

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

BRIEF OF PLAINTIFFS-APPELLANTS

Edward L. Barocas (026361992)
Jeanne LoCicero (024052000)
American Civil Liberties Union
of New Jersey Foundation
Post Office Box 32159
Newark, New Jersey 07102
(973) 642-2086 ext. 1717

Frank Corrado (022221983)
Barry, Corrado & Grassi, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333

Daniel Mach*
American Civil Liberties Union
Program on Freedom of Religion
and Belief
915 15th Street NW
Washington, DC 20005
(202) 675-2330

Ayesha Khan*
Alex Luchenitser*
Americans United for Separation
of Church and State
1901 L Street NW, Suite 400
Washington, DC 20036
(202) 466-3234

Galen Sherwin*
Lenora Lapidus (027951990)
American Civil Liberties Union -
Women's Rights Project
125 Broad St.
New York, NY 10004
(212) 519-7848

* admitted pro hac vice

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	2
STATEMENT OF FACTS	5
I. The Building Our Future Bond Act	5
II. The Higher Education Technology Infrastructure Act	6
III. The Award of \$10,635,747 to Beth Medrash Govoha	7
A. The Yeshiva is a rabbinical school dedicated to the provision of religious education and the training of rabbis and religious teachers.....	7
B. Virtually all of the Yeshiva's curriculum consists of religious instruction and study.....	12
C. The Yeshiva discriminates based on gender and has an exclusively Jewish faculty.....	15
D. The state grants would further the Yeshiva's religious mission.....	16
i. Construction of Academic Space.....	17
ii. The Library and Research Center.....	17
IV. The Grants to Princeton Theological Seminary.....	19
A. The Seminary is a theological school dedicated to the training of Christian ministers.....	19
B. The Seminary's curriculum consists predominantly of religious instruction and study.....	22
C. The Seminary discriminates based on religion.....	24
D. The state grants would further the Seminary's religious mission.....	24

i.	Revamped Cooper Conference Room.	25
ii.	New training room.	27
iii.	Enhanced IT Infrastructure for Library.	27
	SUMMARY OF ARGUMENT	28
	ARGUMENT	30
	I. THE GRANTS OF TAXPAYER FUNDS TO THE YESHIVA AND SEMINARY VIOLATE BOTH RELIGION CLAUSES OF THE STATE CONSTITUTION.....	30
	A. The Grants of Tax Dollars to Institutions That Train Ministers and Provide Religious Instruction Violate Art. I, Par. 3 of the State Constitution.	31
	B. The Grants Violate Art. I, Par. 4 of the State Constitution Because They Support Religious Instruction and Discrimination.	38
	II. THE STATE HAS VIOLATED THE NEW JERSEY LAW AGAINST DISCRIMINATION BY PROVIDING MORE THAN \$10 MILLION IN SPECIAL BENEFITS TO ORGANIZATIONS THAT DISCRIMINATE.....	47
	III. THE GRANTS WOULD VIOLATE ART. VIII, SEC. III, PAR. 3 OF THE NEW JERSEY CONSTITUTION BECAUSE THEY WOULD SERVE PRIVATE PURPOSES, NOT PUBLIC ONES.....	56
	CONCLUSION	60

TABLE OF AUTHORITIES

CASES

Ams. United for Separation of Church & State v. Prison Fellowship Ministries, 509 F.3d 406 (8th Cir. 2007) 44

Annunziato v. New Haven Bd. of Aldermen, 555 F. Supp. 427 (D. Conn. 1982) 49

Bowen v. Kendrick, 487 U.S. 589 (1988) 50

Bryant v. Atlantic City, 309 N.J. Super. 596 (App. Div. 1998) 64

Clayton v. Kervick, 52 N.J. 138 (1968) 62, 65

Clayton v. Kervick, 56 N.J. 523 (1970) 42

Clayton v. Kervick, 59 N.J. 583 (1971) 29, 43, 44, 47

Columbia Union College v. Oliver, 254 F.3d 496 (4th Cir. 2001) 50

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 47, 48

Community House, Inc. v. City of Boise, 490 F.3d 1041 (9th Cir. 2007) 48, 50

Countiss v. Trenton State College, 77 N.J. 590 (1978) 60

Dale v. Boy Scouts of America, 160 N.J. 562, rev'd on other grounds 530 U.S. 640 (2000) passim

Davidson Bros. v. D. Katz & Sons, 121 N.J. 196 (1990) passim

DeStefano v. Emergency Housing Group, Inc., 247 F.3d 397 (2d Cir. 2001) 50

Everson v. Bd. of Educ., 330 U.S. 1 (1947) 40, 50

Foremaster v. City of St. George, 882 F.2d 1485 (10th Cir. 1989) 49

Frank v. Ivy Club, 120 N.J. 73 (1990) 56

Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981) 57

Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89 (1990) .. 56

<i>Hunt v. McNair</i> , 413 U.S. 734 (1973)	50
<i>Jansen v. Food Circus Supermarkets, Inc.</i> , 110 N.J. 363 (1988) .	60
<i>Johnson v. Economic Development Corp.</i> , 241 F.3d 501 (6th Cir. 2001).....	51
<i>L.W. ex rel. L.G. v. Toms River Regional Schools Bd. of Educ.</i> , 189 N.J. 381 (2007)	51
<i>Lehmann v. Toys 'R' Us</i> , 132 N.J. 587 (1993)	56, 59, 60
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	46, 47
<i>Marks v. United States</i> , 430 U.S. 188 (1977).	47
<i>Marsa v. Wernik</i> , 86 N.J. 232 (1981).	39, 42
<i>Mitchell v. Helms</i> , 530 U.S. 793 (2000)	50
<i>N.J. State Bar Ass'n v. State</i> , 387 N.J. Super. 24 (App. Div. 2006).....	63
<i>Patzau v. New Jersey Department of Transportation</i> , 271 N.J. Super. 294 (App. Div. 1994).....	64
<i>Ran-Dav's Cnty. Kosher, Inc. v. State</i> , 129 N.J. 141 (1992)	40
<i>Resnick v. East Brunswick Township Board of Education</i> , 77 N.J. 88 (1978).....	passim
<i>Right to Choose v. Byrne</i> , 91 N.J. 287 (1982).	39
<i>Roe v. Kervick</i> , 42 N.J. 191 (1964)	63, 67
<i>Roemer v. Bd. of Pub. Works</i> , 426 U.S. 736 (1976)	50
<i>Romano v. Oklahoma</i> , 512 U.S. 1 (1994)	47
<i>S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of Infant Jesus Church Elementary Sch.</i> , 150 N.J. 575 (1997).....	40
<i>State v. Celmer</i> , 80 N.J. 405 (1979)	41
<i>Student Members of Playcrafters v. Bd. of Educ.</i> , 177 N.J. Super. 66 (App. Div. 1981).....	41
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971)	45, 46
<i>Trustees of Rutgers College v. Morgan</i> , 70 N.J.L. 460 (1904) ...	62

Twp. of Mount Laurel v. Dep't of Pub. Advocate,
83 N.J. 522 (1980) 63, 64

Tudor v. Bd. of Educ., 14 N.J. 31 (1953) 41

Two Guys From Harrison v. Furman, 32 N.J. 199 (1960) 40, 66

Wirtz v. City of S. Bend, 813 F. Supp. 2d 1051 (N.D. Ind. 2011)
..... 49

STATUTES

N.J.A.C. 9A:13-1.1 to -1.8 6

N.J.A.C. 9A:18-1.6. 5, 6, 54, 57

N.J.S.A. 10:5-12(f)passim

PRELIMINARY STATEMENT

This action challenges grants of taxpayer funds for the support of schools that provide religious education and ministerial training, on the ground that the grants violate three state constitutional provisions and the New Jersey Law Against Discrimination.

The New Jersey Constitution prohibits the use or grant of any taxpayer funds for the maintenance of any religion or ministry. Art. I, Paragraph 3. It also bars the use of taxpayer funds to subsidize or build facilities at which religious services or instruction will take place. Art. I, Paragraphs 3 and 4. And it prohibits the provision of public funding to private organizations if such funding does not serve a public purpose. Art. VIII, Paragraph 3, Section 3. Further, New Jersey's Law Against Discrimination forbids the government (as a place of public accommodation) from providing sponsorship of, or any special benefit to, an organization that discriminates on the basis of sex or religion.

Defendant Rochelle Hendricks, the New Jersey Secretary of Higher Education, violated all four provisions by awarding a direct grant of taxpayer funds to two religious schools - \$10,635,747 to Beth Medrash Govoha yeshiva ("the Yeshiva") and \$645,323 to Princeton Theological Seminary ("the Seminary"). Both the Yeshiva and the Seminary provide sectarian education

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 with an all-male faculty. Moreover, all of the grants at issue would directly advance the schools' religious missions. Accordingly, Plaintiffs seek a declaration that the proposed grants are unconstitutional and an immediate, permanent injunction against their payment by the State.

PROCEDURAL HISTORY

On April 29, 2013, the Office of the Governor announced that 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. Ja1361-1363.¹ The list included grants awarded under five separate grant programs: (1) a \$750 million General Obligation construction bond authorization (known as the "Building Our Future Bond Act," hereinafter the "Bond Act"); (2) the Higher Education Facilities Trust Fund; (3) the Higher Education Capital Improvement Fund; (4) the Higher Education Technology Infrastructure Fund ("HETI"); and (5) the Higher Education Equipment Leasing Fund. *Id.*

On that list of grants were awards to fifteen private institutions, including two sectarian institutions whose primary

¹ "Ja" refers to the Joint Appendix.

functions are to provide religious education and to train students for ministry pursuant to tenets of the institutions' respective faiths. *Id.* Specifically, the list included (1) an award of \$10,635,747 in Bond Act funds for the Yeshiva and (2) an award of \$645,323 in HETI funds for the Seminary. *Id.*

On June 24, 2013, the plaintiffs – three New Jersey taxpayers, and two New Jersey civil rights organizations – filed a Verified Complaint in the New Jersey Superior Court, Chancery Division, Mercer County, challenging Hendricks's decision to award taxpayer-funded grants to the Yeshiva and the Seminary. Ja1308. The suit seeks to enjoin the disbursements of the disputed grant funding to those two institutions, and to declare those grants in violation of the New Jersey Constitution and the New Jersey Law Against Discrimination. *Id.* Plaintiffs also sought immediate temporary restraints. *Id.*

On July 15, 2013, the court entered a Consent Order. Ja1351. Pursuant thereto, Plaintiffs agreed to withdraw their request for temporary restraints and Defendants (Hendricks and the State Treasurer, collectively "the State") agreed to provide fourteen days advance written notice to Plaintiffs' counsel prior to disbursing any funds under the challenged grants to the two institutions at issue. *Id.*

Plaintiffs filed an Amended Verified Complaint in December of 2013. Ja1353. On March 4, 2014, the State filed a Motion to

Dismiss Pursuant to R. 4:6-2(a) or, in the Alternative, to Transfer to the Appellate Division. Ja1382. Plaintiffs opposed that motion, but on May 8, 2014, the Chancery Division ruled that this matter was an appeal from an agency action and transferred the matter to this Court. Ja1402.

On December 23, 2014, more than six months after the transfer, the State completed producing the items it listed in its Statement of Items Comprising the Record. See Certification of Edward Barocas in support of Motion to Remand, Feb. 4, 2015. Many items received were redacted, however; the State completed production of unredacted versions on January 14, 2015. *Id.*

On February 4, 2015, Plaintiffs moved to remand the matter to a lower court for limited fact finding. Plaintiffs explained that the development of certain specific factual issues would substantially assist adjudication of claims before the Court and was necessary for a just outcome, and that no opportunity existed for such factual development before the agency. See Brief in Support of Motion for Remand to Trial Court for Factual Development.

Plaintiffs also filed a motion to amend the Case Information Statement, to place the State on notice that, based on the documents the State produced, Plaintiffs' Law Against Discrimination claim applies not only to the grants of funds to the Yeshiva, but also to the grants to the Seminary.

On March 17, 2015, the Court denied the motion to remand but granted the motion to amend the Case Information Statement.

STATEMENT OF FACTS

I. The Building Our Future Bond Act.

New Jersey voters approved the Bond Act 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.

Hendricks was 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 considered numerous subjective criteria and thus had significant discretion in their decision-making. *N.J.A.C. 9A:18-1.6.* The criteria included "[w]hether [the project] serves the best interests of higher education in the State as a whole," "[a]dvancement of student education in the State of New Jersey," "[t]he cost-effectiveness of the project," and "[c]onsistency 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 considered recommendations of the review committee but had sole authority to approve or reject project grants and establish the amounts of the grants. *Id.*

The list of projects and grant amounts that included the grant to the Yeshiva was presented to the Legislature on April 29, 2013. Ja1361-1363. Because the Legislature failed to take action to preclude the grants, the list was deemed approved and authorized on June 28, 2013. See *N.J.A.C.* 9A:18-1.6(b).

II. The Higher Education Technology Infrastructure Act.

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

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

The list of proposed HETIA projects was submitted to the Legislature's Joint Budget Oversight Committee on June 28, 2013. Ja1397, Ja1402-03. Because that committee did not take action to block any of the grants on that list, they were all deemed

approved and authorized on July 8, 2013. See Ja1397, Ja1402-03; N.J.A.C. 9A:13-1.6.

III. The Award of \$10,635,747 to Beth Medrash Govoha.

The \$10,635,747 awarded to Beth Medrash Govoha ("the Yeshiva" or "BMG") constitutes over one fifth of the total \$52,500,000 in funds available for private institutions under the Bond Act. Ja1362. The amount awarded to the Yeshiva is more than any other private institution is slated to receive from the Bond Act. *Id.* The funds are for two projects: \$5,517,747 for construction of academic space, and \$5,118,000 for a library and research center. Ja1288.

A. The Yeshiva is a rabbinical school dedicated to the provision of religious education and the training of rabbis and religious teachers.

The Yeshiva is a Jewish rabbinical school located in Lakewood, New Jersey. Ja355, Ja369, Ja390, Ja1365. It was first incorporated in 1944. Ja145. Its original Certificate of Incorporation set forth its purposes: "(a) [t]o provide a suitable place of divine worship for its members and others of the Jewish Orthodox faith[;] (b) [t]o advance in every possible manner the religious, social and cultural welfare of its members[;] (c) [t]o conduct a Yeshiva for the higher education of those of the Jewish faith[; and] (d) [t]o purchase, own and acquire cemetery plots for the burial of the members of the corporation." Ja144. In 2000, the Yeshiva amended its

Certificate of Incorporation, omitting some of the purposes listed in its original Certificate, while listing among its purposes "advanc[ing] the cause of education, generally" and "carry[ing] on a program for the advanced study of Talmud, in particular[.]" Ja141.

The Talmud is commonly understood as "a compilation of ancient teachings regarded as sacred and normative by Jews from the time it was compiled until modern times and still so regarded by traditional religious Jews." See, e.g., Encyclopaedia Britannica, *Talmud and Midrash* (last visited Mar. 26, 2015), <http://www.britannica.com/EBchecked/topic/581644/Talmud-and-Midrash>. A yeshiva is commonly understood to be a "Jewish academ[y] of Talmudic learning, whose biblical and legal exegesis and application of Scripture have defined and regulated Jewish religious life for centuries." See, e.g., Encyclopaedia Britannica, *Yeshiva* (last visited Mar. 26, 2015), <http://www.britannica.com/EBchecked/topic/653077/yeshiva>.

The State of New Jersey, according to the New Jersey Secretary of Higher Education's website, describes the Yeshiva as a "Rabbinical School." See Ja1365. The State further identifies the Yeshiva's categorization under the Carnegie Classification of Institutions of Higher Education system as "Special Focus Institutions - Theological seminaries, Bible colleges, and other faith-related institutions." *Id.*

The U.S. Department of Education's Institute of Education Sciences, largely tracking and often directly quoting the Yeshiva's mission statement, describes the Yeshiva as follows: The Yeshiva is "an institute for advanced Talmudic scholarship." Ja1371; *accord* Ja369. "Its primary objective is to produce Talmudic scholars." Ja1371; *accord* Ja369. 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." Ja1371; *accord* Ja369. The graduate studies program "aims to promote advanced Jewish scholarship and research in classical Talmudic and cognate studies." Ja1371; *accord* Ja369.

The Department of Education further explains that the Yeshiva's graduate studies program "is concerned with professional orientation by providing programs to prepare [Yeshiva] scholars as teachers and administrators in secondary Torah schools and institutions of higher Talmudic studies, as practicing Rabbis and as experts in Rabbinical jurisprudence." See Ja1371; *accord* Ja369. In fact, the Yeshiva "estimates that 95 percent of all teachers in the close to 100 Orthodox Jewish K-12 schools in Lakewood (in which some twenty thousand students are enrolled) are either BMG alumni, their spouses or students' spouses." Ja377.

The Yeshiva's approved grant application concerning construction of academic space describes the institution in terms similar to those of the descriptions above: "BMG is renowned for its rigorous Talmudic studies program." Ja180. The Yeshiva strives to "offer the broadest Talmudic curriculum available in any such institute in the world, providing its students with the opportunity to study almost any area in the widest spectrum of Talmudic studies." Ja189. The Yeshiva "is dedicated to helping its students achieve the highest level of scholarship along with intensive commitment to academic excellence in every area of Talmudic studies." *Id.* The Yeshiva thus is "the college of choice for New Jersey residents seeking a degree in Talmudic studies." Ja181. "Students come to BMG because they know that the breadth and scope of the topics and levels in Talmudic studies offered at BMG cannot be found anywhere else in the United States." *Id.*

Indeed, according to a report submitted by the Yeshiva to the State, the Yeshiva is "[t]he largest and most highly regarded Talmudic college in the world" and "the leading 'yeshiva' in the country." Ja372, Ja376. Likewise, the Yeshiva boasts in its Long-Range Facilities Plan that it "has grown into the largest and most prominent Institution of Higher Education dedicated to advanced study of the Talmud in the United States." Ja233.

The Yeshiva is accredited by the Association of Advanced Rabbinical and Talmudic Schools ("AARTS") and is a member of the AARTS Association of Schools. Ja392. AARTS' standards require that an accredited school's curriculum "be closely related to the Torah mission of the institution," that tuition and fees be "in keeping with what is usual in the community of advanced rabbinical and Talmudic schools," and that students seeking a doctorate must be required to "defend a thesis which offers a distinct and original contribution to the study and understanding of Talmudic law." Ja403, Ja406, Ja407. The Yeshiva's mission statement adds that "[a]n integral part of the [institution's] scholastic and professional aims is ethical and moral growth and maturity of students, based on Jewish ethics and philosophy." Ja369; *accord* Ja374.

In addition, the Internal Revenue Service has determined that the Yeshiva is exempt from the requirement that it file a Form 990 Return of Organization Exempt from Income Tax. Ja275. Higher-education institutions, including religious ones, are *not* exempt from this requirement unless they are 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>.

B. Virtually all of the Yeshiva's curriculum consists of religious instruction and study.

The website of the State Secretary of Higher Education describes the courses of study at the Yeshiva as "Talmudic Studies" and "Rabbinical and Talmudic Studies." Ja1365. This state website also sets forth the categorization of the Yeshiva's courses of study pursuant to the U.S. Department of Education's Classification of Instructional Programs - 2010. All courses of study at the Yeshiva are classified with codes corresponding to "Theology/Theological Studies" or "Talmudic Studies." *Id.*² "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" (while also making students "qualified to enter conventional graduate and professional schools") and "[i]ncludes instruction in Jewish Law and Jurisprudence, Philosophy, and Ethics, in addition to a major emphasis on Talmud." Ja1367 (emphasis added). "Rabbinical Studies" is defined as "[a]

² The State describes the courses of study as either "Talmudic Studies" or "Rabbinical Studies," but lists codes for "Talmudic Studies" and "Theology/Theological Studies." *Id.* Plaintiffs therefore provide the State's description of all three programs of study ("Talmudic Studies," "Rabbinical Studies," and "Theology/Theological Studies").

program that prepares individuals for ordination as Rabbis" and "[i]ncludes instruction in Talmud, Halacha, Liturgy and Rituals, Rabbinical Thought, Jewish Ethics, Jewish Education, Pastoral Counseling and Homiletics." *Id.* (emphasis added).

"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*" and "[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).

Although it attempted to downplay its religious nature in questionnaires submitted to the State, the Yeshiva admitted that its curriculum includes "religious instruction" and involves "religious study." Ja356. In fact, course catalogs the Yeshiva submitted to the State confirm that virtually all of its curriculum consists of religious instruction and study. Ja409-462.

The Yeshiva's undergraduate curriculum has six required courses: "Intermediate Talmud Intensive"; "Senior Talmud Intensive"; "Advanced Talmud Intensive"; "Intermediate Talmud Survey"; "Senior Talmud Survey"; and "Advanced Talmud Survey." Ja364-Ja366. These courses include "[c]lose reading of the

Talmud" and "classical Talmud Commentaries," "[i]ndependent Talmud study," "study of large portions of additional Talmud tractates [chapters or sections]," and "[f]ormulation of a Talmudic world-view." *Id.* The vast majority of elective courses for undergraduates similarly focus on close study of portions of the Talmud and other rabbinical writings. See Ja409-420. Such study includes "[i]ntense review of selected Babylonian Talmud passages," "[r]eview of major commentaries on selected passages," "[c]losely guided reading of the Babylonian Talmud in its original Hebrew-Aramaic," and "[c]losely guided presentation and study of large portions of individual Talmud tractates." Ja414-415.

Similarly, the vast majority of the Yeshiva's graduate curriculum consists of courses that involve intensive study of specific "tractates" of the Talmud and specific Talmudic commentaries. Ja421-462. Graduate students study topics such as "laws pertaining to vows," "pagan practices," "vessels of temple," "the Mincha offering," "animal tithes," "templar regulations," "services at the ancient Temple," "chief impurity," "impurity of various types of tools," "ritual purity," "the importance of peace, and reward for the righteous," "laws of prayer," "laws of blessings," "levitical tithes," "sabbath laws," "candlelighting," "determining exact time of twilight," "fire safety and rescue on Sabbath," "laws of

eruv," "limits of travel and modifying areas that may be traveled," "passover laws," "laws of rosh hashana," "laws of sukkah," "laws of festivals," "festival procedures," "marriage dowries," "immoral behavior," "divorce proceedings," "the extent of parental control over the marital choices of a daughter," "burial obligation," "entering the temple," and "dietary laws." *Id.* Graduate students also study other rabbinical writings covering topics such as "ethical teachings of the great sages of the Babylonian era," "purity," "[m]easuring and assessing pious behavior," "[m]ethods of achieving piety," "[f]ear of sin," "[s]anctity," and "the virtue of humility." Ja445-447.

C. The Yeshiva discriminates based on gender and has an exclusively Jewish faculty.

In a questionnaire submitted to the State, the Yeshiva conceded that "[a]dmission to the Institution is limited to qualified males." Ja356. Office of the Secretary of Higher Education records confirm that all of the Yeshiva's students are male. Ja1377. Likewise, the U.S. Department of Education's Institute of Education Sciences confirms that the Yeshiva is an institution that is "Single sex: Men." Ja1371.

The Yeshiva claims not to discriminate on other grounds in admission or on any grounds in hiring. Ja271. However, according to 2011 Office of the Secretary of Higher Education records, all 79 of the Yeshiva's faculty members are male.

Ja1375. Moreover, though it asserts that "there is no formal requirement," the Yeshiva's "faculty are all of the Jewish faith." Ja393.

Further, while the Office of the Secretary of Higher Education does not disclose on its website the religious composition of higher-education institutions, it does disclose racial and ethnic composition. The Secretary of Higher Education's records confirm that, in 2012, the Yeshiva's entire undergraduate student body was white (96%) or non-resident alien (4%). Ja1379. None of the 2,696 undergraduate students were Black, Hispanic, Asian, Native American, Pacific Islander, or of multiple races. *Id.*

D. The state grants would further the Yeshiva's religious mission.

As noted earlier, the grant funds awarded to the Yeshiva are for two projects: \$5,517,747 for construction of academic space in an already existing building, and \$5,118,000 for a library and research center. Ja1288. In questionnaires submitted to the State, the Yeshiva denied that these projects would advance its religious mission. Ja313, Ja338. But other documents in the record, including the Yeshiva's approved grant applications for Bond Act funds, confirm that the grants will plainly serve the institution's mission of providing theological education and training.

i. Construction of Academic Space.

The Yeshiva's application for \$5,517,747 for construction of academic space reveals the following: The new facilities will include new classrooms, new study halls, new faculty offices, a new library, and a computer workroom. Ja161. "The proposed project will serve students at all levels of BMG's programs, including Undergraduates, Graduate Students, and Advanced Talmudic Fellows." Ja165. "[T]he project will significantly increase the capacity of BMG's academic programs," raising "the total student capacity of BMG's academic space by 1,130 students." Ja157, Ja166. "100% of the gross square footage" of the academic space supported by the project "will be devoted to direct academic use or to facilities supporting the Academic Use." Ja179. And "[t]he proposed project also promotes *Innovation*, in setting new trends for tradition-steeped Talmudic studies programs." Ja188. Moreover, according to a supplemental questionnaire the Yeshiva submitted to the State, "[a]ll [BMG] classes may be offered" in the facilities to be constructed with the grant funds, except for "anything associated with ordination," which is "pursued only by a few students." Ja396, Ja398.

ii. The Library and Research Center.

The application for \$5,118,000 for Construction of Library and Research Center reveals the following: The project is for

construction of a "three-story library and academic building."
Ja5. The "library will be open to and used by students in every Beth Medrash Govoha program." Ja15. Because "[f]or the advanced scholar of the Talmud and its interpreters, scholarship is intensely text driven," the Library will be a "core destination for every BMG student on a regular basis." Ja16. The new library will make available "thousands of resources and texts in digital databases to directly support the academic research of Talmudic studies students at all levels of BMG's programs." Ja36. It will "provide the proper research materials, texts, and access to digital archives to support and advance the education of Undergraduates and Graduate students and Advanced Talmudic Fellows." Ja42.

In addition, the third floor of the new building will contain "faculty and student meeting rooms, faculty offices, BMG's Department of Hebrew Studies and Student Writing Resource Center, the Department of Adult and Continuing Education, student internship advisors, BMG's Student Pathways to Success Advisement Program, workrooms for Graduate Students and Academic Fellows, and larger rooms devoted to scholarly research and writing projects connected with the library." Ja10-11. The project as a whole will thus "directly advance and support the institution's educational mission." Ja43. What is more, it will "enabl[e] BMG to sustain and grow its academic program" by

"providing the infrastructure necessary for BMG to accommodate additional growth in enrollment" and "significantly increas[ing] the capacity of BMG's academic programs." Ja5, Ja33. The funding also "is expected to decrease overall operating cost to the Institution." Ja14.

IV. The Grants to Princeton Theological Seminary.

Princeton Theological Seminary ("the Seminary" or "PTS") was awarded grants totaling \$645,323 for three projects: \$289,889 for "Revamped Cooper Conference Room"; \$113,712 for "Learning Spaces: Training Room"; and \$241,722 for "IT infrastructure upgrade for library for expanded historical and theological research." Ja1301. All awards were from Higher Education Technology Infrastructure Act funds. *Id.*

A. The Seminary is a theological school dedicated to the training of Christian ministers.

Princeton Theological Seminary is a Presbyterian Christian seminary located in Princeton, New Jersey. Ja453, Ja455. The Seminary's articles of incorporation call on it "to provide graduate, graduate professional, and continuing education programs in . . . fields and disciplines of Christian ministry and theological scholarship." Ja719. Its bylaws provide that it "is recognized by the Presbyterian Church as one of its theological institutions." Ja733. The bylaws further require the Seminary "to conduct a program of theological education in a

manner not inconsistent with the standards of [the Presbyterian] Church." *Id.*

The Seminary's Mission Statement is:

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.*

Ja1381 (emphasis added).

The State of New Jersey, according to the New Jersey Secretary of Higher Education's website, describes the Seminary as a "Theological Institution." Ja1383. The State further identifies the Seminary's categorization under the Carnegie Classification system as "Special Focus Institutions - Theological seminaries, Bible colleges, and other faith-related institutions." *Id.* The State also describes the courses of study at the Seminary as "Christian Education," "Theological Professions," and "Theology - First Professional." *Id.* Similarly, in its grant applications, the Seminary acknowledged that it is a "denominational school" that provides "graduate theological education." *See, e.g.,* Ja617, Ja652.

The Seminary further acknowledges in its grant applications that its "mission is the preparation of men and women for theological leadership." Ja655; *accord* Ja457, Ja617. According to the institution's board minutes, "our primary task as a seminary . . . is to form and equip students for leadership in the churches through the M.Div. degree." Ja752. Similarly, the Seminary's financial statements explain that the institution "offers professional preparation for persons who contemplate service in religious occupations, including various forms of chaplaincy, in educational settings, and in certain types of social agencies." Ja863. Thus "365 churches throughout New

Jersey are currently led by a pastor or pastors who are Princeton Seminary graduates." Ja649.

The Seminary is "accredited by the Association of Theological Schools." Ja617. "An important component of the academic program is theological research, in which all members of the faculty are expected and encouraged to participate." Ja863.

What is more, the Seminary's Course Catalog explains that "[w]orship enriches the spiritual and communal life of Princeton Theological Seminary and all who gather here to study, teach, and serve." Ja991. "During the fall and spring semester . . . the community gathers Monday through Friday to worship." *Id.* "The sacrament of Holy Communion is celebrated on Fridays." *Id.* "Special services are held throughout the year." *Id.* "The president leads in worship weekly, and other daily chapel services are led by our students, faculty, and administration." *Id.*

B. The Seminary's curriculum consists predominantly of religious instruction and study.

The website of the State Secretary of Higher Education classifies all courses of study at the Seminary with codes corresponding to "Religious Education," "Theology/Theological Studies," or "Divinity/Ministry." Ja1383. "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.*" Ja1367 (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" and "[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*" and "[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).

In questionnaires it submitted to the State, the Seminary acknowledged that its curriculum includes "religious instruction" and "religious study." Ja927. A review of the Seminary's course catalog, which is incorporated by reference in the Seminary's questionnaires (Ja930), confirms the religious

nature of its curriculum. Ja954-1217. Most of the courses listed in the catalog fall into the categories of "Biblical Studies," "Theology," and "Practical Theology." See Ja1054-1168. Other courses cover topics such as "Church History," "Field Education," "Ministry Leadership," "Denominational History, Theology, and Polity," and "Youth Ministry." *Id.*

C. The Seminary discriminates based on religion.

The Seminary requires all degree students to be Christians. Ja927. All faculty must be Christians too. Ja928. So must all members of the Seminary's Board. Ja719. (Most of the Board members must specifically be Presbyterians, as must the Seminary's President. *Id.*)

D. The state grants would further the Seminary's religious mission.

The Seminary's approved applications for state funds, as well as the questionnaires it submitted to the State, confirm that the proposed grants would serve the institution's mission of providing theological education and training. As noted earlier, the grants are for three projects: \$289,889 for "Revamped Cooper Conference Room"; \$113,712 for "Learning Spaces: Training Room"; and \$241,722 for "IT infrastructure upgrade for library for expanded historical and theological research." Ja1301.

According to the Seminary's applications, the following is true of each of the three projects: Each "[p]roposed project is essential to the Seminary's educational mission" of "the preparation of men and women for ministry to congregations and for Christian leadership in communities and professional environments." Ja496, Ja647, Ja708. Each project "will multiply the impact of the Seminary's mission" of "preparation of men and women for theological leadership." Ja457, Ja641, Ja655-56. Each project will allow the Seminary to "continue as a leader in theological education." Ja474, Ja644, Ja706. And each project "mirrors the guiding principles established in the [Seminary's] technology plan . . . which articulates the need to prepare men and women, in accordance with the Seminary's stated mission, for all the many forms and vocations in ministry, in service to the church and the world." Ja497, Ja648, Ja710. In addition, the documents the Seminary submitted to the State disclose the following facts specific to the three proposed projects:

i. Revamped Cooper Conference Room.

The funding awarded for the Revamped Cooper Conference Room would benefit the Seminary's School of Christian Vocation and Mission (SCVM), which is the Seminary's "continuing education department." Ja652. The Seminary describes the SCVM as striving "to cultivate more informed people of faith, who are

also equipped with the mindset, mentors, and practical skills needed to lead congregations, nonprofit organizations and community groups in the 21st Century." *Id.* "Cooper Conference room, where most SCVM events take place, is at the heart of the educational programs offered." Ja653. Among other activities, the conference room hosts "[t]raining programs . . . leading to certification for hospital chaplains, volunteers who hold leadership roles in various faith-based settings, pastors, and youth ministers," as well as "an annual conference on faith-based leadership in the public square." Ja658. The project would "increase [the Seminary's] ability to offer technologically enabled courses of study in areas that are . . . critical to the church and church leaders." Ja659.

In a questionnaire submitted to the State, the Seminary confirmed that the project would serve "religious use or religious instruction," explaining that "[l]ectures or religious education topics will be given or made available from certain of the project facility." Ja911-12. Similarly, in another questionnaire, the Seminary confirmed that the project would "facilitate remote learning as part of PTS's continuing education programming, which includes religious instruction and study." Ja949.

ii. New training room.

The Seminary's application for a new training room states that this project "will have an immediate impact on training at the Seminary from an academic perspective." Ja629. The project would aid the endeavors of both students and faculty. Ja631. In a questionnaire submitted to the State, the Seminary confirmed that "the training facility potentially may be used for software programs employed in both religious instruction and religious study." Ja943.

iii. Enhanced IT Infrastructure for Library.

In its application for funding for "Enhanced IT Infrastructure for Renovated Luce Library," the Seminary states that the project will "further the Seminary as a leader in theological education." Ja460. The Seminary explains that "[b]y strengthening our converged technologies, the Seminary is better able to fulfill its core mission." *Id.* The project would allow the institution "to advance its 'digital' reach to the next level, able to offer its unparalleled resources for historical and theological research and reference to a vastly broader community." Ja456. For example, the project would support the Seminary's development of a "core Internet resource for the study of theology and religion . . . due to [the Seminary's] rich theological and religious collection." Ja490. The project would "offer a change in the way religious and

theological scholars, students and communities of interest work with texts." Ja493.

In a questionnaire submitted to the State, the Seminary acknowledged that this project could be used for "religious" purposes among others. Ja926.

SUMMARY OF ARGUMENT

The proposed grants violate three separate provisions of the New Jersey Constitution, as well as the Law Against Discrimination.

Article I, Paragraph 3 prohibits the use of tax funds "for the maintenance of any minister or ministry." The New Jersey Supreme Court has interpreted this provision as barring "the use of tax revenues for the maintenance or support of a religious group." *Resnick v. E. Brunswick Twp. Bd. of Educ.*, 77 N.J. 88, 102 (1978). The proposed grants plainly violate this clause. The Yeshiva and the Seminary are religious institutions that train ministers of their faiths and engage in religious instruction.

Article I, Paragraph 4 prohibits any "establishment of one religious sect in preference to another." This clause prohibits state aid to higher-education institutions unless three requirements are met: (1) the facility supported by state aid must "never be used for sectarian purposes"; (2) the institution must not "restrict[] entry on racial or religious grounds"; and

(3) the institution must not require "all students gaining admission to receive instruction in the tenets of a particular faith." See *Clayton v. Kervick*, 59 N.J. 583, 599, 601 (1971). The proposed grants unabashedly violate the first two requirements. The grants would fund core facilities of the Yeshiva and the Seminary that would plainly be used for religious instruction and study and to advance the institutions' missions of training their clergy. The Seminary facially denies and the Yeshiva effectively denies admission to students who do not subscribe to the institutions' faiths. In addition, it appears that at least the Yeshiva requires all students to receive instruction in its religious tenets.

The Law Against Discrimination ("LAD") prohibits any place of public accommodation from discriminating based on religion or sex. Because governmental entities are public accommodations subject to the LAD, they are prohibited from providing special benefits to organizations that discriminate based on religion or sex. The proposed grants constitute special benefits to two institutions that do exactly that. The Yeshiva has a policy of admitting only men, and discriminates in practice against women in hiring and against non-Jews in admission and hiring. The Seminary has a policy of allowing only Christians to become degree students, faculty, or board members.

Article VIII, Section III, Paragraph 3 of the State Constitution provides that "[n]o donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association, or corporation whatever." The New Jersey Supreme Court has interpreted this clause to require grants of public funds to serve "a public purpose" – the grants must benefit "the community as a whole" and be "directly related to functions of government." See *Davidson Bros. v. D. Katz & Sons*, 121 N.J. 196, 217 (1990). The proposed grants would violate this test. The grants would serve primarily private purposes, for the Yeshiva and the Seminary provide services for the benefit of their particular faiths, not the community as a whole. Moreover, the institutions' activities – training of clergy and religious instruction – are plainly not related to the functions of government.

ARGUMENT

I. THE GRANTS OF TAXPAYER FUNDS TO THE YESHIVA AND SEMINARY VIOLATE BOTH RELIGION CLAUSES OF THE STATE CONSTITUTION.

The State Constitution contains two religion clauses. Article I, Paragraph 3 prohibits the use of public funds to support "any minister or ministry." Article I, Paragraph 4 prohibits the establishment of one sect "in preference to another."

The proposed grants violate both clauses. They allocate more than \$11 million to support and maintain the ministries of the Yeshiva and the Seminary. And in doing so, they provide preferential support to two religious sects.

A. The Grants of Tax Dollars to Institutions That Train Ministers and Provide Religious Instruction Violate Art. I, Par. 3 of the State Constitution.

Article I, Paragraph 3 of the New Jersey Constitution ("the Religious Aid Clause") 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." "Fairly read," this provision "specifically prohibits the use of tax revenues for the maintenance or support of a religious group." *Resnick v. E. Brunswick Twp. Bd. of Educ.*, 77 N.J. 88, 102 (1978).

This prohibition is separate from, and exceeds, the protections and prohibitions of the Establishment Clause of the United States Constitution and its New Jersey analog (Article I, Paragraph 4). In the seminal case on the Religious Aid Clause, the Court held that it prohibits using taxpayer funds to subsidize a religious organization – *even if such a subsidy is provided on an equal basis to other organizations.* *Resnick*, 77 N.J. at 103.

While this clause does not preclude the provision of general services such as police or fire protection, it does

preclude any "out-of-pocket expenses" that are not fully reimbursed, even if the funding or subsidy at issue is made generally available. *Id.* As held by the Court, the Religious Aid Clause "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.

Here the State seeks to award tax-generated funds to two religious institutions that train ministers and provide religious instruction. Such an award violates the Religious Aid Clause.

Resnick governs this 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. 77 *N.J.* at 94. Numerous religious organizations entered into leases and used the facilities for Sunday religious instruction, religious services, or both. *Id.* The Court held that, while the district could offer its facilities to non-religious organizations at a reduced rental rate or even for no charge at all, the Religious Aid Clause "prohibits any lease arrangement between a school and religious groups under which the out-of-pocket expenses of the [school] directly attributable to the use by a religious body are not fully reimbursed." *Id.* at 103. Therefore, the Court held that if the school district wanted to

rent to the religious organization, it would have to adjust its charges to "fully cover extra utility, heating, administrative and janitorial costs which result from the leasing by these groups." *Id.*

Here, the State is going well beyond offering reduced rents. It is subsidizing two religious institutions by way of direct grants of taxpayer dollars for building construction and capital improvements. By providing more than \$11 million in direct grants of taxpayer funds, the State is obviously providing "out-of-pocket expenses" that are not being "fully reimbursed." *Id.*

Further, both the Yeshiva and the Seminary are "ministries" within the meaning of the Religious Aid Clause, for at least two reasons. First, they train ministers of their particular sects. Second, they engage in the exact activity that was conducted by a number of the organizations precluded from receiving governmental aid in *Resnick*: provision of religious instruction. The Yeshiva and the Seminary provide that training at a collegiate, rather than elementary, level, but that is a distinction without constitutional significance.

The facts describing the religious nature of the Yeshiva and Seminary are fully set forth *supra* at 7-15 and 19-24. Plaintiffs will simply highlight the most notable facts below.

Beth Medrash Govoha Yeshiva

- Defendant New Jersey Secretary of Higher Education Hendricks categorizes the Yeshiva as a "Rabbinical School." Ja1365.
- According to the federal government, the Yeshiva's graduate studies program prepares students "as teachers and administrators in secondary Torah schools and institutions of higher Talmudic studies, *as practicing Rabbis and as experts in Rabbinical jurisprudence.*" Ja1371 (emphasis added).
- The Yeshiva specifically admits to training students for ministerial ordination (in the rabbinate). Ja356, Ja391.
- The Yeshiva admits that its curriculum includes "religious instruction" and involves "religious study." Ja356. Its 2014-15 Graduate Course Catalog describes numerous courses of study of Jewish religious rules regarding, e.g., "ritual purity," "the importance of peace, and reward for the righteous," "laws of prayer," "laws of blessings," "sabbath laws," "immoral behavior," "divorce proceedings," "the extent of parental control over the marital choices of a daughter," "burial obligation," and "entering the temple," as well as other Jewish holidays and religious practices. Ja421-462. Graduate students also read rabbinical writings covering

topics such as “[m]easuring and assessing pious behavior,” “[m]ethods of achieving piety,” “[f]ear of sin,” “[s]anctity,” and “the virtue of humility.” Ja445-447.

- The Yeshiva acknowledges it is an “institution rooted in the Jewish tradition.” Ja355. Its mission statement adds that “[a]n integral part of the [institution’s] scholastic and professional aims is ethical and moral growth and maturity of students, *based on Jewish ethics and philosophy.*” Ja369.
- The IRS has given the Yeshiva an exemption from tax-reporting requirements that in this instance is only available to thoroughly religious institutions. See *supra* at 11.
- The Yeshiva is accredited by the Association of Advanced Rabbinical and Talmudic Schools, which requires that an accredited school’s curriculum “be closely related to the Torah mission of the institution.” Ja403.

Princeton Theological Seminary

- The Seminary acknowledges its sectarian (Presbyterian Christian) mission and admits to providing sectarian instruction and to training students for Christian ministry. Ja927, Ja1381.

- The Seminary's mission statement explains that the institution "prepares women and men to serve Jesus Christ in ministries . . . equipping them for leadership worldwide in congregations and the larger church, in classrooms and the academy, and in the public arena." Ja1381.
- To further its mission, "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." *Id.*
- The Seminary also admits to conducting religious worship services. Ja991. Specifically, "[d]uring the fall and spring semester . . . the community gathers Monday through Friday to worship"; "[t]he sacrament of Holy Communion is celebrated on Fridays"; "[s]pecial services are held throughout the year"; and "[t]he president leads in worship weekly, and other daily chapel services are led by our students, faculty, and administration." *Id.*

- Defendant Secretary of Higher Education Hendricks's website describes the Seminary as a "Theological Institution" and its courses of study as "Christian Education," "Theological Professions," and "Theology - First Professional." Ja1383.
- Defendant Hendricks sets forth the categorization of the Seminary's courses as "Religious Education," "Theology/Theological Studies," or "Divinity/Ministry," meaning that the Seminary's programs focus "on the theory and practice of providing educational services to members of faith communities, within the context of a particular religion"; "prepare[] individuals to serve as religious educators"; "prepare[] individuals for ordination as ministers or priests in any of the Christian religious traditions"; and "focus[] on the beliefs and doctrine of a particular religious faith from the intramural point of view of that faith." Ja1367.

In sum, both the Yeshiva and the Seminary are religious schools that train students for the ministry and engage in religious instruction, as is acknowledged by the State and the U.S. government. Therefore, both the Yeshiva and the Seminary are exactly the kinds of organizations that are precluded from receiving taxpayer funds under the New Jersey Supreme Court's holding in *Resnick*. Indeed, just as churches, temples, Sunday

Schools, Hebrew Schools, or parochial preparatory schools (including elementary and secondary yeshivas) are precluded from receiving taxpayer funds because they engage in religious instruction, so too are their higher-education corollaries. The State's grant of taxpayer funds to two such religious institutions violates the Religious Aid Clause.

B. The Grants Violate Art. I, Par. 4 of the State Constitution Because They Support Religious Instruction and Discrimination.

Article I, Paragraph 4, of the New Jersey Constitution ("the state Establishment Clause") provides that "[t]here shall be no establishment of one religious sect in preference to another." This clause "is less pervasive" than its federal analogue, but at least when "one religious sect [is] assertedly preferred over other sects," it requires "exacting judicial scrutiny . . . to ensure that no religious sect dominates and that no sect is disfavored," scrutiny that "may very well be different from that accorded under the federal constitution." *Marsa v. Wernik*, 86 N.J. 232, 239 n.2 (1981).

In practice, when interpreting the state Establishment Clause, the New Jersey Supreme Court has "generally followed the federal [Establishment Clause] standard." *Right to Choose v. Byrne*, 91 N.J. 287, 313 (1982). For example, in *Two Guys From Harrison, Inc. v. Furman*, the Court stated that, like the federal Establishment Clause, the state Establishment Clause

prohibits the State from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another.'" 32 N.J. 199, 213 (1960) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)). See also *S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of Infant Jesus Church Elementary Sch.*, 150 N.J. 575, 586 (1997) ("[u]nder both constitutions, the State and all instrumentalities of the State are prohibited from showing a preference for one religion over another"); *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"); *State v. Celmer*, 80 N.J. 405, 417 (1979) ("fusion of secular and ecclesiastical power" violates both federal and state Establishment Clauses); *Tudor v. Bd. of Educ.*, 14 N.J. 31, 44-45 (1953); *Student Members of Playcrafters v. Bd. of Educ.*, 177 N.J. Super. 66, 74 (App. Div. 1981) (state Establishment Clause provides "similar protections" as federal Establishment Clause).

In this case, scrutiny under the state Establishment Clause should be more exacting than that of its federal counterpart. The funding program at issue does not provide equal aid to all higher-education institutions or to all students attending them. Rather, the grants were awarded to particular institutions through a competitive process based on subjective criteria. See

supra at 5-6. Moreover, the Yeshiva received more than one fifth of the total amount awarded. Ja1362. The awards to two particular religious institutions thus suggest that some sects are "preferred over other sects," triggering "exacting judicial scrutiny" under the state Establishment Clause. See *Marsa*, 86 N.J. at 239 n.2.

But even if the state Establishment Clause is construed similarly to the federal one, the proposed grants violate it. The leading New Jersey case concerning state assistance to religiously affiliated higher-education institutions is *Clayton v. Kervick*, 56 N.J. 523 (1970), on remand from the U.S. Supreme Court, 59 N.J. 583 (1971). In *Clayton*, the New Jersey Supreme Court considered the constitutionality of a program that provided loans, not grants or gifts, to higher-education institutions for construction of facilities. 56 N.J. at 526. The challenge was a facial one to the whole program, not a challenge to specific grants that evinced a religious preference. See *id.* at 526. The Court thus did not construe the state Establishment Clause independently, but rather examined federal Establishment Clause law to decide both the state and the federal Establishment Clause challenges. See *id.* at 529.

The Court held that state aid to a religiously affiliated university is constitutional only if it meets three conditions:

First, "the facility" supported with state aid "may never be used for sectarian purposes." 59 *N.J.* at 599. Second, state aid may not be given to any institution that "restricts entry on racial or religious grounds." *Id.* at 601 (internal quotation marks omitted). Third, state aid may not be given to any institution that requires "all students gaining admission to receive instruction in the tenets of a particular faith." *Id.*

The proposed grants violate the standards set forth in *Clayton*. First, the funded projects would certainly "be used for sectarian purposes." *Cf. Clayton*, 59 *N.J.* at 599. Both the Yeshiva and the Seminary are theological schools dedicated to the provision of religious education and the training of clergy. See *supra* at 7-11, 19-22. Virtually all of the Yeshiva's curriculum consists of religious instruction and study, and the Seminary's curriculum is at least predominantly so. See *supra* 12-15, 22-23. What is more, the proposed grants would fund core facilities of the Yeshiva and the Seminary that would plainly be used for religious instruction and study and to advance the institutions' missions of training their faiths' clergy. See *supra* 16-19, 23-28.

Second, contrary to the prohibition of *Clayton*, 59 *N.J.* at 601, the state grants would go to institutions that "restrict[] entry on . . . religious grounds." The Seminary requires all degree students to be Christians. Ja927. And although the

Yeshiva claims to have a religion-neutral admission policy, virtually all if not all of its curriculum consists of instruction in Jewish religious doctrine. See *supra* at 12-15. Thus, admission to the institution is not truly open to non-Jews. See *Ams. United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 414, 425 (8th Cir. 2007) (though religious prison program was nominally open to non-Christians, court found "that inmates' religious beliefs (or lack thereof) precluded their participation" because inmates had to be "willing to productively participate in a program that is Christian-based").

Finally, it appears that at least the Yeshiva (though it denies this) requires "all students gaining admission to receive instruction in the tenets of a particular faith." *Clayton*, 59 N.J. at 601. The Yeshiva's undergraduate curriculum has six required courses where the students learn the Talmud. Ja364-366. And the entirety of the graduate curriculum appears to consist of courses where students study the Talmud, Talmudic commentaries, and other rabbinical writings. See Ja421-462.

Federal Establishment Clause law is in accord. In *Tilton v. Richardson*, 403 U.S. 672 (1971), the U.S. Supreme Court partially invalidated a statute that provided grants to colleges and universities, including religiously affiliated institutions, for the construction of educational facilities. Unlike in the

present case, the federal grant program precluded grants to divinity schools. *Id.* at 675. Moreover, the statute prohibited the funding of "any facility used or to be used for sectarian instruction or as a place for religious worship," but this restriction expired twenty years after a facility's construction. *Id.* at 675, 683.

A four-Justice plurality concluded that the statute and the grants issued under it were unconstitutional to the extent that the restriction expired after twenty years. *Id.* at 683-84, 689. The Court reasoned that if, after twenty years, a building were used for religious purposes, "the original federal grant will in part have the effect of advancing religion." *Id.* at 683. The Court explained that "[i]t cannot be assumed that a substantial structure has no value after that [twenty-year] period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body." *Id.*

In providing the fifth vote to sustain the Court's judgment, Justice White agreed that the expiration of the restriction after twenty years was unconstitutional. See *Lemon v. Kurtzman*, 403 U.S. 602, 665 n.1 (1971) (White, J., concurring).³ He added, however, that the Establishment Clause

³ *Tilton*, 403 U.S. 672 (1971), was decided the same day as *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Justice White's concurrence was published in the U.S. reports under *Lemon* but covers both

requires two additional restrictions: institutions receiving governmental aid must not "[i] restrict[] entry on racial or religious grounds or [ii] require[] all students gaining admission to receive instruction in the tenets of a particular faith." *Id.* at 671 n.2. Because Justice White provided the decisive vote on grounds narrower than those given by the plurality, the New Jersey Supreme Court was correct in concluding in *Clayton*, 59 N.J. at 600-01, that his opinion represents controlling law. See, e.g., *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *Marks v. United States*, 430 U.S. 188, 193 (1977).

Subsequently, the U.S. Supreme Court and 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

Lemon and *Tilton* and is referenced in *Tilton's* title page. Four dissenting Justices in *Tilton* voted to prohibit any aid to sectarian universities. See *Tilton*, 403 U.S. at 689-97 (Douglas, J., dissenting); *Lemon*, 403 U.S. at 659-61 (opinion of Brennan, J., concerning both *Lemon* and *Tilton*).

facilities. The grants were not accompanied by any restriction limiting them "to the upkeep of facilities used exclusively for secular purposes." *Id.* 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 voluntary, 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).

These cases are all consistent with a fundamental Establishment Clause principle: Governmental aid must not be used to support religious activities. See *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 754-55 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973); *Everson*, 330 U.S. at 16; accord *Mitchell v. Helms*, 530 U.S. 793, 840, 857 (2000) (O'Connor, J., concurring).⁴ That principle governs the application of the state Establishment Clause to this case. For that reason as well, the Court should invalidate the challenged grants.

⁴ Justice O'Connor's concurring opinion in *Mitchell* represents controlling law because, like Justice White in *Tilton*, she provided the decisive vote to sustain the judgment on narrower grounds than the plurality in the case. See *Community House*, 490 F.3d at 1058; *Columbia Union College v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 418 (2d Cir. 2001); *Johnson v. Economic Development Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001).

II. THE STATE HAS VIOLATED THE NEW JERSEY LAW AGAINST DISCRIMINATION BY PROVIDING MORE THAN \$10 MILLION IN SPECIAL BENEFITS TO ORGANIZATIONS THAT DISCRIMINATE.

The Law Against Discrimination ("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 religion or sex. See *N.J.S.A. 10:5-12(f)*.

Governmental entities are "public accommodations" and are 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. 381, 402 (2007); *Dale v. Boy Scouts of America*, 160 N.J. 562, 593 n.7 (1999), *rev'd on other grounds*, 530 U.S. 640 (2000). Defendants are therefore subject to the LAD.

Educational institutions "operated or maintained by a bona fide religious or sectarian institution" are exempt from the LAD. *N.J.S.A. 10:5-5(1)*. Thus, as religious institutions, the Yeshiva and the Seminary are free to discriminate in their programs on the basis of religion; the Yeshiva is free to exclude women as students or professors as well.⁵

However, places of public accommodation (such as the Office of the Secretary of Higher Education) are precluded not only

⁵ If the institutions were *not* religious institutions, then they would be in violation of the LAD for engaging in exclusionary practices on the basis of religion, or (in the case of the Yeshiva) hiring only male professors.

from discriminating directly, but also from doing so indirectly by providing sponsorship of, or special benefits to, organizations that have exclusionary programs that disfavor individuals based on protected characteristics. *Dale*, 106 N.J. at 593 n.7. "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 ensures that the spirit of the LAD is fulfilled. Without it, operators of places of public accommodation could circumvent the anti-discrimination laws: Instead of refusing to serve members of disfavored groups or charging those persons higher prices directly, the operators could simply provide special benefits (such as reduced pricing or more favorable terms of access) to organizations from which the disfavored groups are excluded (or, which only favored groups are able to join). The result – fostering disparate treatment based on disfavored status – would be the same. The State should not be permitted to do indirectly what it is prohibited from doing directly.

Here, by way of grants totaling more than \$10 million, the State is unlawfully providing sponsorship of, and a "special benefit" to, two organizations that have exclusionary programs that preclude or disfavor individuals based on protected

characteristics of sex and religion. Provision of millions of dollars of funding constitutes both sponsorship and a special benefit. The State's award of grant funds need not be repaid but is, rather, an outright financial gift. The particular gifts of funds to the Yeshiva and the Seminary subsidize the building or refurbishing of facilities and the procurement of technology for use by exclusionary organizations.

The ability to obtain the grants is not open to the general public. Moreover, the application process is a selective one: Institutions must compete for the funding, and applications are compared and measured against one another. *N.J.A.C. 9A:18-1.6*. Defendant Hendricks and her review committee assessed relative worth of applicants based in significant part on subjective categories such as "[w]hether [the project] serves the best interests of higher education in the State as a whole," "[a]dvancement of student education in the State of New Jersey," "[t]he cost-effectiveness of the project," and "[c]onsistency 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)*. Hendricks reviewed the committee's recommendations but had sole authority to approve project grants and establish the amounts of the grants. *Id.*

Thus, the award of these taxpayer-funded grants is not like provision of general police services or equal use of parks to all comers. Only certain organizations can apply for these special financial benefits, the organizations that do apply must compete for the funds, and both the decision to award funds and the amounts of such awards are determined in part through subjective factors. As such, these awards are "sponsorships" or "special benefits," and the State violated the LAD by awarding such funds to organizations that have exclusionary practices.

The Seminary admits it discriminates on the basis of religion. Specifically, the Seminary informed the State that "[a]ll degree students are expected to be of the Christian faith." Ja927. Likewise, "[f]aculty . . . are required to be of the Christian faith." Ja928. The Seminary may engage in such exclusionary practices because it is exempt from the LAD. However, by providing a special benefit to the Seminary – an organization that engages in discrimination – the State itself violated the LAD. *Dale*, 106 N.J. at 593 n.7.

The Yeshiva also engages in exclusionary practices: It discriminates in the provision of services and the hiring of faculty, on the basis of both religion and sex.

The Yeshiva admits it excludes female students. Ja361 ("[a]dmission to the Institution is limited to qualified

males"). The federal government specifically identifies the Yeshiva as an institution that is "Single sex: Male." Ja1371.

"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). "Discrimination based on gender is 'peculiarly repugnant in a society which prides itself on judging each individual by his or her merits.'" *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 600 (1993) (quoting *Grigoletti v. Ortho Pharmaceutical Corp.*, 118 N.J. 89, 96 (1990)). While the LAD allows exempted schools to have single-sex student bodies (see N.J.S.A. 10:5-5(1)), nothing in that provision permits other public accommodations that are themselves subject to the LAD to fund or otherwise provide special benefits to such exclusionary schools. *Id.*; see also *Dale*, 106 N.J. at 593 n.7. Indeed, the funding of the Yeshiva can benefit only males; women cannot benefit from the funding because of the institution's exclusionary policies.⁶

⁶ Plaintiffs note that, 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 the Yeshiva's males-only status, women — who are denied the right to be students — would be precluded from enjoying those benefits.

The exclusion of females by the Yeshiva also extends to faculty. While the institution professes a non-discrimination policy regarding hiring that includes sex (see Ja368), State records confirm that it maintains an all-male faculty (see Ja1375).

To justify a practice of hiring only males, an employer must establish that being of a particular sex "is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise." *N.J.S.A.* 10:5-12; see also *Goodman v. London Metals Exchange, Inc.*, 86 *N.J.* 19, 30 (1981). Yet nothing inherently precludes a female professor for rabbinical or Talmudic studies, other than exclusionary and discriminatory religious principles. See, e.g., Avi Hein, *Women in Judaism: A History of Women's Ordination as Rabbis*, Jewish Virtual Library (last visited Apr. 2, 2015), <https://www.jewishvirtuallibrary.org/jsource/Judaism/femalerabbi.html>. As noted, the Yeshiva, as a sectarian educational institution, may implement such exclusionary principles without having to justify its all-male faculty. But because of the Yeshiva's exclusivity in professorships by gender, the State (as a public accommodation) cannot support it with sponsorship or a special benefit, as the State has done here.

The Yeshiva also engages in exclusionary practices on the basis of religion. While it claims not to have a "formal" requirement that faculty be of the Jewish faith, "the faculty are all of the Jewish faith." Ja393 (emphasis added). Moreover, the Yeshiva engages in exclusionary practices in its provision of student services in at least two ways. First, it acknowledges that it has a program for ordination as a minister in the Jewish faith only, which of course requires participants to be part of sectarian Jewish training. Ja361, Ja391. That this program is not a mandatory course of study for all students is of no legal consequence. The Yeshiva offers a course of study that specifically provides benefits for members of one particular religious sect. That too is precluded by the LAD, *N.J.S.A. 10:5-12(f)*, and is sufficient to preclude the government, as a public accommodation, from providing special benefits to the organization.

In addition, the Yeshiva's entire program of study caters to members of one faith, as it provides religious instruction solely in that faith. See *supra* at 12-15; see also Ja409-462; *Ams. United*, 509 *F.3d* at 414, 425. The law permits a religious institution to do so, or to have an all-Jewish or (as documented by the federal government) an almost all-white student body. See Ja1372 (documenting that the Yeshiva's student body is 96% white and 4% "Non-resident alien"). But engaging in practices

that lead to exclusion and segregation is only permissible for groups that are exempt from the LAD as religious educational institutions. *N.J.S.A. 10:5-5(1)*. Groups that are not exempt are not permitted to engage in such practices or to provide benefits to organizations that do. *Dale*, 106 *N.J.* at 593 n.7.

The Yeshiva disavows the *intent* to discriminate, but that does not affect this claim. See *Lehmann*, 132 *N.J.* at 600. "The LAD is not a fault- or intent-based statute The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional. Although unintentional discrimination is perhaps less morally blameworthy than intentional discrimination, it is not necessarily less harmful in its effects, and it is at the effects of discrimination that the LAD is aimed." *Id.* at 604-605. Accordingly, the LAD not only protects against direct discriminatory actions based on an invidious intent, but also against practices that result in a discriminatory impact. See, e.g., *Countiss v. Trenton State College*, 77 *N.J.* 590, 595 (1978) ("[T]he 'impact' of the disparate treatment is such as to categorize the resulting discrimination as based on sex regardless of the absence of invidious intent."); see also *Jansen v. Food Circus Supermarkets, Inc.*, 110 *N.J.* 363, 378 (1988) ("Unconscious discrimination prejudices its victims as effectively as discrimination that is malicious."). Even if the Yeshiva does

not intentionally mean to exclude females from its faculty or exclude non-Jews from its faculty or student body, its practices have that result, which means that the state's grant to it violates the LAD.⁷

In short, the State's decision to provide special benefits (*i.e.*, millions of taxpayer dollars in grant funding) to two institutions that engage in exclusionary practices violates the LAD. The state funding would subsidize organizations whose exclusionary programs benefit only certain groups of individuals based on their religious beliefs or sex. Such an action by the government violates New Jersey's Law Against Discrimination.

Dale, 106 N.J. at 593 n.7.

⁷ Plaintiffs sought remand for factual development to provide further evidence of discriminatory policies of the Yeshiva (as well as additional evidence relating to Plaintiffs' other claims). Indeed, the statement of the Yeshiva that it does not engage in "formal" discrimination does not address either its *practices* or the effects of any facially neutral policies, which have resulted in no female or non-Jewish faculty and an almost all-white student body. Even a practice such as requiring students to wear a yarmulke would be a practice that discriminates against non-Jews; evidence of such practices is therefore pertinent to the LAD claim. No such inquiry occurred in the agency process. Plaintiffs believe that sufficient evidence exists to support their LAD claim. However, should this Court determine that more evidence is needed, with respect to this claim or other claims, a remand can still be ordered.

**III. THE GRANTS WOULD VIOLATE ART. VIII, SEC. III, PAR. 3
OF THE NEW JERSEY CONSTITUTION BECAUSE THEY WOULD
SERVE PRIVATE PURPOSES, NOT PUBLIC ONES.**

Article VIII, Section III, Paragraph 3 of the State Constitution ("the Private Aid Clause") provides, "No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association, or corporation whatever." This clause requires grants of public funds to serve a public purpose, *i.e.* the grants must benefit the community as a whole and be directly related to functions of government. *See Davidson Bros. v. D. Katz & Sons*, 121 N.J. 196, 217 (1990). The proposed grants would violate this test because they would serve primarily private purposes, as the Yeshiva and the Seminary provide services for the benefit of their particular faiths, not the community as a whole.

Over a century ago, in *Trustees of Rutgers College v. Morgan*, 70 N.J.L. 460, 474 (1904), the New Jersey Supreme Court stated that the Private Aid Clause (then Section 20 of Article I of the State Constitution) was "designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced." More recently, the Court has held that the clause is "designed to insure that public money would be raised and used only for public purpose," and "that incidental private benefit would not

defeat execution of a paramount public purpose." *Clayton v. Kervick*, 52 N.J. 138, 155 (1968).

The New Jersey Supreme Court has accordingly established two "strict standards" that governmental aid must meet to be constitutional under the Private Aid Clause. *Davidson*, 121 N.J. at 218. First, the challenged aid must serve "'a public purpose' - "[t]he activity must be one that 'serves a benefit to the community as a whole, and which, at the same time is directly related to the function of government.'" *Id.* at 217 (quoting *Roe v. Kervick*, 42 N.J. 191, 207, 212 (1964)). Second, the use of the aid must be "'confined to the execution of that public purpose through a reasonable measure of control by a public authority'" (*Davidson*, 121 N.J. at 218 (quoting *Roe*, 42 N.J. at 222)) to ensure that "[a]ny private advantage" is "incidental and subordinate" to "accomplish[ing] the public purpose" (*Roe*, 42 N.J. at 218). *Accord Twp. of Mount Laurel v. Dep't of Pub. Advocate*, 83 N.J. 522, 534 (1980); *N.J. State Bar Ass'n v. State*, 387 N.J. Super. 24, 53-54 (App. Div. 2006).

Even when a governmental funding or aid program is facially constitutional under the Private Aid Clause, specific grants or agreements under that program may violate it. For example, in *Patzau v. New Jersey Department of Transportation*, 271 N.J. Super. 294, 311 (App. Div. 1994), the court held that a statute allowing provision to airports of certain kinds of governmental

aid was facially constitutional under the clause, but permitted future suits challenging "the application of the statute[] . . . to specific properties." See also *Davidson*, 121 N.J. at 219 (examining constitutionality of a single transaction); *Mt. Laurel*, 83 N.J. at 535 (after concluding that functioning of Department of Public Advocate generally satisfies the clause, analyzing whether specific Departmental action at issue served public purpose); *Bryant v. Atlantic City*, 309 N.J. Super. 596, 611-14 (App. Div. 1998) (examining whether a particular city action authorized under certain statutes promoting urban redevelopment violated the clause).

Here, Plaintiffs do not allege that the statutes under which the challenged grants were issued facially violate the Private Aid Clause. In *Clayton*, 52 N.J. at 156-57, the New Jersey Supreme Court held that a state program that provided loans for facilities construction to higher-education institutions was facially constitutional under the clause, with respect to loans to non-religious institutions.⁸ The Court noted that "the furtherance of higher education is a proper public purpose." 52 N.J. at 156.

⁸ The constitutionality of loans to religious institutions under that program was adjudicated in later decisions in the same litigation, discussed above. See *supra* at 40-42 (discussing *Clayton*, 56 N.J. 523, 59 N.J. 583).

However, the specific proposed grants for the Yeshiva and the Seminary do violate the Private Aid Clause. The grants would not "serve a public purpose" because they would not provide "a benefit to the community as a whole." *Cf. Davidson*, 121 *N.J.* at 217. The Yeshiva and the Seminary principally serve the private interests of two specific religious faiths. The institutions' main activities are training clergy of their faiths and providing religious instruction in those faiths. See *supra* at 7-15, 19-24. And any benefits the institutions provide are available only to certain segments of New Jersey's population — both institutions have admission and employment policies or practices that discriminate in favor of their own faiths; and the Yeshiva admittedly excludes women from its student body and, whether intentionally or merely in practice, has a male-only faculty. See *supra* at 50-55. In addition, training clergy and religious instruction are plainly not "directly related to the function of government." *Cf. Davidson*, 121 *N.J.* at 217; see, e.g., *Two Guys From Harrison*, 32 *N.J.* at 211 (the State Constitution "ban[s] . . . the union of State and Church").

Furthermore, even if the State could provide funding to the Yeshiva or the Seminary that did serve a public purpose, use of the planned aid here has not been "confined to the execution of [any such] public purpose through a reasonable measure of

control by a public authority" (*cf. Davidson*, 121 N.J. at 218); the State has not ensured that "[a]ny private advantage" is "incidental and subordinate" (*cf. Roe*, 42 N.J. at 218). Rather, the State has approved grants for core facilities of the Yeshiva and the Seminary that would clearly be used to advance the institutions' missions of training their religions' clergy and for sectarian study and instruction. See *supra* 16-19, 23-28.

CONCLUSION

The proposed grants are fundamentally at odds with three provisions of the State Constitution, as well as the Law Against Discrimination. The Constitution does not allow the State to subsidize the training of clergy or other religious instruction. The Constitution and the LAD both prohibit the State from subsidizing discriminatory institutions. The proposed grants would do exactly these things.

For the foregoing reasons, the Court should reverse the decision of the agency below, declare the proposed grants unconstitutional, and enjoin the State from paying them. In the alternative, if the Court concludes that the factual record before it is insufficient to allow it to resolve the case, it should remand the matter to a trial court for further factual development.

Date: April 9, 2015



Edward Barocas
Jeanne LoCicero
American Civil Liberties Union
of New Jersey Foundation
Post Office Box 32159
Newark, New Jersey 07102
(973) 642-2086 ext. 1717

Frank Corrado
Barry, Corrado & Grassi, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
(609) 729-1333

Ayesha Khan
Alex Luchenitser
Americans United for Separation
of Church and State
1301 K Street NW, Suite 850, East Tower
Washington, DC 20005
(202) 466-3234

Daniel Mach
American Civil Liberties Union Program
on Freedom of Religion and Belief
915 15th Street NW
Washington, DC 20005
(202) 675-2330

Galen Sherwin
Lenora Lapidus
American Civil Liberties Union
- Women's Rights Project
125 Broad St.
New York, NY 10004
(212) 519-7848