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June 23, 2013

Hon. Paul Innes, J.S.C.  
Superior Court of New Jersey, Chancery Division, General Equity  
Civil Courthouse  
175 S. Broad Street, P.O. Box 8068  
Trenton, New Jersey 08650-0068

Re: ACLU-NJ, et al. v. Hendricks, et al.  
Civil Action No. \_\_\_\_\_

Brief in Support of Order to Show Cause with Temporary Restraints

Dear Honorable Judge Innes,

Kindly accept this letter-brief in lieu of a more formal brief in support of Plaintiffs' Order to Show Cause, which seeks to immediately enjoin Defendants from disbursing taxpayer funds to two higher education institutions that provide sectarian educations and ministerial training, in violation of Article I, Paragraphs 3 and 4, of the Constitution of the State of New Jersey, and in violation of the New Jersey Law Against Discrimination.

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## **PRELIMINARY STATEMENT**

The New Jersey Constitution specifically prohibits the use or grant of any taxpayer funds for the maintenance of any religion or ministry. Art. I, Paragraph 3. It also prohibits the use of taxpayer funds to build facilities at which religious services or instruction will take place. Art. I, Paragraphs 3 and 4. Further, New Jersey's Law Against Discrimination prohibits the government (as a place of public accommodation) from providing sponsorship of, or any special benefit to, an organization that discriminates.

Defendants are violating all three provisions by providing a direct grant of taxpayer funds to two sectarian religious schools – \$10,635,747 to Beth Medrash Govoha yeshiva and \$645,323 to the Princeton Theological Seminary. Both Beth Medrash Govoha and the Princeton Theological Seminary provide sectarian religious educations and train students for the ministry. Both schools tailor their programs to students of a particular religious sect, and one is a males-only institution. Both of the grants at issue were provided pursuant to competitive grant application processes, with the ultimate determination of the relative need for proposed projects and the amount of awards based on the subjective determinations of Defendant Rochelle Hendricks, New Jersey Secretary of Higher Education.

Because Defendants will imminently have authority to disburse taxpayer funds pursuant to these grant awards, Plaintiffs hereby seek, and are entitled to, preliminary and temporary injunctive relief.

## STATEMENT OF FACTS

On April 29, 2013, the Office of the Governor announced that Defendant Hendricks had sent the Legislature a list of higher education construction project grants that had been awarded to various public and private New Jersey higher education institutions. *See* Exhibit 1 to Verified Complaint. The list included grants awarded under five separate grant programs: (1) the \$750 million General Obligation construction bond authorization (also referred to as the “Building Our Future Bond Act,” hereinafter referred to as the “Bond Act”); (2) the Higher Education Facilities Trust Fund; (3) the Higher Education Capital Improvement Fund; (4) the Higher Education Technology Infrastructure Fund; and (5) the Higher Education Equipment Leasing Fund. *Id.*

On that list of grants were awards to 15 private institutions, including two sectarian institutions whose primary functions are to provide sectarian religious education and to train students for ministry pursuant to tenets of their respective faiths. *Id.* Specifically, the list included (1) an award of \$10,635,747 in Bond Act funds for Beth Medrash Govoha yeshiva and (2) an award of \$645,323 in Higher Education Technology Infrastructure Act funds for Princeton Theological Seminary. *Id.*

### *The Building Our Future Bond Act*

The Bond Act was approved by New Jersey voters on November 6, 2012. Of the \$750 million authorized to be awarded under the Act, \$52.5 million was designated for grants to private higher education institutions with an endowment of \$1 billion or less, with the rest designated for public universities or county colleges. *See* [http://www.njleg.state.nj.us/2012/Bills/AL12/41\\_.PDF](http://www.njleg.state.nj.us/2012/Bills/AL12/41_.PDF).

Defendant Hendricks was, and remains, responsible for reviewing applications for funding under the Bond Act, and for approving projects and designating amounts of funding to be awarded. *N.J.A.C.* 9A:18-1.1 et seq. In evaluating the relative value of the grant applications and deciding the amounts awarded, Hendricks and an advisory review committee she established consider, among other factors, numerous broad-based, subjective criteria, and they thus have significant discretion in their decision-making. *N.J.A.C.* 9A:18-1.6. For example, in evaluating which applications are most qualified to receive funding, Hendricks and the review committee assess relative worth based in significant part on subjective categories such as “Whether it serves the best interests of higher education in the State as a whole,” “Advancement of student education in the State of New Jersey,” “The cost-effectiveness of the project,” and “Consistency of the project with the State’s goals and priorities for development and redevelopment, including... promotion of access to opportunity for all New Jersey residents.” *N.J.A.C.* 9A:18-1.6(b). Hendricks considers recommendations of the review committee but has sole authority to approve or reject a project grant and establish the amount of the grant. *Id.*

Pursuant to *N.J.A.C.* 9A:18-1.7(d), once the Secretary of Higher Education provides to the presiding officers of each house of the State Legislature a list of projects and amounts of grants she has approved under the Bond Act, the Legislature has 60 days to pass a concurrent resolution disapproving the list; if it fails to do so, the grants will be deemed authorized. *Id.*

The list of projects and grant amounts that includes the grant to Beth Medrash Govoha was presented to the Legislature on April 29, 2013. Exhibit 1 to Verified Complaint. Therefore, if no action is taken, the list will be deemed approved and

authorized on June 28, 2013, and Defendant New Jersey State Treasurer Andrew P. Sidamon-Eristoff may thereafter disburse the grant funds. However, the Senate and Assembly have bills currently before them to authorize funding under the Bond Act. Verified Complaint, paragraph 14. Final action can be taken on the bills as early as Monday, June 24, 2013. *Id.*

*The Higher Education Technology Infrastructure Act*

Pursuant to *N.J.A.C.* 9A:13-1.1 to -1.8, Hendricks likewise has authority and discretion to preliminarily approve grant applications and determine amounts of funding pursuant to the Higher Education Technology Infrastructure Act (*N.J.S.A.* 18A:72A-59 to -61).

The subjective criteria for determining which projects are most qualified to receive funds under the Higher Education Technology Infrastructure Act are the same as those considered under the Bond Act, described above. *N.J.A.C.* 9A:13-1.5(b).

Once the list of projects proposed to receive funding under the Higher Education Technology Infrastructure Act is submitted to the Legislature's Joint Budget Oversight Committee, that committee has 10 days to disapprove each grant or they shall be deemed approved. *N.J.A.C.* 9A:13-1.6. It is unclear when or whether the proposed grant of funds to Princeton Theological Seminary was presented to the Legislature's Joint Budget Oversight Committee (although it was presented to the general Senate and Assembly on April 29, 2013). Therefore, it is unclear whether Defendant Sidamon-Eristoff already has authority to disburse the contested funds to Princeton Theological Seminary.

*The \$10,635,747 Grant to Beth Medrash Govoha*

The \$10,635,747 grant award to Beth Medrash Govoha (also known as “Beth Medrash Govoha of America, Inc.”) is for two projects: \$5,118,000 for a library and research center, and \$5,517,747 for construction of academic space in an existing building. *See* Exhibit 2 to Verified Complaint. Hendricks awarded both of these grants under the Bond Act. *Id.*

Given that the Bond Act designated \$52,500,000 for grants to private higher education institutions, Beth Medrash Govoha was thus awarded more than one-fifth of the total \$52,500,000 in funds available for private institutions under the Act, which is more than any other private institution is slated to receive from the Bond Act.

Beth Medrash Govoha is an all-male Orthodox Jewish yeshiva located in Lakewood, New Jersey. *See* <http://nces.ed.gov/collegenavigator/?s=NJ&l=3%2b5&id=183804#accred> (Exhibit 8 to Verified Complaint). The State of New Jersey, according to the New Jersey Secretary of Higher Education’s website, describes Beth Medrash Govoha as a “Rabbinical School.” *See*

[http://www.nj.gov/highereducation/Program\\_Inventory/DegreeListings/BethMedrash.htm](http://www.nj.gov/highereducation/Program_Inventory/DegreeListings/BethMedrash.htm) (Exhibit 3 to Verified Complaint). The State further identifies Beth Medrash Govoha’s categorization under the Carnegie Classification system as “Special Focus Institutions – Theological seminaries, Bible colleges, and other faith-related institutions,” and notes that Beth Medrash Govoha is accredited by the Association of Advanced Rabbinical and Talmudic Schools. *Id.*

The State denotes the courses of study at Beth Medrash Govoha as “Talmudic Studies” and “Rabbinical and Talmudic Studies.” *Id.* The State’s site also sets forth the categorization of the courses of study pursuant to the U.S. Department of Education’s *Classification of Instructional Programs – 2010*. All courses of study at Beth Medrash Govoha yeshiva are classified as either “Theology/Theological Studies” or “Talmudic Studies.” “Theology/Theological Studies” is defined as “A program that focuses on the beliefs and doctrine of a particular religious faith *from the intramural point of view of that faith*. Includes instruction in systematic theology, historical theology, moral theology, doctrinal studies, dogmatics, apologetics, and applications to specific questions of ecclesiastical polity and religious life.” *See* [http://www.nj.gov/highereducation/Program\\_Inventory/DegreeListings/CIPs.htm#390401](http://www.nj.gov/highereducation/Program_Inventory/DegreeListings/CIPs.htm#390401) (Exhibit 4 to Verified Complaint) (emphasis added). “Talmudic Studies” is defined as “A program that prepares individuals for advanced Talmudic scholarship and research *and for entry into a program leading to ordination as Rabbis*; students are also qualified to enter conventional graduate and professional schools. Includes instruction in Jewish Law and Jurisprudence, Philosophy, and Ethics, in addition to a major emphasis on Talmud.” *Id.* (emphasis added).

The U.S. Department of Education’s Institute of Education Sciences identifies the mission statement of Beth Medrash Govoha as “an institute for advanced Talmudic scholarship. Its primary objective is to produce Talmudic scholars.”

<http://nces.ed.gov/collegenavigator/?s=NJ&l=3%2b5&id=183804#accred> (Exhibit 5 to Verified Complaint). Its undergraduate studies program “is designed to provide the student with a thorough foundation in the basic areas of Talmudic knowledge according



to the traditional model of Talmudic scholarship.” *Id.* The graduate studies program “aims to promote advanced Jewish scholarship and research in classical Talmudic and cognate studies. In addition, it is concerned with professional orientation by providing programs to prepare these scholars as teachers and administrators in secondary Torah schools and institutions of higher Talmudic studies, as practicing Rabbis and as experts in Rabbinical jurisprudence.” *Id.*

According to 2011 State records, Beth Medrash Govoha has 79 faculty members, all of whom are male. *See*

<http://www.state.nj.us/highereducation/statistics/FacultyRaceSex2011.pdf> (Exhibit 6 to Verified Complaint). State records confirm that Beth Medrash Govoha’s entire student body is also all-male. *See*

<http://www.state.nj.us/highereducation/statistics/Enr2012Sex.pdf> (Exhibit 7 to Verified Complaint). Its most recent undergraduate enrollment (2012) is 2,696 students, all of whom are male (*id.*); its graduate studies program has 3,842 students, all of whom are male. *Id.*

Additionally, the U.S. Department of Education’s Institute of Education Sciences confirms Beth Medrash Govoha is an institution that is “Single sex: Male.” *See*

<http://nces.ed.gov/collegenavigator/?s=NJ&l=3%2b5&id=183804#accred> (Exhibit 8 to Verified Complaint).

#### *The \$645,323 Grant to Princeton Theological Seminary*

The \$645,323 grant awarded to Princeton Theological Seminary was for three projects: \$241,722 for “IT infrastructure upgrade for library for expanded historical and theological research...,” \$113,712 for “Learning Spaces: Training Room,” and \$289,889

for “Revamped Cooper Conference Room.” All awards were from Higher Education Technology Infrastructure Act funds. *See* Exhibit 2 to Verified Complaint.

Princeton Theological Seminary is a Presbyterian Christian seminary located in Princeton, New Jersey. According to its website, Princeton Theological Seminary’s mission is as follows:

**Mission Statement**

Princeton Theological Seminary prepares women and men to serve Jesus Christ in ministries marked by faith, integrity, scholarship, competence, compassion, and joy, equipping them for leadership worldwide in congregations and the larger church, in classrooms and the academy, and in the public arena.

A professional and graduate school of the Presbyterian Church (U.S.A.), 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.

In response to Christ’s call for the unity of the church, the Seminary embraces in its life and work a rich racial and ethnic diversity and the breadth of communions represented in the worldwide church. In response to the transforming work of the Holy Spirit, the Seminary offers its theological scholarship in service to God’s renewal of the church’s life and mission. In response to God’s sovereign claim over all creation, the Seminary seeks to engage Christian faith with intellectual, political, and economic life in pursuit of truth, justice, compassion, and peace.

To these ends, the Seminary provides a residential community of worship and learning where a sense of calling is tested and defined, where Scripture and the Christian tradition are appropriated critically, where faith and intellect mature and life-long friendships begin, and where habits of discipleship are so nourished that members of the community may learn to proclaim with conviction, courage, wisdom, and love the good news that Jesus Christ is Lord.

*Adopted by the Board of Trustees, May 1996*

[http://www.ptsem.edu/index.aspx?menu1\\_id=2030&menu2\\_id=2031&id=1237](http://www.ptsem.edu/index.aspx?menu1_id=2030&menu2_id=2031&id=1237)

(Exhibit 9 to Verified Complaint).

The State of New Jersey, according to the New Jersey Secretary of Higher Education's website, describes Princeton Theological Seminary as a "Theological Institution." *See* [http://www.nj.gov/highereducation/Program\\_Inventory/DegreeListings/Princeton\\_S.htm](http://www.nj.gov/highereducation/Program_Inventory/DegreeListings/Princeton_S.htm) (Exhibit 10 to Verified Complaint). The State further identifies Princeton Theological Seminary's categorization under the Carnegie Classification system as "Special Focus Institutions – Theological seminaries, Bible colleges, and other faith-related institutions," and notes that the Seminary is accredited by the Middle States Association of Colleges and Schools & Association of Theological Schools. *Id.*

The State describes the courses of study at Princeton Theological Seminary as "Christian Education," "Theological Professions" and "Theology – First Professional." *Id.* The State's site also sets forth the categorization of the courses of study pursuant to the U.S. Department of Education's *Classification of Instructional Programs – 2010*. All courses of study at Princeton Theological Seminary are classified as either "Religious Education," "Theology/Theological Studies" or "Divinity/Ministry." "Religious Education" is defined as "A program that focuses on the theory and practice of providing educational services to members of faith communities, *within the context of a particular religion, and that prepares individuals to serve as religious educators....*" [http://www.nj.gov/highereducation/Program\\_Inventory/DegreeListings/CIPs.htm#39040](http://www.nj.gov/highereducation/Program_Inventory/DegreeListings/CIPs.htm#39040) 1 (Exhibit 4 to Verified Complaint) (emphasis added). "Divinity/Ministry" is defined as "A program that prepares individuals for ordination as ministers or priests in any of the *Christian religious traditions*[". The program i]ncludes instruction in the theology and

polity of a particular church, church law, liturgy and ritual, principles of pastoral ministry, homiletics, evangelism, church/parish organization and management, Christian ethics, church history, and related studies.” *Id.* (emphasis added). “Theology/Theological Studies,” as noted above, is defined as “A program that focuses on the beliefs and doctrine of a particular religious faith *from the intramural point of view of that faith*[. The program i]ncludes instruction in systematic theology, historical theology, moral theology, doctrinal studies, dogmatics, apologetics, and applications to specific questions of ecclesiastical polity and religious life.” *Id.* (emphasis added).

### ARGUMENT

To be entitled to interim relief pursuant to *Rule 4:52-1*, a party must show (a) that the restraint is necessary to prevent irreparable harm, *i.e.*, that the injury suffered cannot be adequately addressed by money damages, which may be inadequate because of the nature of the right affected; (b) that the party seeking the injunction has a likelihood of success on the merits; and (c) that the relative hardship favors the party seeking the restraint. *Crowe v. DeGoia*, 90 N.J. 126, 132-136 (1982). Plaintiffs satisfy these requirements.

I. **Plaintiffs Are Likely to Succeed on Their Claims, As the Grants of Tax Dollars to Beth Medrash Govoha Yeshiva and the Princeton Theological Seminary Violate the Law Against Discrimination and Article I, Paragraphs 3 and 4, of the New Jersey Constitution.**<sup>1</sup>

To obtain temporary restraints, plaintiffs need merely establish a “likelihood” of success on the merits. *Id.* Plaintiffs easily meet that standard.

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<sup>1</sup> In their Verified Complaint, Plaintiffs also claim that Defendants are violating Article VIII, Section 3, Paragraph 3, of the New Jersey Constitution. Plaintiffs do not rely on that claim for purposes of the present motion.

The New Jersey Supreme Court has held that using taxpayer funds to subsidize a religious organization – even if such a subsidy is provided on an equal basis with other organizations – violates Article I, Paragraph 3, of the New Jersey Constitution, which prohibits using taxes for the maintenance of a ministry. *Resnick v. East Brunswick Township Board of Education*, 77 N.J. 88, 103 (1978).

The Court has further held that, even regarding a *loan* program for construction of higher education facilities (as opposed to the direct grant of funds at issue here), the New Jersey Constitution’s analog to the Establishment Clause — Article I, Paragraph 4 — prohibits the loans if students at the institution are required to receive instruction in the tenets of a particular faith, if the admissions to that institution are discriminatory, or if a particular facility for which funds are received are used for sectarian instruction or services. *Clayton v. Kervick*, 59 N.J. 583, 599-601 (1971), *modifying (upon remand from the U.S. Supreme Court, 403 U.S. 945 (1971)) Clayton v. Kervick*, 56 N.J. 523, 528 (1970).

Finally, while religious educational institutions are exempt from the New Jersey Law Against Discrimination [hereinafter “LAD”] and are therefore permitted to discriminate, the Court has held that the State, as a public accommodation, violates the LAD if it provides sponsorship of, or any special benefit to, a discriminatory organization. *Dale v. Boy Scouts of America*, 160 N.J. 562, 593, n.7 (1999), *overturned on other grounds*, 530 U.S. 640 (2000).

In the present case, by providing direct taxpayer funding to subsidize construction projects for two religious organizations that give students a sectarian education and train students for the ministry, Defendants are violating both Article I, Paragraph 3 and

Paragraph 4 of the New Jersey Constitution. Likewise, because at least one of those organizations – Beth Medrash Govoha – discriminates on the basis of gender, and because Defendants awarded the disputed grants based on a competitive application process, Defendants have provided a special benefit to an organization that discriminates, in violation of the LAD.

**A. Because Defendants Are Granting Taxpayer Dollars to Institutions that Provide Religious Instruction and the Training of Ministers, Plaintiffs Are Likely to Succeed on Their Claim that Defendants Are Violating Article I, Paragraph 3 of the New Jersey Constitution.**

Article I, Paragraph 3 of the New Jersey Constitution specifically prohibits taxpayer dollars from being used “for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry....” *Id.* This clause creates a prohibition above and beyond that of the Establishment Clause of the United States Constitution and its New Jersey analog (Article I, Paragraph 4). As described by the New Jersey Supreme Court: “[O]ur state constitution contains a provision 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.

The New Jersey Supreme Court has explained that, while this clause does not go so far as to preclude the provision of general services such as police or fire protection, it does preclude the provision of any “out-of-pocket expenses” that are not fully reimbursed. *Resnick*, 77 N.J. at 103. This is the case even if the funding or subsidy at issue is made generally available to all-comers. *Id.* As held by the Court, Article I, Paragraph 3 “require[s] that religious organizations be singled out among nonprofit groups in general as being ineligible for certain benefits which are partly subsidized by tax-generated funds.” *Id.* at 103-104.

*Resnick* provides directly applicable guidance for the present case. In *Resnick*, the Court addressed a lease arrangement under which a school district permitted any organization to rent a school's facilities on the weekends. The Court held that, while the district could offer its facilities to other organizations at a reduced rate or even for free, "Art. I, par. 3, prohibits any lease arrangement between a school and religious groups under which the out-of-pocket expenses of the board directly attributable to the use by a religious body are not fully reimbursed." *Id.* at 103. Therefore, if the district wanted to rent to the religious organization, the organization would have to adjust the rental costs to "fully cover extra utility, heating, administrative and janitorial costs which result from the leasing by these groups." *Id.*

In the present case, Defendants are going well beyond merely offering reduced rates for leasing facilities. Defendants are subsidizing and providing support for two religious institutions by way of direct grants of taxpayer dollars. By providing over \$11 million in direct grants of funding, there are clearly "out-of-pocket expenses...[that are not being] fully reimbursed." *Id.*

Moreover, both Beth Medrash Gohova and Princeton Theological Seminary are subject to this clause. Both provide religious training "from the intramural point of view of that faith." *See*

[http://www.nj.gov/highereducation/Program\\_Inventory/DegreeListings/CIPs.htm#39060](http://www.nj.gov/highereducation/Program_Inventory/DegreeListings/CIPs.htm#39060)

1. Both prepare students for the ministry of each of their respective faiths. According to the federal government, Beth Medrash Gohova's mission includes preparing students "as teachers and administrators in secondary Torah schools and institutions of higher Talmudic studies, as practicing Rabbis and as experts in Rabbinical jurisprudence."

<http://nces.ed.gov/collegenavigator/?s=NJ&l=3%2b5&id=183804#accred> (Exhibit 5 to Verified Complaint). Princeton Theological Seminary acknowledges that it “prepares women and men to serve Jesus Christ in ministries” and teaches them to “learn to proclaim with conviction, courage, wisdom, and love the good news that Jesus Christ is Lord.”

[http://www.ptsem.edu/index.aspx?menu1\\_id=2030&menu2\\_id=2031&id=1237](http://www.ptsem.edu/index.aspx?menu1_id=2030&menu2_id=2031&id=1237) (Exhibit 9 to Verified Complaint).

By providing over \$11 million of taxpayer funds to these schools, the State is directly subsidizing those sectarian programs and pursuits. None of that taxpayer money will be reimbursed.

Thus, even more clearly than the mere lease agreements at issue in *Resnick*, the direct grant of taxpayer funds in the present instance violates the strict proscription of Article I, Paragraph 3, of the New Jersey Constitution.<sup>2</sup> Plaintiffs are thus likely to succeed on the merits of that claim.

**B. Because the State Is Providing, to Particular Religious Institutions, Funding that Can Be Used to Further Sectarian Purposes, Plaintiffs Are Likely to Succeed on Their Claim That the Grants Violate Article I, Paragraph 4 of the New Jersey Constitution.**

Article I, Paragraph 4, of the New Jersey Constitution states: “There shall be no establishment of one religious sect in preference to another....” *Id.* The New Jersey Supreme Court has explained that, in one sense, Article I, Paragraph 4, is “less pervasive” than the Establishment Clause of the United States Constitution. *Marsa v. Wernik*, 86 N.J. 232, 239 n.2 (1981). Specifically, when a government action or law affects religion

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<sup>2</sup> Further, unlike the all-comers policy at issue in *Resnick*, here the awarding of grants is based on an application process under which the sectarian institutions *competed* for funding with other sectarian or private institutions. *N.J.A.C.* 9A:18-1.6.



generally, but does not affect any particular religious sect to a greater or lesser degree, Article I, Paragraph 4, might not be implicated. *Id.* However, when government action pertains to a particular sect or sects, Article I, Paragraph 4 mandates that the government meet “exacting judicial scrutiny required under the New Jersey Constitution to ensure that no religious sect dominates and that no sect is disfavored.” *Id.*

In the present case, Plaintiffs are challenging direct grants of taxpayer funds to two particular religious institutions. As explained *supra*, the grant process was competitive, with applications measured against one another. The determination of which institutions receive grants and the amounts they receive is made by Defendant Hendricks based in large part on subjective criteria. Since the result is that particular sects’ institutions are slated to receive taxpayer funding, Article I, Paragraph 4 is clearly implicated.

The New Jersey courts have never assessed what the more “exacting judicial scrutiny” of Article I, Paragraph 4, might entail. *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*, 150 N.J. 575, 586 (1997) (“As the federal jurisprudence concerning the Religion Clauses now stands, there is no need to consider whether our State Constitution affords greater religious protection than that afforded by the First Amendment”). To date, the New Jersey courts have relied on federal Establishment Clause jurisprudence to resolve Article I, Paragraph 4 claims. *See Ran-Dav’s Cnty. Kosher, Inc. v. State*, 129 N.J. 141, 151 (1992) (“interpretation of the state constitutional standard is informed by an understanding of federal constitutional doctrine concerning the establishment of religion”); *see also, e.g., South Jersey Catholic School Teachers*, 150 N.J. at 586; *Marsa v. Wernik*, 86 N.J. at 239

n.2; *Two Guys From Harrison, Inc. v. Furman*, 32 N.J. 199, 213 (1960); *Student Members of Playcrafters v. Bd. of Educ. of Township of Teaneck*, 177 N.J. Super. 66, 74 (N.J. Super. Ct. App. Div. 1981).

The New Jersey Supreme Court has already held that the government is constitutionally prohibited from providing financial assistance (even a mere loan) to an institution that requires students to receive instruction in the tenets of a particular faith, to an institution that discriminates based on race or religion, or if the particular facility for which funds are received is used for sectarian instruction or services. *Clayton v. Kervick*, 59 N.J. at 599-601.<sup>3</sup> Because Beth Medrash Govoha and Princeton Theological Seminary provide instruction in the tenets of their respective faiths, and because the facilities to be constructed will be used for sectarian services, the government grants in this case violate Article I, Paragraph 4.

In *Clayton v. Kervick*, *supra*, the New Jersey Supreme Court assessed the constitutionality of a program that provided construction loans to higher education institutions. Therein, the Court discussed at length the United States Supreme Court decision in *Tilton v. Richardson*, 403 U.S. 672 (1971). In *Tilton*, the Court struck down, under an Establishment Clause analysis, a portion of a federal program that provided grants to higher education institutions, including religiously-affiliated institutions. Thus, *Tilton* and *Clayton v. Kervick* are directly relevant to the present case.

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<sup>3</sup> In a 1970 decision in the *Clayton v. Kervick* litigation, the New Jersey Supreme Court determined that it would apply federal Establishment Clause analysis to resolve both the plaintiffs' claims under the federal Establishment Clause and their claims under Article I, Paragraph 4. *See* 56 N.J. at 528. After the litigation was remanded by the U.S. Supreme Court for reconsideration in light of new federal precedent (403 U.S. 945 (1971)), the New Jersey Supreme Court relied on the newly-decided federal case-law in its 1971 decision. *See* 59 N.J. 583.

The federal grant program at issue in *Tilton* was created to finance construction projects, as is the case here. Unlike in the present case, the federal grant program precluded grants to divinity schools. *Tilton*, 403 U.S. at 675; *Clayton*, 59 N.J. at 590. Further, pursuant to the program, the government forbade the recipient from using the federally financed facilities for sectarian instruction or religious services for a period of 20 years. *Clayton*, 59 N.J. at 683. The Court held that the 20-year prohibition on religious usage was an insufficient protection against government sponsorship of religion. *Id.*

The Court ruled that, in order to be constitutional, the government must ensure that the facilities it finances are *never* used for sectarian purposes. *Id.* The Court explained, in a plurality opinion: “If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.... To this extent the Act therefore trespasses on the Religion Clauses.” *Id.* Additionally, in providing the pivotal fifth vote (over four dissenting justices who voted to strike down the program completely), Justice White explained that the Establishment Clause requires additional restrictions, namely that the schools be forbidden from “restrict[ing] entry on racial or religious grounds or requir[ing] all students gaining admission to receive instruction in the tenets of a particular faith.” *Id.* at 671.

Thus, the New Jersey Supreme Court concluded in *Clayton v. Kervick* that at least three restrictions must be adhered to in providing financial assistance to higher education institutions: “a facility may not ‘be used for sectarian instruction or as a place for religious worship...; no college may participate if it restricts ‘entry on racial or religious

grounds’[, and no college may participate if it] requires ‘all students gaining admission to receive instruction in the tenets of a particular faith[.]’” 59 N.J. at 601.

In *Clayton v. Kervick*, the New Jersey Supreme Court addressed the constitutionality of a *loan* program, rather than a grant program as in *Tilton* and at issue here. *Id.* at 594. The Court reiterated and adopted the tests set forth in *Tilton*. *Id.* at 599-600. The Court found that the *Tilton* tests had not been violated by the loan program before it, although the Court needed to clarify that no facility for which a loan was provided could ever be used for sectarian instruction or as a place of worship, even after the loan is fully repaid. *Id.* at 601.

Subsequently, the U.S. Supreme Court and the lower federal courts have repeatedly struck down the provision of public funding or property to religious institutions for the construction, maintenance, or improvement of buildings that are or can be used for religious instruction or activity. In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 774-80 (1973), the Supreme Court invalidated a New York statute that provided private schools, including parochial schools, with grants for the maintenance and repair of their facilities. 413 U.S. at 774-80. The grants were not accompanied by any restriction limiting them “to the upkeep of facilities used exclusively for secular purposes.” 413 U.S. at 774. Citing its holding in *Tilton*, the Court reasoned, “[i]f 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 20 years hence, a fortiori they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitations on their use.” *Id.* at 776-77. The Court further stated, “[i]f the State may not

erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.” *Id.* at 777.

More recently in *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1059-60 (9th Cir. 2007), the court concluded that a city violated the Establishment Clause by leasing a city-owned building for \$1 per year to a religious organization to operate a homeless shelter, because the religious organization offered a one-hour Christian chapel service to the homeless before dinner. *See also Foremaster v. City of St. George*, 882 F.2d 1485, 1489 (10th Cir. 1989) (striking down governmental electricity subsidy to Church of Latter Day Saints); *Wirtz v. City of S. Bend*, 813 F. Supp. 2d 1051, 1069 (N.D. Ind. 2011) (striking down city gift of property to parochial school for construction of football field), *appeal dismissed as moot*, 669 F.3d 860 (7th Cir. 2012); *Annunziato v. New Haven Bd. of Aldermen*, 555 F. Supp. 427, 433 (D. Conn. 1982) (striking down city transfer to religious institution of property for one dollar).

The grants to Beth Medrash Govoha and the Princeton Theological Seminary are plainly unconstitutional under the foregoing principles. The facilities will primarily be used for sectarian purposes. Given that Beth Medrash Govoha is a yeshiva dedicated to studying the Talmud, the Library and Resource Center the State seeks to finance (*see* Exhibit 2) will invariably be stocked mostly (if not wholly) with religious texts. Likewise, Beth Medrash Govoha will be able to provide sectarian training in the 14 classrooms of the Academic Center that State funds will be used to build. Similarly, for the three projects at Princeton Theological Seminary, federal money will go towards upgrading technology at a library for “historical and theological research,” allowing on-site and distance training for seminary students and staff, and creating multimedia

functioning to expand the seminary's online programs. Exhibit 2 to Verified Complaint. Moreover, contrary to the rule set forth in *Clayton*, 59 N.J. at 601, both schools require "students gaining admission to receive instruction in the tenets of a particular faith."

Unlike in *Tilton* and *Clayton v. Kervick*, the matter cannot be remedied with a requirement that facilities not be used for sectarian purposes. Unlike the merely "religiously-affiliated" institutions at issue in those cases,<sup>4</sup> the very missions of the two institutions at issue here are to further a sectarian purpose.

Thus, Plaintiffs are likely to succeed on the merits of their Article I, Paragraph 4 claim.

**C. Providing More Than \$10 Million of Taxpayer Funds to an Organization that Discriminates on the Basis of Gender Violates the New Jersey Law Against Discrimination, and Plaintiffs Are Therefore Likely to Succeed on the Merits of Their LAD Claim.**

"Gender discrimination is contrary to the legislative policy of the State of New Jersey." *Frank v. Ivy Club*, 120 N.J. 73, 110 (1990) (finding eating club at higher education institution violated LAD by not affording privileges and use of facilities to women). As the state Supreme Court recently explained:

"Freedom from discrimination is one of the fundamental principles of our society." *Lehmann, supra*, 132 N.J. at 600, 626 A.2d 445. With that bedrock principle in mind, "the overarching goal of the LAD is nothing less than the eradication 'of the cancer of discrimination.'" *Fuchilla v. Layman*, 109 N.J. 319, 334, 537 A.2d 652 (quoting *Jackson v. Concord Co.*, 54 N.J. 113, 124, 253 A.2d 793 (1969)), cert. denied, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988).

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<sup>4</sup> The Court in *Tilton* made clear that none of the four institutions at issue therein was an institution that "imposes religious restrictions on admissions, requires attendance at religious activities, compels obedience to the doctrines and dogmas of the faith, requires instruction in theology and doctrine, [or] does everything it can to propagate a particular religion. Perhaps some church-related schools fit the pattern that appellants describe. Indeed, some colleges have been declared ineligible for aid by the authorities that administer the Act." 403 U.S. at 682.

*L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. 381, 399 (2007).

The LAD makes it unlawful for any place of public accommodation to discriminate in hiring or to refuse to any person “any of the accommodations, advantages, facilities or privileges thereof” based on that person’s sex. *See N.J.S.A. 10:5-12(f)*.

Government entities are “public accommodations” and thus bound by the LAD. *See, e.g.*,

*L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.*, 189 N.J. at 402 (holding that school district is bound by LAD); *Dale v. Boy Scouts of America*, 160 N.J. 562, 593 n.7 (1999) (“New Jersey governmental entities are, of course, bound by the LAD”),

*overturned on other grounds*, 530 U.S. 640 (2000); *Thomas v. County of Camden*, 386

N.J. Super. 582, 591-92 (App. Div. 2006) (“Camden defendants are public entities and, by their very nature, constitute a place of public accommodation”); *Ptaszynski v.*

*Uwaneme*, 371 N.J. Super. 333, 346-47 (App. Div. 2004) (township and municipal police

stations are places of public accommodation); *Hinfey v. Matawan Reg'l Bd. of Educ.*, 77

N.J. 514, 523 (1978) (“Public schools and public education assuredly are covered by the anti-discrimination law. Public schools under the supervision of the Commissioner of Education are specifically ‘(a) place of public accommodation’ under the Law Against Discrimination.”).

Educational institutions “operated or maintained by a bona fide religious or sectarian institution” are exempt from the LAD and are therefore free to discriminate.

*N.J.S.A. 10:5-5(l)*. Thus, Beth Medrash Govoha is free to exclude women as students or as professors.

However, places of public accommodation are not only precluded from discriminating directly, but also precluded from doing so indirectly by providing

sponsorship of, or special benefits to, organizations that discriminate. *Dale*, 106 N.J. at 593 n.7. Because the State and its agencies are “places of public accommodation,” the State engages in discrimination if it provides sponsorship of, or a special benefit to, an organization that discriminates in hiring, membership or the provision of services. *Id.* As succinctly stated by the New Jersey Supreme Court: “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.*

This prohibition is intended to ensure that the spirit of the LAD is fulfilled. Without this restriction, a place of public accommodation could easily circumvent the anti-discrimination laws in the following manner: Instead of refusing to serve or charging higher prices to certain disfavored groups, it would provide reduced pricing to members of organizations from which the disfavored groups are banned (or, which only favored groups are able to join). The result – disparate treatment based on disfavored status – would be the same.

Here, by way of a grant of more than \$10 million, Defendants are unlawfully providing sponsorship of, and a “special benefit” to, an organization (Beth Medrash Govoha) that discriminates based on gender.

The exclusionary policy of Beth Medrash Govoha is documented by both the federal and state governments. The federal government specifically identifies Beth Medrash Govoha as an institution that is “Single sex: Male.” *See* <http://nces.ed.gov/collegenavigator/?s=NJ&l=3%2b5&id=183804#accred> (Exhibit 8 to Verified Complaint). State records confirm that it maintains an all-male faculty (*see* <http://www.state.nj.us/highereducation/statistics/FacultyRaceSex2011.pdf>, Exhibit 6 to



Verified Complaint) and an all-male student body of 6,538. *See* <http://www.state.nj.us/highereducation/statistics/Enr2012Sex.pdf>, (Exhibit 7 to Verified Complaint). Therefore, the funding to that institution can only benefit males; women cannot share in the benefit of the funding because of the institution's exclusionary policies.<sup>5</sup>

Further, the direct grant of over \$10 million is both sponsorship and a special benefit. First, the State's award of a grant, as opposed to the reimbursed loans at issue in *Resnick*, need not be repaid but is rather a gift of funds. The \$10 million gift subsidizes the building of two facilities for use of the exclusionary organization. Additionally, the ability to obtain the grant is not open to the general public.

Moreover, the application process is a competitive one: Institutions must compete for the funding, and applications are compared and measured against one another. *N.J.A.C.* 9A:18-1.6. Hendricks and the review committee she created assess relative worth of applicants based in significant part on subjective categories such as "Whether it serves the best interests of higher education in the State as a whole," "Advancement of student education in the State of New Jersey," "The cost-effectiveness of the project," and "Consistency of the project with the State's goals and priorities for development and redevelopment, including...promotion of access to opportunity for all New Jersey residents." *See N.J.A.C.* 9A:18-1.6(b). Defendant Hendricks reviews recommendations of the review committee but has sole authority to approve or disapprove a project grant and establish the amount of the grant. *Id.*

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<sup>5</sup> Indeed, in order to be eligible for a Bond Act grant, an institution must establish that the project to be financed "provides a direct benefit to students." *N.J.A.C.* 9A:18-1.4. Because of Beth Medrash Govoha's males-only status, women – who are denied the right to be students – would be precluded from enjoying those benefits.

Thus, the awarding of a taxpayer-funded grant (here, of more than \$10 million) is both sponsorship of, and a “special benefit” being provided to, Beth Medrash Govoha, an organization that discriminates on the basis of gender. Because Hendricks is acting on behalf of a state agency which is a public accommodation under the LAD, her grant of more than \$10 million to an organization that discriminates violates the LAD.

Accordingly, Plaintiffs are likely to succeed on their LAD claim.

**II. Plaintiffs Easily Meet the Remaining Standards for Granting Temporary Restraints.**

**A. Restraints are necessary to prevent irreparable harm.**

As explained above, the State is on the verge of disbursing taxpayer funding in violation of the New Jersey Constitution and the LAD. This injury is irreparable, as construction projects can immediately begin and taxpayer funds that have been unlawfully granted will be spent in furtherance thereof.

**B. The relative hardships favor entering injunctive relief.**

Once the funds at issue are disbursed, the ability of Plaintiffs to vindicate their rights if successful becomes more difficult, perhaps infeasible. At the same time, there will be little to no hardship to Defendants to keep the disputed funds in the general treasury rather than disburse them in what is likely an unlawful manner. Indeed, Plaintiffs merely seek at this point to restrain Defendants from disbursing funds that are currently in the general treasury of the State. Meanwhile, the disbursement of the contested funds to the two religious institutions discussed in this case would alter the *status quo*. Defendants seek to alter the *status quo*, and seek to do so unlawfully.

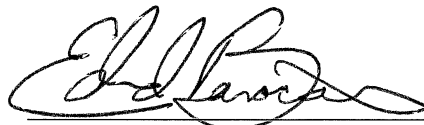
**C. The public interest requires entering injunctive relief.**

It is frequently said that in determining whether to order immediate injunctive relief, the public interest must be considered. Indeed, “courts, in the exercise of their equitable powers, ‘may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.’” *Waste Mgmt. of New Jersey, Inc. v. Union County Utilities Auth.*, 399 N.J. Super. 508, 520-21 (App. Div. 2008) (quoting *Yakus v. United States*, 321 U.S. 414, 441 (1944)).

Here, the public interest requires injunctive relief. Denial of an injunction in this case would impose great injury upon the public’s interest in preserving the New Jersey Constitution’s provisions and principles, as well as the provisions of the LAD. The public interest therefore requires the entry of immediate injunctive relief.

**CONCLUSION**

For the reasons set forth above, the Court should enter Plaintiffs’ Order to Show Cause and immediately restrain Defendants from disbursing the disputed funds to Beth Medrash Govoha and the Princeton Theological Seminary.



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