AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY; UNITARIAN UNIVERSALIST LEGISLATIVE MINISTRY OF NJ; GLORIA SCHOR ANDERSEN; PENNY POSTEL; and WILLIAM FLYNN,

Plaintiffs-Appellants,

v.

ROCHELLE HENDRICKS, Secretary of Higher Education for the State of New Jersey, in her official capacity; and ANDREW P. SIDAMON-ERISTOFF, State Treasurer, State of New Jersey, in his official capacity,

Defendants-Respondents.

IN THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

No.: A-004399-13

ON APPEAL FROM FINAL ADMINISTRATIVE ACTION BY THE OFFICE OF THE SECRETARY OF HIGHER EDUCATION

SAT BELOW: ROCHELLE HENDRICKS, SECRETARY OF HIGHER EDUCATION

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellants rely on the Statement of Facts and Procedural History set forth in their principal brief.

ARGUMENT

I. The Grants of More Than $10 Million to Beth Medrash Govoha Yeshiva and Princeton Theological Seminary Were Awarded Based on a Competitive Grant Process, with Subjective Criteria Determining Which Institutions Received the Most Funds.

Respondents attempt to minimize the grants – in excess of ten million dollars of taxpayer funds – to the Yeshiva and Seminary by repeating that all institutions that sought funds under the grant programs received *some* funding. Rb at 2, 12, 34, 43. But the fact that each institution that applied received some funds misses the point.

First, as explained in Appellants' main brief and *infra*, Point II, the State may not provide taxpayer money to a religious entity that trains ministers and promotes its mission through sectarian education, *regardless* of how many other organizations also receive funds. *Resnick v. E. Brunswick Twp. Bd. of Educ.*, 77 *N.J.* 88 (1978).

Second, the grant process was a competitive one, with limited funding. Ja1361. Institutions were pitted against one another for funding, and Respondent Hendricks determined which institutions would receive funds and how much they would

receive. *N.J.A.C.* 9A:18-1.6; *N.J.S.A.* 18A:72A-59 to -61. While all institutions that applied received *some* amount of funds, Hendricks decided to fully fund certain grant proposals while rejecting or only partially funding others. Ja1361.

Hendricks rejected more than *one-third* of the funding requested by institutions. *Id.* Specifically, Hendricks received requests for funding for more than 250 projects. *Id.* Those requests totaled $2.1 billion, well more than the $1.3 billion the State ultimately awarded. *Id.* Hendricks determined which institutions (she believed) most deserved the funds and which projects should be rejected or not fully funded. She employed subjective criteria, such as whether the project "serv[es] the best interests of higher education in the State as a whole;" "consistency with the institution's educational mission;" and "the advancement of student education in the State of New Jersey." *N.J.A.C.* 9A:18-1.6(b). In the end, Hendricks chose 176 projects to fully or partially fund, and rejected at least 74 projects. Ja1361. The grant process was therefore clearly competitive, with winners and losers determined by Respondent Hendricks.

Using the subjective criteria described above, Hendricks chose to fully fund every one of the Yeshiva's and Seminary's proposed projects. Ja1, Ja153, Ja453, Ja615, Ja650, Ja1288, Ja1301. Because both Yeshiva projects (totaling over $10

million) and all three Seminary projects (totaling $645,323) were approved and fully funded, funding for other institutions' projects was denied or reduced.

II. The Religious Aid Clause Prohibits the Payment of Taxpayer Funds to Religious Institutions that Further a Sectarian Mission By Training Ministers and Providing Sectarian Religious Education.

"[O]ur state constitution contains a provision [*i.e.*, the Religious Aid Clause[1]] which, fairly read, specifically prohibits the use of tax revenues for the maintenance or support of a religious group." *Resnick*, 77 N.J. at 102. While that prohibition does not extend to "general services such as police or fire protection" (*id.* at 103), it clearly covers any "out-of-pocket expenses." *Id.* The clearest and most obvious example of "out-of-pocket expenses" is a *direct grant of taxpayer money* to an institution. The grants at issue in the present matter — more than ten million dollars to a Jewish yeshiva and a Christian seminary — subsidize, support, and assist in the maintenance of those religious entities in the exact manner *Resnick* prohibits.

Respondents must therefore defend the grants by asking this Court to ignore or overrule *Resnick* and by arguing that the Yeshiva and Seminary are not religious groups covered by *Resnick* and the Religious Aid Clause. Both arguments are unavailing.

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[1] N.J. Const., art. I, para. 3.

A. *Resnick* Created Binding Precedent.

Respondents ask this Court to ignore *stare decisis* and the New Jersey Supreme Court's clear pronouncement in *Resnick* because the case was decided at a time when "federal and state courts had a more hostile view of aid to religious organizations," Rb at 29, and because no post-*Resnick* published cases have discussed the Religious Aid Clause. Yet despite the State's antipathy, *Resnick's* determination that the Religious Aid Clause prohibits public funding of religious groups is binding upon this Court. *State v. Adkins*, 433 *N.J. Super.* 479, 490 (App. Div. 2013) ("As an intermediate appellate court we are, of course, bound by [New Jersey Supreme Court precedent]"), *rev'd on other grounds*, 220 *N.J.* 300 (2015). Thus, while the State might want to overturn the *Resnick* decision, such an action is not within this Court's authority; it can be done only by the New Jersey Supreme Court. *Id.; see also State v. Witt*, 435 *N.J. Super.* 608, 612 (App. Div. 2014) (rejecting state's argument that court should "replace" the governing legal standard), *appeal pending*, Dkt. No. A-9-14. Second, the lack of litigation after an authoritative Supreme Court decision does not make the decision less persuasive or less binding. To the contrary, given the clear dictates of *Resnick,* one would not expect many attempts to provide direct funding to religious institutions like the Yeshiva or Seminary.

B. Despite Respondents' Protestations, Sectarian Institutions that Train Ministers and Engage in Religious Instruction Are Religious Groups that Fall Within the Religious Aid Clause's Prohibition on Receipt of Taxpayer Funds.

It cannot be disputed that training ministers for a particular sect helps maintain that sect's ministry. Likewise, a religious group clearly furthers its sectarian mission by engaging in theological training from that group's religious point of view. The Yeshiva and Seminary engage in both activities. *See* Ab at 7-15, 19-24.

Nevertheless, Respondents ask this Court to disregard those facts and adopt a cramped reading of the Religious Aid Clause that would only prohibit support for churches or places of worship. Rb at 30. Yet both *Resnick* and the Clause's language and history make clear that its reach is broader, and that its prohibition on taxpayer funding encompasses direct aid for institutions that further their sectarian missions by training new ministers and engaging in sectarian religious instruction.[2]

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[2] Contrary to Respondents' claim, Appellants do not argue that the grants violate the Religious Aid Clause "simply by virtue of the religious affiliation of" the Yeshiva and Seminary. Rb at 26. While the argument can be made that *Resnick* applies to all organizations or institutions with religious affiliations, *see Resnick*, 77 *N.J.* at 102, the Court need not read *Resnick* that broadly to resolve this case. The Yeshiva and Seminary fall under the funding prohibition of *Resnick* not merely because they are religiously affiliated, but because they engage in sectarian activities that further the institutions' religions — namely, training new ministers and providing religious education from a sectarian point of view.

Resnick did not only prohibit taxpayer support for religious *services* held at a public school's facilities; it also precluded taxpayer support for sectarian education (*i.e.*, Sunday school or Hebrew school) held at the facilities. 77 *N.J.* at 103.[3] As set forth fully in Appellants' principal brief, the same type of sectarian education (simply at the adult level) is what occurs at the Yeshiva and Seminary. *See* Ab at 7-15, 19-24.[4]

The additional distinction Respondents attempt to make — that the organizations providing the religious instruction in *Resnick* were churches or synagogues — is neither meaningful nor accurate. Indeed, the Seminary admits that it provides its sectarian instruction as a "school of the Presbyterian Church (U.S.A.)" and that:

> the Seminary stands within the Reformed tradition, affirming the sovereignty of the triune God over all creation, the Gospel of Jesus Christ as God's saving word for all people, the renewing power of the word and Spirit in all of life, and the unity of Christ's servant church throughout the world. This tradition shapes the instruction, research, practical training, and continuing education provided by the Seminary, as well as the theological scholarship it promotes.

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[3] In fact, one of the religious groups used the government facilities only for religious instruction and not for services. *Id.* at 94-95.

[4] The fact that the Yeshiva and Seminary provide college-level and graduate-level religious instruction as opposed to elementary or secondary instruction is irrelevant. The age of the student or level of religious education does not make sectarian training any more or less sectarian or any more or less in furtherance of a ministry.

Ja1381. Likewise, Respondents acknowledge that the Yeshiva is specifically associated not only with a particular religion, but with a particular sect within that religion. Rb at 31 ("a 'yeshiva,' such as BMG, is defined as a college or seminary for those of the Orthodox Jewish faith"). It is also notable that the Yeshiva is in fact run by a Jewish rabbi (Rabbi Aaron Kotler, *see* Ja1, Ja394), and "the faculty are all of the Jewish faith." Ja393. Further, the Yeshiva was granted a federal tax exemption (*see* Ja275) which would only be applicable in this instance to a higher-education institution found to be "a church, an interchurch organization of local units of a church, a convention or association of churches, or an integrated auxiliary of a church" or "[a]n exclusively religious activity of any religious order." *See* Internal Revenue Service, *2014 Instructions for Form 990 Return of Organization Exempt From Income Tax*, 2-4, *available at* http://www.irs.gov/pub/irs-pdf/i990.pdf.[5]

Thus, the Yeshiva and Seminary are part of specific churches or ministries for which they train ministers and provide religious education. But the Religious Aid Clause precludes these activities even when they are not performed

[5] Respondents provide no counter to these factual points; nor do they explain how a Seminary that admits to being part of a church and a Yeshiva that receives a tax-exemption for being part of a church or religious order are not "religious groups" or "ministries" covered by the Religious Aid Clause and *Resnick*.

under the auspices of a particular church. The Clause precludes taxpayer support not only to churches but also, *separately*, to the "maintenance of any . . . ministry."

Respondents admit that, at the Yeshiva, rabbis train members of the Orthodox Jewish sect to become future rabbis. Rb at 14; Ja356. Likewise, at the Seminary, Christian clergy train future clergy. Ja655; Ja719; Ja752; Ja783; Ja927; Ja1381. Thus, providing funds to the Yeshiva and Seminary clearly helps "maintain [a] . . . ministry." *Id.* And as explained in *Resnick*, the provision of any funding to such a "religious group" is prohibited. 77 *N.J.* at 102.

Moreover, the Seminary admits that it provides a sectarian religious education to spread the belief system and understanding of a religion to others. *See* Ja655; Ja752. In addition to those direct admissions, Respondents admit that the main instruction at the Yeshiva is on the Talmud, which Respondents acknowledge is "the authoritative body of Jewish law and tradition developed *on the basis of scriptural law*." Rb at 13 (emphasis added).

Again, such activity would help to "maintain [a] ministry" regardless of whether the organization that does so has official affiliation with a congregational church. Indeed, a holding to the contrary would create a loophole and absurdity: Funding for Sunday schools, Hebrew schools, seminaries, or yeshivas run by

particular congregations would be precluded; but if certain members of a congregation wanted to circumvent that prohibition, they could (separate from their church) start a religious school that engaged in the *exact same sectarian religious instruction* and then seek taxpayer funding. That result is inconsistent with the Clause, with *Resnick*, and with common sense.

Respondents miss the point when they state that "students at BMG are not ordained. Thus, they could not possibly carry on the work or service of ministers while studying at the institutions." Rb at 31-32. Perhaps this is the crux of Respondents' misunderstanding of the issue. It is not the *students* that are engaging in ministry; it is the institution and the faculty (*i.e.*, the rabbis of the Yeshiva and the clergy and other professors at the Seminary) that are imparting their sectarian religious messages and training to those students. The institutions themselves are engaging in and supporting a ministry, and the government is precluded from providing them taxpayer funds to do so.

C. The History of the Religious Aid Clause Also Supports the Prohibition of Direct Funding to Religious Schools.

Respondents suggest that the rejection of a 1947 proposal to amend the Religious Aid Clause is evidence that the Clause does not cover aid to religious schools. Their argument is specious. The discussions that took place provide even greater

support for the continued strength of the Religious Aid Clause's prohibition against the aid at issue here: direct grants of taxpayer dollars to religious schools.

Indeed, Respondents tell only part of the story when they note that, during the Constitutional Convention of 1947, the Committee on Taxation and Finance declined to propose that an expanded prohibition on funding of religious schools be added to the Religious Aid Clause. Not only was that amendment unrelated to direct funding of such schools, it was rejected because it was not deemed necessary, as aid to religious schools was already prohibited. *See* N.J. Const., Art. I, Paragraph 3.

The amendment that was offered by certain citizens and organizations sought to address the United States Supreme Court's decision in *Everson v. Bd. of Educ.*, 330 *U.S.* 1 (1947), which determined that a school district does not violate the Establishment Clause by providing busing to parochial-school students on the same terms as public-school students. *Id.* The United States Supreme Court reached that conclusion by determining that the busing was a benefit to *students*, not to any specific institution. *Id.* at 18. The Court specifically noted: "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and

from accredited schools." *Id.* The proposed amendment brought to members of the Committee sought to expand the prohibitions of the Religious Aid Clause to cover the issue of transportation.

Numerous members of the Committee explained to those that sought the amendment that, as recognized by the United States Supreme Court, providing transportation to students (which the Court permitted) is far different from providing direct benefits to religious schools (which remained and remains prohibited). *See Proceedings of New Jersey State Constitutional Convention of 1947, Vol. 5*, p. 797 (Statement of Mr. Rafferty, noting that *Everson* only holds that the State may provide students with transportation to various schools that include religious schools, but "[i]t doesn't say that they may *support* [religious] schools . . . .") (emphasis added); *id.* at 796 (Statement of Mr. Lightner: "Leaving out the support of schools – this is just transportation of children"). Committee members rejected as far-fetched the notion that the ability to provide transportation to all students (including those who attend religious schools) might be expanded to allow the government to provide direct funding to religious schools. *Id.* What is most notable in the discussion that ensued is that the reason given for not supporting the amendment was that it was not needed, as funding of religious schools was already precluded. As stated by the Secretary of the Committee: "The parochial school system

developed without any public aid whatsoever and it will continue to develop without any public aid." *Id.* at 805.

Thus, far from Respondents' suggestion that the rejection of the amendment evidenced a desire to *allow* aid to religious schools, the discussion surrounding the rejection of the amendment clarified the understanding by members of the Committee that New Jersey already had in place a prohibition against support of religious schools in the exact manner at issue here: direct funding. Even had there been any question (which there was not), *Resnick* has since removed any doubt.

III. The Grants Violate Art. I, Par. 4 of the State Constitution.

A. The Grants Demonstrate Unconstitutional Religious Preference.

Respondents argue that the grants to the Yeshiva and Seminary do not demonstrate unconstitutional religious preference because every grant applicant received funding for at least one proposed project. *See* Rb at 34-36. But as discussed above, Respondents did not fund every proposal, rejecting over one-third of the submissions. *See supra* at 2-3. Even among projects approved for state funding, not every institution received the requested amount. *See id.*

The grant application process was competitive, and Respondents evaluated applications using highly subjective

criteria. *See id.*; Ab at 5-6. Respondents' decision to award over ten million dollars to the Yeshiva and Seminary — the full amount those institutions requested — thus reflects Respondents' judgment that the religious training offered by those institutions, *see* Ab at 12-15, 22-24, contributes more to "the best interests of higher education in the State," *see* Rb at 9, than do many other applicant institutions. This demonstrates religious preference prohibited by the State Constitution.

Respondents wrongly contend that demonstrating "preference" under the state Establishment Clause requires a showing that other religions were affirmatively disfavored in the grant application process. Rb at 34-36. The State Constitution takes a more expansive approach to religious preference. For example, in *Tudor v. Board of Education*, 14 *N.J.* 31, 51 (1953), the New Jersey Supreme Court held that a school board engaged in unconstitutional religious preference by permitting the distribution of Gideon Bibles on school premises, with no showing that other religious groups had been denied a comparable opportunity. It was enough that the government had put its imprimatur on the Gideons' religious teaching. *See id.*

Even if Respondents were correct that the state Establishment Clause does not apply in some cases where religious institutions benefit as a result of a policy that provides uniform and equal aid to all secular and religious

institutions, *see, e.g., Resnick v. E. Brunswick Twp. Bd. of Educ.*, 77 *N.J.* at 104, the grants here did not result from such a policy. The competitive application process and subjective judgments that led to funding the Yeshiva and Seminary, *see supra* at 2-3, necessarily involved assessing the value of the religious educations offered at those institutions. As in *Tudor*, the grants thus bear the imprimatur of the state. This does not comport with the state Establishment Clause, which requires that the government "undertake to develop compelling criteria" to ensure that no religious group receives any special benefit from the state. *Marsa v. Wernik*, 86 *N.J.* 232, 240 n.2 (1981). Accordingly, "exacting judicial scrutiny" is warranted here, *id.*, as it was in *Tudor*.

B. The Grants Would Unconstitutionally Subsidize the Religious Missions of the Yeshiva and Seminary.

Respondents are correct that there are circumstances under which the Establishment Clause permits state aid to religious institutions, *see* Rb at 39, but those circumstances are not present here.[6] As Respondents acknowledge, *see* Ab at 44-45,

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[6] Respondents also briefly contend that the state Establishment Clause does not prohibit state funding of religious activity. *See* Rb at 35-36. The New Jersey Supreme Court, however, has "generally followed the federal [Establishment Clause] standard" in interpreting the state Establishment Clause, *Right to Choose v. Byrne*, 91 *N.J.* 287, 313 (1982), including the federal case law prohibiting funding of religious activity, *see, e.g., Clayton v. Kervick*, 56 *N.J.* 523 (1970), *on remand from the U.S. Supreme Court*, 59 *N.J.* 583 (1971).

government aid may not constitutionally be used to support religious activity or instruction, *see* Ab at 46 (listing cases), and must be restricted to prevent diversion toward those ends, *see Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 *U.S.* 756, 780 (1973); *Tilton v. Richardson*, 403 *U.S.* 672, 683 (1971). The grants at issue here would unavoidably support religious instruction and training at the Yeshiva and Seminary.

Indeed, religious instruction and training are those institutions' raison d'être. Respondents reluctantly admit that the Yeshiva's and Seminary's "educational missions are related to their religious missions." Rb at 43. That is true in the sense that a cake is "related to" its ingredients: the former comprises the latter. Virtually every course offered at the Yeshiva and Seminary is religious in nature, *see* Ab at 12-15, 22-24, restricted in enrollment to members of a particular faith (either formally or practically), *see id.* at 7-11, 15-16, 24, and intended to prepare students for religious service, *see id.* at 7-11, 21.

Respondents thus err in relying on cases like *Mitchell v. Helms*, 530 *U.S.* 793, 801 (2000) (plurality op.), and *Agostini v. Felton*, 521 *U.S.* 203, 209 (1997), *see, e.g.*, Rb at 42-45, which involved aid to parochial schools that taught religion in addition to, rather than in place of, secular subjects. Religious training is "not fungible" with secular education, and

supporting it with taxpayer money is "one of the hallmarks of an 'established' religion." *Locke v. Davey*, 540 *U.S.* 712, 721, 722 (2004). That some Yeshiva and Seminary graduates ultimately pursue secular professions – a group that includes fewer than half the graduates of the Seminary, *see* Rb at 19 – does not change the religious nature of the education the grants would support. *See* Ab at 12-15, 22-24.

For that reason, Respondents are also incorrect that the grants would avoid unconstitutional "government-financed . . . indoctrination into the beliefs of a particular religious faith." *Agostini*, 521 *U.S.* at 219. Respondents claim that the grants would not finance religious indoctrination because students who attend the Yeshiva and Seminary are relatively sophisticated. Rb at 42-43. But "indoctrination," in this context, means only "instruction" or "formal teaching." *Compact Oxford English Dictionary* 840 (2d. Ed. 2004). Religious indoctrination is precisely what students receive from the Yeshiva and Seminary, and what the grants would support. Respondents improperly cite the plurality opinion of *Mitchell* to suggest that this does not matter so long as the grants were allocated on a neutral basis, *see* Rb at 43; in fact, a majority of the Supreme Court rejected that proposition in that decision. *See Mitchell*, 530 *U.S.* at 839 (O'Connor, J., concurring); *id.* at 884 (Souter, J., dissenting); *see also* Ab at 46 n.4 (explaining

that the federal circuit courts have concluded that Justice O'Connor's concurring opinion in Mitchell is controlling). In any event, unlike here, the aid in *Mitchell*, 530 *U.S.* at 829-30 (plurality op.), and *Agostini*, 521 *U.S.* at 209-10, was not allocated through discretionary decision-making, but was provided on an equal, per-capita basis to all public and private schools.

Moreover, unlike *Mitchell* and *Agostini*, which involved donations of supplies restricted to secular uses and supplemental secular services, *see Mitchell*, 530 *U.S.* at 801, 829-31 (plurality op.); *Agostini*, 521 *U.S.* at 210, Respondents propose to make direct cash grants to the Yeshiva and Seminary that would support those institutions' core religious missions. The Supreme Court has long "recogni[zed] . . . the special dangers associated with direct money grants to religious institutions," because "this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." *Mitchell*, 530 *U.S.* at 855-56 (controlling concurrence of O'Connor, J.).

In addition, while the aid in *Mitchell*, 530 *U.S.* at 861-63 (O'Connor, J., concurring), and *Agostini*, 521 *U.S.* at 211-12, was securely restricted to non-religious uses, the grant contracts here acknowledge that the funded projects will be used for religious purposes. *See* Rb at 18. Though, in so

acknowledging, the grant contracts require "that the percentage of the costs of the projects used for nonsectarian use exceeds the percentage of the costs funded with grant funds," *id.*, the Supreme Court has rejected arguments that such percentage limitations can render grants to religious institutions constitutional, in a detailed discussion in *Nyquist*, 413 *U.S.* at 777-79 & n.36. "[A] mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education." *Id.* at 778; *accord Freedom From Religion Found. v. McCallum*, 179 *F. Supp. 2d* 950, 974 (W.D. Wis. 2002) ("[t]he Supreme Court has systematically rejected attempts to unbundle religious activities through statistics and accounting"). In any event, it is implausible that the grant projects can comply with these percentage limitations, as the Yeshiva and Seminary are inherently religious institutions, the proposed projects will support these institutions' core religious missions, and state funds will support 75 percent of the cost of the Yeshiva's funded projects, Rb at 8, and approximately half the cost of the Seminary's projects, Rb at 22-23. What is more, the comprehensive monitoring Respondents would have to undertake to enforce the percentage limitations would almost certainly itself violate the Establishment Clause through entanglement. *See Lemon v. Kurtzman*, 403 *U.S.* 602, 619-

21 (1971); *see also New York v. Cathedral Acad.*, 434 *U.S.* 125, 132-33 (1977).

Finally, Respondents argue that the grants are constitutional because they are intended to finance facilities that lack "inherent religious content." Rb at 51. Courts – including the *Mitchell* Court – have consistently rejected such arguments, notwithstanding Respondents' repeated improper citation to the plurality opinion in that case. *See* Ab at 46 n.4. Where government aid helps to construct facilities that will be "used to promote religious interests," it has "the effect of advancing religion," and so violates the Establishment Clause. *Tilton*, 403 *U.S.* at 683; *see also Nyquist*, 413 *U.S.* at 776 ("tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities").[7]

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[7] *See also Mitchell*, 530 *U.S.* at 837-38, 857-58 (controlling concurrence of O'Connor, J.) (Establishment Clause prohibits use of secular federally funded materials and equipment, such as computers, to advance a parochial school's religious mission); *Community House, Inc. v. City of Boise*, 490 *F.3d* 1041, 1059-60 (9th Cir. 2007) (enjoining city from leasing homeless shelter to religious organization for one dollar per year so long as religious organization continued to hold daily chapel services for its residents, because "a publicly financed government building may not be diverted to religious use"); *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 *F.3d* 406, 418-19, 424-25 (8th Cir. 2007) (state payments to religious prison program – which were in part used for telephone, mailing, computer, copying, and other office

IV. In Violation of the Law Against Discrimination ("LAD"), Respondents' Discretionary Grants of Funds to the Yeshiva and Seminary Provide Sponsorships of, and Special Benefits to, Organizations that Discriminate.

As noted in Appellants' principal brief, the New Jersey Supreme Court declared in *Dale v. Boy Scouts of America,* 160 *N.J.* 562, 593 n.7 (1999), *rev'd on other grounds* 530 *U.S.* 640 (2000): "New Jersey governmental entities are, of course, bound by the LAD. Their sponsorship of, or conferring of special benefits on, an organization that practices discrimination would be prohibited." *Id.* Respondents admit (albeit reluctantly) that, as government actors, they are bound by the LAD. Rb at 55-56. Further, in addressing Appellants' LAD claim, Respondents do not argue that the Yeshiva and Seminary do not discriminate. Rather, Respondents base their argument on two alternative grounds, both of which are unavailing.

First, Respondents suggest that the provision of over ten million dollars via direct grants of funding is not "support" or

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costs – were unconstitutional because they ultimately supported religious indoctrination); *Freedom from Religion Found. v. Bugher*, 249 *F.3d* 606, 612-13 (7th Cir. 2001) (program of grants to public and private educational institutions for telecommunications purposes was unconstitutional insofar as it made grants to religious institutions that could be used to support the religious activities of such institutions). *American Atheists, Inc. v. City of Detroit Downtown Development Authority*, 567 *F.3d* 278, 292-94 (6th Cir. 2009), relied on by Respondents, Rb at 49, is inapposite because the aid there was used for improvements to facades of buildings, and so did not support religious entities' religious missions to a more than "de minimis" extent.

a "special benefit," and describe it instead as simply part of a "broad based government benefit program." Rb at 57. Yet the award of these taxpayer-funded grants is not like provision of general police services or equal use of parks to all comers (or even like opening up public tennis courts for reservation times for any organization or individual that signs up). Only certain organizations could apply for these special financial benefits, and as explained *infra* at Point I, the organizations that do apply must compete for the funds. Both the decision to award funds and the amounts of such awards are discretionary, with Respondent Hendricks determining, in part through subjective factors, which organizations would receive full funding for their proposed projects and which would have projects denied or only partially funded. *Id.* Providing millions of dollars of *discretionary, selective* funding obviously provides a special benefit, and the funds sponsor certain institutions as opposed to others.

Respondents must therefore urge this Court to ignore or dismiss the New Jersey Supreme Court's holding in *Dale*, or to interpret it into meaninglessness. They posit that the LAD does not bar the government (and other public accommodations) from providing special benefits, and even discretionary funding, to organizations that discriminate. That position is contrary to the language of the statute itself, *see N.J.S.A.* 10:5-12(f)(1)

(making it unlawful for "any place of public accommodation *directly or indirectly* to" discriminate on the basis of a protected characteristic) (emphasis added)), and to *Dale's* holding and reasoning, *see Dale*, 160 *N.J.* at 593 n.7.

The meaning of the Court's quote in *Dale* is made clear by its context. No one disputed that the Boy Scouts had an exclusionary policy that would violate the LAD if the organization were subject to the statute. The first question before the Court was therefore whether the Boy Scouts were a "public accommodation" or whether they were a distinctly private associational organization exempt from the LAD. *Id.; see also N.J.S.A.* 10:5-5(l)(setting forth definition of "public accommodation" and exemptions). One aspect of that inquiry was whether the organization in question had close ties to other public accommodations. *Dale*, 160 *N.J.* at 591. In citing to the Boy Scouts' close relationships with certain other public accommodations, the Court noted: "Likewise, state and local governments have contributed to the Boy Scouts' success." *Id.* at 593. It was then that the Court explained that government entities (and other public accommodations) would themselves violate the LAD if they provide sponsorship of, or special benefits to, an organization that discriminates. *Id.* at 593 n.7. The point was clear that, even if the Boy Scouts were a private association that was permitted to discriminate,

government entities and other public accommodations could not "contribute to the . . . success" of (and, in the instance of providing funding, essentially underwrite) such an organization. The Court recognized that when a public accommodation provides special benefits to organizations that have exclusionary membership or programs, the public accommodation is *itself* engaging in discrimination by providing its special benefits in a way that can only be enjoyed by certain persons based on whether they are of a certain race, religion, gender, ethnicity or other protected characteristic. *Id.*

Dale recognizes and ensures that public accommodations cannot "outsource" discrimination, nor do indirectly what they are also proscribed from doing directly. *Dale* follows from the letter of the statute. The LAD prohibits both direct *and indirect* discrimination in the provision of services. Specifically, *N.J.S.A.* 10:5-12 states:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination: . . . (f)(1) For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation *directly or indirectly* to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, . . . [on the basis of the statutorily-identified protected characteristics].

(Emphasis added.)

For example, a public restaurant would clearly violate the LAD by providing direct discounts based on race; but it would also violate the LAD if it were to provide special discounts based on membership in the Ku Klux Klan or other organizations that don't allow persons of certain races to be members. A movie theater violates the LAD not only if it reserves the best rows of seats for members of one religion, but also if it reserves those rows specifically for the members of the local Presbyterian Church (thereby resulting in the same effect). A town that runs a swimming pool could not reserve days of the week for the pool to be used only by people who can prove they are of certain ethnic backgrounds; likewise, other than providing for a generally available, non-discretionary sign-up process for any and all organizations or persons, a town could not decide to selectively reserve days of the week for an organization with membership policies that discriminate based on ethnicity.

In all of the cases above, the effect of the public accommodations' actions is that the availability of certain of their services is determined by the discriminatory membership policies of the organizations to which they provide the special benefits. Even though the Ku Klux Klan, religious organizations, or the ethnicity-based organizations are exempt

from the LAD,[8] the public accommodation that is providing the special treatment is *itself* engaging in an action or practice that results in its goods or services not being made available equally, based on race, religion, ethnicity, or other protected category. Such actions therefore violate the spirit, the intent, and the letter of the LAD. *N.J.S.A.* 10:5-12(f)(1).

Here, Respondents are providing their goods and services in a way that unequally benefits people based on protected criteria. Respondents have provided millions of dollars to two organizations[9] that discriminate on the basis of religion or gender in employment and in the provision of services or programs. *See* Ab at 7-16, 19-24. Therefore, Respondents are providing sponsorship and special benefits which will not be made available equally, but will rather be limited only to those

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[8] *N.J.S.A.* 10:5-5(l) ("Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution . . . .").

[9] Respondents note that Seton Hall University previously invoked the LAD's religious exemption in *Romeo v. Seton Hall*, 378 *N.J. Super.* 384, 389 (App. Div. 2005). There, this court found that Seton Hall University was exempt from the LAD and therefore could lawfully discriminate, thereby nullifying any potential LAD claim against it. *Id.* Appellants are unaware whether the university currently engages in such discrimination. If it does, the government would be precluded from providing it with discretionary financial benefits, as such special benefits would ultimately serve to support and enable such discrimination. *Dale*, 160 *N.J.* at 593 n.7.

who fall within discriminatory membership or employment criteria, in violation of the Law Against Discrimination.[10]

Finally, to the extent the State suggests that the federal Constitution may prevent states from declining to provide governmental aid (here, discretionary aid) to religious groups and institutions (Rb at 59), such arguments have been repeatedly rejected by the federal courts.[11]

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[10] Respondents posit that certain organizations might engage in "benign discrimination," apparently suggesting that such organizations should be able to receive discretionary government funds. Rb at 55. It is unclear what Respondents mean by "benign discrimination." However, whether discriminatory membership policies or discriminatory service or employment practices are based on hatred, religious affiliation, ethnic affiliation, or any other exclusive associational interest, a public accommodation such as the government can neither engage in, nor provide support that furthers, the resulting discrimination. *Dale, supra.*

[11] *See Christian Legal Society v. Martinez*, 561 U.S. 661 (2010) (rejecting free exercise, free speech, and expressive association challenge to public university policy denying funding and support to student groups that discriminate in membership); *Locke v. Davey*, 540 *U.S.* 712 (2004) (state law barring university students from using state scholarship funds to pursue a degree in theology did not violate the Free Exercise, Free Speech, Equal Protection, or Establishment Clauses); *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, ___ F.3d ___, No. 14-1382, 2015 WL 3429427 (8th Cir. May 29, 2015) (affirming dismissal of a religious preschool's claim that the State of Missouri violated the school's federal constitutional rights by excluding the school – in reliance on a clause of the Missouri state constitution – from a state program that provides state grants to resurface playgrounds); *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 353-57 (1st Cir. 2004) (state did not violate U.S. Constitution by establishing program that provided for funding of secular but not religious private schools); *Wirzburger v. Galvin*, 412 F.3d 271, 280-85 (1st Cir. 2005) (upholding against federal constitutional challenge prohibition in Massachusetts

V. The Grants Would Violate the State Constitution's Private Aid Clause.

Respondents suggest that if the Private Aid Clause[12] is interpreted to bar grants to the Yeshiva and Seminary, it would also prohibit grants to other private institutions. *See* Rb at 62. This is not so. The grants to the Yeshiva and Seminary fail to serve a public purpose because those institutions provide religious instruction rather than secular education. *See* Ab at 59. Moreover, both institutions benefit only members of certain faiths rather than the community as a whole. *See id.* There is no evidence that other institutions receiving grants share those characteristics.

Indeed, the historical record shows that the Private Aid Clause was principally intended to bar state aid to religious institutions. As originally drafted, the Private Aid Clause

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Constitution on use of initiative process to repeal constitutional clause restricting public aid to religious organizations); *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 21-23 (1st Cir. 2004) (school district was not obligated to provide disabled children at private schools with special-education benefits equal to those given at public schools); *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409-10 (6th Cir. 2007) (state did not violate U.S. Constitution by denying a religious facility for troubled youths public funding available to non-religious entities); *Bowman v. United States*, 564 F.3d 765, 775 (6th Cir. 2008) (upholding federal regulation that provided former military service-members credit toward retirement for secular but not religious public-service work, explaining that "[t]he withholding of a retirement credit for [a former soldier's] work as a youth minister does not burden his right to practice or adhere to his religious beliefs").

[12] N.J. Const., Article VIII, Section III, para. 3.

specified that it applied to "any *religious* society or corporation." *The Constitutional Commission*, Daily State Gazette, October 21, 1873, *reprinted in* Peter J. Mazzei and Robert F. Williams, *"Traces of its Labors:" The Constitutional Commission, The Legislature, and Their Influence on the New Jersey Constitution, 1873-1875*, 463 (2012), *available at* http://tinyurl.com/qakxlmu (emphasis added). The religious qualifier was removed before the Clause's submission to the electorate without recorded debate. *See The Constitutional Convention*, Daily State Gazette, October 23, 1873, *reprinted in* Mazzei and Williams, *supra*, at 510.

Notwithstanding the removal of that term, the voters who ratified the provision understood its "main point . . . was to prevent the Legislature or any municipal corporation from making appropriations to sectarian schools," *Untitled Editorial*, Jerseyman, August 10, 1875, *reprinted in* Mazzei and Williams, *supra*, at 1118, and that it would "put an end to all raids upon the Treasury for the benefit of denominational institutions of whatever sort of character." *Untitled Editorial*, Jerseyman, August 24, 1875, *reprinted in* Mazzei and Williams, *supra*, at 1118. General language did not change the understanding that "the provision shuts out all association of State and Church," ensuring "that each Church or denomination must maintain its own hospitals, schools, protectories or whatever forms of

denominational teaching it may choose to assert." *The Constitutional Amendments*, Newark Daily Advertiser, August 5, 1875, *reprinted in* Mazzei and Williams, *supra*, at 1116.

Historical context thus demonstrates that the Private Aid Clause distinguishes between secular education and religious instruction, flatly prohibiting aid to the latter. While Respondents' "statewide program," Rb at 64, may otherwise pass muster under the Private Aid Clause, the specific grants to the Yeshiva and Seminary do not.

CONCLUSION

The proposed grants violate three provisions of the State Constitution, as well as the Law Against Discrimination. The Court should therefore reverse the decision of the agency below, declare the proposed grants unconstitutional, and enjoin the State from paying them.

Date: July 17, 2015

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