

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
PERMISSION TO APPEAL TO
THE NEW YORK COURT OF
APPEALS UNDER CPLR
§§ 5602(a)(1)(i) AND/OR 5602(b)**

COUNSELORS:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Eric S. Baxter, Esq., dated the 15th day of September, 2022, 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, will move this Court located at 27 Madison Avenue, New York, NY, 10010, on the 3d day of October at 10:00 AM,¹ or as soon thereafter as counsel can be heard, for an Order, pursuant to CPLR 5602(a)(1)(i) and/or (b), Rule 1250.16(d)(3) of the Practice Rules of the Appellate Division, and this Court's inherent powers, granting Appellants' leave to appeal to the New York Court of Appeals the Decision and Order of this Court dated August 23, 2022 ("Order"), denying Appellants' motion to stay the permanent injunction entered against them by the Supreme Court for the County of New York in the above-captioned matter, thereby compelling them to violate their sincerely held religious beliefs by immediately recognizing Plaintiff YU

¹ For the reasons set forth in this motion, Appellants need immediate relief. They have selected October 3, 2022, as the return date only because it is the earliest available return date that does not fall on a Jewish holiday. Appellants respectfully request relief at the earliest possibility.

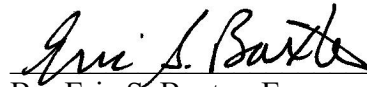
PRIDE ALLIANCE as an official campus club and for such other and further relief as this Court may deem just and proper, in its discretion, under all of the circumstances.

Dated: September 15, 2022
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



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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-Appellants YESHIVA UNIVERSITY and PRESIDENT ARI BERMAN (collectively “Yeshiva”), and I am fully familiar with the facts and circumstances of this matter.

2. This affirmation arises from the above-referenced action initially filed in the New York County Supreme Court. 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. This runs directly contrary to Yeshiva’s religious determination, made in consultation with its senior rabbis, not to give the club official recognition. A copy of the trial court’s order is attached as **Exhibit A**.²

3. Yeshiva immediately appealed the order to this Court, also on June 24. A copy of the notice of appeal is attached as **Exhibit B**. Yeshiva’s appeal was perfected on August 8, 2022, and the matter is currently set for the Court’s November calendar.

² All page numbers referenced for Exhibit A pertain to pdf-generated page numbers.

4. Via order to show cause, Yeshiva filed a motion to stay the injunction on July 5, 2022. On August 23, 2022, this Court denied that request. A copy of that order is attached as **Exhibit C**.

5. That same day, Yeshiva sought leave to appeal the denial to the New York Court of Appeals via an order to show cause. That filing was rejected by the Court Clerk on August 25, 2022. A copy of that order is attached as **Exhibit D**.

6. After speaking with the Clerk, Yeshiva refiled its order to show cause later that day, but it was again rejected. The second notice of rejection stated that Yeshiva could no longer file “[a]n Interim Stay request,” but instead had to file “[a] completed full motion with proper return date.” A copy of that order is attached as **Exhibit E**.

7. Upon speaking with the Clerk again, undersigned counsel was told that, in the circumstances of this case, no mechanism existed to expedite consideration of “a full motion with proper return date.”

8. While Yeshiva was seeking leave from this Court to appeal to the Court of Appeals, it simultaneously sought leave from the Court of Appeals directly. On August 25, 2022, the Court of Appeals denied leave. A copy of that order is attached as **Exhibit F**.

9. At that point, Yeshiva understood there was no further path in the New York courts for seeking emergency relief. “[A] full motion with proper return date” might not have been decided for months, leaving Yeshiva with the impossible choice of either abandoning its religious beliefs in a matter of weeks (with the window for review of club applications then closing on September 12), or facing a finding of contempt. Yeshiva thus sought emergency relief in the United States Supreme Court.

10. On September 9, 2022, Justice Sotomayor issued an interim stay of the trial court’s permanent injunction, allowing more time for the full U.S. Supreme Court to act. A copy of that order is attached as **Exhibit G**.

11. On September 15, 2022, a majority of five justices held that Yeshiva still had two options “for expedited or interim state court relief.” A copy of that order is attached as **Exhibit H**.

12. First, Yeshiva could “ask the New York Courts to expedite consideration of the merits of their appeal.” (*Id.* at 1.)

13. Second, Yeshiva could file the “full motion with proper return date,” as previously suggested by this Court (Ex. E), and “ask [this Court] to expedite consideration of that motion,” (Ex. H).

14. Through this motion, Yeshiva seeks this second form of relief by filing the motion as a “full motion with proper return date” and simultaneously filing an order to show cause for the motion to be considered on an expedited basis. *See* CPLR 2214(d).³

15. 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. H.) Four justices dissented only because they would have granted Yeshiva immediate relief. (*Id.*) They 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.)

16. Under Rule 1250.16(d)(1), Yeshiva’s motion for leave to appeal the denial of a stay is timely because the order denying the stay issued on August 23, 2022 (Ex. C) and this motion is being filed on September 15, 2022, less than 30 days after the order issued.

17. The motion should be granted for multiple reasons. Yeshiva is an undisputedly religious institution which raised ironclad First Amendment defenses that were “[p]erfunctorily dismiss[ed]” by the trial court. (Ex. H at 3 (four Justices).) Yeshiva also has a clear statutory defense, which the trial court rejected only by adopting an atextual reading of the New York City law at issue without citing any supporting authorities. And finally, the injunction irreparably harms Yeshiva, putting defendants to the impossible choice of violating their sincere religious beliefs or facing contempt of court. For all these reasons, leave to appeal to the Court of Appeals is warranted.

³ Yeshiva is also seeking the first form of relief directed by the Supreme Court via a separate order to show cause.

FACTUAL BACKGROUND

18. This lawsuit arose from Yeshiva's religious decision not to officially recognize a Yeshiva "Pride Alliance" student club on its undergraduate campuses.

19. Plaintiffs contend that this decision violated the public accommodation provisions of the New York City Human Rights Law ("NYCHRL").

20. That law has three relevant exemptions or potential exemptions.

21. *First*, it expressly excludes from the definition of public accommodation any "religious corporation incorporated under the education law." (N.Y.C. Admin. Code § 8-102.) Relevant to this exemption, it is undisputed that Yeshiva is a corporation "incorporated under the education law." (Ex. A at 8.) And it is undisputed that Yeshiva is also deeply "religious." The trial court acknowledged that it has "proud and rich Jewish heritage and a self-described mission to combine 'the spirit of Torah' with strong secular studies." (*Id.* at 6.) And Plaintiffs themselves "concede Yeshiva's deeply religious character in their pleadings." (Rec 454; *see also* Rec 1741-1742 (extensive unrebutted evidence of Yeshiva's religiosity).)⁴

22. *Second*, the NYCHRL exempts decisions made by any "religious or denominational institution or organization" that "promote the religious principles for which it is established or maintained." (N.Y.C. Admin. Code § 8-107(12).) Here, Plaintiffs conceded that Yeshiva decided not to have a Yeshiva Pride Alliance in consultation with its *Roshei Yeshiva* (or senior rabbis), because Yeshiva believes that recognizing the club would "cloud" the Torah's "nuanced" message calling students to "accept[] each individual with love," while still "affirm[ing] [the Torah's] timeless prescriptions." (Ex. H at 2-3; *see also* Rec 46-47 ¶ 1; Rec 65 ¶¶ 98-101; Rec 295 ¶ 53; Rec 456; Plaintiff Meisels YouTube Statement at 18:10.)⁵

23. *Third*, the NYCHRL includes a discretionary exemption providing that claims of gender discrimination "shall not apply ... to places or providers of public accommodation where the

⁴ All "Rec" cites are to the Record on Appeal (Volumes I-V) on this Court's docket.

⁵ All "Doc." cites are to the Supreme Court docket.

commission grants an exemption based on bona fide considerations of public policy.” (N.Y.C. Admin. Code § 8-107(4)(b).) There is no dispute that each of Plaintiffs’ claims alleges discrimination on “the [b]asis of [g]ender and [s]exual [o]rientation.” (Rec 72-74.)

24. Yeshiva also raised constitutional defenses under the First Amendment’s church autonomy doctrine, the Free Exercise Clause, and the Free Speech and Assembly Clauses.

ARGUMENT

25. Review by the Court of Appeals is warranted as to each of Yeshiva’s constitutional and statutory defenses.

Church Autonomy

26. Church autonomy protects “the right of churches and other religious institutions”—including religious schools—to make “internal management decisions that are essential to the institution’s central mission.” (*Our Lady of Guadalupe Sch. v Morrissey-Berru*, 140 S Ct 2049, 2060 [2020] (applied to Catholic schools); *see also* Ex. H at 4 (“The Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith” (citing *Carson v Makin*, 142 S Ct 1987 [2022]; *Hosanna-Tabor Evangelical Lutheran Church and Sch. v EEOC*, 565 US 171 [2012])).)

27. Church autonomy includes religious institutions’ “unquestioned” right to “organize [or not] ... to assist in the expression and dissemination of any religious doctrine.” (*Kedroff v St. Nicholas Cathedral*, 344 US 94, 114 [1952]; *see also Obergefell v Hodges*, 576 US 644, 679-680 [2015] (First Amendment “ensures that religious organizations ... are given proper protection as they seek to teach” their own beliefs regarding marriage and sexuality).)

28. Here, it is undisputed that Yeshiva is religious and that it decided not to recognize the club for religious reasons in pursuit of its religious mission of forming its undergraduate students in the Jewish faith. Because this is a “quintessentially religious” decision (*Serbian E. Orthodox Diocese for United States of America & Canada v Milivojevich*, 426 US 696, 720 [1976]), this lawsuit is barred by the religious autonomy doctrine.

29. Yet, as four justices of the U.S. Supreme Court just stated, the trial court “[p]erfunctorily dismiss[ed] the University’s First Amendment arguments.” (Ex. H at 3.) Neither the trial court nor this Court provided any reason for rejecting Yeshiva’s church autonomy defense, which would have stripped the trial court’s jurisdiction to hear Plaintiffs’ case.

30. Review by the Court of Appeals is thus warranted to correct this constitutional error.

Free Exercise

31. Under the Free Exercise Clause, a law that is not generally applicable is subject to strict scrutiny. (*Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 531-532 [1993].)

32. The NYCHRL is not generally applicable because, as four Justices just explained, it “treats a vast category of secular groups more favorably than religious schools like Yeshiva.” (Ex. H at 4.) The NYCHRL exempts hundreds of secular organizations while not accommodating Yeshiva’s religious exercise. (See N.Y.C Admin. Code § 8-102 (exempting private clubs with up to 400 members and “benevolent orders”); see also Benevolent Orders Law §§ 2, 7 (listing dozens of nationwide benevolent orders with hundreds of thousands of members); *Gifford v Guilderland Lodge, No. 2480, B.P.O.E. Inc.*, 707 NYS2d 722, 723-724 [3d Dept 2000] (recognizing that these secular exemptions are “absolute and not subject to limitation”); accord Ex. H at 3-4.)

33. Under the Free Exercise Clause, if “any” such secular exemption is allowed, requests for religious exemptions must also be granted. (*Tandon v Newsom*, 141 S Ct 1294, 1296 [2021]; see also *Kennedy v Bremerton Sch. Dist.*, 142 S Ct 2407, 2421-2422 [2022].) This is true even if a law’s exemptions are only discretionary and the government has never exercised that discretion, (*Fulton v City of Philadelphia*, 141 S Ct 1868, 1879, 1882 [2021]). This factor is also present here, since the NYCHRL contains just such a discretionary exemption. (See N.Y.C. Admin. Code § 8-107(4)(b) (providing that the NYCHRL “shall not apply, with respect to ... gender, to places or providers of public accommodation where the commission grants an exemption based on bona fide considerations of public policy”).)

34. Yet as with Yeshiva’s church autonomy rights, the trial court “[p]erfunctorily dismiss[ed]” this general applicability problem too. (Ex. H at 3.) The trial court ignored the multiple recent

Supreme Court cases just described, instead relying on the New York Court of Appeals’ decision in *Catholic Charities of the Diocese of Albany v Serio*, 7 NY3d 510 [2006]. (Ex. A at 17.) But the Court of Appeals is already reconsidering its free exercise jurisprudence as set forth in that case by direction of the U.S. Supreme Court in *Roman Catholic Diocese of Albany v Emami*. (142 S Ct 421 [2021] (remanding in light of *Fulton*); see also *Roman Catholic Diocese of Albany v Vullo*, No. 2022-00089; *id.* Mot No. 2022-523.) Review by the Court of Appeals of the exact same issue in this case is thus warranted.

35. Review is also warranted because the NYCHRL’s numerous exemptions mean that strict scrutiny could not be satisfied in any case. (See *Lukumi*, 508 US at 547 (compelling interest test cannot be met when a law “leaves appreciable damage to [the government’s] supposedly vital interest unprohibited”).) As four Supreme Court justices put it, “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.” (Ex. H at 4.)

Freedom of Speech and Assembly

36. “[T]he Free Speech Clause provides overlapping protection for expressive religious activities.” (*Kennedy*, 142 S Ct at 2421.) This overlapping protection prohibits compelling a religious organization “to be an instrument for fostering public adherence to an ideological point of view.” (*Wooley v Maynard*, 430 US 705, 715 [1977].)

37. The Assembly Clause protects the freedom of private organizations, including religious organizations, to educate and form the next generation according to their particular tradition’s religious vision. (*Our Lady*, 140 S Ct at 2055; *Thomas v Collins*, 323 US 516, 532 [1945].) Yet Plaintiffs seek to use the NYCHRL and this Court to force “cultural changes” both at Yeshiva and in the Orthodox Jewish community at large. (See, e.g., Rec 91.)

38. Such claims cannot survive strict scrutiny, for the reasons stated above. (See also *Hurley v Irish-Am. Gay, Lesbian and Bisexual Group*, 515 US 557, 572-573 [1995] (forcing a gay club’s participation in private parade would “essentially requir[e] petitioners to alter the expressive content of their parade” in violation of the Free Speech and Assembly Clauses).)

39. Because the trial court ignored the U.S. Supreme Court’s free speech and free assembly precedents, and because this Court did not intervene to correct that error or provide any justification for the decision below, review by the Court of Appeals is warranted.

The Statutory Exemptions

40. The trial court agreed that—“[a]t first blush”—the NYCHRL’s statutory exemption for “a religious corporation incorporated under the education law” applies to Yeshiva. (Ex. A at 7, 9.)

41. Indeed, one year ago, when Plaintiffs sought a *preliminary* injunction demanding club recognition, the trial court rejected Plaintiffs’ argument that Yeshiva was not exempt from the NYCHRL as “contrary to the plain language of the statute.” (Rec 458.)

42. Plaintiffs filed a notice of appeal from that ruling, (Doc. 131), but failed to perfect it.

43. Later, on summary judgment, the trial court reversed itself. (Ex. A at 4.)

44. It again confirmed that Yeshiva is the nation’s flagship Jewish university “with a proud and rich Jewish heritage” and “an inherent and integral religious character which defines it and sets it apart from other schools and universities of higher education.” (*Id.* at 7, 15.)

45. Yet it concluded that Yeshiva is not “religious” within the meaning of the NYCHRL (*Id.* at 22) because Yeshiva is not a house of worship (*Id.* at 10, 16); Yeshiva in its most recent charter only noted that its original religious purpose was “continued” instead of restating that purpose outright (*Id.* at 11-12; *see also* Rec 1750); and Yeshiva offers too many secular degrees to be religious. (Ex. A at 11-12.)

46. Under the trial court’s reasoning, it concluded that even an explicit purpose of “promot[ing] the study of Talmud” would “not necessarily make Yeshiva a religious corporation” under the NYCHRL. (Ex. A at 11-12.) It cited no case law or other legal authority to support its conclusion, claiming only that the City Council meant for the religious exclusion to be interpreted “narrowly.” (Ex. A at 15.)

47. Further, the trial court ignored entirely the NYCHRL’s second religious exemption for actions taken to “promote ... religious principles.” (N.Y.C. Admin. Code § 8-107(12).) Yeshiva is

a religious organization covered by that provision, and Yeshiva's club review process undisputedly is meant to ensure the University's religious atmosphere.

48. Because the trial court's statutory construction rejects the plain meaning of the NYCHRL with no supporting case law or legislative history, review by the Court of Appeals is warranted.

49. Left uncorrected, the trial court's interpretation of the NYCHRL could subject hundreds of religious schools to unprecedented litigation (including for any religious based decisions, as the NYCHRL also prohibits discrimination based on "creed"). (N.Y.C. Admin. Code § 8-107(4).)

Irreparable Harm

50. As a matter of law, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (*Roman Catholic Diocese of Brooklyn v Cuomo*, 141 S Ct 63, 67 [2020]; *see also Nebraska Press Assn. v Stuart*, 423 US 1327, 1329 [1975] ("[A]ny First Amendment infringement that occurs with each passing day is irreparable." (Blackmun, J.)); *accord* Ex. H at 4-5.)

51. Here, four Supreme Court Justices just described the permanent injunction entered in this case as "a shocking development that calls out for review. The Free Exercise Clause protects the ability of religious schools to educate according to their faith." (Ex. H at 4.) And, "[a]s the [Pride] Alliance has contended, this [injunction] would force Yeshiva to make a 'statement' in support of an interpretation of Torah with which the University disagrees." (*Id.*)

52. Once this harm occurs, individuals could seek to compel Yeshiva to abandon its Torah values on any number of subjects and instead make statements approving of all manner of clubs that Yeshiva has denied for religious reasons. (Rec 90; Rec 294 ¶¶ 38-44 (noting that Yeshiva has rejected videogame, gambling, and shooting clubs, as well as the Jewish "AEPi" fraternity, as "not consistent with Yeshiva's Torah values").) All this is exactly the kind of irreparable harm the First Amendment guards against. And even if the injunction is eventually dissolved, the impact on Yeshiva's religious culture cannot be undone.

53. Indeed, the U.S. Supreme Court all but conceded the irreparable harm to Yeshiva. The Court did not deny Yeshiva's stay under the "well-established standard" regarding irreparable

harm. (Ex. H at 5.) Instead, the Supreme Court took the extraordinary step of stating that Yeshiva’s stay application was denied “without prejudice,” with instructions for how Yeshiva “may return to this Court” if “neither expedited review nor interim relief” is afforded to it “from the New York courts.” (*Id.* at 1-2.) This would make no sense unless a majority of the U.S. Supreme Court—in fact, all nine justices—recognized the irreparable harm of the trial court’s permanent injunction taking effect against Yeshiva.

54. If forced to violate its religious convictions, Yeshiva will also suffer irreparable harm to its religious authority in the Orthodox Jewish Community. Students come to Yeshiva because “[t]he undergraduate program is structured to help [them] embrace the Jewish faith and engage with the secular world from a foundation of Torah values.” (Rec 401.) As both the record here—and the eleven amicus briefs filed in the U.S. Supreme Court demonstrate—constituent communities around the world similarly look to Yeshiva as a standard-bearer for Torah values. (Rec 400 ¶¶ 2-4; Rec 292-293 ¶¶ 24-27; *see also* Supreme Court Docket, No. 22A184 (Sept. 15, 2022), <https://perma.cc/C889-S58K>.) The loss of Yeshiva’s authority to make these religious decisions—instead being forced to defer to the government’s determinations—is a lasting harm that cannot be undone.

55. Because the trial court’s ruling, as upheld by this Court, upends the status quo and is highly injurious, immediate review of whether Yeshiva is entitled to a stay is warranted.

CONCLUSION

56. The upshot of refusing Yeshiva’s stay request is exactly what four Supreme Court justices said it was: “A State’s imposition of its own mandatory interpretation of scripture,” achieved by “[p]erfunctorily dismissing the University’s First Amendment arguments.” (Ex. H at 3-4.) No wonder there are already enough votes on the U.S. Supreme Court to grant review (four), and that they telegraphed “Yeshiva would likely win if its case came before us.” (*Id.*)

57. Accordingly, this court should grant the review laid out by a majority of the Supreme Court: “permission to appeal [this] court’s denial of a stay to the New York Court of Appeals.” (*Id.* at 1.)

WHEREFORE, it is respectfully requested that this Court grant Yeshiva's motion in its entirety, that this Court grant Yeshiva leave to appeal to the Court of Appeals and that this Court order such other and further relief as it deems just and proper, in its discretion, under all of the circumstances.

Dated: September 15, 2022

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.

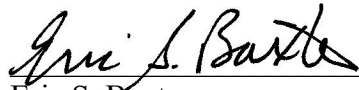

Eric S. Baxter

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.,

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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.,

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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 - against - YESHIVA UNIVERSITY, VICE PROVOST CHAIM NISSEL, and PRESIDENT ARI BERMAN		Date Notice of Appeal Filed
Case Type		Filing Type
☒ Civil Action ☐ CPLR article 75 Arbitration	☐ CPLR article 78 Proceeding ☐ Special Proceeding Other ☐ Habeas Corpus Proceeding	☒ Appeal ☐ Original Proceedings ☐ CPLR Article 78 ☐ Eminent Domain ☐ Labor Law 220 or 220-b ☐ Public Officers Law § 36 ☐ Real Property Tax Law § 1278 ☐ Transferred Proceeding ☐ CPLR Article 78 ☐ Executive Law § 298 ☐ CPLR 5704 Review
Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.		
☐ Administrative Review	☐ Business Relationships	☐ Commercial
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation
		☒ Contracts ☐ Estate Matters ☐ Prisoner Discipline & Parole ☒ 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.

- | | | | |
|--|---|---|---|
| ☐ Amended Decree | ☐ Determination | ☒ Order | ☐ Resettled Order |
| ☐ Amended Judgement | ☐ Finding | ☐ Order & Judgment | ☐ Ruling |
| ☐ Amended Order | ☐ Interlocutory Decree | ☐ Partial Decree | ☐ Other (specify): |
| ☐ Decision | ☐ Interlocutory Judgment | ☐ Resettled Decree | |
| ☐ Decree | ☐ Judgment | ☐ 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			

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.

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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 BORGEEST & RYAN LLP

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PRESIDENT ARI BERMAN**

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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



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

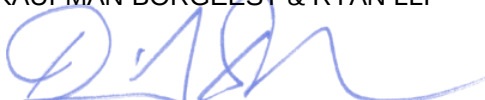
MORRISON & FOERSTER LLP
Attorneys for Non-Party
Lesbian and Gay Law Association Foundation of Greater New York
250 W. 55th Street
New York, New York 10019-9710
Tel.: (212) 336-4482
tfoudy@mofo.com

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 BORGEEST & 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

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. 2022-02616

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 the appeal having been perfected,

And defendants-appellants having moved to stay execution and enforcement of the aforesaid order, which adjudged and declared that defendants Yeshiva University and President Ari Berman must immediately recognize plaintiff YU Pride Alliance as an official campus club, pending the hearing and determination of the appeal taken therefrom,

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 denied.

ENTERED: August 23, 2022



Susanna Molina Rojas
Clerk of the Court

EXHIBIT D

From: efile@nycourts.gov
To: mvelez@ecbawm.com; asharda@ecbawm.com; mбенавидес@ecbawm.com; mselver@ecbawm.com; [Abigail Smith](mailto:Abigail.Smith@ecbawm.com); gmejia@ecbawm.com; dbloom@kbrlaw.com; docketing@ecbawm.com; krosenfeld@ecbawm.com; sjames@ecbawm.com
Subject: NYSCEF Alert: Appellate Division - 1st Dept - Civil Action - General - <DOCUMENT RETURNED> 2022-02726 (YU Pride Alliance et al v. YESHIVA UNIVERSITY et al)
Date: Thursday, August 25, 2022 11:00:02 AM



Appellate Division - 1st Dept DOCUMENT RETURNED FOR CORRECTION 08/25/2022

The court has returned the documents listed below for correction.

Reason for Returning: Document #21 returned for correction. This motion filing for leave to the Court Of Appeals on a motion decision, dated 8/23/2022, if applicable, should be filed as a full Notice of motion with a proper return date. Please return a corrected single, bookmarked and searchable, pdf to include a Notice of motion with a return date, Affirmation in support, Order appealing from, and any other supporting documents to this motion. The bookmarking to be used in the pdf is the table of content style bookmarking, not the page style type. Provide a brief description of each document provide in this filing. ie: Notice of motion with a return date, Affirmation in support, Order appealing from, Exhibit A-Notice Of Appeal, etc. Please return a correct pdf for further review and processing if motion is applicable to this court.

Instructions - DO NOT FILE A NEW DOCUMENT: To refile the documents, go to the Document List for this case and click the "Refile Document" link under each document.

Case Information

Appeal #: **2022-02726**

Caption: **YU Pride Alliance et al v. YESHIVA UNIVERSITY et al**

eFiling Status: **Full Participation Recorded**

Documents Returned on 08/25/2022 11:59 AM

Doc #	Document	Filed Date
21	ORDER TO SHOW CAUSE W/SUPPORTING DOCUMENTS INCLUDING EXHIBIT(S) (PROPOSED) OTSC for Leave to Appeal	08/23/2022

E-mail Notifications Sent

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EXHIBIT E

From: efile@nycourts.gov <efile@nycourts.gov>

Sent: Thursday, August 25, 2022 3:04:45 PM (UTC-05:00) Eastern Time (US & Canada)

To: mvelez@ecbawm.com <mvelez@ecbawm.com>; asharda@ecbawm.com <asharda@ecbawm.com>; mбенавидес@ecbawm.com <mбенавидес@ecbawm.com>; mserver@ecbawm.com <mserver@ecbawm.com>; Abigail Smith <asmith@becketlaw.org>; gmejia@ecbawm.com <gmejia@ecbawm.com>; dbloom@kbrlaw.com <dbloom@kbrlaw.com>; docketing@ecbawm.com <docketing@ecbawm.com>; krosenfeld@ecbawm.com <krosenfeld@ecbawm.com>; sjames@ecbawm.com <sjames@ecbawm.com>

Subject: NYSCEF Alert: Appellate Division - 1st Dept - Civil Action - General - <ORDER TO SHOW CAUSE W/SUPPORTING DOCUMENTS INCLUDING EXHIBIT(S) (PROPOSED)> 2022-02726 (YU Pride Alliance et al v. YESHIVA UNIVERSITY et al)



Appellate Division - 1st Dept

Comment Added to Case

08/25/2022

Comment from Court User - Kam Yuen

Important Note: An Interim Stay request is not applicable anymore, since a full bench has already denied your request for a stay under M2616, decision date 8/23/2022. A completed full motion with proper return date must be filed. Amend your filing to comply with the motion practice rules and return a single, bookmarked and searchable, pdf for further review and processing. Call the clerk's office if you have any questions.

Case Information

Appeal #: **2022-02726**

Caption: **YU Pride Alliance et al v. YESHIVA UNIVERSITY et al**

Document Information

Document #: **21**

Document Type: **ORDER TO SHOW CAUSE W/SUPPORTING DOCUMENTS INCLUDING EXHIBIT(S) (PROPOSED)**

Additional Document Information: **Motion for Leave to Appeal and Interim Stay**

Filed Date: **08/23/2022**

E-mail Notifications Sent

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EXHIBIT F



*State of New York
Court of Appeals*

*Lisa Le Cours
Chief Clerk and
Legal Counsel to the Court*

*Clerk's Office
20 Eagle Street
Albany, New York 12207-1095*

August 25, 2022

via email only

Kaufman Borgeest & Ryan LLP
Attn: David Bloom, Esq.
200 Summit Lake Drive
Valhalla, NY 10595-1338

Re: YU Pride Alliance v Yeshiva University

Dear Mr. Bloom:

Your proposed order to show cause was reviewed by Judge Madeline Singas, who declined to sign the order. As a result of the determination by Judge Singas, no motion is pending at the Court of Appeals in the above title.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Lisa LeCours'.

Lisa LeCours

RMM

cc: Hon. Madeline Singas
Katherine Rosenfeld, Esq.

EXHIBIT G

Supreme Court of the United States

No. 22A184

YESHIVA UNIVERSITY, ET AL.,

Applicants

v.

YU PRIDE ALLIANCE, ET AL.

O R D E R

UPON CONSIDERATION of the application of counsel for the applicants and the response and reply filed thereto,

IT IS ORDERED that the injunction of the New York trial court, case No. 154010/2021, is hereby stayed pending further order of the undersigned or of the Court.

/s/ Sonia Sotomayor

Associate Justice of the Supreme
Court of the United States

Dated this 9th
day of September, 2022.

EXHIBIT H

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.