.

Applicants Yeshiva University and its president seek emergency relief from a non-final order of the New York trial court requiring the University to treat an LGBTQ student group similarly to other student groups in its student club recognition process. The application is denied because it appears that applicants have at least two further avenues for expedited or interim state court relief. First, applicants may ask the New York courts to expedite consideration of the merits of their appeal. Applicants do not assert, nor does the Appellate Division docket reveal, that they have ever requested such relief. Second, applicants may file with the Appellate Division a corrected motion for permission to appeal that court's denial of a stay to the New York Court of Appeals, as the Appellate Division clerk's office directed applicants to do on August 25. Applicants may also ask the Appellate Division to expedite consideration of that motion.

If applicants seek and receive neither expedited review

ALITO, J., dissenting

nor interim relief from the New York courts, they may return to this Court.

JUSTICE ALITO, with whom JUSTICE THOMAS, JUSTICE GORSUCH, and JUSTICE BARRETT join, dissenting.

Does the First Amendment permit a State to force a Jewish school to instruct its students in accordance with an interpretation of Torah that the school, after careful study, has concluded is incorrect? The answer to that question is surely “no.” The First Amendment guarantees the right to the free exercise of religion, and if that provision means anything, it prohibits a State from enforcing its own preferred interpretation of Holy Scripture. Yet that is exactly what New York has done in this case, and it is disappointing that a majority of this Court refuses to provide relief.

Yeshiva University hosts our nation’s largest Jewish undergraduate institution. That “program is structured to help students embrace the Jewish faith and engage with the secular world from a foundation of Torah values.” App. 191. Thus, Yeshiva expects its undergraduate students “to live in accordance with halachic norms and Torah ideals.” *Id.*, at 196.

A student group, the YU Pride Alliance (the Alliance), “vehemently disagreed” with Yeshiva’s interpretation of Torah with respect to sexual relations between members of the same sex, so it applied for recognition as an official student group in order to “make a statement” and promote “cultural changes” in the institution. *Id.*, at 16, 250–51. To facilitate those goals, the Alliance planned to host events that framed Jewish practices and religious events through an LGBTQ lens. “After much deliberation” and in consultation with senior rabbis, Yeshiva concluded that recognizing the Alliance would have “implications that are not consistent with Torah.” *Id.*, at 191. Doing so, Yeshiva believed, would “cloud [the] nuanced message” of Torah, which “accept[s] each individual with love,” but also “affirm[s] its

ALITO, J., dissenting

timeless prescriptions.” *Id.*, at 107. The University therefore denied the Alliance’s request for formal recognition but made it clear that students could “socialize in gatherings [as] they see fit.” *Id.*, at 81, 107.

Dissatisfied with this response, the Alliance sued Yeshiva in state court, claiming that its refusal to recognize the group violated a provision of the New York City Human Rights Law (NYCHRL) that forbids discrimination on the basis of sexual orientation and gender. The trial court agreed. Perfunctorily dismissing the University’s First Amendment arguments, the court ordered Yeshiva to recognize the group and to “immediately” grant it “the full and equal accommodations, advantages, facilities, and privileges afforded to all other student groups.” *Id.*, at 71. The court denied Yeshiva’s request for a stay pending appeal, and when the University applied to the Appellate Division and the Court of Appeals for interim relief, those courts refused without providing a single word of explanation. As a last resort, Yeshiva turned to this Court, but the majority—for no good reason—sends the University back to the state courts. The upshot is that Yeshiva is almost certain to be compelled for at least some period of time (and perhaps for a lengthy spell) to instruct its students in accordance with what it regards as an incorrect interpretation of Torah and Jewish law.

An applicant may obtain a stay pending appeal if it makes a strong showing (1) that it would likely prevail if review is granted, (2) that it will suffer irreparable harm during the time it takes for the completion of the appellate process, and (3) that neither the interests of other parties nor those of the public militate in favor of denial. *Nken v. Holder*, 556 U. S. 418, 434 (2009). Yeshiva easily satisfies all these requirements.

At least four of us are likely to vote to grant certiorari if Yeshiva’s First Amendment arguments are rejected on appeal, and Yeshiva would likely win if its case came before

ALITO, J., dissenting

us. A State’s imposition of its own mandatory interpretation of scripture is a shocking development that calls out for review. The Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith. See *Carson v. Makin*, 596 U. S. ___, ___ (2022) (slip op., at 7); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171 (2012). Restrictions on religious exercise that are not “neutral and of general applicability” must survive strict scrutiny, *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 531, 546 (1993), and the NYCHRL treats a vast category of secular groups more favorably than religious schools like Yeshiva. The NYCHRL exempts any “corporation incorporated under the benevolent orders law or described in the benevolent orders law.” NYC Admin. Code §8–102 (2022). It is therefore inapplicable to large groups like the American Legion and the Loyal Order of Moose, as well as smaller groups like the United Scottish Clans of New York and New Jersey. See N. Y. Ben. Ord. Law §2 (McKinney 2015). But Yeshiva was denied an exemption, and there has been no showing that granting an exemption to Yeshiva would undermine the policy goals of the NYCHRL to a greater extent than the exemptions afforded to hundreds of diverse secular groups. Accordingly, strict scrutiny applies. Based on the papers submitted to us in connection with this application, it is not likely that the Alliance could satisfy its burden under that standard.

Unless a stay is granted, Yeshiva will be required to recognize the Alliance as an official student group and to grant it all the privileges extended to other such groups. As the Alliance has contended, this would force Yeshiva to make a “statement” in support of an interpretation of Torah with which the University disagrees. The loss of First Amendment rights for even a short period constitutes irreparable harm, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ___, ___ (2020) (*per curiam*) (slip op., at 5), and the

ALITO, J., dissenting

appellate process in the state courts could easily drag on for many months. And as for the interests of Alliance members and the general public, while a stay would deprive the Alliance of the statement it wishes to obtain, Alliance members would not be prevented from socializing and conducting activities that do not require official recognition.

The majority does not address our well-established standard for granting a stay but instead suggests that we cannot grant a stay because the New York courts have not entered a final order. But the state courts' denial of interim relief constitutes a final order under *National Socialist Party of America v. Skokie*, 432 U. S. 43, 44 (1977) (*per curiam*). It is ironic that the theory that supported a stay in that case is eschewed here. Moreover, it is far from clear that our authority to issue a stay of a state court order that violates the Constitution is limited to situations in which a final order has been entered below. See, e.g., *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 25 (1943); *General Atomic Co. v. Felter*, 436 U. S. 493, 497 (1978) (*per curiam*); *Volkswagenwerk A. G. v. Falzon*, 461 U. S. 1303, 1304 (1983) (O'Connor, J., in chambers).

The majority instructs Yeshiva to pursue two avenues of relief in state court before filing another application here. First, the University is told to seek "expedit[ed] consideration of the merits of [its] appeal." *Ante*, at 1. But even expedited review could take months, and during all that time, the University would be required to continue to make the statement about Torah that it finds objectionable. Thus, an expedited appeal in and of itself would not be sufficient to protect Yeshiva's First Amendment rights. Second—and more to the point—the majority seems to think that it is still possible for the University to persuade the Court of Appeals to grant a stay. Of course, the Court of Appeals has *already* denied Yeshiva's application for interim relief, but the majority interprets a case comment written by a court clerk employed by the Appellate Division to mean that the

ALITO, J., dissenting

Court of Appeals may give Yeshiva a second bite at the apple notwithstanding its previous denial. That interpretation is dubious, yet the majority seizes upon it as dispositive.

I doubt that Yeshiva's return to state court will be fruitful, and I see no reason why we should not grant a stay at this time. It is our duty to stand up for the Constitution even when doing so is controversial.

For these reasons, I respectfully dissent.

EXHIBIT D

FILED: APPELLATE DIVISION - 1ST DEPT 09/20/2022 09:27 AM

FILED: APPELLATE DIVISION - 1ST DEPT 09/16/2022 08:06 PM

2022-02726

2022-02726

NYSCEF DOC. NO. 49

**SUMMARY STATEMENT ON APPLICATION FOR
EXPEDITED SERVICE AND/OR INTERIM RELIEF**

RECEIVED NYSCEF: 09/20/2022
RECEIVED NYSCEF: 09/19/2022

(SUBMITTED BY MOVING PARTY)

Date: September 16, 2022

Case # 2022-02726

Title YU Pride Alliance, et al. v. Yeshiva University, et al.

Index/Indict/Docket # 154010/2021

of

Matter

Appeal
by Leave from Decree

Order



Judgment



of

Supreme



Surrogate's



Family



County New York

Court entered on June 24, 20 22

Name of

Judge Lynn R. Kotler

Notice of Appeal

filed on June 24, 20 22

If from administrative determination, state agency

Nature of Civil Action

action

or proceeding

Provisions of



order



judgment



decree

appealed from

Denial of summary judgment for Appellants;

Grant of summary judgment in favor of Appellees: entry of permanent injunction

requiring Appellants to recognize YU Pride Alliance inconsistent w/ Torah values.

This application by

appellant

respondent

is for

this Court to expedite consideration of Appellants'

Motion for leave to reargue this Court's denial of Appellants' motion to stay the

permanent injunction pending appeal and issue an order no later than 10/3/22.

If applying for a stay, state reason why requested

Has any undertaking been posted No

If "yes", state amount and type

Has application been made to
court below for this relief No

If "yes", state

Disposition

Has there been any prior application
here in this court No

If "yes", state dates

and nature

Has adversary been advised
of this application Yes

Does he/she

consent No

Attorney for Movant

Attorney for Opposition

Name Eric Baxter

Katie Rosenfeld

Address The Becket Fund for Religious Liberty

Emery Celli Brinckerhoff Abady Ward & Maazel LLP

1919 Pennsylvania Avenue NW

600 Fifth Avenue 10th Floor

Washington, D.C. 20006

New York, New York 10020

Tel. No. 202-349-7221

Email ebaxter@becketlaw.org

krosenfeld@ecbawm.com

Appearing by _____

(Do not write below this line)

DISPOSITION

Application to expedite motion to rehear
is granted as below:

AMM
Justice ew

9/19/22
Date

Motion Date 9/26/22 Opposition 9/26 10am Reply _____

EXPEDITE ✓ PHONE ATTORNEYS _____ DECISION BY 10/3/22

ALL PAPERS TO BE SERVED PERSONALLY.

Court Attorney

EXHIBIT E

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

YU PRIDE ALLIANCE, et al.,

Plaintiffs-Respondents,

-against-

YESHIVA UNIVERSITY, et al.,

Defendants-Appellants.

Appellate Division
Case/Docket No.: 2022-02726

Originating Court
Index No.: 154010/2021

**STIPULATION AND AGREEMENT
TO STAY OF TRIAL COURT ORDER**

Plaintiffs but not Defendants stipulate to the following facts:

Justice Lynn R. Kotler of the Supreme Court of the State of New York, New York County, entered a Decision and Order in the proceedings below on June 14, 2022 (“Trial Court Order”);

Defendants-Appellants perfected their appeal of the Trial Court Order in this Court on August 8, 2022;

The appeal remains pending before this Court and is scheduled to be heard in the November Term;

Defendants-Appellants sought a stay during the pendency of this appeal of that portion of the Trial Court Order granting a permanent injunction to Plaintiffs, from this Court, from the New York State Court of Appeals, and from the United States Supreme Court;

Defendants-Appellants are now engaged in additional motion practice in this Court to seek a stay of the Trial Court Order following the Order of the Supreme Court dated September 15, 2022 that it could seek “expedited or interim state court relief”; and

Defendant-Appellant Yeshiva University announced on September 16, 2022 that “the university will hold off on all undergraduate club activities” while it seeks expedited or interim state court relief pursuant to the Supreme Court’s September 15, 2022 direction; and

Defendant-Appellant Yeshiva University intends to restart all undergraduate club activities upon the issuance of a stay of the Trial Court Order.

All parties agree to the following:

The parties to the above-referenced appeal hereby stipulate and agree that the June 24, 2022 Order entered by the Supreme Court of New York, New York County, shall be stayed pending the exhaustion of all appeals, including any appeals to this Court, the Court of Appeals, or the Supreme Court of the United States.

Dated: September 21, 2022

/s/ Katherine Rosenfeld
Katherine Rosenfeld
EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP
600 Fifth Avenue, 10th Floor
New York, New York 10020
krosenfeld@ecbawm.com

/s/ Eric S. Baxter
Eric S. Baxter
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave., NW, Suite 400
Washington, DC 20006
ebaxter@becketlaw.org

David Bloom
KAUFMAN BORGEEST & RYAN
LLP 120 Broadway, 14th Floor
New York, NY 12207
dbloom@kbrlaw.com

SO ORDERED:

HON. ANGELA M. MAZZARELLI

EXHIBIT F

Appellate Division, First Judicial Department

PRESENT: Hon. Angela M. Mazzarelli,
Anil C. Singh
Saliann Scarpulla
Julio Rodriguez III,

Justice Presiding,

Justices.

YU Pride Alliance, et al.,
Plaintiffs-Respondents,

Motion No. 2022-03647

Index No. 154010/21

Case No. 2022-02726

-against-

Yeshiva University and President Ari
Berman,

Defendants-Appellants,

Vice Provost Chaim Nissel,
Defendant.

An appeal having been taken to this Court from an order of the Supreme Court, New York County, entered on or about June 24, 2022, and said appeal having been perfected,

And an order of this Court entered on August 23, 2022 (M-2022-02616) having denied defendants-appellants' motion to stay, pending the hearing and determination of the perfected appeal of the order, the execution and enforcement of the order, which, inter alia, directed that defendants Yeshiva University and President Ari Berman immediately recognize plaintiff YU Pride Alliance as an official campus club,

And defendants-appellants having moved for reargument of the order of this Court entered on August 23, 2022 (M-2022-02616), and upon reargument, granting a stay of enforcement of the order entered June 24, 2022, pending determination of the appeal,

And the parties having stipulated and agreed that the June 24, 2022 order shall be stayed pending the exhaustion of all appeals, including, inter alia, to this Court,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is granted on consent.

ENTERED: September 29, 2022

A handwritten signature in black ink, reading "Susanna Molina Rojas". The signature is fluid and cursive, with the first name "Susanna" being more prominent and the last name "Rojas" following in a similar style.

Susanna Molina Rojas
Clerk of the Court

EXHIBIT G

Appellate Division, First Judicial Department

Webber, J.P., González, Mendez, Pitt-Burke, JJ.

16879 &
[M-04092,
04103,
04417,
04188]

YU PRIDE ALLIANCE et al.,
Plaintiffs-Respondents,

-against-

YESHIVA UNIVERSITY et al.,
Defendants-Appellants,

Index No. 154010/21
Case No. 2022-02726

VICE PROVOST CHAIM NISSEL,
Defendant.

LESBIAN & GAY LAW ASSOCIATION FOUNDATION
OF GREATER NEW YORK, NEW YORK CITY BAR
ASSOCIATION, ESHEL, KESHET, NATIONAL
COUNCIL OF JEWISH WOMEN, WOMEN LAWYERS
ON GUARD INC., A GROUP OF RABBIS AND LAW
SCHOOL PROFESSORS, DR. JOSHUA R. WOLFF, DR.
H.L. HIMES, DR. THERESA STUELAND KAY, NEW
YORK CIVIL LIBERTIES UNION FOUNDATION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
AMERICANS UNITED FOR SEPARATION OF CHURCH
AND STATE, FIRST AMENDMENT SCHOLARS,
CHRISTIAN COLLEGES AND UNIVERSITIES, THE
ASSOCIATION OF CATHOLIC COLLEGES AND
UNIVERSITIES, THE CARDINAL NEWMAN SOCIETY,
15 INDIVIDUAL RELIGIOUS SCHOOLS, NATIONAL
ORTHODOX JEWISH ORGANIZATIONS, CARDOZO
OUTLAW, FERKAUF LGBTQIA+ AFFINITY GROUP,
CARDOZO OUTLAW ALUMNI COMMITTEE,
CARDOZO STUDENT BAR ASSOCIATION, FORDHAM
OUTLAWS, FORDHAM LAW STUDENT BAR
ASSOCIATION, OUTLAWS+ ALLIES AT ST. JOHN'S
SCHOOL OF LAW, JEWISH COALITION FOR
RELIGIOUS LIBERTY, COALITION FOR JEWISH
VALUES, AGUDATH ISRAEL OF AMERICA,
ARCHDIOCESE OF NEW YORK, PROFESSOR

DOUGLAS LAYCOCK AND PROFESSOR RICHARD A.
EPSTEIN,
Amici-Curiae.

Kaufman, Borgeest & Ryan, LLP, New York (David Bloom of counsel), and The Becket Fund for Religious Liberty, Washington, DC (Eric S. Baxter of the bar of the District of Columbia, admitted pro hac vice of counsel), for appellants.

Emery Celli Brinckerhoff Abady Ward & Maazel, LLP, New York (Katherine Rosenfeld of counsel), for respondents.

New York City Bar Association, New York (Lauren G. Axelrod, Danielle (Danny) King and Karen Levit of counsel), for New York City Bar Association, amicus curiae.

Squire Patton Boggs (US) LLP, New York (Norman N. Kinel of counsel) and David R. Kuney, Potomac, MD for Eshel, Keshet, National Council of Jewish Women, Women Lawyers on Guard Inc., and A Group of Rabbis and Law School Professors, amici curiae.

Jenner & Block LLP, New York (Jeremy M. Creelan, Rémi J.D. Jaffré and Owen W. Keiter of counsel), and Jenner & Block LLP, Washington, DC (Michelle S. Kallen of counsel), for Dr. Joshua R. Wolff, Dr. H.L. Himes and Dr. Theresa Stueland Kay, amici curiae.

Gabriella Larios and Robert Hodgson, New York New York Civil Liberties Union Foundation, amicus curiae.

Rose A. Saxe, New York and Daniel Mach, Washington, D.C., for American Civil Liberties Union Foundation, amicus curiae.

Richard B. Katskee, Bradley Girard and Gabriella Hybel, Washington, DC, for Americans United for Separation of Church and State, amicus curiae.

Wilmer Cutler Pickering Hale and Dorr LLP, New York (Olivia P. Greene and Alan E. Schoenfeld of counsel), for First Amendment Scholars: Professors Nelson Tebbe, Katherine Franke, Frederick Mark Gedicks, Linda C. McClain, Lawrence G. Sager, Richard C. Schragger, Micah Schwartzman, Elizabeth W. Sepper and Nomi Stolzenberg, amici curiae.

Schaerr | Jaffe LLP, New York (Erik S. Jaffe of counsel and Gene Schaerr of the bar of the District of Columbia and Joshua Prince of the bar of the District of Columbia), for Christian Colleges & Universities, The Association of Catholic Colleges and Universities, The Cardinal Newman Society and 15 Individual Religious Schools, amici curiae.

Dennis Rapps, New York, for National Orthodox Jewish Organizations, amici curiae.

Arnold & Porter Kaye Scholler LLP, New York (Rosalyn H. Richter, Angela R. Vicari, Rebecca D. Maller-Stein and Mindy A. Gorin of counsel), for Cardozo OUTLaw, Ferkauf LGBTQIA+ Affinity Group, Cardozo OUTLaw Alumni Committee, Cardozo Student Bar Association, Fordham OUTLaws, Fordham Law Student Bar Association, and OUTLaws+ Allies at St. John's School of Law, amici curiae.

Nelson Madden Black LLP, New York (Barry Black of counsel), for Jewish Coalition for Religious Liberty and Coalition for Jewish Values, amici curiae.

Dhillon Law Group, Inc., New York (Ronald D. Coleman of counsel), for Agudath Israel of America, amicus curiae.

The Law Office of Judah Z. Cohen PLLC, Woodmere (Judah Z. Cohen of counsel), for Professor Douglas Laycock and Archdiocese of New York, amici curiae.

Archdiocese of New York, New York (Roderick Cassidy of counsel), and Boyden Gray & Associates PLLC, Washington, DC (Michael Buschbacher of counsel), for Archdiocese of New York, amicus curiae.

First Liberty Institute, Plano, TX (Keisha T. Russell of counsel), for Professor Richard A. Epstein, amicus curiae.

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered June 24, 2022, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiffs' New York City Human Rights Law (City HRL) claims asserting gender, sexual orientation, and association discrimination, granted plaintiffs' motion for partial summary judgment, and issued a permanent

injunction requiring defendant university (Yeshiva) to recognize plaintiff student group (Pride Alliance) as an official student organization, unanimously affirmed, with costs.

Yeshiva was originally chartered in 1897 under the Membership Corporations Law as the Rabbi Isaac Elchanan Theological Seminary Association (RIETS), with the stated purpose to “promote the study of Talmud” and prepare Orthodox Jewish rabbis for ministry. Over several decades, the charter was amended to allow numerous secular degrees to be awarded and to change the name of the institution, while RIETS remained part of Yeshiva. In 1967, Yeshiva amended its charter to become incorporated under the Education Law. Two years later it amended the charter to drop Hebrew Literature and Religious Education degrees, since RIETS was being spun off as its own corporation offering those degrees, and to “clarify the corporate status of the University as a non-denominational institution of higher learning.” While Yeshiva is now comprised of three undergraduate colleges and seven graduate schools, RIETS remains a separate corporate entity housed on one of Yeshiva’s campuses.

Supreme Court correctly held that Yeshiva does not meet the definition of “religious corporation incorporated under the education law or the religious corporation law,” which would exempt it from the prohibitions against discrimination in public accommodations as an organization “deemed to be . . . distinctly private” (Administrative Code of City of NY §§ 8-102, 8-107[4][a][1][a]). Under the Education Law, a “[r]eligious or denominational educational institution” is “an 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” (Education Law § 313[2][b]). The Religious Corporations Law uses the term “religious corporation” to describe “a

corporation created for religious purposes,” that is, “created to enable its members to meet for divine worship or other religious observances” (Religious Corporations Law § 2; *see New York State Club Assn. v City of New York*, 118 AD2d 392, 393-394 [1st Dept 1986], *affd* 69 NY2d 211 [1987], *affd* 487 US 1 [1988]; *Temple-Ashram v Satyanandji*, 84 AD3d 1158, 1160 [2d Dept 2011] [possible “de facto” religious corporation due to language of charter and operation as “place of worship”]). A plain reading of the above statutes, along with Yeshiva’s proffered statements to public authorities contained in the record, show that Yeshiva does not qualify under either definition (*see* Administrative Code § 8-130[b] [“Exceptions to and exemptions from the provisions of this title shall be construed narrowly in order to maximize deterrence of discriminatory conduct”])).

Nor does Yeshiva qualify for exemption under the provision allowing “any religious or denominational institution or organization or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization,” to “limit[] employment or sale or rentals of housing accommodations or admissions to or giv[e] preference to persons of the same religion or denomination or . . . mak[e] such selection as is calculated by such organization to promote the religious principles for which it is established or maintained” (Administrative Code § 8-107[12]; *accord* Education Law § 313[3][a]). Even assuming that religious officials at RIETS exercise some influence over Yeshiva, this exemption’s terms apply only to employment, housing, and student admissions selections, not to every decision made concerning enrolled students (*compare Scheiber v St. John’s Univ.*, 84 NY2d 120, 126-127 [1994] [similar provision under State Human Rights Law]).

Turning to defendants' First Amendment arguments, we find that providing the Pride Alliance with full and equal access to public accommodations does not intrude on Yeshiva's asserted right "to decide matters 'of faith and doctrine'" (*Our Lady of Guadalupe School v Morrissey-Berru*, --- US ---, 140 S Ct 2049, 2060 [2020], quoting *Hosanna-Tabor Evangelical Lutheran Church & School v Equal Empl. Opportunity Commn.*, 565 US 171, 186 [2012]; see also Administrative Code § 8-107[4][a]). The record demonstrates that Yeshiva already recognizes LGBTQ+ student organizations at three of its graduate schools, which are legally part of Yeshiva's corporation, has done so for over 25 years, and made clear as early as 1995 that this recognition did not mean Yeshiva endorsed or accepted the views of those student groups. As such, and in light of Yeshiva's corporate purpose as an institution of higher education, we find that denial of recognition for the Pride Alliance is not "essential" to Yeshiva's "central mission" (*Our Lady of Guadalupe School*, 140 S Ct at 2060).

Similarly, we find no violation of Yeshiva's free exercise of religion. The City HRL's public accommodations provision is both neutral and generally applicable (see *Fulton v Philadelphia*, ___ US ___, 141 S Ct 1868, 1876 [2021]). The exception relieving places of public accommodation from the prohibition against age and gender discrimination "where the commission grants an exemption based on bona fide considerations of public policy" (Administrative Code § 8-107[4][b]), does not concern an individual's sexual orientation or religion, and does not create a "system of individualized governmental assessment of the reasons for relevant conduct" that would subject the law prohibiting discrimination to strict scrutiny (*Church of the Lukumi Babalu Aye, Inc. v Hialeah*, 508 US 520, 537 [1993] [internal quotation marks omitted]). Instead, regulations allow for, among other things, senior discounts, age

requirements for certain motion pictures, gender-based restrictions for restrooms, rooming houses, and lodging facilities with sleeping rooms or bathrooms used in common, and otherwise require a showing that health or safety would be protected by an exemption (*see* 47 RCNY 2-03, 3-02, 3-03, 3-04).

Nor does the exemption for benevolent organizations affect the general applicability of the City HRL. “[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue” (*Tandon v Newsom*, --- US ---, 141 S Ct 1294, 1296 [2021]). Here, that interest is the City’s “compelling interest in providing its citizens an environment where all persons . . . have a fair and equal opportunity to participate in the business and professional life of the city” (*New York State Club Assn.*, 487 US at 5). In creating the benevolent organization and religious corporation exemptions, the City Council found that these organizations “have not been identified in testimony before the Council as places where business activity is prevalent” (Local Law No. 63 [1984]; *see New York State Club Assn.*, 487 US at 21 [Scalia, J., concurring]).

Finally, we reject the contention that recognizing the Pride Alliance as a student club violates Yeshiva’s freedom of expression and association, as a “school does not endorse or support student speech that it merely permits on a nondiscriminatory basis” (*Board of Educ. of Westside Community Schools v Mergens*, 496 US 226, 250 [1990]; *see Gay Activists Alliance v Board of Regents of Univ. of Oklahoma*, 638 P2d 1116, 1122 [Okla 1981] [“recognition” of student group “does not suggest approval or endorsement by the university”]; *Gay Alliance of Students v Matthews*, 544 F2d 162, 165 [4th Cir 1976] [same]; *see also Rumsfeld v Forum for Academic & Institutional Rights, Inc.*, 547 US 47, 65 [2006] [law schools’ free speech and association rights not violated by

requirement to allow military recruiters on campus, though schools disagreed with ban on openly gay personnel]). As previously noted, Yeshiva has made clear that it does not endorse or accept the views of its already-existing LGBTQ+ student groups, and the City HRL does not require any such endorsement or compel speech (*Rumsfeld*, 547 US at 61-65). Moreover, there is no violation of Yeshiva’s associational rights where plaintiff Pride Alliance members are already enrolled students, Yeshiva already engaged in many discussions with the Pride Alliance about sexual orientation and gender identity issues, Yeshiva continued to express the desire to foster diversity and inclusion in association with Pride Alliance members when denying official recognition, and Yeshiva even explained several actions it was undertaking to bring about “greater awareness and acceptance” and “create a space where students, faculty and Roshei Yeshiva to continue this conversation” about sexual orientation and gender identity (*see Rumsfeld*, 547 US at 68-70).

M-4092

M-4103

M-4417 – *YU Pride Alliance et al. v Yeshiva University et al.*

Motions for leave to file amicus curiae briefs, granted.

M-4188 – *YU Pride Alliance et al. v Yeshiva University et al.*

Motion by plaintiffs to enlarge the record, denied.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: December 15, 2022



Susanna Molina Rojas
Clerk of the Court