To Be Argued By:
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by permission of the Court
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

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

Plaintiffs-Respondents,

—against—

YESHIVA UNIVERSITY and PRESIDENT ARI BERMAN,

Defendants-Appellants,

VICE PROVOST CHAIM NISSEL,

Defendant.

LESBIAN AND GAY LAW ASSOCIATION FOUNDATION OF GREATER NEW YORK,

Amicus-Curiae Respondent.

CASE NO. 2022-02726

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Plaintiffs' arguments are a desperate attempt to distract the Court from the simple resolution required here. Ignoring the plain meaning of the NYCHRL's religious corporations exemptions, and New York law's requirement that religious schools generally incorporate under the Education Law, Plaintiffs concoct from nothing an interpretation that the NYCHRL only exempts houses of worship. But the trial court already rejected that argument as contrary to the statutory text, and Plaintiffs have no response. Instead, Plaintiffs assert the legislative history for the NYCHRL's inapposite *private club* exemption, arguing that it shows the City Council sought to protect only organizations that are an "extension of the home." That is both wrong and irrelevant. The City Council ultimately broadened the exemption to protect clubs of up to 400—hardly a "home." In any case, the relevant exemptions are the ones for religious corporations, and New York courts have already held that they are "absolute," as Plaintiffs are forced to concede.

Plaintiffs also strain to avoid the NYCHRL's exemption for "any religious … organization" acting to promote its religious principles. They concede this provision permits Yeshiva to deny admission to *students* who don't share its religious beliefs. It is absurd to argue it does not also permit Yeshiva to decide which *student groups* sufficiently share its beliefs to become part of the campus community.

Floundering on their statutory arguments, Plaintiffs next try to shore up the trial court's assertion that Yeshiva is not really religious, at least under the NYCHRL. But they can only get there by ignoring the mountain of undisputed evidence of Yeshiva's consistent religious practice, their own admissions, and the trial court's

acknowledgements of Yeshiva's obvious religious identity. Plaintiffs attempt instead to focus on events from the late 1960s, a stray memorandum from 1995, and a handful of documents where Yeshiva accurately identified itself as "not for profit" or "educational." None are sufficient to negate the overwhelming evidence that Yeshiva is intensely religious. And Plaintiffs' cherry-picked facts show only that Yeshiva at times grappled with how to appropriately integrate Torah principles with its students' professional development (challenges it resolved in consultation with its rabbis) or how best to respond to government pressure to choose between its beliefs and letting students access state and federal funding (pressure the Supreme Court has now thrice held unconstitutional).

Finally—and fatally—even if Yeshiva is not "religious" under a contrived state-law definition, Plaintiffs cannot avoid the First Amendment. If there could be any doubt, the U.S. Supreme Court just removed it. (*See Yeshiva Univ. v YU Pride Alliance*, 2022 WL 4232541, *1 [Sept. 14, 2022, No. 22A184].) Four justices are ready to review Yeshiva's constitutional defenses and believe it is "likely" to win on the merits. (*Id*. at *2 (Alito, J., dissenting).) And the remaining five justices stated that if Yeshiva could not get a stay or comparable relief from this Court, it could "return to [the Supreme] Court" for reconsideration. Because the questions before the Supreme Court match those here, Plaintiffs are whistling past the graveyard by ignoring Yeshiva's First Amendment defenses.

POINT 1

YESHIVA QUALIFIES FOR THE NYCHRL'S RELIGIOUS EXEMPTIONS.

Yeshiva is exempt under the plain language of two NYCHRL exemptions. (Br. 17-35.) In response, Plaintiffs ignore the text and make up their own standard. But the plain meaning governs, and Plaintiffs' claims are barred.

A. Yeshiva is exempt as a "religious corporation incorporated under the education law."

First, Yeshiva is exempt because, as a "religious corporation incorporated under the education law," it is excluded from the definition of a public accommodation. (Administrative Code § 8-102.) Plaintiffs and the trial court concede that Yeshiva is "religious," (Br. 9, 19, 34, 39-41; Opp. 3, 5, 35; Rec 7, 15), and that it is a "corporation incorporated under the education law," (Opp. 9; Rec 9). That should end this case. Even if the NYCHRL's legislative history contemplates the law being "construed with the aim of making it the most progressive in the nation, the NYCHRL still must be interpreted based on its plain meaning." (*Makinen v City of New York*, 30 NY3d 81, 88 [2017] (cleaned up).)

Instead, Plaintiffs invent a definition of "religious corporation" that contradicts the NYCHRL's plain meaning and makes all religious schools—including seminaries—public accommodations. This definition fails on multiple levels: First, it violates the NYCHRL's text. Second, it disregards the overwhelming record of Yeshiva's religious nature. And third, it needlessly—and impermissibly—pits the NYCHRL against the First Amendment.

1. Plaintiffs' theory violates the NYCHRL's text.

Plain meaning. The sum of Plaintiffs' argument is that a "religious corporation" under the NYCHRL is an entity created for "worship and religious observance"—*i.e.*, a "church." (Opp. 17, 21.) The trial court twice rejected that argument because it is "contrary to the plain language of the statute," (Rec 458), and would "render the exemption duplicative," (Order 5.) Under New York law, only churches and church-like organizations can incorporate under the Religious Corporations Law ("RCL"). (Religious Corporations Law §§ 2, 2-a, 2-b.) But the NYCHRL exempts religious corporations incorporated under *both* the RCL *and* the Education Law. If the City Council intended to exempt only places of "worship and religious observance," as Plaintiffs claim, it simply would have protected "corporations incorporated under the RCL."

Further, nothing in the NYCHRL supports Plaintiffs' argument that "a religious corporation incorporated under the Education Law" must be defined by the RCL. But even if this Court looked to the RCL to define "religious corporation," Yeshiva qualifies. The RCL defines a "religious corporation" as "any corporation created for a religious purpose," (Religious Corporations Law § 2), which Yeshiva clearly satisfies, (Br. 2-9, 24-29.) Plaintiffs' "place of worship" test comes not from the RCL's definition of "religious corporation," but from its definition of "church." (*See* Religious Corporations Law §§ 2, 2-d.) Imposing that on the Education Law exemption would negate it, which is why Plaintiffs candidly admitted below that, under this reading of the statute, "there is no such legal entity as a 'religious corporation under the education law.'" (Doc. 147 at 2 n 1.)

Backtracking, Plaintiffs now claim that RIETS (Yeshiva's affiliated rabbinical seminary) is a "useful illustration" of the type of school that "could" be an exempt "church." (Opp. 33-34.) But their concocted distinction yields incoherent results. Plaintiffs claim that RIETS alone is "a place of worship" because it "awards exclusively religious degrees to ordain rabbis." (*Id.* at 34.) That definition comes from nowhere. Moreover, in terms of actual worship and religious observance, Yeshiva and RIETS are indistinguishable. RIETS is housed within Yeshiva's undergraduate men's campus. Both RIETS and undergraduate students study Torah and pray in the same building, in the same study halls, and at the same time. (Br. 3-7.) If Plaintiffs deem RIETS a place of "worship and religious observance," then RIETS and Yeshiva satisfy the standard together. Otherwise, on Plaintiffs' theory, Yeshiva would have to allow women to enter its all-male *beit midrash* because Yeshiva is a public accommodation, while RIETS could insist on excluding women from the same room at that same moment. This is nonsense.

Plaintiffs' second factor for identifying a "church" focuses on what a religious corporation puts in its charter. (Opp. 22-23.) But the cases they cite—*Temple Ashram*, *Badesha*, *Watt*, *Matter of Lueken*, *Agudist*, *In re Religious Corporations*, and *Kroth* (Opp. 23-25)—are ultimately about whether a *non*-RCL corporation nevertheless meets the RCL definition of a "church." Here, that's irrelevant. But even in that distinct context, the courts looked *past* the corporate charter to see how each corporation functioned. (*Temple-Ashram v Satyanadji*, 84 AD3d 1158, 1160 [2d Dept 2011] ("'de facto' religious corporation" because it "was intended to be a religious corporation and … carried on under th[at] assumption"); *Badesha v Soch*,

136 AD3d 1415, 1416 [4th Dept 2016] ("intended to be a religious corporation and operated as such"); *Watt Samakki Dhammikaram, Inc. v Thenjitto*, 166 Misc 2d 16, 19 [Sup Ct, Kings County 1995] ("actual practices of the organization"); *Matter of Lueken*, 97 Misc 2d 201, 204 [2d Dept 1978] (functions "involve worship"); *In the Matter of Agudist Council of Greater New York v Imperial Sales Co.*, 158 AD2d 683, 683 [2d Dept 1990] ("provide religious services"); *In re Religious Corps. and Assns.—Divestment of Prop.*, 784 NYS2d 923, 2 [Sup Ct, NY County 2003] ("comprised of synagogues"); *Kroth v Congregation Chebra Ukadisha Bnai Israel Mikalwarie*, 430 NYS2d 786, 791 [Sup Ct, NY County 1980] ("acted exclusively as a synagogue").)

Here, Yeshiva does not need to show it is akin to a "church" under the RCL, because the NYCHRL exemption applies to corporations "incorporated under the Education Law," which Yeshiva undisputedly is. And, again, even if the Court were to look to RCL cases for guidance, they *all* conclude that function trumps form. There is not a single New York case that disregards a corporation's corporate status *or its religiosity* (as at issue here) based solely on its corporate documents. (Br. 20-23.) Indeed, beginning with *Kittinger* in 1936 (which Plaintiffs studiously ignore), every New York court to address the issue has "look[ed] through the corporat[ion's] structure" to "what it actually is." (*Kittinger v Churchill*, 292 NYS 35, 46-47 [Sup Ct, Erie County 1936]; *see also* Br. 23-24.)[1] New York courts have never held that

[1] Plaintiffs' distinction of *Scheiber* (Opp. 35-36) is a non sequitur. What matters is that the Court of Appeals focused on function when evaluating whether St. John's was religious. (Br. 24.)

a corporation is religious just by asking for "papers, please." If the test is solely about language in an organization's charter, the organization could simply reclaim the exemption by stating a religious purpose via amendment.

Legislative history. Apparently recognizing this conundrum from elevating form over function, Plaintiffs give up on plain meaning and pivot to "legislat[ive] intent," arguing that Yeshiva is too "large" and "public-facing" to qualify as exempt. (Opp. 29-33.) This is flawed too.

First, "the clearest indicator of legislative intent is the statutory text," and unless the text produces "absurdity or contradiction," courts cannot depart from it. (*New York Pub. Interest Research Group Straphangers Campaign v Reuter,* 739 NYS2d 127, 130 [1st Dept 2002].) Plaintiffs have identified no reason for ignoring the plain meaning, so there is no basis to invoke "legislative history." (*Matter of Avella v City of New York*, 29 NY3d 425, 437 [2017] ("The plain language of the statute does not authorize the proposed construction, and we therefore need not consider the legislative history.").)

Second, even if the Court indulges Plaintiffs' frolic into legislative history, that history contradicts Plaintiffs' theory. Their "legislative history" pertains to the 1984 amendment that proposed narrowing the preexisting exception for private clubs of any size, (Local Law No. 97 [1965] of City of NY § B1-2.0(9)), to cover only those with up to 100 members. (Opp. 30-31; NYCHRL § 8-102; Rec. 710-711.) Some club owners argued that the amendment was unconstitutional on the ground that a "club is an 'extension of the home' which should be free from governmental interference." (Rec. 707.) In response, the City's law department concluded that the proposed

exemption would not be unconstitutional because larger clubs would not foster such "intimate relationship[s]." (Rec. 711.) Even so, the City Council ultimately expanded the revised exemption to protect clubs of up to "400 members" (NYCHRL § 8-102)—hardly an indication that it meant to protect only small, intimate organizations. Indeed, clubs of *any* size are exempt as long as they do not "provide[] regular meal service" or "regularly receive[] payment" from nonmembers. (NYCHRL § 8-102; Rec 711.)

More to the point, for exempted "benevolent" and "religious" corporations, the City Council imposed *no* size limitations. Thus, the exemption for benevolent orders categorically protects large, nationwide organizations like the American Legion and others. (Br. 45.) And the corresponding legislative history categorically states that "[c]learly, religious groups and benevolent orders must be excluded." (Rec. 744.) In the U.S. Supreme Court, the City's own attorneys justified this absolute protection, saying "the Council was quite sensitive to the constitutional issues raised by the legislation" because "an association organized for religious or benevolent purposes could have a more serious claim of 'expressive association' than the typical downtown businessmen's club." (Brief for Appellees in *New York State Club Assn., Inc. v City of New York*, 108 S Ct 2225 [1986], available at 1988 WL 1026276, at *36-37.)

Finally, the plain text of the NYCHRL distinguishes the club exemption from the religious and benevolent orders exemptions. Whereas any club of up to four hundred members must "prove[]" it is "distinctly private" to be exempt, corporations incorporated under the Benevolent Orders Law, the Education Law, or the Religious

Corporations Law are statutorily "deemed … distinctly private," making their exemption "absolute and not subject to limitation." (*Gifford v Guilderland Lodge*, 707 NYS2d 722, 723 [3d Dept 2000].)[2] Plaintiffs admit that these exemptions are "absolute" and "wholesale"—they just want them defined around the RCL's definition of "church" instead of the NYCHRL's actual text. (Opp. 37-38.) But the Court cannot simply "rewrite the statute to achieve more 'fairness' than the Legislature chose to enact." (*Makinen*, 30 NY3d at 89 (cleaned up).)

2. Plaintiffs' theory defies the undisputed evidence.

Plaintiffs cannot dispute—and, indeed, concede—the overwhelming evidence of Yeshiva's religiosity. (Br. 2-9, 24-30.) Instead, they try to defend the trial court's selective review of Yeshiva's religious functions. (Opp. 27-28, 38-41.) In doing so, they get the facts wrong. But more fundamentally, their cherry-picking depends on an unconstitutional premise.

To Plaintiffs, Yeshiva had to "decide[]" to be religious "in all matters" or to "incorporate as an educational corporation in order to receive significant financial benefits from federal, state, and local governments." (Opp. 29.) They say it "cannot have it both ways." (*Id.*) Plaintiffs say this choice was a product of "the [New York Constitution's] provision" against aid to religious schools. (*Id.* at 11.) Their use of

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[2] Comparing Yeshiva to secular schools like CUNY, Parsons, and the New York Academy of Art, (Opp. 19), is meaningless. Nobody contests that secular schools are subject to the NYCHRL, because they don't have, or even claim, a religious identity. (*Id.* at 19.) Notably, however, prior to 1984, *all* schools were exempt. (Local Law 97 § B1-2.0(9).) The change in 1984 to exempt only "religious" schools reinforces that the City Council was specifically concerned about protecting First Amendment rights.

brackets is notable: The quoted source actually cites New York's "Blaine Amendment." (Rec 613.) The Supreme Court has recently and repeatedly confirmed that using Blaine Amendments to impose such choices is unconstitutional. (*Carson v Makin*, 142 S Ct 1987, 2002 [2022]; *Espinoza v Montana Dept. of Revenue*, 140 S Ct 2246, 2259 [2020] ("The Blaine Amendment was 'born of bigotry.'"); *Trinity Lutheran v Comer*, 137 S Ct 2012, 2024 [2017] (such forced choices are "odious").) Attempting to enforce them causes "state entanglement with religion and denominational favoritism" by requiring civil courts to "scrutinize[e] whether and how a religious school pursues its educational mission." (*Carson*, 142 S Ct at 2001.)

Yet that is exactly what Plaintiffs ask this Court to do: conclude that—by reincorporating under the Education Law (as New York required), offering secular degrees (as Torah Umadda requires), and not running itself like a hierarchical Christian institution—Yeshiva lost its religious identity. (Opp. 29.) But this Court can't reach that result without violating the Constitution. *Infra* 14, 16-26. Since the U.S. Constitution prohibits forcing Yeshiva to choose between its religious identity and its ability to participate in public programs, Plaintiffs' entire read of the factual record—and their theory of liability—collapses.[3]

Even just considering the factual record, Plaintiffs are wrong. First, Plaintiffs take a snapshot of Yeshiva's development as a university to suggest that, in the late 1960s, it "reconstitute[d] itself as formally 'nonsectarian' in order to comply" with

[3] The same is true of Plaintiffs' claims regarding the DASNY bond. (Opp. 40-41.) Its narrow prescriptions, with which Yeshiva complies, must be understood in light of its assurance that it "shall not prohibit the free exercise of any religion." (Rec. 689.)

New York's Blaine Amendment. (Opp. 9-11; *see also id.* at 29.) But Yeshiva didn't "reconstitute itself." Integrating Torah with secular studies is the entire reason Yeshiva exists. (Br. 32-34; *see also* Jeffery S. Gurock, *The Men and Women of Yeshiva* 217 [1988].) From its founding, Yeshiva's administrators and *Roshei Yeshiva* have grappled with how to appropriately balance Torah studies with their students' professional development. For example, in 1966, "plans were announced to construct a 15 million dollar science center." (*Id*. at 235.) Rejecting fears that this was part of "a new era of creeping, if not galloping, secularization," (*id*. at 215), Yeshiva explained that the effort to help students pursue professional degrees in an intensely religious environment, (*id*. at 236), was essential to "the very survival of Orthodoxy in the modern world," (*id*. at 238). The balanced integration of Torah with an understanding of the professional world—a question infused with religious judgment—is the entire point of Yeshiva's Torah Umadda philosophy. That is why Yeshiva continuously expanded its degree offerings as it matured from a "small y" yeshiva to a nationally ranked university. Courts cannot conclude that the balance struck was insufficiently religious without "scrutinizing whether and how a religious school pursues its educational mission"—an option that is off the table. (*Carson*, 142 S Ct at 2001.)

Similarly, throughout the 1960s, Yeshiva students—like those at other universities—became embroiled in questions concerning the Vietnam war and the civil rights movement, asking what it meant to be Orthodox considering such conflicts. (*See, e.g.*, Gurock at 215-235.) Yeshiva's leaders were also concerned about "signs of a new homogeneity" among its students, wanting to attract a diverse

range of Jewish students, not just those recruited from the "burgeoning nationwide day school movement." (*Id*. at 213.) It was with this desire of admitting students from a range of Orthodoxy that Yeshiva identified as "non-denominational." (*See* Rec 504-505; *see also Grussgott v Milwaukee Jewish Day Sch., Inc*., 882 F3d 655, 658 [7th Cir 2018] (school decision to cater to "Conservative, Reform, and Reconstructionist Jewish families, as opposed to Orthodox ones," did "not deprive it of its religious character").)

Plaintiffs' related speculation about Yeshiva's formal separation from RIETS, (Opp. at 33-34), is similarly inappropriate. Plaintiffs do not dispute that Yeshiva's decision to recharter under the Education Law was driven by changes in New York Law. (Br. 3.) That's why one commissioner on the Board of Regents called the amendment "long overdue." (Rec 508.) And despite Yeshiva's and RIETS's distinct legal structures, Yeshiva "continued" its religious purpose of forming students in the Jewish faith, and its courses and faculty have, in practice, remained integrated with RIETS. (Br. 2-9, 24-30.)

Most importantly, on all of these religiously sensitive issues, Yeshiva's *Roshei Yeshiva* worked toward a "meeting of minds" whereby "Yeshiva's clock" would not be "turned back," (*id*. at 244, 243), but concrete steps would be taken to ensure "both that the university not appear ambiguous in its intentions and that its religious character would always be maintained," (Rec 619).

Plaintiffs are similarly off base when they discuss a 1995 memo regarding LGBTQ clubs at Yeshiva's graduate schools. (Opp. 6, 38-40.) Yeshiva's attorneys' conclusions then don't bar Yeshiva from relying on a correct interpretation of the

law now. (*See* Br. 26-27.) Moreover, the memo itself confirmed there could be "no" such clubs at the undergraduate level. (Rec. 1433.) The fact that Yeshiva's undergraduate and graduate schools are "part of the same corporation," (Opp. 39), does not require Yeshiva to take the same pedagogical approach to both settings. Religious institutions are entitled to vary their approach based on their faith's tenets and the degree of religious diversity in distinct colleges on separate campuses. Plaintiffs are again "scrutinizing whether and how a religious school pursues its educational mission." (*Carson*, 142 S Ct at 2001.) There is no legal basis for claiming that Yeshiva loses its religion for taking a different pedagogical approach in its yeshiva-based undergraduate program than it does in its religiously diverse graduate schools.

Plaintiffs' reference to Yeshiva's "Undergraduate Student Bill of Rights," (Opp. 39-40), is similarly question-begging. Of course, federal, state, and local laws protect Yeshiva students against *unlawful* discrimination. The question is how those laws apply given Yeshiva's religious status. If Plaintiffs are right, Yeshiva could be forced to approve student clubs that seek to convert Jews to other faiths or open its synagogues for worship by other religions. It could be forced to make its campuses and *beit midrash* co-educational. And countless other religious decisions—and countless other religious organizations—could be subjected to the NYCHRL. Plaintiffs' superficial attempts at reassurance ring hollow, suggesting only that Yeshiva *might* be able to prevail on *some* such claims, albeit after *extensive* litigation over its religious decisions. (Opp. 41-42.) That would make the process the punishment, upending the point of exempting religious institutions from such

burdens. (*See NLRB v Catholic Bishop of Chicago*, 440 US 490, 502 [1979] ("It is not only the conclusions that may be reached … which may impinge on [religious liberty], but also the very process of inquiry leading to findings and conclusions.").)

Finally, Plaintiffs are wrong to claim that "YU has consistently reported to federal, state, and local governments that it *lacks* a religious corporate status." (Opp. 40 (emphasis added).) The record is replete with contrary evidence. (*See* Br. 25; Rec 1908 (IRS 990); Rec 1909 (New York state submissions); Rec 1910 (congressional correspondence); Rec 1914-1919 (self-study report for Middle States Association of Colleges and Schools).) Yeshiva's occasional self-references as a "not for profit" or "educational" institution are not inconsistent with its religious identity.

3. Plaintiffs' theory violates the constitutional avoidance canon.

The unconstitutional premise at the core of Plaintiffs' case also explains why their NYCHRL construction cannot be adopted without violating the canon of constitutional avoidance. (Br. 30-34.) Applying the NYCHRL's plain meaning to exempt Yeshiva avoids any constitutional doubts. But the trial court embraced Plaintiffs' arguments, which produced a result that four U.S. Supreme Court justices deemed constitutionally "shocking." (*Yeshiva*, 2022 WL 4232541, at *2 (Alito, J., dissenting).) Aware of this, Plaintiffs bury constitutional avoidance in a footnote and similarly bury the justices' rebuke. (Opp. 43 n 15; *id* at 17 n 8.) But "courts *must* avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." (*State v Enrique T.*, 93 AD3d 158, 167 [1st Dept 2012] (cleaned up).) This Court must construe the NYCHRL to avoid "serious First Amendment questions." (*NRLB*, 440 US at 504.)

B. The "religious principles" exemption also applies.

Plaintiffs have no response to Yeshiva's alternative exemption: Section 8-107(12)'s "religious principles" exemption. (Br. 34-35.) Instead, Plaintiffs claim (again in a footnote) that Yeshiva did not raise this argument below. (Opp. 36 n 13.) Wrong. (Br. 35.) But "[s]o long as the issue is determinative and the record on appeal is sufficient to permit … review, [this Court] may consider a new legal argument raised for the first time in this Court." (*Vanship Holdings, Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009].)

Here, Plaintiffs admit that Yeshiva fits within "[a]ny religious … organization." (Br. 34; *see also* Administrative Code § 8-107(12); Opp. 41 (concession).) Instead, they attempt to limit this exemption to "employment, housing, and admissions decisions." (Opp. 36 n 13.) But this exemption also applies to "making 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).) That "such selection[s]" are distinct from Plaintiffs' cramped choices is clear from the exemption's phrasing. (*See id.* ("from limiting employment *or* sales *or* rentals of housing accommodations *or* admission to *or* giving preference to persons of the same religion or denomination *or* from making [above phrase]") (emphasis added).) This exemption accordingly covers other religious "selection[s]" than those mentioned before the "or." It is illogical to hold that Yeshiva may, as Plaintiffs concede, deny admission to students who disagree with its religious beliefs, but not deny access to clubs inconsistent with its religious values. And the logic of the U.S. Supreme Court's holding—that Yeshiva "may return" if not protected by the New

York courts—only makes sense if Yeshiva's free exercise rights are at issue in being forced to approve Pride Alliance. (*Yeshiva*, 2022 WL 4232541, at *1.) The independent "religious principles" exception applies to Yeshiva.

POINT 2

THE FIRST AMENDMENT PROTECTS YESHIVA'S RIGHT TO MAKE INTERNAL RELIGIOUS DECISIONS.

A. Religious autonomy bars application of the NYCHRL to Yeshiva's internal religious decisions.

"The Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith." (*Yeshiva*, 2022 WL 4232541, at *2 (Alito, J., dissenting) (citing *Carson*, 142 S Ct at 1995-1996 and *Hosanna-Tabor v EEOC*, 565 US 171 [2012]).)[4] This "broad principle" affords Yeshiva a "sphere" of religious "autonomy with respect to internal management decisions that are essential to the institution's central mission." (*Our Lady of Guadalupe Sch. v Morrissey-Berru*, 140 S Ct 2049, 2060-2061 [2020].) Upholding Torah values is core to Yeshiva's very existence. Further, "scrutinizing whether and how" Yeshiva pursues that "educational mission" here would result in "state entanglement with religion and

[4] Plaintiffs—for the first time—now argue that CPLR § 1012 bars courts from considering Yeshiva's constitutional arguments. (Opp. 43-44.) The notice requirement precludes facial, not as-applied challenges. (*See 20 W. Properties LLC v Banks*, 188 AD3d 552, 553 [1st Dept 2021].) Here, Yeshiva is not claiming the NYCHRL is unconstitutional. Rather, Yeshiva is asking this Court to interpret the NYCHRL as written "to *avoid* declaring it unconstitutional," or accept its as-applied First Amendment defenses. (*Empire HealthChoice Assurance, Inc. v McVeigh ex rel. Est. of McVeigh*, 402 F3d 107, 110 [2d Cir 2005] (interpreting nearly identical federal notice requirement).) In any case, out of an overabundance of caution, Yeshiva notified New York City Corporation Counsel. (Dkt. 85.)

denominational favoritism." (*Carson*, 142 S Ct at 2001.) Religious autonomy thus protects Yeshiva from suit over its religiously motivated decision not to approve Pride Alliance.

1. Yeshiva is protected by religious autonomy.

As the Supreme Court confirmed by calling religious autonomy a "broad principle," this doctrine applies to myriad conflicts between internal religious decisions and secular policies. For example, it has repeatedly exempted religious schools from various nondiscrimination laws. (*See, e.g.*, *Fratello v Archdiocese of New York*, 863 F3d 190, 203-204 [2d Cir 2017]; *Butler v St. Stanislaus Kostka Catholic Academy*, 2022 WL 2305567, *4 [EDNY June 27, 2022, No. 19-cv-3574].) It has protected a church from attempts to punish its publication of a list of church leaders credibly accused of sexual abuse. (*In re Lubbock*, 624 SW3d 506, 513 [Tex 2021].) And it has safeguarded a religious school's decision not to admit an unvaccinated student. (*Flynn v Estevez*, 221 So 3d 1241, 1243 [Fla App 1 Dist., 2017].) Examples abound, but they share one common element: the religious institution was permitted to enforce its religious decision despite contrary secular laws.

Yeshiva's decision not to approve Pride Alliance is similarly protected. As Yeshiva explained (Br. 35-43)—and at least four Supreme Court justices now agree—Yeshiva's decision whether to endorse clubs within its undergraduate campus is "purely ecclesiastical." (*Serbian E. Orthodox Diocese v Milivojevich*, 426 US 696, 713-714 [1976]; *see also* Br. 38-42; *Yeshiva*, 2022 WL 4232541, at *2 (Alito, J., dissenting).) While the application of nondiscrimination statutes like the

NYCHRL is "undoubtedly important," it does not overcome the right of religious groups like Yeshiva to "preach their beliefs, teach their faith, and carry out their mission." (*Hosanna-Tabor*, 565 US at 196.) When those freedoms are at issue, "the First Amendment has struck the balance for us." (*Id.*; *see also* Br. 35-38.)[5]

2. Religious autonomy—not "neutral principles"—applies.

Plaintiffs claim an exception to religious autonomy exists when a court can use "neutral principles of law" to resolve the dispute. (*Id.* at 46.) Not so.

The U.S. Supreme Court has never applied the "neutral principles" doctrine outside church property disputes, which "present a conflict between two church entities over what the church's decision was in the first place," not—as here—"a conflict between the civil law and an internal church decision." (Michael W. McConnell & Luke W. Goodrich, *On Resolving Church Property Disputes*, 58 Ariz L Rev 307, 336 [2016].) The Court of Appeals has offered similar guidance in New York, holding that the doctrine applies to disputes over "exclusively property issues" between churches. (*First Presbyt. Church of Schenectady v United Presbyt. Church*

[5] There is no need to consider Plaintiffs' fearmongering that racial discrimination "could" occur in Yeshiva's graduate schools. (Opp. 5, 42, 48.) The Supreme Court has already rejected this "*Bob Jones*" argument, holding that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises," and they should not be "disparaged." (*Obergefell v Hodges*, 576 US 644, 672 [2015]; *see also Masterpiece Cakeshop v Colorado*, 138 S Ct 1719, 1729 [2018].) Accordingly, the U.S. Supreme Court has condemned conflating religious decisions to uphold beliefs on marriage and sexuality with invidious racial discrimination. (*See Fulton v City of Philadelphia*, 141 S Ct 1868, 1882 [2021] ("[T]his interest cannot justify denying CSS an exemption for its religious exercise."); *Bostock v Clayton County, Georgia*, 140 S Ct 1731, 1754 [2020] (identifying how some "doctrines protecting religious liberty" "might supersede" sexual orientation and gender identity claims).)

in U.S., 62 NY2d 110, 119 [1984].) Indeed, Plaintiffs' cases primarily concern church property disputes or the purely secular provisions of ordinary legal agreements entered by churches. (*See* Opp. 45.) The one case that does not confirms that religious autonomy—and not neutral principles—applies here.

In *Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana* (9 NY3d 282 [2007]), petitioners asked the Court to resolve an election dispute over who would lead Brooklyn's Satmar Hasidic community. (*Id.* at 285-286.) Petitioners argued that "neutral principles" resolved the case because it "involve[d] nothing more than notice, quorum or other technical challenges to the respondents' election." (*Id.* at 286.) The Court of Appeals disagreed. Because membership in the religious organization was conditioned on "religious criteria, including whether a congregant follows the 'ways of the Torah,'" the Court held that it could not get involved since "matters of an ecclesiastical nature are clearly at issue." (*Id.* at 288).

Similarly here, after consultation with its senior rabbis, Yeshiva determined that recognizing Pride Alliance would not be consistent with Torah values. Plaintiffs now for the first time—and without evidence—dispute this was a religious decision. (Opp. 46 n 16.) But that contradicts their public statements. (*See, e.g.*, Plaintiff Meisels YouTube Interview at 18:11 (admitting "[t]he reason why [Yeshiva] will reject a club is because it clouds the nuance of the Torah").) A civil court may not "scrutiniz[e] … how" Yeshiva pursued its "educational mission" with its religious decision on Pride Alliance—an inquiry "rais[ing] serious concerns about state entanglement with religion and denominational favoritism." (*Carson*, 142 S Ct at 2001; *see also Yeshiva*, 2022 WL 4232541, at *2 (Alito, J., dissenting).) (*Penn v*

New York Methodist Hosp., 884 F3d 416, 429 [2d Cir 2018] ("[T]he First Amendment prohibits … [courts] from inquiring into an asserted religious motive to determine whether it is pretextual.").) Religious autonomy applies.

B. The Free Exercise Clause bars applying the NYCHRL here.

The Free Exercise Clause also prohibits application of the NYCHRL to Yeshiva. (Br. 43-49.) Indeed, because the NYCHRL burdens Yeshiva's religious exercise, is not generally applicable, and does not satisfy strict scrutiny, four U.S. Supreme Court Justices already adjudged it "likely" that Yeshiva will prevail. (*Yeshiva*, 2022 WL 4232541, at *2 (Alito, J., dissenting).) Accordingly, this Court would err if, "undeterred by [the Supreme Court]," it adopted a contrary result. (*See Espinoza*, 140 S Ct at 2256 (criticizing—and reversing—"the Montana Supreme Court" for being "[u]ndeterred by *Trinity Lutheran*," an on-point Supreme Court case).)

1. The NYCHRL imposes a religious burden on Yeshiva.

Four justices (enough to grant certiorari) stated that using the NYCHRL to compel Yeshiva to approve Pride Alliance is "a shocking development that calls out for review." (*Yeshiva*, 2022 WL 4232541, at *2.) Plaintiffs declare this burden "incidental" "at most." (Opp. 51.) They say that Yeshiva can recognize the Pride Alliance without compromising its religious "environment" or "atmosphere" because (i) Yeshiva's law school and other "religiously identified" universities recognize similar groups and (ii) Yeshiva believed that its medical school was subject to an unrelated provision of the NYCHRL over 20 years ago. (Opp. 51-52 (citing *Levin v Yeshiva Univ.*, 96 NY2d 484, 491 [2001]).)

Plaintiffs miss the point: even "incidental[]" burdens on religion must be "neutral and generally applicable." (*Fulton*, 141 S Ct at 1876.) And neither litigants nor courts may "deprive [the Seminary] of the right of construing [its] own church laws," (*Milivojevich*, 426 US at 714), nor are they "arbiters of Scriptural interpretation" who can determine that Yeshiva's interpretation of its own beliefs is "unreasonable," (*Thomas v Review Bd.*, 450 US 707, 715-716 [1981].) Further, Plaintiffs mischaracterize Yeshiva's undergraduate mission: not only to have a religious "environment," but to train its students in the Orthodox faith. (Br. 43-44.) Indeed, the U.S. Supreme Court's unanimous decision to let Yeshiva "return to th[at] Court" only makes sense if the justices concluded that Yeshiva's religious exercise was burdened. (*Yeshiva*, 2022 WL 4232541, at *1.) It is undisputed that recognizing the Pride Alliance would cloud the nuanced message Yeshiva seeks to convey consistent with its Torah values. (Br. 10.) "[P]utting [Yeshiva] to the choice" of acting contrary to its religious decisions triggers the Free Exercise Clause. (*Fulton*, 141 S Ct at 1876.)

2. The NYCHRL is not generally applicable.

Laws are not generally applicable if "they treat *any* comparable secular activity more favorably than religious exercise" (*Tandon v Newsom*, 141 S Ct 1294, 1296 [2021]), or contain "entirely discretionary exceptions." (*Fulton*, 141 S Ct at 1878.) And as Yeshiva explained, the NYCHRL's public accommodation provisions are not generally applicable for these two, independent reasons. (Br. 44-49.)

Plaintiffs' response turns on a misapprehension of Free Exercise law. They wrongly claim that a law only triggers strict scrutiny if it "target[s]" religious

exercise. (*See* Opp. 48-50, 52-53.) But general applicability does not address "targeting"—neutrality does. (Br. 46-47 (contrasting *Serio* with *Kennedy*).)

The error shows that Plaintiffs' reliance on *Catholic Charities of the Diocese of Albany v Serio* (7 NY3d 510 [2006]) is misplaced. *Serio*, which merges the general applicability and neutrality inquiries, is out of step with intervening U.S. Supreme Court precedent. A similar problem—using *Serio* to consider only neutrality and not general applicability—plagues *Matter of Gifford v McCarthy* (137 AD3d 30, 40-41 [3d Dept 2016]), which was decided pre-*Fulton*. (Opp. 49.) After *Fulton*, the Supreme Court ordered the New York courts to reconsider *Serio*, which is ongoing. (*See Roman Catholic Diocese of Albany v Emami*, 142 S Ct 421 [2021]; *Roman Catholic Diocese of Albany v Vullo*, 206 AD3d 1074 [3d Dept 2022], *lv pending*, Ct App, Mo No. 2022-523.) The only post-*Fulton* case Plaintiffs cite considering general applicability—*Emilee Carpenter, LLC v James* (575 F Supp 3d 353 [WDNY 2021]) (Opp. 49)—is irrelevant. There, the court distinguished its ruling from cases where "religious organizations" (like Yeshiva) have a "special solicitude" that make them eligible for public accommodations exemptions like those here. (*Emilee Carpenter*, 575 F Supp 3d at 383-384.) And unlike the religious claimant in that case, Yeshiva is invoking exemptions that apply to the claims and public accommodations provisions at issue, rather than from other parts of the law. (*See id.* at 383; Br. 47-48.)

"A government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for

individualized exemptions.'" (*Kennedy v Bremerton Sch. Dist.*, 142 S Ct 2407, 2422 [2022].) Under the correct standard, the NYCHRL is not generally applicable.

Comparable Secular Activity. At least four justices have already recognized that the NYCHRL contains secular exemptions that trigger strict scrutiny: "[t]he NYCHRL exempts any 'corporation incorporated under the benevolent orders law or described in the benevolent orders law,'" rendering it "inapplicable to large groups like the American Legion … as well as small groups like the United Scottish Clans of New York and New Jersey." (*Yeshiva*, 2022 WL 4232541, at *2 (first quoting Administrative Code § 8-102, then citing Benevolent Orders Law § 2).) Accordingly, these four justices deemed the NYCRL "more favorabl[e]" to secular groups than religious schools. (*Yeshiva*, 2022 WL 4232541, at *2; *see also* Br.44-46.)

Plaintiffs claim that these are not true exemptions but definitional carve outs. (Opp. 53.) The Free Exercise Clause does not care. (*See Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 535-536, 543-544 [1993] (definitional exclusions not generally applicable).) Whether definitionally or categorically, the NYCHRL exempts secular organizations—including national organizations with thousands of members. (*See Yeshiva*, 2022 WL 4232541, at *2 (citing Benevolent Orders Law § 2).)

Falling back, Plaintiffs aver that the exempted entities are "distinctly private" (Opp. 53-54)—or not "comparable" to Yeshiva (*see Tandon*, 141 S Ct at 1296). But whether two activities are "comparable" for Free Exercise purposes is not judged by legislative history. (Opp. 53-54.) Rather, the exempted and non-exempted activities

"must be judged against the asserted government interest that justifies the regulation at issue." (*Tandon*, 141 S Ct at 1296.)

Here, the exemption for benevolent organizations and private clubs undermines "[e]radicating discrimination" more than exempting Yeshiva. (Opp. 56.) The Masons, for instance, do not recognize women as members, and therefore those women cannot receive the indirect cultural, relational, and financial benefits that flow from that recognition. Yet the NYCHRL definitionally exempts such organizations—some of which have more members than Yeshiva has students. This requires strict scrutiny. (*See Tandon*, 141 S Ct at 1297-1298.)

Discretionary Exemption. The NYCHRL's discretionary exemption for "bona fide considerations of public policy" also renders it not generally applicable. (*See* Administrative Code § 8-107(4)(b); *Fulton*, 141 S Ct at 1877 (discretionary exemption rendered statute not-generally applicable); Br. 47-49.) Plaintiffs attempt to distinguish the exemption in *Fulton*, which they describe as "unbounded," with the NYCHRL public policy exemption, which they say "rest[s] on articulated, clear goals of public policy." (Opp. 54.) How "public policy" limits public officials' discretion is not self-evident. Nor is it clear why "bona fide" "public policy" exemptions wouldn't include those for the First Amendment's "special solicitude to the rights of religious organizations." (*Hosanna-Tabor*, 565 US at 189.) Even assuming "bona fide" "public policy" has a limiting principle, Plaintiffs cannot identify it by citing potential, nonbinding examples from legislative history. (Opp. 55.) Like the exemption in *Fulton*, the public policy standard "invites the government to decide which reasons for not complying with the policy are worthy

of solicitude," rendering the NYCHRL not generally applicable. (*Fulton*, 141 S Ct at 1879 (cleaned up).)

3. Plaintiffs cannot satisfy strict scrutiny.

Citing *Bob Jones*, Plaintiffs claim that the U.S. Supreme Court has recognized a compelling interest in enforcing "antidiscrimination laws" sufficient to override Yeshiva's free exercise claim. (Opp. 57.) No. The U.S. Supreme Court has dispelled the irrational conflation of religious-based decision making and invidious race discrimination. (*Supra* n 5.) What matters is that the system of exemptions described in the NYCHRL above undermines Plaintiffs' "contention that [the NYCHRL] can brook no departures" and constitutes a compelling government interest. (*Fulton*, 141 S Ct at 1882; *see also* Br. 49-50.) And even if Plaintiffs identified a compelling interest that is properly focused, the NYCHRL is not the least restrictive means: "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." (*Fulton*, 141 S Ct at 1881.) Plaintiffs cannot satisfy strict scrutiny. (*Yeshiva*, 2022 WL 4232541, at *2.) [6]

[6] Plaintiffs' passing citation to *Gay Rights Coalition v Georgetown University* (536 A2d 1 [D.C. 1987]) is a non sequitur. (*See* Opp. 43.) The case is dead letter: its disparaging compelling interest analysis has been rejected in *Obergefell*, *Masterpiece*, and *Fulton*. (*Supra* n. 5; *cf. Georgetown*, 536 A2d at 33 ("We are met at the outset with centuries of attitudinal thinking, often colored by sincerely held religious beliefs, that has obscured scientific appraisal ….").) Congress effectively overturned it. (*See Clarke v United States*, 915 F2d 699, 700 [D.C. Cir 1990] (recounting history).) And the case did not involve any statutory exemptions—which is key under modern law. (*Fulton*, 141 S Ct at 1882.)

C. The Free Speech and Assembly Clauses also bar Plaintiffs' claims.

Yeshiva already explained how the freedoms of speech and assembly provide additional First Amendment protection to make the religious decision not to approve Pride Alliance. (Br. 50-51.)

Plaintiffs' response is to claim that forcing Yeshiva to make a decision inconsistent with its Torah values does not send a message, because Yeshiva can approve the club under court order while saying something else. (Opp. 58-60.) But courts "must … give deference to an association's view of what would impair its expression." (*Boy Scouts of Am. v Dale*, 530 US 640, 653 [2000].) Here, as Yeshiva has explained, forcing it to endorse a campus club that is inconsistent with its Torah values will impair the religious atmosphere that Yeshiva expresses on its undergraduate campus. Indeed, the fact that Plaintiffs say Yeshiva can counter the recognition of Pride Alliance by making its own public statements about "Torah values" is an admission that recognition is, by itself, endorsement. (Opp. 60.) The First Amendment has long rejected the reduction of religious freedom to "the[] right to counteract by [one's] own persuasiveness the wisdom and rightness of those loyalties which the [state] is seeking to promote." (*Minersville Sch. Dist. v Gobitis*, 310 US 586, 599 [1940], *overruled by West Va. State Bd. of Educ. v Barnette*, 319 US 624 [1943].) This Court should decline Plaintiffs' invitation to retread abandoned constitutional ground.

CONCLUSION

The trial court's ruling should be reversed, permanent injunction vacated, and summary judgment entered in favor of Yeshiva.

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Respectfully submitted,

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