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

REPLY IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Dated: February 2, 2023
Washington, D.C.

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INTRODUCTION

Plaintiffs' response underscores the need for leave to appeal—an interlocutory procedure designed to get issues of public importance resolved quickly. (*See Matter of City of New York v 2305-07 Third Ave., LLC*, 142 AD3d 69, 75 [1st Dept 2016] (quoting 22 NYCRR 500.22(b)(4)).) It is beyond dispute that the issues here are ones of significant public importance: This Court's opinion addresses multiple questions of first impression, implicates First Amendment concerns, and leaves all religious schools subject to the full force of the NYCHRL. If left unreviewed, this ruling will impact these schools for years while this case winds through discovery, back through this Court, the Court of Appeals, and finally the U.S. Supreme Court—where four justices have already said they will grant review of this case and that Yeshiva will likely win. Given the constitutional issues of significant public importance affecting all religious schools in New York, leave to appeal is warranted.

I. This Court's reading of the "religious corporations" exemption creates confusion and legal risk for religious schools throughout New York, raising significant questions of public importance.

Religious schools in New York City depend on the NYCHRL's exemption for "a religious corporation incorporated under the education law." (Administrative Code § 8-102.) Without it, they would be prohibited from making decisions based on religious "creed." (Administrative Code § 8-107(4).) In that world, a Catholic school could not refuse Baptist, Jewish, or Hindu services in its sanctuaries. A Protestant school could not restrict its religious courses to those advancing a Protestant worldview. An Islamic school could not require its students to observe its religious standards in the classroom. Without the religious exemption, these schools would all risk liability as students could claim they were being denied "the full and equal enjoyment, on equal terms and conditions" of any of the school's "accommodations, advantages, services, facilities or privileges"—just as Plaintiffs do here.

This Court' opinion adopts that line and effectively informs all religious schools in New York City that they risk civil liability for upholding their religious beliefs on their own campuses. Indeed, Plaintiffs read the Court's ruling as holding that the exemption applies only to

organizations that qualify as a "place of worship" such as a "synagogue." (Opp. 6 (citing Opinion at 4-5).) Under this reading, all religious schools face the full force of the NYCHRL. Of course, if that were the case, the language protecting "a religious corporation incorporated under … the religious corporation law" (Administrative Code § 8-102) would alone have been sufficient. The additional protection for "a religious corporation incorporated under the education law" (*id.*)—which applies only to educational institutions—shows the City Council intended to protect religious schools as well. Further, even if the exemption applied only to "houses of worship," Plaintiffs fail to explain why Yeshiva's undergraduate campus—which is full of worship, prayer, devotion, and synagogues—does not qualify. And if it cannot, again, it is hard to imagine any religious schools that could.

A narrower reading of the Court's opinion is equally problematic for the majority of religious schools in New York. If the exemption turns on being "operated, supervised or controlled by a religious or denominational organization" (*see* Opinion at 4 (quoting Education Law § 313[2][b])), then schools from hierarchical denominations are favored over the majority of schools from congregational denominations, which reject hierarchical control as a matter of religious doctrine. (*See*, *e.g.*, Rebecca Turley, *What Is a Congregational Church* (Apr. 20, 2022), https://perma.cc/MXY9-LVDR ("[T]he Congregational Church avoids any sort of hierarchy.") Such denominational discrimination is itself unconstitutional (*Larson v Valente*, 456 US 228, 244 [1982]), further raising the public significance of the Court's ruling. Furthermore, considering that the decision of its "supervis[ing]" rabbis triggered this lawsuit in the first place, it is again unclear why Yeshiva would not qualify for the exemption even under this reading of the law.

Plaintiffs try to mitigate this confusion, risk, and inconsistency by arguing that faith-based schools are still free to use religious preferences in "employment, housing, and admission" (Opp. 10)—a view reinforced by the Court (Opinion at 5). But that only exacerbates the problem. A statutory interpretation that permits a religious school to *exclude* students who don't share its religious beliefs—but punishes a school that *welcomes* students of diverse religious views, asking

only that they respect religious control of its own campus environment—not only infringes religious belief but also contradicts the public interest.

Finally, despite Plaintiffs' protests, it is not just the Third Department's decision in *Gifford* that is inconsistent with the Court's ruling here. The New York Court of Appeals itself, in *Makinen v City of New York*, held that "even if its legislative history contemplates that the [NYCHRL] be independently construed with the aim of making it the most progressive in the nation," it still "must be interpreted based on its plain meaning." (30 NY3d 81, 88 [2017] (cleaned up).) Here, it is undisputable that, by protecting "a religious corporation incorporated under the education law," the City Council intended to exempt at least some category of religious schools. And it is unclear how a "plain" reading of that exemption could support favoring schools from hierarchical denominations over those from congregational denominations. *Makinen* demands that a religious corporation include any corporation that is—in practice—religious, a standard Yeshiva unquestionably satisfies.

In *Gifford*, that "plain meaning" approach led the Third Department to conclude that secular, benevolent orders of all types are entirely exempt from the NYCHRL, regardless of any networking benefits that might attend membership. (707 NYS2d 722, 722-23 [3d Dept 2000].) A decision that subjects religious institutions named in the same statutory passage to the full force of the NYCHRL raises substantial concerns—substantial enough to justify leave to appeal.

Thus, whether right or wrong on the merits, it is clear that the Court's ruling raises issues of significant "public importance," that—at minimum—are in tension with the Court of Appeals' ruling in *Makinen* and the Third Department's ruling in *Gifford*. Such cases are "leaveworthy" as a matter of law. (*Matter of City of New York*, 142 AD3d at 75.) Religious schools throughout the City now face potential liability under the NYCHRL simply for upholding their religious standards. Discovery and subsequent appeals back through this Court, and then to the Court of Appeals, could easily take another two years on the mere issue of damages, when issues of grave constitutional concern are at stake. Indeed, Plaintiffs' demand for punitive damages based on Yeshiva's efforts to defend decisions made in consultation with its rabbis will inevitably raise

constitutional questions that could lead to further applications to the United States Supreme Court. In these circumstances, initial review by the Court of Appeals is fully warranted in the interests of judicial economy and legal certainty for religious schools in New York City.

II. This Court's reading of the "religious principles" exemption is a matter of first impression, raising significant questions of public importance.

By its own terms, the "religious principles" exemption applies to *any* "religious … institution," without regard to how it is operated, supervised, or controlled. (Administrative Code § 8-107(12).) Unlike the religious corporations exemption, which is a carve-out from the definition of a "place … of public accommodation" (Administrative Code § 8-102), the religious principles exemption cuts across the entire NYCHRL. Both Plaintiffs and this Court agree that it allows religious organizations to exercise religious preferences in "employment, housing, and student admissions." (Opp. 10; Opinion at 5.) But neither has accounted for the language protecting any other "such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." (Administrative Code § 8-107(12).) The inclusion of this language demarks legislative desire to protect religious decision-making outside of the "employment, housing, and student admissions" contexts. Further, that language has never been interpreted by any court. As a matter of first impression, evoking constitutionally protected rights and raising an issue of significant importance, it is certainly significant enough to warrant initial review by the Court of Appeals.

Plaintiffs primarily raise two objections. First, they claim that this language—or at least the New York State version of it—was interpreted in *Scheiber v St. John's University*, 84 NY2d 120 [1994)]. But the only language implicated in *Scheiber* was the "employment" prong—it never addressed the "such selections" language, and the Court of Appeals thus did not interpret it. (*Id.* at 127.) Second, Plaintiffs claim that Yeshiva never raised this theory in the Supreme Court. That is wrong. (*See* Rec 92, 100, 1751-1752.) And in any case, the question was fully briefed and addressed in this Court on the merits.

III. The constitutional questions at stake further demonstrate that leave to appeal is warranted.

Plaintiffs dismiss the constitutional concerns at issue in this case, arguing that the views of four dissenting justices in the Supreme Court are not controlling and were, in any case, based on a mistaken view of the "basic facts." (Opp. 12). The idea that four United States Supreme Court Justices missed the mark on the basic facts of a case is not credible. Four justices are enough to grant certiorari—something they said "at least" four of them would do. (*Yeshiva Univ. v YU Pride All.*, 143 S Ct 1, 2 [2022]). If that's not a sign of an "important federal question" warranting leave to appeal in this case, it's hard to imagine what would be. (*See* Sup. Ct. R. 10 (Considerations Governing Review on Writ of Certiorari)). That enough justices to grant review found the New York Supreme Court's injunction "shocking," and were willing to explicitly predict that Yeshiva will win should the case return (*Yeshiva Univ.*, 143 S Ct at 2 [2022]), underscores the public importance of the issues at hand. Indeed, even the five remaining justices all indicated that the issue was of sufficient importance that—should Yeshiva not obtain emergency relief upon remand to the New York courts—it could "return" to the high court for further consideration. (*Id.* at 1.) The point is not whether the dissenting justices were right or wrong. Rather, the Supreme Court's attention to the matter demonstrates that the issues carry significant public importance, thus warranting direct review by the Court of Appeals. (Clerk's Office, *Practice Outline*, at 4-5, 2-3 [2011] ("constitutional argument[s] need not [have] prevailed on the merits to support an appeal").

CONCLUSION

For all the foregoing reasons, this Court should grant Defendants motion for leave to appeal to the New York Court of Appeals.

Dated: February 2, 2023
Washington, D.C.

Respectfully,

THE BECKET FUND FOR RELIGIOUS LIBERTY

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