To be Argued by
ERIC S. BAXTER, ESQ.
(of the Bar of the District of Columbia), by permission of the Court

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 STAY

Dated: New York, New York
July 5 , 2022

Respectfully submitted,

THE BECKET FUND
FOR RELIGIOUS LIBERTY

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INTRODUCTION

Among religious universities, Yeshiva stands out as one of the most obviously religious. And despite the trial court's statutory gymnastics, everyone knows it: students come from across the world expressly for Yeshiva's religious environment. Undergraduate students spend hours each day in religious studies, and all of Yeshiva's campuses are structured to support and encourage compliance with Torah values. Like all religious universities, Yeshiva has to balance many religious concerns in carrying out its mission—decisions about the religious formation of undergraduate versus graduate students, decisions about the appropriate mix of religious and professional studies, and decisions about the proper balance in loving all while still upholding core religious values. These are inherently ecclesiastical questions that courts have no authority or competence to resolve. They are also religiously complex, as Yeshiva seeks to remain true to both its 3,000-year-old Torah values and its mission to bring those values into the secular world through the religious formation of its students.

The trial court's ruling that Yeshiva is not religious enough to enjoy the available First Amendment or statutory rights to make these internal religious management decisions for itself has significant reverberations throughout the Jewish community. It reignites significant historical concerns about government interference into Jewish education, warning current and potential students that the religious education they seek at Yeshiva is subject to government control over religious questions, and not to Yeshiva's leaders, who are committed to ensuring consistency with Torah values. Yeshiva is at great risk to lose both its students and reputation if it is compelled to give official sanction to a club that—by its name and the activities it seeks to promote—is not consistent with Torah values. As Plaintiffs concede in their opposition brief, Yeshiva for years has worked diligently to create a welcoming environment on its campuses for LGBTQ students and to allow them space where they can find support and understanding. But regardless of the individual Plaintiffs' current intentions, a Pride Alliance club, as described by many students and understood by the culture at large, sends a message that promotes and celebrates conduct that is not consistent with Torah values. That is something that Yeshiva cannot approve on its undergraduate campuses,

where it is intensely focused on the religious formation of its students. The First Amendment and NYCHRL religious exemptions were designed specifically to give religious institutions the right to make these types of complex and nuanced decisions. Yet the trial court entirely ignored Yeshiva's religious autonomy defenses, misunderstood the leading cases on its free exercise defense, and contorted the statutory exemption beyond recognition. This threatens the identity of all religious universities.

Plaintiffs' legal arguments are likewise consistently wrong. They assert that "universities—*religiously affiliated or not*—are places of public accommodation," bound *without exception* by the NYCHRL. (Opp. 1 (emphasis added)).[1] This is wrong, both as a matter of statutory text and constitutional law. The First Amendment guarantees religious institutions a sphere of autonomy shielding them from laws, including nondiscrimination laws, that infringe their internal religious management. At bottom, this case is a disagreement between Yeshiva and Plaintiffs over how the Torah should be construed. Plaintiffs admit they seek club recognition to "change the culture" at Yeshiva to match their own beliefs. Right, wrong, or somewhere in between—it is not for a civil court to say. This is a quintessentially ecclesiastical dispute, which courts lack authority to resolve. The trial court's failure even to address the issue is sufficient to warrant a stay pending appeal. Considering the interests at stake, this Court at the very least should stay the ruling below until it has time to fully consider Yeshiva's First Amendment and Statutory defenses.

Plaintiffs and the trial court also get Yeshiva's free exercise defense wrong. The Supreme Court's recent rulings confirm that Yeshiva is exempt from the NYCHRL, yet these cases are again ignored or dismissed. Plaintiffs try to divert attention, pointing to the Court of Appeals' 2006 *Serio* decision. But even assuming *Serio* applies, the trial court erred in reaching that conclusion and issued a permanent injunction without even addressing the relevant Supreme Court cases. They show Yeshiva is likely to prevail on appeal, and Yeshiva's free speech and assembly claims further support this conclusion.

[1] Throughout this brief, "Mot." refers to Yeshiva's Order To Show Cause Motion [Dkt. 5] and "Opp." refers to Plaintiffs' brief in opposition [Dkt. 11].

Finally, on the statutory text, Plaintiffs' arguments confirm that the opinion below makes a mess of the NYCHRL's exemption for "religious corporations incorporated under the education law." The court admits that, on the face of the exemption, Yeshiva qualifies. But it invoked nebulous legislative intent to conflate this exemption with the one for corporations incorporated under the Religious Corporations Law, excluding Yeshiva essentially because it isn't a house of worship. This led to a confused analysis, littered with denominational discrimination, cherry-picked document citations, and a failure to address the most relevant cases.

The practical consequences are ominous. If religious universities like Yeshiva are not exempt, then they become "public accommodations" under the NYCHRL for all purposes. This means all religious universities in New York City could be subject to crippling litigation over any of their religiously motivated decisions regarding hiring, admissions, student life, housing, degree offerings, and other programs. Worse will be the chilling effect on Yeshiva's students. Undergraduates choose to attend Yeshiva for its religious environment; a government-imposed mandate to act inconsistent with the Torah robs them of that choice. These untold consequences are an independent justification for a stay.

Yeshiva plans to perfect its appeal for an October hearing. Thus, maintaining the status quo for a few months pending a merits ruling would not cause Plaintiffs significant injury. This is particularly true given that nearly all of the individual Plaintiffs have already graduated, and Yeshiva already makes great effort to provide a welcoming campus environment for all students consistent with its Torah values. Indeed, Yeshiva loves and welcomes its LGBTQ students. And Plaintiffs concede that they came to Yeshiva *because* of its Torah values. Disagreeing with how a private religious university carries out is religious mission is not irreparable harm.

In contrast, Yeshiva is suffering immediate, ongoing, and irreparable harm in being told that it is a non-religious, public accommodation, subject to the full scope of the NYCHRL, with no First Amendment protections. This sends a message to the students, alumni, and members of the broader Orthodox community that their 3,000-year-old beliefs and practices make them second-class citizens. After extended discussion with Plaintiffs and other students, and thorough consultation

with its *Roshei Yeshiva*, Yeshiva has concluded as a religious matter that giving official recognition to an undergraduate student club called "Pride Alliance" would not be consistent with Yeshiva's Torah values. Yeshiva would suffer irreparable harm if compelled to violate its own religious convictions on how best to convey them. A stay should thus be granted while the Court considers these weighty issues on appeal.

ARGUMENT

I. Yeshiva is highly likely to prevail on appeal.

Plaintiffs' dismissal of Yeshiva's constitutional arguments as a "grab bag of First Amendment 'defenses'" illustrates why a stay is warranted: they want this Court to ignore Yeshiva's constitutional claims. Considering their merits only confirms that Yeshiva will prevail in showing that it is an orthodox Jewish religious institution.

A. Yeshiva will prevail on its religious autonomy claim.

Attempting to justify why the court ignored religious autonomy, Plaintiffs mischaracterize it. They are wrong, for example, that "[n]o court has ever held that it allows a religious entity to violate nondiscrimination laws." (Opp. 14.) The opposite is true. Recent Supreme Court cases—cases Plaintiffs don't mention—confirm the doctrine's application to nondiscrimination laws. *Hosanna-Tabor v EEOC* held unanimously that religious schools are exempt from Title VII's nondiscrimination standards with regard to ministerial employees. (565 US 171, 188 [2012].) Thus, religious schools cannot be sued by ministerial employees "regardless of [their] asserted reason (if any) for [an] adverse employment action." (*Fratello v Archdiocese of New York*, 863 F3d 190, 203-204 [2d Cir 2017]; *see also Rweyemamu v Cote*, 520 F3d 198, 209-210 [2d Cir 2008] (barring race discrimination claim); *Butler v St. Stanislaus Kostka Catholic Academy*, 2022 WL 2305567, *4 [EDNY 2022] (barring sexual-orientation discrimination claim).) In 2020, the Supreme Court reaffirmed this principle in *Our Lady of Guadalupe School v Morrissey-Berru*, ensuring religious schools a "sphere" of "autonomy with respect to internal management decisions that are essential to the institution's central mission." (140 S Ct 2049, 2060 [2020].) While nondiscrimination laws are "undoubtedly important," when it comes to religious groups' right to

"preach their beliefs, teach their faith, and carry out their mission," "the First Amendment has struck the balance for us." (*Hosanna-Tabor*, 565 US at 196.)

Plaintiffs are also wrong to suggest that religious autonomy is so "narrow" that it only protects against compelled "doctrine or … beliefs." (Opp. 15.) As the Supreme Court reiterated just this term, religious autonomy protects religious schools from the "entanglement … and denominational favoritism" that follow when the government "scrutinize[es] whether and how a religious school pursues its educational mission." (*Carson v Makin*, 142 S Ct 1987, 2001 [2022].) Nor does religious autonomy apply solely to formal houses of worship or ministerial employment disputes, as Plaintiffs contend. (Opp. 23-24.) Among other things, it has been applied to protect a religious school's decision not to admit an unvaccinated student, (*Flynn v Estevez*, 221 So3d 1241, 1243 [Fla App 1 Dist., 2017]), to internal religious decisions about corporate organization and financial oversight, (*Dermody v Presbyterian Church (U.S.A.)*, 530 SW3d 467 [Ky Ct App 2017]), and to decisions about membership, even in the face of evidence that the decisions violated the organization's own bylaws. (*Singh v Sandhar*, 495 SW3d 482 [Tex App 2016].)

Yeshiva's decision not to approve the Pride Alliance club falls within this sphere of protected religious governance. Yeshiva has long sought to ensure that approved clubs are consistent with halachic tradition and the religious atmosphere on the undergraduate campuses. (Ex. G ¶¶ 31-40.) In the past, for example, Yeshiva has denied official recognition to a shooting club, a gaming club, a gambling club, and even a Jewish fraternity, all because aspects of the clubs were "at odds with Torah values" or "inconsistent with Yeshiva's religious atmosphere and identity." (*Id*. ¶¶ 41-44.) Yeshiva's decision not to recognize Pride Alliance was made for these same reasons. (*Id*. ¶¶ 46-53.) Which clubs are consistent with Yeshiva's religious values is a "purely ecclesiastical" question. (*Serbian E. Orthodox Diocese v Milivojevich*, 426 US 696, 713-714 [1976].) That makes it a judicial no-go zone.

Yeshiva seeks not only to form its undergraduate students in the Jewish faith but also to serve as a beacon of Torah values. (Ex X ¶¶ 3-4; Ex. G ¶¶ 24-27.) Indeed, Modern Orthodox Jews throughout the country look to Yeshiva for guidance. *See id*. It is easy then to say of Yeshiva what

the U.S. Supreme Court has twice said of all religious schools: "educating young people in their [Jewish] faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core" of Yeshiva's mission. (*Our Lady*, 140 S Ct at 2064.) Students come to Yeshiva fully aware of its religious beliefs and standards and how they are to accord with Yeshiva's mission. (Ex. I at 4; Ex. C 138:20–139:5.) Entangling civil courts in disagreements between Yeshiva and its students over how to apply that religious mission on campus is exactly what religious autonomy prohibits. (*Carson*, 142 S Ct at 2001.) Yet this is exactly what Plaintiffs demand.

Plaintiffs ignore these clear principles and instead cite a series of cases relying on the "neutral principles" doctrine. But Plaintiffs' own cases confirm that New York courts cannot intrude into internal religious disputes like this one. For example, in *Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana* (9 NY3d 282 [2007]), the Court of Appeals held that courts could *not* intervene in a religious dispute among Satmar Hasidic Jews because there were no "neutral principles of law" that permitted a civil court to determine whether members satisfied "religious criteria, including whether a congregant follows the 'ways of the Torah.'" (*Id.* at 286, 288.) Likewise here, as Plaintiffs complaint acknowledges, after consultation with its senior Rabbis, Yeshiva determined that Pride Alliance would not be consistent with its religious, Torah-based values. (*See, e.g.*, Ex. S ¶¶ 80, 98-103, 107, 110-111.)

The "neutral principles" doctrine—if it even has a role outside of property disputes[2]—is not meant to adjudicate "conflict[s] between the civil law and an internal church decision," but rather only disputes "over what the church's decision was in the first place." (Michael W. McConnell & Luke Goodrich, *On Resolving Church Property Disputes*, 58 Ariz L Rev 307, 336 [2016].) "In other words," this doctrine cannot apply when "the application of neutral principles would impose civil liability upon a church for complying with its own internal rules and regulations or resolving

[2] The U.S. Supreme Court has cautioned against expanding the "neutral principles" doctrine beyond the church property context. (*See Serbian Eastern Orthodox Diocese for U.S. of Am. & Can. v Milivojevich*, 426 US 696, 710 [1976].)

a religious matter." (*In re Diocese of Lubbock*, 624 SW3d 506, 513 [Tex 2021].) Yet that *is* the liability Plaintiffs want to exact on Yeshiva here. Plaintiffs know why Yeshiva denied the Pride Alliance: "The reason why they will reject a club is because it clouds the nuance of the Torah." (Plaintiff Meisels YouTube Interview at 18:11.) Chilling religious exercise is not a proper purpose of the neutral principles doctrine. But it is a reason to stay the trial court's order from going into immediate effect.

B. Yeshiva will prevail on its free exercise claim.

The trial court addressed Yeshiva's separate free exercise defense only cursorily, ignoring the governing cases and applying inconsistent reasoning. Doubling down, Plaintiffs argue that these U.S. Supreme Court cases are inapplicable—but they say so with only non-sequiturs. This is no basis to deny a stay.

The principal free exercise problem here is that neither the trial court nor the Plaintiffs grapple with the applicable case law showing that the NYCHRL is not generally applicable toward religion. The trial court addressed this issue with only the conclusory statement that the NYCHRL is generally applicable because it "applies equally to all places of public accommodation other than those expressly exempted." (Ex. A at 15.) But the U.S. Supreme Court was clear in *Tandon v Newsom*: "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." (141 S Ct 1294, 1296 [2021]); *see also Roman Catholic Diocese of Brooklyn v Cuomo*, 141 S Ct 63 [2020] (COVID restrictions not generally applicable where churches had attendance caps, but "essential" businesses did not).) Any exemptions means the law is, by definition, not generally applicable.

Here, it is undisputed that "benevolent orders" have an "absolute" exemption from the NYCHRL's public accommodations provisions, "not subject to limitation." (*Gifford v Guilderland Lodge, No.2480, B.P.O.E. Inc.*, 707 NYS2d 722, 723-724 [3d Dept 2000].) Under *Tandon*, these exemptions trigger strict scrutiny, requiring Plaintiffs to demonstrate a compelling government interest that cannot be met by any less restrictive means. (141 S Ct at 1296.) And the compelling

interest test cannot be met where—as here—the law "leaves appreciable damage to that supposedly vital interest unprohibited." (*Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 547 [1993].) The NYCHRL's unqualified exemption for benevolent orders, coupled with the discretionary authority it gives the Human Rights Commission to make more exceptions regarding gender (and age) discrimination, (*see* N.Y.C. Admin. Code §8-107(4)(b)), and the two "religious corporation" exemptions, collectively undermine the claim that the NYCHRL's public accommodation interest in nondiscrimination can "brook no departures." (*Fulton v City of Philadelphia*, 141 S Ct 1868, 1882 [2021]). By no means is a law with this many exemptions generally applicable, meaning Yeshiva will prevail on its free exercise defense.

Plaintiffs respond only by saying that *Tandon* is inapplicable because it involved "a literal restriction" on "the number of people who can worship together." (Opp. 23-24.) But no court has ever limited free exercise protections to worship alone. Rather, the Free Exercise Clause applies to all religiously motivated conduct. (*See, e.g., Fulton*, 141 S Ct at 1876 (free exercise infringed where city put religious foster-care agency "to the choice of curtailing its mission or approving relationships inconsistent with its beliefs"); *Thomas v Review Bd.*, 450 US 707 [1981]) (protecting free exercise right not to participate in weapons production); *Wisconsin v. Yoder*, 406 US 205 [1972] (protecting parental rights to control religious upbringing of children).)

The efforts to distinguish *Fulton*—by both the trial court and Plaintiffs—are equally unavailing. The trial court dismissed *Fulton* with a single mention, concluding that it does not apply because the NYCHRL already "contains a very broad exemption for religious corporations organized under the RCL." (Ex. A at 14.) But the NYCHRL's lack of general applicability—favoring secular organizations over religious organizations—cannot be cured by construing it to favor some religious organizations but not others. (*Larson v Valente*, 456 US 228, 244 [1982] ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").) The court's resulting implication that St. John's University might be exempt but not Yeshiva, (Ex. A at 12-13), further demonstrates that the trial court's reasoning invites denominational discrimination.

Plaintiffs try to shore up the trial court's flawed reasoning by pointing to the New York Court of Appeal's ruling in *Catholic Charities of Diocese of Albany v Serio*, (7 NY3d 510 [2006]), and the Third Department's ruling in *Roman Catholic Diocese of Albany v Vullo*, (168 NYS3d 598 (Mem) ([3d Dept 2022].) There are multiple problems with this approach. First, *Serio* involved a law with a partial religious exemption, but no secular exemptions. Thus, it did not address the precise question at issue here. Second, there can no longer be any doubt that *Tandon* and *Fulton* raise serious questions about *Serio*'s continued vitality. *Serio* failed to analyze general applicability as an independent basis for triggering strict scrutiny. Rather it concluded that the general applicability test is met as long as a law does not "'target[] religious beliefs as such.'" (*Serio*, 7 NY3d at 522.) But *Tandon* and *Fulton* treat "general applicability" separately from "neutrality," imposing strict scrutiny solely by virtue of a laws' secular exemptions. (*See, e.g., Fulton*, 141 S Ct at 1877 (concluding that policy triggered strict scrutiny because mechanism for secular exceptions made it non-generally applicable, while separately declining to consider law's neutrality despite evidence of religious targeting).) Thus, again, a stay is warranted until a court at least considers these arguments.

Plaintiffs also invoke *Vullo* to avoid general applicability analysis. That case involves a New York regulatory requirement that all employees include coverage for surgical abortions in their health care plans. (168 NYS3d at 599.) The Third Department relied on *Serio* to uphold the regulatory requirement despite various exemptions in the regulation. (*Id*.) The U.S. Supreme Court reversed and remanded for further consideration under *Fulton*. (*Id*.) On remand, the Third Department reinstated its initial ruling, in part on the ground that *Fulton* only involved discretionary, and not categorical, exceptions. (*Id*. at 600.) But this reasoning does not apply here for several reasons. First, *Vullo* only asked this Court to reconsider under *Fulton*. Thus, the Third Department did not consider the impact of *Tandon*, which this Court must do here. Second, like the policy at issue in *Fulton*, the NYCHRL has a discretionary exemption scheme in addition to its categorical exemption for benevolent orders. (N.Y.C. Admin. Code §8-107(4)(b); *see also* Ex. S at 27 -29 (Plaintiffs pleading claims of "Gender and Sexual Orientation" discrimination).) Under

Fulton, "a system of individual exemptions" that is not extended "to cases of 'religious hardship'" fails strict scrutiny, because "[t]he creation of a system of exceptions … undermines the [government's] contention that its non-discrimination policies can brook no departures." (141 S Ct at 1878.)[3] At the very least, this Court should stay the trial court's ruling pending consideration of that question on appeal.

C. Yeshiva will prevail on its free speech and assembly claims.

The Free Speech and Assembly clauses likewise support a stay. "[T]he Free Speech Clause provides overlapping protection for expressive religious activities." (*Kennedy v Bremerton Sch. Dist.*, 142 S Ct 2407 2421 [2022].) 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].) And the Assembly Clause protects the freedom of private organizations, including religious organizations, to 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.*, Ex. D at 7.) For the reasons stated above, such claims do not survive strict scrutiny. The Free Speech and Assembly Clauses preclude such coercion. (Ex. D at 16-17.)

Plaintiffs rest their Free Speech arguments almost exclusively on *Board of Education of Westside Community Schools v Mergens By and Through Mergens* (496 US 226 [1990].) But *Mergens* wasn't even a Free Speech case—it dealt with the Equal Access Act (EAA), a federal statute that applies exclusively to "public secondary schools" that create a "limited open forum."

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[3] Nor do the "post-*Fulton* decisions" Plaintiffs' cite (Opp. at 9 n.4) cramp *Fulton*'s holding. The exemption systems in *We The Patriots* and *Kane* "provide[d] for an objectively defined category of people to whom the vaccine requirement does not apply." (*See We The Patriots USA, Inc. v Hochul*, 17 F4th at 266, 289-290 & n.29 [2d Cir. 2021]; *Kane v De Blasio*, 19 F4th 152, 165-166 [2d. Cir. 2021]).); (*accord Doe v Mills*, 16 F4th 20, 30 [1st Cir. 2021] (exempting "only those whose health would be endangered by vaccination").) But here, the NYCHRL's exemption criterion is "bona fide considerations of public policy." (NYC Admin. Code §8-107(4)(b).) "Public policy" must include the First Amendment's "special solicitude to the rights of religious organizations." (*Hosanna-Tabor*, 565 US at 189.)

(*Id.* at 235.) *Mergens*' discussion of club "sponsorship" was thus premised on the statutory definition of that term as found in the EAA, (*see id.* at 236 (citing 20 USC § 4072(2))), and had no bearing on forced sponsorship under the Free Speech Clause. The other cases Plaintiffs rely on are likewise EAA or Establishment Clause cases governing whether *public*, *secular* schools endorse a club under the EAA's *statutory framework* or the *Establishment* Clause, not whether *religious* schools forced to recognize clubs in violation of their religious beliefs illegally endorse them under the *Free Speech* Clause. (*See Prince v Jacoby*, 303 F3d 1074, 1094 [9th Cir 2002] (the Establishment Clause does not prohibit religious clubs at secular schools); *Hsu By and Through Hsu v Roslyn Union Free Sch. Dist. No. 3*, 85 F3d 839, 873 [2d Cir 1996] (EAA permitted Christian Bible Club at public school).)

These differences are significant because while the Supreme Court has held that *public* schools do not endorse private speech by recognizing clubs under the EAA, the First Amendment protects *private* organizations like Yeshiva from being forced to allow participation by groups with whose message they disagree. *Hurley v Irish-Am. Gay, Lesbian and Bisexual Group of Boston* (515 US 557 [1995]) is directly on point. There, a gay club sued a private association under the Massachusetts public accommodations law to allow them to participate in Boston's St. Patrick's Day parade, which was sponsored and operated by the private association. (*Id.* at 560-561.) The Supreme Court ruled for the private association, because forcing the gay club's participation would "essentially require[e] petitioners to alter the expressive content of their parade." (*Id.* at 572-573.) Doing so "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." (*Id.* at 573.)

Plaintiffs' remaining two cases fare no better. *Georgetown* involved a Free Exercise defense, not Free Speech, and in any event the decision was so abhorrently wrong that Congress immediately passed a statute overturning it. (*See Clarke v United States*, 915 F2d 699, 700 [DC Cir 1990] (Congress passed the "Armstrong Amendment" overturning *Gay Rights Coalition of Georgetown Univ. Law Ctr. v Georgetown Univ.*, 536 A2d 1 [DC 1987]).) And Yeshiva has an obvious difference from the wedding venue in *Gifford*: Yeshiva does not "provide services to the

general public," particularly not when it comes to its undergraduate student clubs. (*Matter of Gifford v McCarthy*, 137 AD3d 30, 42 [3d Dept 2016].) Yeshiva is a private university that limits undergraduate student clubs to matriculated undergraduates who have voluntarily chosen to attend Yeshiva, an Orthodox Jewish university. As such, the Free Speech and Assembly Clauses support a stay.

D. Yeshiva will prevail under the NYRCHL.

The far-reaching implications of the trial court's mistaken construction of the NYCHRL also merit a stay. This is the first case to construe what it means to be a "religious corporation incorporated under the education law." (N.Y.C. Admin. Code § 8-102.) The trial court embraced a construction that, by its own admission, belies the exemption's "obvious," "ordinary" meaning. And the court expressly declined to consider how far-reaching the consequences of its novel interpretation would be. (*See* Ex. A at 7 ("the court does not need to reach this issue").) Before enforcing it, a stay pending appeal is warranted.

Plaintiffs' contrary arguments are all unfounded. First they claim that the trial court's novel construction was required by New York law. (Opp. 16-19.) But even the trial court acknowledged that construction belied the "obvious" and "ordinary" meaning of the term "religious corporation." (Ex. A at 3, 6, 11.) Nothing about New York law requires the conclusion that a school that—in the trial court's words—has an "obvious," "inherent," "integral," and "defin[ing]" "religious character" is, for NYCHRL purposes, equivalent to a McDonalds. (*Id.* at 4, 6-7, 10-11.) Indeed, the court ignored all the New York cases identifying religious corporations by their functions. (Mot. ¶ 48.) Had the trial court followed standard statutory construction principles—giving statutory terms "their usual and commonly understood meaning"—it would have recognized its error. (*See Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479-480 [2001].)

Instead, the trial court relied on three cases looking at houses of worship under the Religious Corporations Law, even though it agreed that the exemption for "religious corporations incorporated under the education law" is separate and distinct from the exemption for "religious

corporation[s] incorporated … under the religious corporations law." (NYC Admin. Code § 8-102; Ex. A at 6.)

After deciding that "[t]he court cannot ignore . . . the RCL definition," the trial court concluded that the "inquiry must focus on the purpose of the institution, which is typically expressed in the organizing documents." (Ex. A at 6, 7.) Yet the court rejected the most obvious reading of Yeshiva's corporate documents. Yeshiva's original charter states it was organized "to promote the study of Talmud." (Ex. V at 1-26.) And its current charter states that it "continues to be organized and operated exclusively for educational purposes." (*Id.* at 1-14.) The most natural reading of the current language is that Yeshiva "continues" the educational purpose from its earlier charter: "to promote the study of Talmud," a practice that remains today

The consequences of such a ruling go far beyond recognition of a Pride Alliance club at Yeshiva. The NYCHRL also prohibits discrimination based on "religion," yet religion-based decisions are a key feature of religious universities. Yeshiva, for example, regularly engages in religion-based hiring, (Ex. C at 61-62 ("Leading Torah scholars, faculty members at the University" are "Roshei Yeshiva" and "very large influencers on campus") and upholds Jewish religious requirements on its campuses, including by screening undergraduate students who are not serious about the Jewish faith, (*id*. at 77:5-12, 78:21-79:7), promulgating Jewish laws of *Shabbat* and *kashrut*, (*id.*), and maintaining Jewish-only worship spaces, (Ex. G ¶15). Similarly, its religiously informed requirements for segregated campuses, study halls, and classes, (*Id.* ¶¶ 10-11), potentially would be subject to lawsuits under the NYHCRL's prohibitions against both religious and sex discrimination. Religious standards at numerous other religious universities and colleges would also be subject to extensive litigation.

Second, Plaintiffs contend that the trial court's cherry-picked evidence shows that Yeshiva has abandoned its religious identity. (Opp. 19-20.) But they ignore the mountain of contrary evidence. (*See* Mot. ¶¶ 11-12; Ex. B at 2-6; Ex. C at 7:5-19; 8:4-18; 9:3-10; 20:9-24; 39:22-40:12; 41:4-13; 50:15-25; 53:3-55:2; 55:14-17; 56:23-25; 59:6-11; 60:6-61:3; 65:12-18; 76:15-79:7; 102:7-23; 125:10-24; 138:20-139:12; 140:2-14; Ex. D at 2-3; Ex. E at 2 (Preamble; Art. 3, § 6(3)); Ex. F

(Art. II, § 1); Ex G ¶¶ 4-45; Ex. I at 2-6; Ex. L ¶ 9; Ex. M ¶ 9; Ex. P at 2-8; Ex. T; Ex. U; Ex. V at 1-14; Ex. X; Ex. Z at 1-9 (Mission Statement).) Plaintiffs and the trial court ignore all this evidence, never even mentioning it when declaring Yeshiva isn't religious. They highlight two government forms where Yeshiva (accurately) identified itself as a non-profit educational institution, (Ex. A at 10), but ignore Yeshiva's explanation as to why it did not select the "religious" box, (*see, e.g.,* Mot. ¶ 55.) But the form CHAR410 is written in a way that only hierarchically controlled religious institutions, or religions found in a Christian denominational directory, can check the "religious" box. This may work for Catholic institutions, but no religious institution within Yeshiva's Orthodox community could qualify. (Ex. Y, line 5.) Thus, Yeshiva saying that "'it would be difficult' to produce" the necessary documents, (Ex. A at 10), was a statement of infeasibility, not apathy. (*See* Ex. C at 58:21-59:11; 64:3-19; 115:16-17) (Yeshiva's corporate representative explaining that "the word 'control' in Judaism is a hard word to document," because the religion lacks a central authority). Plaintiffs and the court also ignored other government submissions that spend pages detailing Yeshiva's religious identity. (Ex. T.) The court's suggestion that Yeshiva's self-characterization as a non-profit educational institution was somehow "the basis for licensure and receipt of grants and other public funding," (Ex. A at 9), is entirely unfounded. It would be illegal for government agencies to restrict funding for Yeshiva just because it is religious. (*Carson*, 142 S Ct at 2001 (in offering funds to private schools, governments cannot discriminate against schools based on their religious status or religious use).) There is no evidence that any government entity has ever made a funding decision out of confusion about Yeshiva's religious identity.

Plaintiffs continued insistence that Yeshiva has already admitted being subject to the NYCHRL, (Opp. 19-20, 24-25), is also unavailing. "[T]o constitute a judicial admission, [a] statement must be one of fact." (*IS Chrystie Mgt. LLC v ADP, LLC*, 168 NYS3d 449, 451 [1st Dept 2022].) "[A] legal conclusion does not suffice." (*In re Motors Liquidation Co.*, 957 F3d 357, 360 [2d Cir 2020].) And whatever legal advice Yeshiva received regarding its graduate schools decades ago, (Opp. 19-20, 24), is not "binding on this litigation." (*Starkey v Roman Catholic Archdiocese of Indianapolis, Inc.*, 2022 WL 2980350, at *6 [7th Cir July 28, 2022].) Since 1995 and 2001, the

First Amendment legal landscape has changed dramatically: the Supreme Court has recognized the broad sphere of religious autonomy afforded to religious schools like Yeshiva, *see supra* I.A (discussing *Hosanna-Tabor* and *Our Lady*); has banned "sectarian" funding restrictions, *see Carson*, 142 S Ct at 2002; and has "abandoned *Lemon* and its endorsement test offshoot" that led to those illegal sectarian funding restrictions in the first place, (*see Kennedy*, 142 S Ct at 2427.) In short, Yeshiva is not bound by the legal advice it was given prior to these recent clarifications.

As noted, *see supra* I.A (discussing religious autonomy and entanglement concerns), the trial court's selective review of the evidence thus also introduces constitutional error by allowing a court to weigh from selective evidence just how much religion is sufficient to trigger the exemption.

Finally, Plaintiffs' claim that the New York City Council would not have intended Yeshiva to fall within the NYCHRL's religious exemption is inconsistent with the text of the law and its legislative history. (*See* N.Y.C. Admin. Code § 8-107(12) (broad exemption for religiously motivated decisions); *see also* appellee brief in *NY State Club Assn. v City of New York*, 487 US 1 [1988], available at 1988 WL 1026276, *36-37 (New York City lawyers telling U.S. Supreme Court that the NYCHRL was designed to be "quite sensitive to the constitutional issues raised by the legislation.").) In short, the court's ruling below gives no clear or logical guidance on what it means to be a "religious corporation incorporated under the education law." And needless constitutional conflicts will now be created. In this context, an immediate stay is warranted while these issues are considered more carefully on appeal.

II. The balance of harms and public interest strongly favor a stay.

A. Absent a stay, Yeshiva will suffer irreparable harm.

Plaintiffs' claims that Yeshiva will suffer no harm are long on invective but short on the law. Yeshiva will absolutely suffer irreparable harm from being forced to violate its First Amendment rights and its religious beliefs. *First*, any deprivation of a First Amendment right "for even minimal periods of time"—particularly Free Exercise rights—"unquestionably constitutes irreparable injury" as a matter of law. (*Roman Catholic Diocese of Brooklyn v Cuomo*, 141 S Ct 63, 67 (2020);

accord Uhlfelder v Weinshall, 10 Misc3d 151, 157 [Sup Ct, NY County 2005] ("[V]iolations of First Amendment rights are commonly considered de facto irreparable injuries."), *affd*, 47 AD 3d 169 [1st Dept 2007].) Most students come to Yeshiva expecting it to uphold Torah values. And much of the Orthodox world similarly looks to Yeshiva as a standard-bearer for Torah values. Granting official recognition to the Pride Alliance club, even for a short period of time, would send an irretrievable message that is not consistent with Torah values.who recall the consequences of government control on European yeshivas in the early 20th century, including by the Third Reich

Second, regarding the 1995 memo, legal advice Yeshiva received almost thirty years ago regarding its graduate programs is out-of-date and not binding on it today, especially on the unique issues presented here. (*See Starkey*, 2022 WL 2980350, at *6 (emails from defendants' outside counsel with contrary legal advice were not "binding on th[e] litigation" at hand).) The 1995 memo itself explicitly acknowledged that it was solely describing the situation at particular Yeshiva *graduate* schools, which are not at issue in this lawsuit and which are deliberately geared towards professional, not religious, development. (*See* Mot. ¶¶ 10-12, 54; Opp. Ex. 3 ¶3.) Nor has Yeshiva ever conceded that the NYCHRL's public accommodations provisions apply to it—*Levin v Yeshiva* concerned *housing discrimination* (at one of its graduate schools), under a separate section of the NYCHRL unrelated to public accommodations or the religious exemption thereto. (*See Levin v Yeshiva Univ.*, 96 NY2d 484, 490 [2001] (applying § 8-107(5) (housing), not § 8-107(4) (public accommodations)).) Considering the extensive legal developments since those times, Yeshiva would be irreparably harmed if denied the right to rely on the current understanding of the law.

Third, Plaintiffs argue that because Yeshiva has taken so many other steps to accommodate LGBTQ students, surely it cannot be harmed by taking the additional step of recognizing Pride Alliance as an official student club. Indeed, Yeshiva considers all of its students, including its LGBTQ students, as members of its family and has taken a number of measures to create an inclusive environment including an LGBTQ support group, sensitivity training for all of its rabbis and faculty, as well as university wide programs to sensitize its community about the experience

of being LGBTQ and Orthodox. (*See* Ex. H.) At the same time, it has also expressed its uniform policy not to place its imprimatur on student clubs that promote activities that are not consistent with its Torah values, as demanded by Plaintiffs. How to balance Torah's commands to both "model … a traditional view on intimate relationships" and "to 'love your neighbor as yourself,'" (Ex. X ¶ 10), is an inherently religious question. Penalizing Yeshiva for how it resolves that balance here would itself be a constitutional violation.

In addition, Plaintiffs essentially argue that because Yeshiva did *anything* to accommodate them, Yeshiva must do *everything* and no longer has any First Amendment defenses. This argument creates a massive incentive problem. If any religious institution's attempt to accommodate its LGBTQ members meant that the institution's First Amendment rights were totally nullified, religious institutions would likely refuse to accommodate them whatsoever. It is Yeshiva that would suffer irreparable harm if it were penalized for doing everything it can to accommodate LGBTQ students consistent with its Torah values, just because it cannot do everything Plaintiffs want it to do.

B. With a stay, Plaintiffs' harm will be minimal.

Plaintiffs will be minimally harmed by a stay, for several reasons. *First*, the stay would preserve the status quo pending appeal, under which Pride Alliance and its earlier iterations have been operating for over a decade. *Second*, three of the Plaintiffs have already graduated from Yeshiva and are no longer on its undergraduate campuses. Plaintiffs also concede that Yeshiva has worked extensively with its LGBTQ students to build a more welcoming environment. (*Id*. at 26). It is undisputed that, in response to this dialogue, Yeshiva has recently committed or recommitted to enforcing its policies prohibiting "any form of harassment or discrimination against students based on protected categories"; to updating its "diversity, inclusion and sensitivity training" to better reflect concerns of LGBTQ students; to ensuring there is staff in its counseling center "with specific LGBTQ+ experience"; to "appointing a person to oversee a Warm Line that will be available" for anyone to "report any concerns pertaining to non-inclusive behavior such as harassment, bullying or inappropriate comments"; and to continuing "to create space for students,

faculty, and Roshei Yeshiva to continue this conversation." (Ex. H; *see also* Opp. at 26.) Plaintiffs cannot credibly claim irreparable harm just because Yeshiva has not gone as far as they want it to.

Plaintiffs argue that Yeshiva should just recognize the club but continue to verbalize its religious beliefs about marriage and sexuality. But actions speak much longer, louder, and more pervasively than mere words. And there is no reason to believe that the harm Plaintiffs claim to be experience from Yeshiva's club decision would be any different from its words justifying its club decision. Plaintiffs came to Yeshiva because of its religious character and knowing full well its traditional view regarding human intimacy. Mere disagreement with Yeshiva's internal religious decisions, or inability to change Yeshiva's beliefs, is not irreparable harm.

Third, any harm from a stay would be briefly felt. Defendants plan to perfect their appeal in time for October argument, and an opinion on the merits of the permanent injunction could be rendered as early as November or December of this year.

C. A stay benefits the public interest.

It is well-established that "securing First Amendment rights is in the public interest." (*New York Progress and Protection PAC v Walsh*, 733 F3d 483, 488 [2d Cir 2013].) And when courts balance statutory violations against constitutional ones, constitutional rights bear out. *See Flynn*, 221 So3d at 1249 n 18 ("[C]onstitutional rights create asymmetries in favor of protected freedoms such that statutory and other lesser rights must give way if they conflict or cannot coexist with the former.").) As such, and in light of the foregoing, the balance of equities tips in favor of a stay for Yeshiva.

CONCLUSION

Plaintiffs say that "College is a transitory experience," and thereby try to downplay the irreparable harm to Yeshiva of being forced to violate its Torah values and become legally indistinct from sandwich shops and railway cars. But while Plaintiffs may just be passing through Yeshiva, Yeshiva's mission is meant to endure. A full appeal should be resolved before Yeshiva is forced to compromise its 3,000-year-old religious tradition. For all the foregoing reasons, Yeshiva's motion for a stay pending appeal should be granted forthwith.

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Respectfully submitted,

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