

Appellate Division – First Department Case No. 2022-02726

New York Supreme Court
Appellate Division—First Department

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

Plaintiffs-Respondents,

v.

YESHIVA UNIVERSITY, VICE PROVOST CHAIM NISSEL, AND PRESIDENT ARI BERMAN,

Defendants-Appellants.

**BRIEF OF JEWISH COALITION FOR RELIGIOUS LIBERTY
AND COALITION FOR JEWISH VALUES
AS AMICI CURIAE**

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PRELIMINARY STATEMENT

Beyond a classic clash of conflicting rights, this case contends with First Amendment principles in their most foundational essence. That principle was expressly concretized in this nation's foundational governing documents to ensure that the British government's oppressive establishment of the Church of England could never occur here.

In 2020, certain students asked Yeshiva to recognize the "YU Pride Alliance" as an official campus club. The school's rabbinic deans ("Roshei Yeshiva") determined that such a club would be inconsistent with Judaism and incompatible with Yeshiva's faith-based mission. Unwilling to accept that determination or to allow the school to observe its faith in peace, the students sued in an attempt to coerce the school into violating its faith.

On June 14, 2022, the New York County Supreme Court ruled in favor of the students. It concluded that Yeshiva was not sufficiently religious in nature to qualify for a religious exemption to New York's Human Rights Law. The decision below effectively invites the state to interfere with Yeshiva's internal affairs, including on matters relating to religious doctrine. The notion that Yeshiva is insufficiently religious is wholly inconsistent with the school and its history. This brief will outline some of Yeshiva's history, role, and practices in order to demonstrate that it is unquestionably a thoroughly religious institution. The trial court's conclusion that

Yeshiva is insufficiently religious gives license to the City of New York to impose its worldview upon one of Orthodox Judaism’s central institutions in violation of its religious mandate, and in direct conflict with the First Amendment.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus Curiae Jewish Coalition for Religious Liberty (“JCRL”) is a nondenominational organization of Jewish communal and lay leaders, seeking to protect the ability of all Americans to freely practice their faith. JCRL also aims to foster cooperation between Jewish and other faith communities in an American public square that recognizes the unique societal benefits of religious exercise, religious liberty, and religious diversity.

Amicus Curiae Coalition for Jewish Values (“CJV”) is the largest rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in American public policy.

Amici recognize the danger that the lower court decision poses to religious institutions, and urge this Court to reverse, in order to protect such institutions from undue governmental interference with matters of faith.

ARGUMENT

Appellant Yeshiva University (“Yeshiva”) faces a government in New York City that, through its Human Rights Law (“NYCHRL”) threatens to undermine

religious traditions and institutions that are vital to the survival and growth of Modern Orthodox Judaism in America. Yeshiva's functional indispensability to the faithful is best understood against the backdrop of its unique, often painful, history.

Tsar Alexander II was assassinated on March 13, 1881, and blame turned on the usual scapegoat: the Jews. "In its wake," one historian describes, "an orgy of anti-Jewish hatred swept over Russia, abetted by the new tsar, and 169 Jewish communities were attacked in a series of pogroms that destroyed twenty thousand Jewish homes and left tens of thousands of individuals economically ruined." Jonathan D. Sarna, *American Judaism: A History* 152 (2d ed. 2019). The antisemitic wave spread through Eastern Europe, and some two million Jews desperately fled. *Id.* at 151. Seeking a country where they could practice their religion freely, 80% of those Russian Jewish refugees came to the United States, 85% of whom passed through the port of New York. *Id.* at 153. So unprecedented was this exodus—even for an ancient people accustomed to fleeing—that a Jewish leader noted at the time that "[i]n New York City there have come . . . more Jews than have been together at any one time and place since the destruction of Jerusalem," in 70 A.D. *Id.* at 153-54.

Saved physically, some of these Jewish emigres in New York yearned to preserve their heritage and religious culture. Unfortunately, New York lacked the Orthodox Jewish educational institutions through which to transmit their faith to the next generation. The situation was so bad that by the beginning of World War I only

one-quarter of school-aged children received any Jewish education in New York City. See History of Jewish Schooling in America, <https://www.myjewishlearning.com/article/jewish-schooling/> (last visited August 10, 2022). When Rabbi Moses Weinberger immigrated to New York from Hungary in the early 1880s, he exclaimed in horror: “There is nothing in the way of schooling here for the young men of Israel. Our faithful Orthodox brethren . . . allow their sons to grow up without Torah or faith.” Sarna, Jonathan D., *Jewish Education in New York— 1887*, *Tradition: A Journal of Orthodox Jewish Thought*, vol. 19, no. 3, 1981, pp. 244–51, JSTOR, <http://www.jstor.org/stable/23258624> (accessed 10 Aug. 2022), at 245. Pious Jewish immigrants, “hav[ing] trouble finding steady work” worked long hours in order to survive; they did not have the ability to teach their children in addition to putting food on their table and a roof over their heads. *Id.* at 246.

Without Jewish schools to which to send them, their children were ignorant of fundamental Jewish teachings. A large mass, perhaps three-fourths of NYC’s Jewish children, were described by Rabbi Weinberger as “poor lambs” that “wander the main roads, as so many other wild urchins of their age in this city do, much to the regret of everyone who loves his people and religion.” *Id.* at 248. These children were lost to the Jewish faith, as a rabbi lamented that “the longer a person remained in such a land . . . the souls of his children were exposed to extreme [spiritual] danger.” *Id.* at 154. “Initially,” one historian describes, the education of Jewish youth was so absent that

“many posited a straight-line path to complete assimilation: They expected Jews to disappear as a separate group in American society.” See Deborah Dash Moore, *Assimilation in the United States: Twentieth Century* (June 23, 2021), <https://jwa.org/encyclopedia/article/assimilation-in-united-states-twentieth-century>.

To help solve this dire problem and to improve what they called American Jewry’s “terribly degenerate spiritual situation,” several lay leaders gathered funds in 1886 to open a full-time elementary school yeshiva—the first of its kind in America—named Etz Chaim (Tree of Life), a phrase from the Book of Proverbs describing the Torah as a tree of life. Sarna, *American Judaism at 180*. “The yeshiva conceived itself as being just that—a tree of life for American Judaism, a tiny oasis of traditional learning in a vast desert of secular[] ignorance. It set Talmud study at the core of its curriculum.” *Id.* The goal was “to save the next generation of Jews for Judaism.” *Id.*

Finally, with a school to rear their youth, the Orthodox, like Rabbi Weinberger, believed Etz Chaim had, quite literally, saved Judaism. The mood was exultant: “Hurrah! What pleasant news! How lovely! How dear! A yeshivah for Mishnah and Gemara! How much good is hidden in these words. I can hardly believe my own ears. Am I awake? Is this possible? Can it be? Here in New York? In America? . . . It is a marvelous thing—a wonder.” Sarna, *Jewish Education at 250*.

In 1897, a group of New York Orthodox rabbis, critical of the non-traditional nature of New York’s Jewish academies, founded Rabbi Isaac Elchanan Theological

Seminary (RIETS) to bolster higher education for Orthodox Judaism and create an “American Torah enclave [where] the advanced study of the Talmud and its commentaries [would] serve [] as the focus.” *Id.* at 192.

In 1915, RIETS merged with Etz Chaim, added a yeshiva high school for boys, and eventually rebranded this singular institution which could provide comprehensive Jewish education, “Yeshiva of America.” In 1928, it began issuing bachelor’s degrees and soon became known as Yeshiva University. *See* History of YU, <https://www.yu.edu/about/history> (last visited July 31, 2022).

The religious fervor and mission never abated. In the post-World War II decades, Yeshiva University “announced far-reaching programs of expansion, spurred both by the catastrophic extinction of Jewish centers of learning abroad [in the Holocaust] and by the glaring need of the American community for religious direction.” Sarna, *supra* at 280. This initiative led to the creation of the Stern College for Women in 1954. *Id.*

Today, as then, Talmud study and Jewish religious instruction remain the bedrock of a Yeshiva University undergraduate education. *All* male undergraduates are required to complete the Torah Studies Program (“Program”).¹ *See* Undergraduate Torah Studies Program Comparison Chart, <https://www.yu.edu/sites/default/files/inli>

¹ The Stern College for Women has a comparable program. *See* Undergraduate Catalog for Women 2016-2018, https://www.yu.edu/sites/default/files/inline-files/Stern%20College%20for%20Women%2016-18%20Final_0.pdf at 3-4, 6-7.

ne-files/UTS%20Comparison%20Chart.pdf?fbclid=IwAR0IC_M6cYbBDSyUG1wthWrF6q1HTR1TfS7sLi8D7OKrqPpAEAxOx9URkZg. This rigorous core curriculum includes Talmud, Hebrew Bible, Jewish Law, Jewish theology, and other foundational Jewish subjects. But this is no vestige of a bygone era; the Program is *the* defining feature of a Yeshiva University schedule: meeting for 3 - 4.5 hours every weekday morning, every semester, and every year. Not surprisingly, the University grants full years of credits for students who studied at Orthodox Israeli seminaries that teach only religious subjects. *See* Guide to Israel Schools, <https://www.yu.edu/israel-program/gis> (last visited July 31, 2022).

Beyond Judaic studies, Jewish religious instruction infuses all aspects of a Yeshiva education—even secular studies. Students at Yeshiva’s Sy Syms School of Business, for instance, are required to complete additional Jewish Studies requirements.² To be clear, these are not academic surveys of Judaism. The Business School Jewish Values Curriculum is taught by rabbis and offers courses on religious precepts like “Practical Workplace Halacha,” using the Hebrew word for binding Orthodox Jewish law. *See* Sy Syms Jewish Values Curriculum 2020-2021, <https://www.yu.edu/sites/default/files/inlinefiles/Sy%20Syms%20Jewish%20Values%20Curriculum%20-%20Overview%20and%20Course%20Synopsis%20for%202020-2021>

² This is true of all undergraduate divisions and applies to all majors.

%2C%205Apr2020_1.pdf (last visited July 31, 2022). For finance majors, Jewish doctrine is as much a requirement as accounting.

But even accounting is a “Jewish” class at Yeshiva University. Indeed, all classes are infused with Judaism as intended by Yeshiva’s founders. Under President Bernard Revel (1915-1940) and Head Rabbi Joseph B. Soloveichik (1941-1993), Yeshiva University went from having “grudgingly taught state-mandated secular subjects” to condoning it, but only through a rabbinic philosophy known as “Torah U’Madda” or Torah and Science, which sees value in other subjects because of their capacity to “enhance Torah” and expound knowledge that can be used in divine pursuits. Sarna, *supra* at 180, 192; Norman Lamm, *Some Comments on Centrist Orthodoxy*, TRADITION: A Journal of Orthodox Thought (1985), at 303, <http://modernjh.pbworks.com/f/Lamm-Comments+on+Centrist+Orthodoxy.pdf>. This principle remains the school’s motto today, emblazoned on its seal, and marks no dilution of Yeshiva’s religious character.³ “Torah U’madda does not imply . . . coequality. Torah remains the unchallenged and preeminent center,” Yeshiva’s president Rabbi Norman Lamm (1976-2003) asserted. Lamm, *supra* at 304. Yeshiva University Rabbi Yehuda Parnes preached that “Torah Umadda can only be viable if

³ See Stern College for Women, <https://www.yu.edu/stern> (last visited July 31, 2022) (self-described as “rooted in the tradition of Torah Umadda”)

it imposes strict limits on freedom of thought in areas that may undermine the fundamental Jewish beliefs.” Yehuda Parnes, *Torah U’Madda and Freedom of Inquiry*, at 71, https://www.yutorah.org/_cdn/_shiurim/TU1_Parnes.pdf. With regard to the observance of Jewish law, Rabbi Lamm wrote, “No, not a single fundamental of Judaism has been disturbed by us, we adhere to the same ikkarim (principles of faith), we are loyal to the same Torah, we strive for the same study of Torah and observance of mitzvot that our parents and grandparents before us cherished throughout the generations, from Sinai onward.” Lamm, *supra* at 301. As in 1886, everything at Yeshiva today is rooted in and guided by religious doctrine.

In 2017, Yeshiva University officially adopted a statement of its “core values,” expressing the “central teachings of our institution.” *See* The Investiture of Rabbi Dr. Ari Berman, September 10, 2017, <https://www.yu.edu/tomorrow#transcript>; Yeshiva University, Core Torah Values, <https://www.yu.edu/about/values> (last visited July 31, 2022). Posted proudly on its Website and on banners throughout its campuses, Yeshiva’s “core Torah values” include beliefs in:

- The Torah of Truth: “The Jewish people in particular affirm that beginning with the Revelation of the Torah at Mount Sinai, God entrusted eternal teachings and values to us that we must cherish and study diligently above all else, for they represent the terms of the special covenant that God made with us.”
- The Torah of Zion: “In Jewish thought, the concept of [messianic] redemption represents the conviction that . . . we have a responsibility to strive toward [the world’s] perfection. . . . The Jewish people’s task [is] to build up the land of Israel.”

Id. The undergraduate experience is thoroughly religious and is a primary reason many students choose to attend Yeshiva.⁴ The undergraduate Colleges are still separated by sex.⁵ Male visitors are forbidden from entering a female dorm building beyond the lobby and vice versa. *See* Visitor Policy for Undergraduate Student Housing (effective April 7, 2022), https://www.yu.edu/sites/default/files/inline-files/Visitor%20Policy%20for%20Undergraduate%20Student%20Housing%20April%202022_0.pdf. A dress code is enforced based on biblically sanctioned modesty. *See* Yeshiva University Undergraduate Dress Code (Rev. Oct. 2017) https://www.yu.edu/sites/default/files/inline-files/Yeshiva%20University%20Undergraduate%20Dress%20Code_0.pdf (“Female students are required to wear dresses or skirts that are knee-length, and tops that have sleeves and a modest neckline.”). The school is closed for Jewish holidays,⁶ athletic teams do not compete on the Sabbath and Festivals,⁷ the Israeli national anthem is sung (along with the American) before each match⁸, all campus

⁴ *See* The Constitution of the Yeshiva University Wilf Campus Undergraduate Student Body at 4 (establishing in the preamble the goal to “enrich the religious atmosphere on campus[”]), <https://www.yu.edu/sites/default/files/inline-files/YU%20Constitution%202020.pdf>.

⁵ The male and female campuses are nine miles apart and have all separate classes.

⁶ *See generally* Yeshiva University FAQ Brochure, https://www.yu.edu/sites/default/files/legacy/uploadedFiles/Offices_and_Services/HR/Working_at_YU/Orientation/FAQ_Brochure.pdf.

⁷ *See* Judah Ari Gross, *Yeshiva University Team Won’t Play on Shabbat*, The Times of Israel, Feb. 27, 2018, <https://www.timesofisrael.com/yeshiva-university-basketball-team-wont-play-on-shabbat/>.

⁸ Shiryn Ghermezian, *YU president slams decision by Brooklyn College athletes to kneel during Israeli anthem*, Jewish News Syndicate (Feb. 27, 2020), <https://www.jns.org/yu-president-slams-decision-by-brooklyn-college-athletes-to-kneel-during-israeli-anthem/> (President Berman: “We are proud to be the only university who sings both the American and Israeli national anthems before every athletic competition and major event.”).

food is kosher,⁹ non-kosher food is prohibited at certain campus locations,¹⁰ *mezuzahs* adorn every doorpost,¹¹ and assemblies frequently begin with religious invocations.¹² Harkening back to its origins withholding stipends to students who failed to study Torah, students today can be fined for failing to attend worship services at some University events.¹³

Yeshiva's website lists Undergraduate and Graduate Jewish Studies programs:

- Center for the Jewish Future
- The Emil A. and Jenny Fish Center for Holocaust and Genocide Studies
- Sephardic Programs
- Azrieli Graduate School of Jewish Administration & Education
- Bernard Revel Graduate School of Jewish Studies
- Israel Program
- Undergraduate Torah Studies
- Yeshiva College's Beren Department of Jewish Studies
- Stern College for Women's Rebecca Ivry Department of Jewish Studies

<https://www.yu.edu/jewish-studies-full-list>.

Simply put, Yeshiva is as much a religious organization as the Yankees are a baseball team.

⁹ Dining Services, <https://www.yu.edu/dining> (last visited July 31, 2022) (“We conduct a strictly kosher operation, under the strict rabbinical supervision of the Kashruth Division of the Orthodox Union (O-U).”)

¹⁰ FAQ Brochure, *supra* at 2 (“Non-kosher food (even sandwiches) cannot be used in areas where non-disposable equipment is used.”).

¹¹ *Id.* at 1 (“What is a Mezuzah and why is there one on every door in the school?”).

¹² See e.g., YU Commencement 2022, <https://www.youtube.com/watch?v=xY0IM-fuYIg> at 19:50.

¹³ Times of Israel, *Yeshiva U students could be fined \$150 for skipping Shabbat prayers*, Nov. 10, 2017, <https://www.timesofisrael.com/yeshiva-u-students-to-be-fined-150-for-skipping-shabbat-prayers/>.

I. IRRESPECTIVE OF ITS MODE OF INCORPORATION, YESHIVA IS A RELIGIOUS INSTITUTION

The trial court's decision rests on its finding that, although "Yeshiva is an educational institution with a proud and rich Jewish heritage and a self-described mission to combine 'the spirit of Torah' with strong secular studies," (Dckt. 330, p. 3), it is "not a 'religious corporation' as the term is used in the Admin Code § 8-102 exemption of a 'Place or provider of public accommodation.'" *Id.* at 13. The court held that "the purpose students attend Yeshiva is to obtain an education, not for religious worship or some other function which is religious at its core. Thus, religion is necessarily secondary to education at Yeshiva." *Id.* at 12. But the court fundamentally misunderstands or mischaracterizes the essence of Yeshiva's religious mission and, more fundamentally, misconstrues the nature of religious corporations in general.

A. The Nature of a Religious Corporation

Religious corporations, as defined by New York's Religious Corporations Law ("RCL") and explained by this state's courts, differ materially from for-profit and other not-for-profit corporations in that they comprise two separate entities: the ecclesiastical and the corporate. While each entity exists alongside the other, the RCL was specifically enacted to effect "the entire separation of the functions of the ecclesiastical and temporal judicatories, and has limited the former to their proper sphere of control over the spiritual concerns of the people." *Robertson v. Bullions*, 11 N.Y. 243, 264 (1854).

Courts throughout the country have recognized the merger of a church's religious body into its corporate form, resulting in a coexistence of the two as a "dual entity." See *Trinity Presbyterian Church v. Tankersley*, 374 So. 2d 861, 866 (Ala. 1979) ("[T]here is a spiritual church and a secular legal corporation, each separate though closely connected."); *Folwell v. Bernard*, 477 So. 2d 1060, 1063 (Fla. 2d Dist. Ct. App. 1985) ("[W]henver a religious society incorporates, it assumes a dual existence; two distinct entities come into being."); see also *Walker Mem'l Baptist Church v. Saunders*, 285 N.Y. 462, 467-68 (1941); *Gordon v. Bd. of Educ.*, 78 Cal. App. 2d 464, 473-74, 178 P.2d 488, 494 (1947); *Roman Catholic Archbishop v. Indus. Accident Comm'n*, 194 Cal. 660, 677, 230 P. 1, 8 (1924); *Wheelock v. First Presbyterian Church*, 119 Cal. 477, 483, 51 P. 841, 843-44 (1897).

The United States Supreme Court recognized this principle as far back as in *Watson v. Jones*, 13 Wall (80 US) 679 (1871), noting that a "church of a strictly congregational or independent organization, governed solely within itself" holds property "for the use of that congregation as a religious society." *Id.* at 724-25. And the Court of Appeals has fully adopted this principle—indeed concluding that the RCL was enacted *for the very purpose* of protecting the oft complex coexistence of these two bodies. "[T]he policy of the legislature . . . aimed to produce an entire separation between the spiritual and temporal concerns of these associations, and to prevent the latter from being in any manner brought under the control and

management of the ecclesiastical judicatories.” *Robertson*, 11 N.Y. at 251. Specifically, New York’s highest court held that a religious corporation’s “corporate activities can be separated from its ecclesiastical activities,” as is evidenced by various statutory provisions which specifically delegate certain corporate activities to a church’s trustees, while leaving its ecclesiastical affairs to the members, who continue to exist as the religious association which preceded incorporation. *Walker Mem’l Baptist Church*, 285 N.Y. at 467-68.

The notion that a religious corporation, regardless of the statute under which it is incorporated, consists of two separate but coexisting entities—the religious and the temporal—is fundamental to any legal analysis concerning a religious corporation. And that is precisely where the trial court went astray, setting focus on the one without recognizing the other.

B. The RCL and De Facto Religious Corporations

The trial court erred because, under New York law, a certificate of incorporation does not determine whether an organization is religious. The RCL states, “[t]his chapter applies . . . to every corporation formed under any other statute or special act of this state which would, if it were to be formed currently under the laws of this state, be formed under this chapter.” N.Y. Relig. Corp. Law § 2-a. In short, a corporation suited for the RCL is governed by the RCL.

Because religious corporations are treated differently from other for-profit and not-for-profit organizations, a church that has [incorrectly] organized under a statute other than the RCL, such as New York’s Not-for-Profit Corporation Law (“NPCL”), is deemed by New York’s courts to be a “de facto” religious corporation and the courts would apply to it the relevant RCL provisions. For example, in *Temple-Ashram v. Satyanandji*, 84 A.D.3d 1158, 1160 (2d Dep’t 2011), a Hindu temple was found to be a *de facto* religious corporation under RCL Article 9 even though the certificate of incorporation described the corporation as one formed “pursuant to . . . the Not-for-Profit Corporation Law.”

In another case where the organization incorporated under the NPCL, the dispute centered around whether it was *de facto* an RCL Article 9 or Article 10 church. The Fourth Department ruled that because of “the type of governance intended and effectuated by the founders . . . GOR operated as a *de facto* religious corporation under Article 9 of the Religious Corporations Law.” *Badesha v. Soch*, 136 A.D.3d 1415, 1416 (4th Dep’t 2016).

Indeed, one court even recognized that an organization was “both a religious corporation and a type B corporation,” and therefore had “dual legal status.” *In re Nat’l Council of Young Israel*, 2 Misc. 3d 1003(A), 1003A, 2003 N.Y. Slip Op. 51716[U], at *2 (Sup. Ct. New York Cnty. 2003).

In one remarkable case, a court found that although the Churchill Evangelistic Association, Inc., which had been formed as a for-profit corporation, “has the form of a stock trading corporation, it is patent that it is not, but is a religious society,” and “[t]o speak of it as a stock corporation is a misnomer Merely because it has been brought into existence as a stock or profit corporation does not preclude a court of equity from looking through the structure and determining what it actually is.” *Kroth v. Congregation Chebra Ukadisha Bnai Isr. Mikalwarie*, 105 Misc. 2d 904, 910 (Sup. Ct. N.Y. Cnty. 1980).

In short, a religious corporation is defined by the purpose for which it was formed and by what it *is*, rather than by what any document—even its certificate of incorporation—says that it is.

Yeshiva is a religious corporation because it was created, and continues to exist, to fulfill a specific religious purpose; namely, to provide a Torah-guided secular education, Torah U’Madda. For many Orthodox Jews, Yeshiva provides the only religiously acceptable environment in which to achieve a secular education while remaining completely faithful to and compliant with their religious teachings. And the content of Yeshiva’s offerings, even purely secular teachings, are at all times guided and governed by its religious doctrine.

Requiring Yeshiva to formally adopt a position inconsistent with its core doctrine and religious mission would defy the very purpose for its existence and

force many Orthodox Jews to choose between their faith and foregoing higher secular education.

That Yeshiva’s corporate documents in some instances label it an “educational corporation” and “organized and operated exclusively for educational purposes,” (Dckt. 330, p. 6), is in no way inconsistent with its nature as a religious corporation. Yeshiva *is* an academic institution, formed for the express purpose of satisfying crucial religious needs—and it has a long history of doing just that with excellence and distinction. As California’s highest Court noted,

what of a soup kitchen located in a church basement? It may be argued that the technical purpose of a soup kitchen is to provide food to the hungry rather than to make an immediate manifestation of devotion to a divine entity. Sustenance certainly may be obtained in the secular world outside the auspices of the church. Nevertheless, while providing food is an arguably secular function, the church's underlying motivation for feeding the destitute remains a matter of religious motivation and faith.

Every religiously affiliated entity generally is both secular and religious to some extent, from small entities like soup kitchens and parochial schools to large organizations like *religiously affiliated universities* and the Christian Science Monitor. We are not prepared to hold that all of these are prohibited from qualifying as religious solely because their functions may be duplicated in some manner by secular institutions.

Kelly v. Methodist Hosp. of So. Cal., 22 Cal. 4th 1108, 1124, 95 Cal. Rptr. 2d 514, 525, 997 P.2d 1169, 1179 (2000) (emphasis added).

Yeshiva has in fact evolved into *precisely* the kind of academic institution its spiritual ancestors envisioned and present-day “roshei yeshiva” propound. To find

otherwise is akin to determining the absolution of sins in confessional to constitute talk therapy.

The trial court erred in resting its decision on Yeshiva's technical corporate status—which, under New York law, is largely irrelevant—rather than on its religious nature. In doing so, it fell into the misguided trap of distinguishing Yeshiva from St. John's University, though Yeshiva's religious nature is undeniable, as conceded by the trial court itself. (Dckt. 330, p. 12-13.)

C. All Religious Associations, Even Those Unincorporated, Have Legal Rights

Wholly apart from and independent of its corporate status, Yeshiva's religious entity, which predated its incorporation and coexists with its corporate body, is entitled to constitutional protections, as is any unincorporated religious organization. “An “unincorporated church” is a congregation, society, or other assemblage of persons who are accustomed to statedly meet for divine worship or other religious observances, without having been incorporated for that purpose.” N.Y. Relig. Corp. Law § 2. The RCL is replete with various laws governing the rights of such unincorporated churches. *See, e.g., id.* § 48 (providing that “[a]ny devise or bequest of real or personal property to an unincorporated parish, mission, congregation, chapel or religious society under the jurisdiction of or in communion with the Protestant Episcopal Church, for the purposes of such gift, may be taken, held and administered for the benefit of such devisee or legatee by the diocesan corporation of the diocese in which such devisee or

legatee is situate.”); *see also Congregational Unitarian Soc’y v. Hale*, 29 A.D. 396, 400 (1st Dep’t 1898) (“The statutes, in terms, provide that unincorporated societies shall have the like power as incorporated societies, to manage, use and employ, according to its terms and conditions, any donation, gift or grant made to them.”).

“[F]ederal law [has] made it quite clear that unincorporated associations were ‘persons’ that could sue to enforce constitutional rights under § 1983.” *Fort Lauderdale Food not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1280 (11th Cir. 2021), and “the Supreme Court held in 1974 that an unincorporated union could ‘sue under 42 U.S.C. § 1983 as [a] person [] deprived of [its] rights secured by the Constitution and laws.’” *Id.*; *see Green Haven Prison Preparative Meeting of the Religious Soc’y of Friends v. NY State Dep’t of Corr. & Cmty. Supervision*, 16 F.4th 67, 79 (2d Cir. 2021) (holding that there was “standing to pursue both constitutional and statutory claims as an unincorporated association.”); *see also ABC League v. Mo. State High Sch. Activities Ass’n*, 530 F. Supp. 1033, 1044 (E.D. Mo. 1981) (holding that “[t]he ABC League, an unincorporated association, has the capacity to assert the constitutional rights of its members, their students, and the students’ parents.”).

Irrespective and independent of Yeshiva’s corporate form or words on paper, Yeshiva is in fact a religious mission. For generations it has been the backbone of university education for Modern Orthodox Jews, while unabashedly contributing to

the academic community. As such, its statutory and constitutional rights are sacrosanct and unassailable.

II. A STATUTE THAT INTERFERES WITH THE INTERNAL GOVERNANCE OF A RELIGIOUS INSTITUTION VIOLATES THE FIRST AMENDMENT

Government may not interfere with the ecclesiastical determinations of a religious association, regardless of however or whether incorporated. This principle, known as “ecclesiastical abstention” or “church autonomy” finds its roots in a line of United States Supreme Court decisions, the earliest of which primarily involved church property and internal leadership disputes. The High Court set forth the foundational principle:

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Watson v. Jones, 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871).

Although *Watson* “was decided in 1872, before judicial recognition of the coercive power of the Fourteenth Amendment to protect the limitations of the First Amendment against state action,” the decision “radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation – in

short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 115-16 (1952). *Watson* and its progeny firmly establish that no law can be validly enacted or enforced which has the effect of prohibiting the free exercise of religion, including interfering with church governance. Indeed, as *Kedroff* continues,

Ours is a government which by the “law of its being” allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion.

Id. at 120-21 (footnotes omitted).

The state may implement and enforce statutes governing religious institutions only to the extent that they effect their temporal, and not ecclesiastical, affairs. Moreover, as noted above, even when seemingly temporal rights, such as a university’s right to formally recognize a student organization, “follows as an incident from decisions of the [religious] custom or law on ecclesiastical issues,” as is the case here, no statute may be imposed prohibiting the free exercise of those rights. Indeed, the only reason the RCL itself is constitutional is because, although it governs religious corporations, it applies only to their temporal affairs, and expressly not to their ecclesiastical governance, for “an enactment by a legislature

cannot validate action which the Constitution prohibits.” *Id.* at 107. In *Kedroff*, the Supreme Court invalidated Section 5-C of the RCL, which, held the Court, constituted “a transfer by statute of control over churches. This violates our rule of separation between church and state.” *Id.* at 110.

The NYCHRL, as applied by the trial court, unmistakably breaches that wall of separation, because it violates Yeshiva’s religious prerogative to determine on doctrinal grounds that YU Pride should not be recognized as a university organization.

III. THE ESTABLISHMENT CLAUSE PROHIBITS LEGISLATION THAT GIVES PREFERENCE TO A PARTICULAR WORLDVIEW TO THE DETRIMENT OF RELIGIOUS DOCTRINE

Government “may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963). The Establishment Clause is not a vehicle for government to “preference secular activity,” but one prong of “the First Amendment’s double protection for religious expression.” *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431 (2022).

“The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine . . . is unquestioned.”

Watson v. Jones, 13 Wall [80 US] 679, 728-729 (1871). And in *Everson v. Board of Education*, Justice Hugo Black set forth the principles that inform Establishment Clause jurisprudence: “Neither a state nor the federal government can . . . force nor influence a person to . . . profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (emphasis added).

The First Amendment to the U.S. Constitution begins, “[c]ongress shall make no law respecting an establishment of religion.” It is black letter law that, regardless of personal preferences, “[t]he government must be neutral when it comes to competition between sects.” *Zorach v. Clauson*, 343 U.S. 306 (1952). “The First Amendment mandates government neutrality” and “the State may not adopt programs or practices. . . which ‘aid or oppose’ any religion This prohibition is absolute.” *Epperson v. Ark.*, 393 U.S. 97 (1968) (citing *Sch. Dist. of Abington Twp.*, 374 U.S. at 225. As Justice Goldberg articulated in *Abington School District*, “[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.” *Id.* at 305.

The Establishment Clause neither calls for nor envisions marginalizing the religious community and hampering its members’ right to freely exercise their own religion. Nor should the Establishment Clause be read to prioritize the secular over

the spiritual, the temporal over the ecclesiastical, atheists and agnostics over believers, or cultural norms over religious traditions—in effect creating its own religion of moralism or secularism.

To the contrary, “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. . . . We are a religious people whose institutions presuppose a Supreme Being.” *Lynch v. Donnelly*, 465 U.S. 668, 674-75 (1984) (Scalia, J. dissenting).

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Zorach, 343 U.S. at 313-14.

The Supreme Court recently noted that a “proper understanding” of the Establishment Clause does not “require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.” *Kennedy*, 142 S. Ct. at 2431. Indeed, noted the Court, “[r]espect for religious expressions is indispensable to life in a free and diverse

Republic.” *Id.* at 2432-33.

As Kelsey Curtis wrote in *The Partiality of Neutrality*, 41:3 Harv. J. L. & Pub. Pol’y 935 (2018), the Court’s rulings have not been neutral towards religion but, instead, have “embrace[d] the secular.” Daniel O. Conkle similarly wrote in *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 Ind. L.J. 1 (2000), that “the immediate impact of formal neutrality may seem beneficial for religion, but its long-term effect . . . may be to . . . secularize religion.”

Plaintiff Meisels frankly admits that she hopes to use the lawsuit to impose “cultural changes” at Yeshiva and to “make a statement” about Meisels’ views and “change things . . . even for people who are against the movement.” “*Second class citizens*”: *LGBTQ students allege culture of alienation and fear at Yeshiva University*, YOUTUBE (May 10, 2021), https://www.youtube.com/watch?v=J2c7R_8zUbM. This holy war is precisely what the trial court has blessed via its misguided interpretation of the NYCHRL, and it is constitutionally intolerable. The First Amendment provides double protection for religion. It is therefore inconceivable that the trial court would allow government’s worldview or cultural preferences to trump religion.

CONCLUSION

For the reasons set forth above, the trial court's decision and order should be reversed.

Dated: September 6, 2022

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Barry Black', is written over a horizontal line. The signature is stylized with a large initial 'B' and a long, sweeping tail.

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PRINTING SPECIFICATIONS STATEMENT

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