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

YU PRIDE ALLIANCE, et al.,

Plaintiffs-Respondents,

-against-

YESHIVA UNIVERSITY, et al.,

Defendants-Appellants.

Appellate Division
Case/Docket No.: 2022-02726

Originating Court
Index No.: 154010/2021

PLAINTIFFS-RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR A STAY PENDING APPEAL

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NO EMERGENCY JUSTIFIES A STAY PENDING APPEAL: APPELLANTS MUST "IMMEDIATELY" STOP VIOLATING THE LAW

Long on hyperbole and sound bites, but fatally short on substance, Appellants' motion can be swiftly denied because there is no good cause for a stay. Supreme Court's June 14, 2022 Order, set out in a carefully-reasoned 18-page decision issued after it reviewed 20,000 words of briefing from each side and heard extensive oral argument, correctly ordered Yeshiva University to stop discriminating against an unofficial LGBTQ student club, "immediately." Appellants have no likelihood of success on the merits in this appeal and they establish no irreparable First Amendment harm. It is Plaintiffs who will be irreparably harmed if they face continued discrimination and second-class status for another year.

Appellants will not succeed on appeal because this is an open-and-shut discrimination case: the University admittedly denied the YU Pride Alliance, an LGBTQ student club, access to facilities and resources like campus meeting space for club activities *because of* its LGBTQ status. That conduct was illegal because universities—religiously affiliated or not—are places of public accommodation that may not discriminate against their students on the basis of sexual orientation or gender identity.

Appellants will not succeed on their claim that the First Amendment allows them to discriminate. Supreme Court correctly found that "Yeshiva's Free

Speech rights will not be violated by application of the NYCHRL" because "[f]ormal recognition of a student group does not equate to endorsement with that group's message." Ex. 1 at 15.[1] Providing student clubs equal access to facilities does not mean a college endorses any club's particular mission and does not implicate the First Amendment.

Appellants also fail to show irreparable harm. YU's dire—but notably vague—claims about interference with its religious environment if an LGBTQ student group exists on campus in the fall ring hollow because the University *already has an LGBTQ student group functioning within it*, at the law school. The Court's Order does not require any dramatic sea change to Appellants' religious environment. The preposterous idea that now, suddenly, allowing a group of undergraduates to meet for peer support in a classroom in September will irreparably harm the Appellants or interfere with their religious environment is simply attorney hyperbole.

The only irreparable harm here will fall on the Plaintiffs. This fall, Pride Alliance will finally participate in the annual student club fair, hold events, and contribute to the campus community. The group plans to host food and drink events like "LGBTeas" and cupcake decorating; start a book club; prepare and

[1] References to "Ex." are to the Declaration of Katherine Rosenfeld, dated July 25, 2022.

distribute Purim packages to the community around the holidays; and host discussion events for LGBTQ allies. Ex. 5 ¶¶ 5-7. College is a transitory experience, and students have limited time at the University to benefit from its offerings. Supreme Court ordered that the University recognize the Pride Alliance "immediately." Appellants' stay motion must be rejected outright.

FACTS AND PROCEDURAL HISTORY DEMONSTRATING THAT NO STAY IS WARRANTED

Yeshiva University ("YU") is a large research university in New York City that every year educates 5,000 students of myriad religious denominations. It contains seven graduate schools and four colleges, and issues exclusively secular degrees in 23 disciplines ranging from law to social work. It is incorporated as an educational corporation under the New York Education law. And it was founded with an Orthodox Jewish affiliation which continues to date. Religiously affiliated or not, YU is a place of public accommodation.

Plaintiff YU Pride Alliance is an unofficial undergraduate student group formed in 2018 whose goal is to offer a safe, supportive space on campus for LGBTQ+ students.[2] For years, Appellants refused to recognize the Pride Alliance

[2] Ex. 4 (Mission Statement) ("The [YU] Pride Alliance is an unofficial group of undergraduate YU students" who seek to create a formal student club that will "provide a supportive space on campus for all students, of all sexual orientations and gender identities, to feel respected, visible, and represented," and "foster awareness and sensitivity to the unique experiences of being a LGBTQ+ person.").

(and its predecessors) as an official club because of the sexual orientation and gender identity of the club's members and its mission. Students then tried to gain recognition by meeting with Appellants, hoping to convince them to follow the law, but Appellants doubled down and announced in September 2020 that they would not recognize an LGBTQ club. Ex. 6 ¶¶ 10-34.

Plaintiffs filed this action on April 27, 2021, bringing claims for sexual orientation and gender discrimination under Section 8-107(4) of the NYCHRL, which covers public accommodations. After limited discovery requested by Plaintiffs, the parties cross-moved for summary judgment in December 2021 to determine if the University was (or was not) a "religious corporation" exempt from the NYCHRL.

Plaintiffs Are Granted Partial Summary Judgment and a Permanent Injunction

Supreme Court issued its Decision and Order on June 14, 2022. Armed with a substantial record, it concluded that YU is not an exempt "religious corporation" and that complying with the NYCHRL does not violate its First Amendment rights. Supreme Court issued a permanent injunction directing immediate recognition of the club. The court "permanently restrained [Defendants] from continuing their refusal to officially recognize the YU Pride Alliance as an official student organization because of [] sexual orientation or gender" and "directed [Defendants] to immediately grant plaintiff YU Pride Alliance the full

and equal accommodations, advantages, facilities, and privileges afforded to all other student groups at Yeshiva University." Ex. 1 at 18.

ARGUMENT

I. APPLELLANTS FAIL TO MEET THE LEGAL STANDARD FOR A STAY PENDING APPEAL

Appellants cannot show "good cause" to obtain a stay of enforcement pending appeal. *See 64 B Venture v. Am. Realty Co.,* 179 A.D.2d 374, 376 (1st Dep't 1992); *Eisner v. Goldberger*, 28 A.D.3d 354, 354 (1st Dep't 2006) (affirming denial of stay where "[d]efendants failed to show good cause"). "[T]he circumstances to be considered in entertaining an application for a stay [are] (1) a likelihood that the applicant would prevail on the merits of the appeal, (2) irreparable injury to the applicant unless the stay be granted, (3) no substantial harm to other interested persons, and (4) no harm to the public interest." *City of New York v. Pub. Serv. Comn.*, 12 N.Y.2d 786, 786 (1962) (cleaned up). Appellants' request for a stay pending appeal must be denied because they fail to show any merit to their appeal. *See 64 B Venture*, 179 A.D.2d at 376.

II. APPELLANTS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR FIRST AMENDMENT DEFENSE

Appellants' grab bag of First Amendment "defenses" of Free Exercise, Free Speech, and religious autonomy should not detain this Court for long. The First Amendment here is a smokescreen. Appellants' motion plays fast and loose with settled law to pretend there is a novel or urgent crisis of

constitutional proportions before this Court. There is not. The precedents that uphold neutral, generally applicable public accommodations laws barring discrimination, even when such laws incidentally burden stated religious beliefs—*Emp. Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 879 (1990) and *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (2006)—are settled law. As recently as last month, the Third Department affirmed that *Serio* and *Smith* are the law of the land, rejecting a challenge that was brought *by the exact same counsel representing Appellants here*. Success on the merits of Appellants' appeal would require the First Department to disregard binding precedent from the Court of Appeals and the United States Supreme Court. The chance that the First Department will render such a lawless decision is nil.

A. Appellants' "Free Exercise" Defense Has No Merit and Will Fail

Serio is the leading New York case, and it shuts the door on Appellants' appeal. The Court of Appeals in *Serio* held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 7 N.Y.3d at 521 (quoting *Smith*, 494 U.S. at 879). It thus rejected the claim of several faith-based organizations that a state health law mandating contraception coverage of as part of prescription drug benefits violated the Free Exercise Clause.

Following *Serio*, Supreme Court found first that the NYCHRL is such a law, intended to further the legitimate government interest of "maximiz[ing] deterrence of discriminatory conduct," and is subject to rational basis review. Ex. 1 at 11, 14-15. The NYCHRL "is one of the most protective anti-discrimination laws in the country," *id.* at 11, and prohibits discrimination based on protected characteristics, such as gender and sexual orientation, in places of public accommodation such as educational institutions to promote full participation and equal access to public life and the economy for all New Yorkers. The legislative record is robust, extensive, and unequivocal that rooting out harmful discrimination was the purpose of the law. See *infra* § III.D. The law is neutrally written to achieve that aim and does not target or suppress religious exercise.[3]

Supreme Court therefore correctly concluded that the NYCHRL's public accommodations provisions—Sections 8-102 and 8-107—do not violate Appellants' Free Exercise right, even if the law had "the incidental effect" of "burdening a particular religious practice," as explained in *Smith.* 494 U.S. at 879, 886 n.3; *see also Serio*, 7 N.Y.3d at 521.

[3] Indeed, the United States Supreme Court has already held that the challenged exemption provision is valid. *See New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 16 (1988) (Section 8-102 valid as written); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 580 (1995) (citing NYCHRL as an anti-discrimination statute that does not violate First Amendment).

In sum, YU must comply with the NYCHRL, even if it arguably has the incidental effect of burdening the University's religious exercise, or in this case what Appellants describe as their "religious environment" (a burden for which there is little to no support in the record). *See Gifford v. McCarthy*, 137 A.D.3d 30, 37, 39-40 (3d Dep't 2016) (requiring wedding venue to provide equal access to same-sex couples who wish to marry on premises despite venue owner's "religious beliefs that same-sex couples should not marry," because the New York State Human Rights Law was neutral, generally applicable, and advanced "New York's long-recognized, substantial interest in eradicating discrimination"); *Emilee Carpenter, LLC v. James*, 2021 WL 5879090, --- F. Supp. 3d --- (W.D.N.Y. Dec. 13, 2021) (incidental burden on the religious views of wedding photographer required to serve LGBTQ couples was permissible to achieve the legislative goal of full inclusion for LGBT New Yorkers).

B. Appellants Mischaracterize Fulton, Which Does Not Apply

Appellants attempt to sow confusion about the applicability of *Serio* (and *Smith*) following *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). But *Fulton* "did not revisit or overturn the existing rule [under *Smith*]. It was that standard that formed the basis for the Court of Appeals' decision in [*Serio*], and that standard remains good law." *Roman Cath. Diocese of Albany v. Vullo*, 168

N.Y.S.3d 598, 599 (Mem) (3d Dep't 2022) (cleaned up) ("*Vullo II*").[4] Indeed, in *Vullo II*, the Third Department rejected the *precise claim* that Appellants make here, *advanced by the same counsel*—that any exemptions to an anti-discrimination statute require strict scrutiny after *Fulton*—finding that it "is not compelled by the language of *Fulton* and is not shared by subsequent cases interpreting it." *Id.* at 600. Appellants' attempt to package their appeal as raising a legal question under *Fulton* is baseless. Appellants' citations to *Fulton* are particularly misleading because in a unanimous ruling, the United States Supreme Court expressly *declined* to overturn *Smith*; it *applied Smith* to an anti-discrimination provision in the City of Philadelphia's foster care certification policy. 141 S. Ct. at 1877.

In this case, the NYCHRL's three exemptions in the public accommodations section are not discretionary and fully accord with *Fulton*. Since 1984, the NYCHRL public accommodations law has contained a narrow exemption for small private clubs, masonic lodges, and houses of worship, commonly understood to protect the associational rights of small intimate groups meeting for non-economic and non-public activities. *See* Dkt. 5 Ex. N at 13-19.

[4] Post-*Fulton* decisions have rejected the same mischaracterizations of *Fulton* that Appellants urge here. *See Kane v. De Blasio*, 19 F.4th 152, 165-66 (2d Cir. 2021) (rejecting argument that exemptions render a statute not generally applicable under *Fulton*); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288-89 (2d Cir. 2021) (same); *Does 1–6 v. Mills*, 16 F.4th 20, 29–30 (1st Cir. 2021), *cert denied*, 142 S. Ct. 1112 (2022) (same).

These are "distinctly private" membership groups with strong interest in intimate association. *See* N.Y.C. Admin. Code § 8-102(9). These are familiar categorical distinctions; for example, the distinction between houses of worship and religiously affiliated organizations is frequently made by federal and state governments, including in the federal tax code. *See* 26 U.S.C. § 501(c)(3). These exemptions do not depend on any government official's individual evaluation. Section 8-102's validity is unchanged by *Fulton*.

C. Appellants' "Free Speech" Defense Has No Merit and Will Fail

"Yeshiva's Free Speech rights will not be violated by application of the NYCHRL[]" because "[f]ormal recognition of a student group does not equate to endorsement with that group's message." Ex. 1 at 15 (citing *Bd. of Educ. Of Westside Cnty. Schools v. Mergens By and Through Mergens*, 496 U.S. 226, 250 (1990)). Supreme Court's decision applies settled First Amendment law and treads no new ground.

Requiring schools to permit a club to exist on equal terms with other student clubs—all that the Court requires here—does not convey a message that the club's beliefs are favored or imply the institution's endorsement of the club's mission. *See, e.g.*, *Mergens*, 496 U.S. at 250 ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory

basis."); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). In *Widmar*, the Supreme Court ordered a university to provide a religious student group equal access to facilities to host meetings where, as Yeshiva University does in this case, it did the same for "over 100 recognized student groups." 454 U.S. at 274. Providing the religious group access to campus facilities "does not confer any imprimatur of state approval on religious sects or practices. . . . [S]uch a policy would no more commit the University to religious goals than it is now committed to the goals of the Students for a Democratic Society, Young Socialist Alliance or any other group eligible to use its facilities." *Id.* (cleaned up).

New York courts have similarly recognized that equal accommodation does not equate to endorsement of a particular message. In *Gifford*, the Third Department held that requiring wedding venue owners to give same-sex couples equal access to their facilities did not violate the First Amendment rights because "simply requir[ing] [the venue] to abide by the law and offer the same goods and services to same-sex couples that they offer to other couples . . . did not require them to participate in the marriage of a same-sex couple and left them free to adhere to and profess their religious beliefs that same-sex couples should not marry." 137 A.D.3d at 31.

The D.C. Court of Appeals similarly held that D.C.'s Human Rights Law required Georgetown University, another elite research university with a

"religious heritage" the school "cherished," to give its LGBTQ student group access to the same facilities as other student groups. *Gay Rights Coal. Of Georgetown Univ. Law Ctr.*, 536 A.2d 1, 8 (1987).[5] The D.C. high court found the law did not require the school to approve or endorse LGBTQ identities, but only to provide equal access to facilities. *Id.* at 21 ("The Human Rights Act provides legal mechanisms to ensure equality of treatment, not equality of attitudes." (emphasis omitted)).

So too here. "Yeshiva need not make a statement endorsing a particular viewpoint" in recognizing its student clubs. Ex. 1 at 15. Such a requirement would be impossible—YU has 87 clubs representing a robust range of views on social, cultural, and political issues, including clubs that are often directly opposed to each other's views.[6] YU has not signed on to the conflicting views represented by these clubs, and no one reading YU's student club list could think otherwise. How could they? The College Democrats and College Republicans are diametrically opposed, but YU recognizes both. Back in 1995, when Appellants last publicly discussed its position on campus LGBTQ clubs, the University

[5] Other large, religiously affiliated research universities in New York City like St. John's and Fordham also have LGBTQ undergraduate student groups on campus.

[6] YU currently recognizes both the College Democrats and the College Republicans, as well as five other "Political and Activism" student organizations, such as the "YU Feminists Club." Exs. 18-19. YU allowing these organizations to meet and advertise events on campus to further their own interests is not expressive conduct by YU or its administrators.

pointed out it could comply with the law without "endorsing homosexual behavior or organizations involved with gay issues." Ex. 3 (1995 Fact Sheet) at 1.

YU is also free to explicitly state that any one of its student clubs, including the Pride Alliance, does *not* represent the University's views or beliefs, or take any other steps to clarify that the message of the Pride Alliance—peer support and safety for LGBTQ students—is the club's speech, not the University's speech.[7] *See Prince v. Jacoby*, 303 F.3d 1074, 1094 (9th Cir. 2002) ("The School District here can dispel any 'mistaken inference of endorsement' by making it clear to students that a club's private speech is not the speech of the school."); *Hsu By & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996) (school's disclaimer on official materials that it was statutorily required to allow religious club activities was "sufficient disassociation from club's religious speech to avoid appearance of endorsement").

Appellants are "free to adhere to and profess their religious beliefs," *Gifford*, 137 A.D.3d at 40, but they must provide the Pride Alliance with "equal access to the tangible benefits that Yeshiva affords other student groups on its campus." Ex. 1 at 15.

[7] For example, Abilene Christian University formally recognizes an LGBTQ club and publicly notes that the school respectfully disagrees with LGBTQ relationships. *See* Ex. 23. YU is more than capable of doing the same.

D. Appellants' "Religious Autonomy" Defense Has No Merit and Will Fail on Appeal

Appellants' last-ditch invocation of the "religious autonomy" doctrine can be dispatched with quickly and Supreme Court was correct to reject it. A doctrine of extremely limited applicability, it protects only those disputes that are "purely ecclesiastical" in character, such as a religious body's internal governance decisions. *Serbian E. Orthodox Diocese for U. S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 713-14 (1976). The religious autonomy doctrine has been applied to a church's disciplinary proceedings against a bishop, a church's internal reorganization into two sub-groups, and a church's interpretation of its own theology. *See, e.g.*, *id.* at 709. No court has ever held that it allows a religious entity to violate non-discrimination laws. New York courts routinely resolve civil disputes involving religiously affiliated parties as long "as neutral principles of law are the basis for their resolution." *Congregation Yetev Lev D'Satmar, Inc. v. Kahana*, 9 N.Y.3d 282, 286 (2007) (cleaned up); *see Queens Branch of Bhuvaneshwar Mandir, Inc. v. Sherman*, 66 N.Y.S.3d 284 (2d Dep't 2017) (same); *Kelley v. Garuda*, 36 A.D.3d 593, 595 (2d Dep't 2007) (same); *Malankara Archdiocese of Syrian Orthodox Church in N. Am. v. Thomas*, 33 A.D.3d 887, 888 (2d Dep't 2006) (internal congregational dispute as to whether church's corporate documents established an implied trust); *see also CH v. RH*, 18 Misc.3d 268, 274 (Sup. Ct. Nassau Cnty. 2007) (collecting cases).

Appellants try but fail to shoehorn the facts of this case into the narrow religious autonomy doctrine. By no stretch of the imagination does Supreme Court's ruling treat on a "purely ecclesiastical" dispute. No party is asking to compel Appellants' acceptance of LGBTQ relationships as a matter of religious doctrine or dictate what Appellants' religious beliefs should be. Nothing about this case implicates the religious autonomy doctrine. Appellants' ill-conceived attempt to invoke it here will fail on appeal.

III. APPELLANTS' CLAIM THAT YU IS NOW A "RELIGOIUS CORPORATION" WILL FAIL ON APPEAL

As it did below, YU will fail on appeal to establish that it is a "religious corporation," which under New York law is a legal corporate status for places of worship and religious observance such as mosques and synagogues. YU's "proud and rich Jewish heritage" does not make it a "religious corporation" under New York law. Ex. 1 at 3. "The record shows that Yeshiva is not a 'religious corporation' on paper, does not hold itself out to be a 'religious corporation,' and at least 27 years ago knew that it was not exempt from the NYCRHL." *Id.* at 10.

Appellants' position contradicts the text of the law, its legislative intent, the fact that the law explicitly covers "colleges and universities," and decades of case law defining religious corporations. *Id.* at 5-11. Appellants' position is also inconsistent with the undisputed facts establishing that the University, *unlike houses of worship*: (1) "organized itself as an 'educational

corporation' and for educational purposes, exclusively" in its Certificate of Incorporation; (2) amended its charter in 1967 to reflect its "exclusively" educational purposes, "confer[ring] many secular multi-disciplinary degrees"; and (3) "submitted various forms to governmental agencies which belie its contention . . . that it is a religious corporation." *Id.* at 7-10.

A. Appellants' Claim to be "Religious Corporation" Is Foreclosed By New York Law

YU is not a religious corporation. Rather, "Yeshiva organized itself as an 'educational corporation' and for educational purposes, exclusively." *Id.* at 7.

New York courts are in lockstep with Supreme Court's analysis in this case: Religious corporation status is based on (1) whether a religious purpose is "expressed in a corporation's organizing documents" like its Certificate of Incorporation; and (2) whether its organizing purpose is to "enabl[e] people to meet for divine worship or religious purpose," consistent with the definition of a "religious corporation" in the Religious Corporations Law ("RCL").[8] *Id.* at 6-7; RCL § 2; *see Temple-Ashram v. Satyanandji*, 84 A.D.3d 1158, 1160 (2d Dep't 2011 (Hindu Temple incorporated under Not-for-Profit Corporations Law ("N-

[8] The RCL lays out the "[legal] rules for the governance of religious bodies. *Venigalla v. Nori*, 11 N.Y.3d 55, 61 (2008). It is the only place in New York law that defines the term "religious corporation," making it the appropriate place to look for the definition of "religious corporation" under the NYCHRL or any other statute. *See People v. Carroll*, 93 N.Y.2d 564, 568-69 (1999) (using definition of term in Family Court Act to supply definition of undefined term in Penal Law).

CPL") is a "'de facto' religious corporation in accordance with the Religious Corporations Law" because it is a "place of worship" whose certificate of incorporation meets "a hybrid of the relevant criteria of both the Religious Corporations Law and the N-PCL."); *Agudist Council of Greater N.Y. v. Imperial Sales Co.*, 158 A.D.2d 683, 683 (2d Dep't 1990 ("In light of the petitioner's valid certificate of incorporation which indicates that its purposes are to provide religious services and services to senior citizens, the Supreme Court properly determined that the petitioner is a religious corporation."); *Matter of Lueken*, 97 Misc.2d 201, 203 (N.Y. Sup. Ct. Queens Cnty. 1978) ("In determining what kind of corporation is presently proposed, it is incumbent upon [the Court] to make this evaluation based on the purposes set forth in the certificate of incorporation.").[9]

YU fails to qualify as a religious corporation based on these well-settled legal principles because its organizing documents state no religious purpose and it is not a place of divine worship or religious observance. YU is incorporated as an "educational corporation" under the Education Law. Ex. 2 ¶ 1. Its Certificate of Incorporation states that it is "organized and operated *exclusively* for educational

[9] *See also Badesha v. Soch*, 136 A.D.3d 1415, 1416 (4th Dep't 2016) (Sikh place of worship incorporated under N-CPL is "de facto religious corporation" because "the type of governance intended and effectuated by the founders . . . was a self-perpetuating board . . . under article 9 of the Religious Corporations Law"); *Watt Samakki Dhammikaram, Inc. v. Thenjitto*, 631 N.Y.S.2d 229, 231 (Sup. Ct. Kings Cnty. 1995) ("*temple*/residence" established under its certificate of incorporation as N-CPL corporation "for the study of Buddhism . . . falls within the ambit of the Religious Corporations Law" (emphasis in original)).

purposes"; states no purpose to meet for worship or religious observance; and provides that "[p]ersons of every religious denomination shall be equally eligible to offices and appointments." *Id.* ¶¶ 8-9 (emphasis added). Its bylaws contain no rules of religious governance at all. *See* Ex. 7.

Appellants also rely on cases that affirm that religious corporation status begins and ends with these two factors. *See In re Religious Corps. & Ass'n Divestment of Property*, 784 N.Y.S.2d 923 (Table), 2003 WL 23329273, at *1-2 (N.Y. Sup. Ct. N.Y. Cnty. 2003) (a "'model synagogue' prayer group" incorporated under the N-CPL whose enabling legislation explicitly states its religious purpose is "a religious corporation under the Religious Corporations Law and that law applies to its activities"); *Kroth v. Congregation Kadisha, Sons of Israel*, 105 Misc. 2d 904, 910 (Sup. Ct. N.Y. Cnty. 1980 ("[S]ince, if unincorporated, [the synagogue] could now only be incorporated under the Religious Corporations Law, that statute is applicable to its governance.").

Among the other factors the trial court found dispositive are that YU's transformation in 1967 into a corporation organized for "exclusively for educational purposes" coincided with YU "broaden[ing] the scope of education" at the University to "confer many secular multi-disciplinary degrees." Ex. 1 at 7-8. Today, YU's four colleges and seven graduate schools are chartered to award exclusively secular degrees in 23 disciplines like social work and science. Exs. 21-

22. RIETS, a seminary ordaining rabbis, is now incorporated separately. *Id.* YU made this "departure from its initial charter" intentionally, Ex. 1 at 7—"to clarify the corporate status of the University as a non-denominational institution of higher education," Ex. 8 at 5-6, and reflect the "expansion of this institution into a complex university," Ex. 9. There is no basis to disturb this carefully reasoned analysis of Supreme Court.

Accepting that the University has a Jewish identity, and that Judaism is important to some of its existence and activities, it still is not a "religious corporation." *See Naarim v. Kunda*, 801 N.Y.S.2d 237 (Table), 2005 WL 1355143, at *2 (N.Y. Sup. Ct. Kings Cnty. 2005) (summer camp providing "boys with a summer vacation in a religious, spiritual atmosphere" is not a religious corporation because "a religious corporation should be one formed primarily for religious purposes; exercising some ecclesiastical control over its members, having some distinct form of worship and some method of discipline for violation thereof" (cleaned up)).

B. YU Admitted It is Subject to the NYCHRL in 1995

"Yeshiva itself has long acknowledged that it was subject to the NYCHRL." Ex. 1 at 8.

In 1995, YU's *own attorneys* from Weil Gotshal & Manges, "special counsel engaged to review this issue," examined whether YU could claim an

exemption from the NYCHRL to avoid recognizing LGBTQ student groups and concluded it could not: "The attorneys firmly believe that YU would not qualify for a religious exemption, based on its charter and its actions over the course of decades, including representations that have been made concerning the University's legal status as a nondenominational institution." Ex. 3 at 3.

Appellants' contention that this 1995 guidance "did not apply to undergraduate schools," Dkt. 5 ¶ 54, is unavailing. YU's undergraduate colleges and graduate schools make up a single corporation. The 1995 memo concludes that YU cannot claim an NYCHRL exemption based on YU's "legal status." YU's "legal status" applies equally to its undergraduate colleges and graduate schools because they are part of the same corporation.

C. YU Holds Itself Out to Federal, State, and Local Governments as an Educational Corporation

YU's numerous representations to federal, state, and local governments that it *lacks* religious corporate status "neatly square[] with how the term is used in other legal and/or formal application settings." Ex. 1 at 10. Supreme Court's reliance on YU's "CHAR-410," a state form where YU identified itself to the New York State Attorney General as an "educational institution" and not an organization "with a religious purpose," is spot on. *See* Ex. 10.

YU similarly told New York State that it is "an independent, coeducational, nonsectarian, not for profit institution of higher education" in order

to receive $90 million in bond financing, Ex. 11 at YU01251; identified itself as a "Not For Profit" entity and not a "Sectarian Entity" in a funding application to the federal government, Ex. 12; and told the City of New York in a funding application that it is "a community-based not-for-profit corporation or other public service organization." Ex. 13.

All of this makes sense: the University is an educational institution. It has an Orthodox Jewish affiliation and history. But it is not a "religious corporation" under the law.[10]

D. The City Council Intended a Narrow Exemption that Does Not Cover YU

YU's distorted reading of the term "religious corporation" in the NYCHRL would strike a blow at the heart of "one of the most protective anti-discrimination laws in the country." Ex. 1 at 11. The legislative history leaves no room for dispute that the NYCHRL includes YU.[11] Ending discrimination in universities and colleges was the very purpose of the 1991 amendments to the NYCHRL, based on the City's "independent and overriding interest in routing out

[10] An Emory law professor—and YU alumnus—agrees. "It is a secularly chartered but religiously affiliated institution, a status . . . unprotected by the rights granted to religious institutions." Ex. 20.

[11] For a complete discussion of the legislative history of the exemption for "religious corporations," and why it does not cover YU, see Dkt. 5 Ex. N at 13-19.

discrimination from its schools." Ex. 14 at 4. YU's discrimination against its LGBTQ student club grossly undermines the law's clear purpose.

Appellants seek to explode a narrow exemption for "religious corporations" into an unlimited exemption for any entity that can claim some unspecified quantum of religious affiliation or identity. The NYCHRL's rule of construction requires just the opposite: "[e]xceptions to and exemptions from the provisions of this title *shall be construed narrowly* in order to maximize deterrence of discriminatory conduct. Ex. 1 at 11 (quoting N.Y.C. Admin. Code § 8-130(b)) (emphasis added).

IV. APPELLANTS DO NOT FACE ANY IRREPARABLE HARM

The University will not face "irreparable harm" to their First Amendment rights if an official LGBTQ student club starts meeting in September.

The only support for Appellants' claim that Supreme Court's Order irreparably harms YU's First Amendment rights is a declaration from their attorney making conclusory statements that the Order would "change the religious atmosphere at Yeshiva" and "deny Yeshiva's right to make . . . religious decisions for itself. Dkt. 5 ¶ 22.[12] Appellants never say what Supreme Court's Order actually requires YU to do—give the same accommodations to an LGBTQ student group

[12] Appellants' brief speaks primarily of "prejudice," but as Appellants acknowledge, they bear the burden to "demonstrate irreparable injury" absent a stay. Dkt. 5 ¶ 26 (citing *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981)).

that it gives its 87 other undergraduate student groups—or how that harms the school. It does not. Giving equal status to student clubs on a nondiscriminatory basis does not deny any right "to make religious decisions" because it does not require the University to participate in the club's activities or endorse its mission. *See Gifford*, 137 A.D.3d at 40. Giving equal status to the club does not "change the religious environment" because an LGBTQ student group already exists at YU's law school, same-sex couples live together in married housing, and LGBTQ undergraduates can already gather at YU's counseling center, to name just a few examples.

A. Granting Clubs Equal Status Does Not Cause Any First Amendment Injury Under Settled Law

Appellants' claim that they will face irreparable First Amendment harm—the only harm at issue here—is foreclosed by the law. Requiring an institution to provide equal accommodations to a student group on a nondiscriminatory basis does not cause irreparable First Amendment harm. *Mergens* and its progeny establish that "a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250; *see supra* at 10-13 (collecting cases).

Tandon v. Newsom, 141 S. Ct. 1294 (2021), the only case Appellants cite to support their alleged irreparable harm, does not help Defendants because it involved a clear and immediate First Amendment injury—a literal restriction on

the number of people who could meet in the same place for religious observance. *Id.* at 1297; *see Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) ("If only 10 people are admitted to each service, the great majority of those who wish to attend . . . will be barred."). A ceiling on the number of people who can worship together is a far cry from requiring Appellants to provide the Pride Alliance with "the same goods and services" as all other student groups, steps which—unlike *Tandon*—in no way interfere with Appellants' religious observance or worship.

B. Club Recognition Will Not Alter YU's Campus Environment

1. YU Has Known It Has to Comply with the NYCHRL for Decades

Contrary to its attorney's claims in a single affirmation that Supreme Court's decision will somehow wreak havoc on its religious environment, YU has acknowledged for decades that it is required to comply with the NYCHRL and that recognition of LGBTQ clubs does not signal the University's endorsement.

- **YU's Student Bill of Rights Promises that It Will Comply With the NYCHRL:** YU's Student Bill of Rights already gives students "the right to participate fully in the University community without discrimination as defined by federal, state, and *local* law." Ex. 15 at 3 (emphasis added).

- **YU "concede[d] that it is subject to the City Human Rights Law" to the New York Court of Appeals:** In *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 491 (2001), "Yeshiva concede[d] that it is subject to the City Human Rights Law" in a case holding that YU's policy preferring housing for married couples had a disparate impact on same-sex couples who, by law

at the time, were not permitted to marry. It raised no First Amendment challenge to the application of the NYCHRL.

- **YU has acknowledged club recognition does not reflect endorsement of a club's activities or mission:** In the same 1995 Fact Sheet where YU admitted it could not claim an NYCHRL exemption to avoid recognizing an LGBTQ student group, it wrote: "institutions acting in compliance with the law are not thereby endorsing homosexual behavior or organizations involved with gay issues." Ex. 3 at 2.

2. LGBTQ Students and Organizations Already Participate in University Life at YU

Requiring YU to recognize the Pride Alliance is not a sea change in YU's campus environment because LGBTQ students and organizations already participate in the life of YU's campuses, without any identified negative impact on its religious environment.

- **Same-sex couples have lived together at YU for decades:** Following the Court of Appeals' 2001 decision in *Levin*, 96 N.Y.2d 484, same-sex couples won the right to live together in married student housing for decades.

- **An LGBTQ student group operates on equal footing at YU's law school:** YU's Cardozo School of Law recognizes OUTLaw, an official LGBTQ student group, on equal terms as all other student groups, *See* Ex. 16, without compromising YU's Jewish environment and character. Cardozo Law School shares the Jewish environment that Appellants describe. "As part of Yeshiva University, Cardozo is closed from Friday evening . . . through Saturday in observance of the Sabbath"; it observes all Jewish holidays; its cafeteria and food service "is a kosher operation, under [] rabbinical supervision"; mezuzahs hang on every door; and it offers a "concentration in Jewish law." Ex. 17. Appellants cite these aspects of YU's colleges as evidence of their "religious environment" that purportedly mandates its discrimination against LGBTQ undergraduates. *See* Dkt. 5 ¶¶ 11, 59. Yet Cardozo OUTLaw exists on

equal terms at the law school without disrupting YU's religious environment.

- **LGBTQ Students Can Meet at the Undergraduate Counseling Center:** YU's offer to "create[e] support groups that allow a safe space for LGBTQ students to gather in the counseling center," Dkt. 5 ¶ 13, also undercuts its claim that recognizing the Pride Alliance will cause it irreparable harm. A main benefit of club recognition is clubs' ability to reserve campus facilities for meetings and events. Ex. 6 ¶¶ 37-38. If YU is not irreparably harmed by LGBTQ students meeting in its on-campus counseling center, how is it irreparably harmed by those same students meeting in classrooms and other spaces on campus?

V. PLAINTIFFS WILL SUFFER FURTHER IRREPARABLE HARM IF A STAY IS IMPOSED

YU has already harmed generations of LGBTQ students, including Plaintiffs-Respondents, by denying them equal access to school resources, and in the process stigmatizing and devaluing them as members of the campus community. Plaintiffs should not be required to wait a minute longer for the legal protections to which they are entitled.

Forcing Plaintiffs to wait yet another semester—or more—for club recognition while this appeal is resolved will perpetuate the harms they are suffering and delay their equal participation in campus public life. The deleterious effects of discrimination against LGBTQ student clubs are well known. *See Gay-Straight All. of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty*., 483 F. Supp. 2d 1224, 1228, 1231 (S.D. Fla. 2007) (collecting federal cases holding that refusal to recognize LGBTQ affinity groups exacts irreparable harm on the

groups). The toll is a dignitary, social, educational, and professional one. Ex. 24 ¶ 9 (without an official club, the LGBTQ students at YU "have little to no access to safe spaces on campus to discuss their struggles as LGBTQ Jewish students or enjoy much-needed community and support in person."); Ex. 6 ¶ 6 ("I had no way of finding a group of people on campus who were struggling with similar identity issues or finding a source of much-needed support.").

Plaintiffs also submitted evidence to Supreme Court about how affinity groups play a critical and beneficial role for LGBTQ students, who may otherwise face increased mental health and other risks. Ex. 25 at 10. Conversely, LGBTQ campus affinity groups have enormous benefits to students, "foster[ing] positive self-esteem, sense of purpose, and adjustment," which "have positive impacts on . . . student retention and success." *Id.* at 14.

Plaintiffs face irreparable harm from the University's refusal to recognize the Pride Alliance. Defendant-Appellants' stay motion must be denied.

VI. A STAY WOULD BE CONTRARY TO THE PUBLIC INTEREST

The New York City Council enacted the public accommodation provisions of the NYCHRL to protect the public interest in "routing out discrimination." *See supra* § III.D. "[P]rejudice, intolerance, bigotry, and discrimination … threaten[] the rights and proper privileges of [the City's] inhabitants." N.Y.C. Admin Code § 8-101. Allowing Appellants to continue their

discrimination against Respondents while this appeal is pending would undermine the very interest the City Council sought to protect. And it would not further any cognizable public interest: YU has not identified any countervailing harm that would outweigh its legal obligation to provide all students with equal access to school facilities and resources. *See supra* §§ II.C, V. For the sake of the public's interest in equal treatment of its citizens, Appellants' motion to stay must also be denied.

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Respectfully Submitted,

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