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Trojan Horse or Much Ado about Nothing - Analyzing the Religious Exemptions in New York's Marriage Equality Act

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TROJAN HORSE OR MUCH ADO ABOUT NOTHING? ANALYZING THE RELIGIOUS EXEMPTIONS IN NEW YORK'S MARRIAGE EQUALITY ACT

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"Mr. President, . . . [h]ave you ever been present at a meeting of the New York legislature? They speak very fast and very loud and nobody listens to anybody else, with the result that nothing ever gets done."
Robert Morris[1]

I. INTRODUCTION

On June 24, 2011, after several weeks of tense negotiations between Democratic Governor Andrew Cuomo and Republican State Senate leadership, New York enacted the Marriage Equality Act, thus becoming

1. PETER STONE & SHERMAN EDWARDS, 1776: A MUSICAL PLAY 56 (Penguin Books 1976) (1970) (explaining to John Hancock why the New York delegation to the Continental Congress never receives instructions).

the sixth state to allow same-sex marriage, and the first with a Republican-controlled legislative branch to enact such a law.[2] The days between passage in the Assembly and final passage in the Senate were filled with protests by opponents of same-sex marriage and support rallies from proponents.[3] Doubt about whether the Senate would even vote on the measure reigned until the last day of the legislative session.[4] The breakthrough came via an agreement on a set of amendments that purported to strengthen exemptions for religious practitioners and religiously-affiliated organizations.[5] To help protect the political bargain from judicial revision, the amendment bill also included an inseverability clause, raising consternation amongst marriage equality supporters.[6]

An abundance of literature analyzes many actual and potential issues arising from concerns of people whose sincerely-held religious beliefs militate against laws ensuring freedom from discrimination for lesbian, gay, bisexual, and transgendered (LGBT) individuals.[7] Some commentators have expressed concern that, specific to same-sex marriage, antidiscrimination laws will be used to suppress the religious freedoms of those whose religious teachings do not recognize same-sex marriage.[8] Some have proposed broadly exempting religiously-affiliated groups, places of public accommodation, and public officials from participation in,

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2. *See* Mary Snow, *New York Moves to Become 6th State to Legalize Gay Marriage*, CNN (June 24, 2011), http://articles.cnn.com/2011-06-24/politics/new.york.gay.marriage_1_couples-equal-rights-marriage-equality-gay-marriage (reviewing the process from Assembly passage through amendment and Senate passage).

3. *See* Danny Hakim, *Senate Republicans Ponder Marriage Vote as Clock Ticks*, N.Y. TIMES, June 22, 2011, at A17 (describing the competing rallies inside and outside the Senate halls as negotiations were ongoing).

4. *See* Nicholas Confessore & Michael Barbaro, *N.Y. Gay Marriage Bill Gains Key Votes*, N.Y. TIMES (June 24, 2011), http://www.nytimes.com/2011/06/25/nyregion/new-york-state-senate-to-vote-on-same-sex-marriage.html (noting that the vote was the last of the legislative session).

5. *See id.* (reviewing the religious exemptions agreed to by political leaders).

6. *See, e.g.*, Maurice Lacunza, *New York Marriage Equality Has Achilles Heel That Could Void the Entire Law*, CHANGING THE PLANET (June 25, 2011, 2:21 PM), http://www.changingtheplanet.com/2011/06/new-york-marriage-equality-has-achilles.html (emphasizing that future same-sex marriages would be barred if a court enforced the clause, which requires that the entire statute be stricken if any provision is unconstitutional).

7. *See, e.g.*, Colleen Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297, 297-300 (2008) (reviewing the conflict over Catholic Charities' adoption services in Massachusetts after enactment of a state law barring discrimination based on sexual orientation).

8. *See generally* THOMAS M. MESSNER, THE HERITAGE FOUNDATION, SAME-SEX MARRIAGE AND THE THREAT TO RELIGIOUS LIBERTY (2008), *available at* http://www.heritage.org/Research/Family/bg2201.cfm (arguing that same-sex marriage is irreconcilable with traditional definitions of marriage, guaranteeing that such laws will burden religion).

and in some cases recognition of, same-sex marriages.[9] In the run-up to the legislative debate over the Marriage Equality Act, a group of legal scholars proposed such draft language, but these recommendations were not adopted.[10]

This Comment argues that the religious exemptions in the Marriage Equality Act create little change to existing New York law, and that courts should avoid creating new interpretations. Part II reviews existing New York antidiscrimination and marriage law, discusses the Marriage Equality Act, notes New York's rules on statutory interpretation, and introduces scenarios that might reach New York courts requiring interpretation of the new exemptions.[11] Part III analyzes three questions the New York courts are likely to encounter: (1) whether the new religious exemption language changes the interpretation of existing antidiscrimination law, (2) whether the inseverability clause will work to enforce the political bargain that led to passage of the Marriage Equality Act, and (3) whether failure to exempt public employees creates new burdens under existing marriage and antidiscrimination law.[12] Part IV offers policy arguments opposing attaching broad religious exemptions to same-sex marriage laws.[13] Finally, Part V concludes that the amendments to the Marriage Equality Act, while politically necessary, will have little legal impact.[14]

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9. *See, e.g.*, Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318, 323-31 (2010) (arguing that public employees with sincerely-held religious beliefs should be exempt from facilitating same-sex marriages).

10. *See* Letter from Robin Fretwell Wilson et al. to Senator Dean G. Skelos, New York State Senate (May 17, 2011) [hereinafter Skelos Letter], *available at* http://www.nysun.com/files/lawprofessorsletter.pdf (proposing broad religious exemption language to the leader of the New York State Senate).

11. *See infra* Part II (reviewing New York antidiscrimination laws, marriage laws, and rules of statutory interpretation, as well as introducing a relevant New Jersey case and an emerging New York conflict).

12. *See infra* Part III (analyzing the impact of the new religious exemption language in light of existing statutes and case law, explaining how New York courts should interpret the inseverability clause, and exploring the impact on public employees from enacting same-sex marriage).

13. *See infra* Part IV (arguing that exemptions proposed by some commentators are unconstitutionally broad and that New York's existing model of antidiscrimination law and religious protections is the proper model for other states to adopt).

14. *See infra* Part V (concluding that the amendments add little to existing protections and result in minimal new legal impact).

II. BACKGROUND

A. New York Antidiscrimination and Religious Freedom Law

1. Overview and Applicable Provisions

New York's Human Rights Law covers most issues related to claims of unlawful discrimination and provides an administrative complaint process, via the Division of Human Rights (DHR), with provisions for judicial review.[15] In 2002, New York enacted the Sexual Orientation Non-Discrimination Act (SONDA), adding sexual orientation as a protected class in the Human Rights Law, Civil Rights Law, and Education Law.[16] SONDA expressly disavowed any change to existing marriage laws, thereby postponing the debate over same-sex marriage.[17]

Under the Human Rights Law, "place of public accommodation, resort or amusement" is defined in broad terms intended to be construed liberally, largely barring discrimination in such places.[18] Places and organizations found to be "distinctly private" are exempted.[19] Corporations formed under New York's Benevolent Orders Law or Religious Corporations Law are classified as "distinctly private," but other groups have the burden of proving their private nature to the DHR.[20] The Human Rights Law also exempts religious and affiliated organizations from many of the law's provisions, such as those related to employment and rental of housing.[21] Additionally, employers are required to provide reasonable accommodation

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15. *See* N.Y. EXEC. LAW § 296 (McKinney Supp. 2011) (enumerating unlawful discriminatory practices and protected classes); *id.* §§ 297-98 (reviewing the administrative and judicial processes for discrimination complaints).

16. *See generally* Act of Dec. 17, 2002, ch. 2, 2002 N.Y. Laws 46 (adding sexual orientation to existing antidiscrimination laws).

17. *See id.* § 1 (requiring interpretation of SONDA to not alter any constitutional or statutory provision relating to marriage).

18. *See* EXEC. § 292(9) (specifying "all places included in the meaning of such terms" with a long list of terms); *id.* § 296(2) (enumerating many protected classes, and defining discrimination as an unlawful discriminatory practice); *cf.* Cahill v. Rosa, 674 N.E.2d 274, 277-78 (N.Y. 1996) (construing the statute broadly in affirming that a dental office discriminated based on disability for refusing to treat a patient with HIV).

19. *See* EXEC. § 292(9) (defining "distinctly private" by exceptions such as excluding places that routinely rent to non-members).

20. *See id.* (classifying religious corporations and benevolent orders as "distinctly private" as an exception to the requirement that an organization prove its private nature); Gifford v. Guilderland Lodge, No. 2480, B.P.O.E., 707 N.Y.S.2d 722, 722 (App. Div. 2000) (affirming the dismissal of a discrimination complaint against a club incorporated as a benevolent order because such organizations are deemed "distinctly private").

21. *See* EXEC. § 296(11) (allowing religious and affiliated organizations to take actions that promote the religious principles under which the organization was established).

for the religious practices of their employees, but the employee must expressly request such accommodations in advance.[22]

2. Case Law Interpreting Human Rights Law Provisions

While the religious exemption language in the Human Rights Law is broad, New York courts balance the State's interest in preventing discrimination against the religious exercise rights of individuals and organizations.[23] The Supreme Court for New York County noted in *Logan v. Salvation Army* that while section 296(11) expressly exempts religiously-affiliated employers in hiring and promotion decisions, that exemption does not protect employers from claims of on-the-job harassment.[24]

In *Catholic Charities of the Diocese of Albany v. Serio*, the New York Supreme Court, Appellate Division upheld a state law requiring employers to provide coverage for contraceptives in their group prescription insurance plans.[25] The court held that because the law was a neutral law of general applicability, there was no conflict with the First Amendment's Free Exercise Clause.[26] Under the New York Constitution, the court applied a balancing test to hold that the State's interest in ensuring access to contraception in order to promote public health predominated over the burden on the religious exercise rights of employers.[27] Finally, the court held the exemptions for religious organizations in the Human Rights Law inapplicable to the insurance coverage statute.[28]

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22. *See id.* § 296(10)(a) (requiring that employers accommodate employees' "sincerely held practice" of religion unless doing so would cause "undue hardship" to the employer's business); State Div. of Human Rights v. Rochester Prods. Div. of Gen. Motors Corp., 492 N.Y.S.2d 282, 284 (App. Div. 1985) (noting that failure to request an accommodation in advance can be a waiver).

23. *See generally* Logan v. Salvation Army, 809 N.Y.S.2d 846 (Sup. Ct. 2005) (balancing an employer's interest in religious freedom against the State's interest in barring discrimination).

24. *See id.* at 848-49 (denying motion to dismiss claims of on-the-job religious harassment).

25. *See* Catholic Charities of the Diocese of Albany v. Serio, 808 N.Y.S.2d 447, 466 (App. Div.) (finding the requirement in conformance with the federal and state constitutions and that the exemptions in the Human Rights Law were inapplicable), *aff'd*, 859 N.E.2d 459 (N.Y. 2006).

26. *See id.* at 455 (applying the neutral-law test from Emp't Div. v. Smith, 494 U.S. 872 (1989)). *See generally* Kris Banvard, Comment, *Exercise in Frustration? A New Attempt by Congress to Restore Strict Scrutiny to Governmental Burdens on Religious Practice*, 31 CAP. U. L. REV. 279, 292-301 (2003) (reviewing attempts to restore a "compelling interest" test for legislation that burdens religion, as was the case before *Smith*).

27. *See Serio*, 808 N.Y.S.2d at 456-59 (balancing the interest the State is attempting to enforce with the individual's religious freedom (citing People v. Woodruff, 272 N.Y.S.2d 786, 789 (App. Div. 1966), *aff'd*, 236 N.E.2d 159 (N.Y. 1968) (mem.))).

28. *See id.* at 465-66 (noting that there is no suggestion in the language of the Human Rights Law that the exemption applies to other laws the legislature might pass).

The requirement that employers reasonably accommodate the religious beliefs of their employees applies to public and private employers.[29] The New York Court of Appeals in *New York City Transit Authority v. State Division of Human Rights* found that the Transit Authority had not made reasonable accommodations for the employee's religious exercise, upholding the administrative finding of the DHR.[30] The court noted that no one should be forced to choose between their religion and their job, unless accommodations are simply infeasible.[31]

Courts avoid inquiry into the validity of a claim of sincerely held religious belief.[32] In *Faur v. Jewish Theological Seminary of America*, the New York Supreme Court, Appellate Division upheld the dismissal of a religious discrimination complaint, citing entanglement concerns.[33] Courts will address cases involving religious organizations when the issues can be addressed on neutral principles of law.[34]

B. New York Marriage Law

Under New York's Domestic Relations Law, couples seeking to marry in New York must first obtain a marriage license from a town or city clerk, and their marriage can be solemnized either by an officiant authorized by statute, or by filing a witnessed contract with the court.[35] A municipal clerk has a duty to issue a marriage license to qualified applicants, and is empowered only to inquire about the applicants' age and eligibility.[36] Prior

29. *See generally* N.Y.C. Transit Auth. v. State Div. of Human Rights, 674 N.E.2d 305 (N.Y. 1996) (finding discrimination in failure to accommodate shift swaps for an employee's Sabbath).

30. *See id.* at 310 (affirming the DHR's ruling that the employer failed to make reasonable attempts to address the employee's needs).

31. *See id.* (explaining that the statute is an expression of public policy favoring protecting religious diversity and barring invidious discrimination on the basis of religion).

32. *See, e.g.*, Faur v. Jewish Theological Seminary of Am., 536 N.Y.S.2d 516, 517 (App. Div. 1989) (noting that courts violate the First and Fourteenth Amendments if called on to make a religious determination).

33. *See id.* (finding that the court could not examine whether the seminary's change in policy constituted religious discrimination without impermissibly interfering in religious matters, referred to as "entanglement").

34. *See, e.g.*, Vione v. Tewell, 820 N.Y.S.2d 682, 685 (Sup. Ct. 2006) (finding that the court could address breach of fiduciary duty and intentional infliction of emotional distress claims against plaintiff's pastor as these claims do not involve religious doctrine).

35. *See* N.Y. DOM. REL. LAW §§ 13-15 (McKinney 2010) (requiring that couples obtain a license and return it after solemnization); *id.* §§ 11-12 (enumerating clerical and civil officers who may solemnize a marriage, and requiring witnesses to solemnization).

36. *See* Seymour v. Holcomb, 790 N.Y.S.2d 858, 861-62 (Sup. Ct. 2005) (noting that a city clerk has no discretion in issuing marriage licenses, but denying complaint of same-sex couples, finding that they were not valid applicants), *aff'd*, 811 N.Y.S.2d 134 (App. Div.), *aff'd sum nom.* Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

to implementation of the license requirement in 1933, New York recognized common-law marriages, and common-law marriages entered into before the new law went into effect remained valid.[37] Finally, prior to enactment of the Marriage Equality Act, New York recognized out-of-state same-sex marriages in some situations, but courts held that the Domestic Relations Law barred in-state same-sex marriages.[38]

The Marriage Equality Act amends the Domestic Relations Law, specifying the intent of the legislature that same-sex and opposite-sex marriages are to be treated identically under the law, and that any omission of statutory language is not to be construed as intent to preserve any legal distinction.[39] Two new sections were added: section 10-a, which makes New York marriages gender-neutral by prohibiting any legal distinctions based on the gender of parties to a marriage, and section 10-b, which defines new exemptions for religiously-affiliated organizations and reinforces existing statutory provisions and constitutional protections.[40] The requirements for issuing licenses were amended to clarify that the sex of the parties is not a basis for denial of a license.[41] The provisions for solemnizing marriages were amended to clarify that no member of the clergy is required to solemnize any marriage and that no penalties can flow from refusing to do so.[42] Finally, an inseverability clause was included to seal the political bargain, directing that the entire Act be stricken if any part is found to be invalid.[43]

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37. *See In re* Benjamin's Estate, 311 N.E.2d 495, 496 (N.Y. 1974) (noting that even though common-law marriages were abolished in 1933, common-law marriages previously entered are recognized so long as the parties were competent to marry).

38. *See, e.g.*, Golden v. Paterson, 877 N.Y.S.2d 822, 833 (Sup. Ct. 2008) (upholding the Governor's executive order that state agencies recognize same-sex marriages performed in other jurisdictions, based on the absence of express legislation to the contrary); *see also* Hernandez v. Robles, 855 N.E.2d 1, 12 (N.Y. 2006) (applying rational basis scrutiny to find no Equal Protection or Due Process violation in the Domestic Relations Law's restriction of marriage to opposite-sex couples).

39. *See* Marriage Equality Act, ch. 95, § 2, 2011 N.Y. Sess. Laws 95 (McKinney) (stating that the legislature intends same-sex couples to have the same access to protections, obligations, and benefits of marriage as opposite-sex couples); *see also infra* Appendix I (providing the text of selected provisions of the Marriage Equality Act).

40. *See* Marriage Equality Act, sec. 3, § 10-a (defining marriages as valid regardless of the sex of the parties and requiring that all laws referring to marriage be construed as gender-neutral); Act of June 24, 2011, ch. 96, sec. 1, § 10-b, 2011 N.Y. Sess. Laws 96 (McKinney) (exempting religiously-affiliated organizations from solemnizing or celebrating marriages and noting that the Marriage Equality Act will not limit Human Rights Law exemptions or protections in the State Constitution).

41. *See* Marriage Equality Act, sec. 4, § 13 (clarifying that a marriage license may not be denied to same-sex applicants).

42. *See id.*, sec. 5, § 11 (specifying that no clergy member can be required to solemnize a marriage, nor be punished by private action for such refusal); Act of June 24, 2011, sec. 2, § 11 (barring state sanction for refusal to solemnize a marriage).

43. *See* Act of June 24, 2011 § 3 (providing that the entire Marriage Equality Act is

C. New York Statutory Interpretation

1. Canons of Statutory Construction and Related Rules of Interpretation

The New York Code includes a treatise on the enactment and interpretation of statutes, including rules of statutory interpretation that are frequently cited in state court decisions.[44] The primary consideration for courts is to give effect to the intent of the legislature, even above a literal interpretation of statutory text.[45] Statutes are also to be interpreted under equitable principles to avoid hardship or injustice.[46] Courts can refer to extrinsic aids in interpretation, such as legislative history, but only when the text of the statute is ambiguous.[47]

Particularly applicable to analysis of the Marriage Equality Act is the rule that statutes should not be construed in a fashion that strips them of any effect.[48] Thus in *New York State Crime Victims Board ex rel. Organek v. Harris*, the New York Supreme Court, Appellate Division interpreted the "Son of Sam" statute to grant the crime victim's request for a preliminary injunction barring the perpetrator's use of the funds held in guardianship, rejecting the convict's reading that the statute did not provide for preliminary injunctions.[49] Additionally, courts apply a strong presumption of constitutionality to legislative enactments.[50] Courts will typically avoid constitutional questions whenever another interpretation is available.[51] In

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to be construed as a whole).

44. *See generally* N.Y. STAT. LAW §§ 71-262 (McKinney 1971 & Supp. 2011) (defining and annotating the rules of "statutory construction" that courts use to construe and analyze statutes, as well as rules for resolving interpretive conflicts).

45. *See* Braschi v. Stahl Assocs., 543 N.E.2d 49, 52 (N.Y. 1989) (reviewing the meaning of "family" in a rent-control statute and explaining that legislative intent in statutory interpretation is more important than rules of grammar or logic (citing United States v. Whitridge, 197 U.S. 135, 143 (1905))).

46. *See id.* (explaining that avoidance of hardship or injustice is a key consideration when balancing different interpretations (citing STAT. §§ 141, 143, 146)).

47. *See* Lloyd v. Grella, 634 N.E.2d 171, 174 (N.Y. 1994) (discussing statutory interpretation and noting that an unambiguous statute must be construed without reference to legislative history (citing STAT. § 76)). *See generally* STAT. §§ 76, 120-30 (reviewing categories of extrinsic evidence, such as legislative history and administrative agency interpretation).

48. *See* STAT. § 144 (creating a presumption that the legislature did not act with an intent that their acts have no effect).

49. *See* N.Y. State Crime Victims Bd. *ex rel.* Organek v. Harris, 891 N.Y.S.2d 175, 177 (App. Div. 2009) (holding that reading the "Son of Sam" statute as barring a preliminary injunction would strip it of any effect, since the convict could dispose of the funds before the victim could recover them).

50. *See, e.g.*, LaValle v. Hayden, 773 N.E.2d 490, 494 (N.Y. 2002) (noting that the challenging party has the burden of showing unconstitutionality beyond a reasonable doubt).

51. *See* STAT. § 150 (requiring a clear violation for a finding of unconstitutionality).

In re Jacob, the New York Court of Appeals followed this canon to hold that a statutory provision requiring termination of a biological parent's rights when a child is adopted could not be enforced to strip a biological mother of her parental rights when the biological mother's lesbian partner adopted their child.[52]

When local ordinances and state laws overlap, the court must determine whether or not the local ordinance is preempted by state law.[53] State law preempts inconsistent local ordinances.[54] In *Hoetzer v. Erie County*, the district court voided a county drug paraphernalia law as preempted by state law, on the basis that state law did not allow for local revision.[55]

2. Severability and Inseverability

Courts cannot always avoid constitutional questions and are thus faced with deciding whether the entire statute should be declared invalid or whether the invalid provision should be "severed" when unconstitutionality is found.[56] In *New York SMSA Ltd. Partnership v. Town of Clarkstown*, the district court invalidated an entire statute even though federal law preempted only some of the provisions.[57] Under New York law, a court should only sever an invalid provision when the legislature would have intended such severance, provided that the remaining provisions can still operate.[58] The presence of a severability clause provides a strong presumption in favor of severance but is not dispositive.[59] When the

52. *See In re* Jacob, 660 N.E.2d 397, 405 (N.Y. 1995) (noting that the alternate interpretation, holding the provision applicable, would raise constitutional questions regarding the rights of both adoptive children and prospective parents).

53. *See generally* Quest Diagnostics, Inc. v. Cnty. of Suffolk, 865 N.Y.S.2d 504, 508-09 (Sup. Ct. 2008) (rejecting the argument that state law preempted county competitive bidding ordinances).

54. *See id.* (clarifying that "inconsistent" means not only literally inconsistent language but also cases where a local ordinance would inhibit operation of state law).

55. *See* Hoetzer v. Erie Cnty., 497 F. Supp. 1207, 1215-16 (W.D.N.Y. 1980) (finding that the local law was not inconsistent with the state law, but that the state legislature had intended to occupy the entire field of law, to the exclusion of local enactments).

56. *See generally* John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993) (reviewing the evolution of severability jurisprudence and courts' interpretation of legislative intent when faced with an unconstitutional statutory provision).

57. *See* N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 603 F. Supp. 2d 715, 734-35 (S.D.N.Y. 2009) (applying New York rules of statutory interpretation and finding that the statutory language that remained after the preempted provisions were struck could not function alone), *aff'd*, 612 F.3d 97 (2d Cir. 2010).

58. *See id.* at 734 (analogizing to the difference between trimming branches and severing the roots of a tree (citing Alpha Portland Cement Co. v. Knapp, 230 N.E.2d 202, 207 (N.Y. 1920))).

59. *See id.* (noting that the preference for severance is "particularly strong" when there is a severability clause (quoting Nat'l Adver. Co. v. Town of Niagara, 942 F.2d 145, 148 (2d Cir. 1991))).

provisions to be severed are so intertwined with the remaining provisions that the result would be something the legislature never intended, then the entire statute must be invalidated, even when the legislature provided a severability clause.[60]

While there is much case law on severability (with and without severability clauses), there is little case law on *inseverability* clauses.[61] *Zobel v. Williams* is the only case where the U.S. Supreme Court has addressed the issue of an inseverability clause.[62] In *Zobel*, the Court remanded the case to the Alaska Supreme Court to determine the effect of the inseverability clause.[63] Surveys of case law indicate that most courts treat inseverability clauses as presumptions, identically to how they treat severability clauses.[64] However, some commentators have suggested that inseverability clauses are fundamentally different from severability clauses, and should be analyzed in light of the legislative intent underlying their inclusion.[65]

D. Scenarios That New York Courts May Face Under the Marriage Equality Act

1. New Jersey Civil Unions: Bernstein v. Ocean Grove Camp Meeting Association

In early 2007, a New Jersey same-sex couple tried to rent the Boardwalk Pavilion owned by the Ocean Grove Camp Meeting Association (OGCMA) for use in a civil union ceremony.[66] OGCMA is a Methodist organization, and they denied the request on the basis that civil unions, like same-sex

60. *See Nat'l Adver. Co.*, 942 F.2d at 148 (noting that a severability clause is not an invitation for the judiciary to rewrite law).

61. *See* Fred Kameny, *Are Inseverability Clauses Constitutional?*, 68 ALB. L. REV. 997, 1006 (2005) (noting "few reported cases" and only two that have reached the Supreme Court).

62. *See* Zobel v. Williams, 457 U.S. 55, 64-65 (1982) (holding that a court can sever an invalid provision unless it is evident the legislature would not have enacted the legislation without the provision, and noting the inclusion of an inseverability clause in the statute in question).

63. *See id.* (finding that the impact of the inseverability clause is a question of state law); *cf.* Kameny, *supra* note 61, at 1007 n.50 (noting that there is no subsequent history after remand).

64. *See* Israel E. Friedman, Comment, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 907-09 (1997) (surveying federal and state cases that treat the two types identically).

65. *Compare* Kameny, *supra* note 61, at 997-1001 (arguing that coercive inseverability clauses should not be followed), *with* Friedman, *supra* note 64, at 917-23 (arguing that inseverability clauses should be taken as "clear statement rules").

66. *See* Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274, 279 (2010) (reviewing the case as an example of balancing the rights of same-sex families with the religious freedoms of objectors).

marriages, were inconsistent with church teachings.[67] The couple filed a complaint with the New Jersey Division of Civil Rights (NJDCR), alleging violation of New Jersey's Law Against Discrimination, which bars discrimination in places of public accommodation on the basis of sexual orientation or civil union status.[68] NJDCR found probable cause to credit the allegations.[69]

After the complaint was filed, OGCMA removed the Boardwalk Pavilion from public use, and a state agency subsequently revoked a specially-granted property tax exemption because the pavilion was no longer open to all comers on an equal basis.[70] When another same-sex couple filed a similar discrimination complaint against OGCMA, unlike in *Bernstein*, NJDCR found no probable cause, because the pavilion was no longer a public accommodation available for such services.[71] While this case applied New Jersey law, it provides a useful framework to analyze how the New York DHR and courts would apply New York law to a similar fact pattern.

2. Public Officials Refusing to Meet Obligations Based on Sincerely-Held Religious Beliefs.

Immediately after the Marriage Equality Act passed, some New York town clerks stated that they would not issue licenses to same-sex couples, or resigned, citing religious objections.[72] In response, the Nassau County District Attorney issued a warning to clerks in her jurisdiction that they could be subject to criminal prosecution for official misconduct.[73] Under

67. *See id.* (discussing the religious rationale for the refusal).

68. *See* Bernstein v. Ocean Grove Camp Meeting Ass'n, No. PN34XB-03008, at 1 (Div. of Civil Rights, Dec. 29, 2008), *available at* http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf (presenting the statutory basis for the complaint).

69. *See id.* at 12 (finding that probable cause of discrimination by a place of public accommodation had been established).

70. *See id.* at 5-6 (discussing the original grant of the exemption based on promise of public access, OGCMA's decision to remove public access to avoid future conflicts, and the subsequent revocation of the tax exemption).

71. *See* Moore v. Ocean Grove Camp Meeting Ass'n, No. PN34XB-03012, at 3-4 (Div. of Civil Rights, Dec. 29, 2008), *available at* http://www.nj.gov/oag/newsreleases08/pr20081229a-Moore-v-OGCMA-NPC.pdf (declining to find probable cause for discrimination).

72. *See, e.g.*, Paul Riede, *Another New York Employee Resigns over New Gay Marriage Law*, HUFFINGTON POST (July 22, 2011, 10:47 AM), http://www.huffingtonpost.com/2011/07/22/conservative-christian-em_n_906262.html (noting the resignation of one town clerk and the earlier refusal of another).

73. *See* Letter from Kathleen M. Rice, Dist. Att'y, Nassau Cnty., to Nassau Cnty. Town & City Clerks (July 8, 2011), *available at* http://www.docstoc.com/docs/84041181/Rice-Letter-Re-Marriage-Licenses (arguing that the religious exemptions in the Marriage Equality Act do not allow public officials to avoid the duties of their offices).

the Penal Law, a public official can be charged with misconduct for depriving another of a legal benefit by failing to perform a duty imposed by law, and the New York Court of Appeals has held that a "benefit" is not limited to financial gain.[74] The Nassau County District Attorney's analysis has been disputed by opponents of same-sex marriage, based on the religious accommodation provisions in the Human Rights Law.[75]

After the Marriage Equality Act went into effect, the Ledyard, New York, town clerk, citing religious objections to same-sex marriage, decided to stop issuing all marriage licenses rather than be required to participate in a same-sex marriage.[76] On August 30, 2011, the Ledyard clerk refused to issue a marriage license to a same-sex couple, instead telling them to make an appointment with the town's deputy clerk.[77] In response, the couple's counsel sent a demand letter to the Ledyard town board, and a lawsuit may be forthcoming.[78] The outcome of the case may turn on whether or not Ledyard actually had a deputy clerk at the time the clerk denied the same-sex couple's request.[79]

III. ANALYSIS

A. The New Religious Exemptions Will Have Limited Impact.

New York rules of statutory interpretation require that courts interpret

74. *See* N.Y. PENAL LAW § 195.00 (McKinney 2010) (defining misconduct as including intentional deprivation of a benefit to another person by refusing to perform a legally-mandated duty); People v. Feerick, 714 N.E.2d 851, 856 (N.Y. 1999) (distinguishing New York's definition of "benefit" as "any gain or advantage" from other states' more limited definitions (quoting PENAL § 10.00(17))).

75. *See* Memorandum from Alliance Def. Fund to N.Y. Mun. Clerks Responsible for Issuing Marriage Licenses (July 15, 2011) [hereinafter ADF Memo], *available at* http://www.adfmedia.org/files/NYClerksSSMlicenseMemo.pdf (providing guidance on requesting religious accommodations under the Human Rights Law).

76. *See* Tyler Kingkade, *New York Town Clerk Refuses to Let Same-Sex Couple Get Married*, HUFFINGTON POST (Sept. 15, 2011, 5:57 PM), http://www.huffingtonpost.com/2011/09/15/new-york-town-refuses-to-marry-gay-couple_n_964595.html (discussing Ledyard clerk's decision to stop issuing all marriage licenses).

77. *See id.* (describing denial of license to same-sex couple); *see also* N.Y. TOWN LAW § 30(10) (McKinney Supp. 2011) (allowing appointment of deputies in incorporated towns).

78. *See* Press Release, People for the Am. Way, PFAW Foundation Demands That N.Y. Town Clerks End Marriage Discrimination (Sept. 12, 2011), *available at* http://www.pfaw.org/press-releases/2011/09/pfaw-foundation-demands-that-ny-town-clerks-end-marriage-discrimination (demanding that the clerk be ordered to either perform her duties or resign).

79. *Compare* Kingkade, *supra* note 76 (claiming that Ledyard had no deputy at the time), *with* Michael Hill, *Public Duty Clashes with Beliefs*, ALBANY TIMES UNION (Oct. 25, 2011, 11:30 PM), http://www.timesunion.com/news/article/Public-duty-clashes-with-beliefs-2236460.php (explaining that the deputy was available).

statutory language to ensure that statutes have some legal effect.[80] However, the religious exemptions in the Marriage Equality Act largely reiterate existing New York statutory and constitutional principles.[81] The exemptions include only one new provision and its impact is limited.[82]

1. The Language Adds No New Interpretive Basis for Clerical Exemptions.

The Marriage Equality Act expressly exempts clergy from requirements to solemnize marriages that violate their religious tenets, and bars private claims or government sanction for such refusal.[83] However, as noted in *Faur v. Jewish Theological Seminary of America*, courts avoid interpreting religious doctrine on constitutional grounds.[84] Were a discrimination complaint filed for refusal to solemnize a marriage, the court would follow the *Faur* precedent of applying constitutional principles and dismiss the complaint, because otherwise the court would be required to delve into religious tenets.[85] Similarly, any state sanction for such refusal would be struck down as infringing on the free exercise of religion under *Employment Division v. Smith*.[86] To find that the newly-enacted clerical provisions do have some effect, a court should interpret the language added by the Marriage Equality Act as a statement of legislative intent that courts affirm the longstanding principle of avoiding questions that involve religious interpretation.[87]

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80. *See* N.Y. STAT. LAW § 144 (McKinney 1971 & Supp. 2011) (requiring that statutory interpretation not render statutes ineffective).

81. *See* Act of June 24, 2011, ch. 96, sec. 1, §§ 10-b(2), 10-b(3), 2011 N.Y. Sess. Laws 96 (McKinney) (providing that nothing in the Marriage Equality Act diminishes the exemptions in the Human Rights Law or affects constitutional religious freedoms).

82. *See id.*, sec. 1, § 10-b(1) (allowing religiously-affiliated organizations to refuse to participate in celebrating or solemnizing marriages).

83. *See* Marriage Equality Act, ch. 95, sec. 5, § 11, 2011 N.Y. Sess. Laws 95 (McKinney) (clarifying that clergy may refuse to solemnize marriages and barring civil claims for refusal); Act of June 24, 2011, sec. 2, § 11 (barring state sanction for refusal to solemnize a marriage).

84. *See* Faur v. Jewish Theological Seminary of Am., 536 N.Y.S.2d 516, 517 (App. Div. 1989) (noting that courts cannot make religious determinations without violating constitutional religious freedom principles).

85. *See id.* (affirming the lower court's decision to dismiss discrimination complaint in order to avoid constitutional issues); *cf.* Madireddy v. Madireddy, 886 N.Y.S.2d 495, 496 (App. Div. 2009) (refusing, on constitutional grounds, to address the validity of a Hindu marriage ceremony).

86. *See* Emp't Div. v. Smith, 494 U.S. 872, 877 (1990) (noting that government is barred from punishing expressions of religious doctrine or imposing disabilities on the basis of religion).

87. *Cf. In re* Jacob, 660 N.E.2d 397, 405 (N.Y. 1995) (interpreting adoption law to avoid constitutional questions of the rights of adoptive parents and children); Vione v. Tewell, 820 N.Y.S.2d 682, 685 (Sup. Ct. 2006) (avoiding religious questions by analyzing tort and contract claims against plaintiff's pastor on neutral principles).

2. The Introduction of Same-Sex Marriage Changes Nothing for Non-Religiously-Affiliated Public Accommodations.

The Marriage Equality Act provides no new exemptions to allow a non-religiously-affiliated place of public accommodation to defend a discrimination complaint arising from refusal to provide services for a same-sex marriage.[88] The Human Rights Law already barred discrimination in places of public accommodation based on marital status and sexual orientation.[89] When the legislature acts in an area of law, a court should assume that the legislature covered what it intended and not create an expanded interpretation in the absence of statutory language.[90] Furthermore, the statement of legislative intent in the Marriage Equality Act reinforces that rule of statutory interpretation.[91] Therefore, the DHR or a reviewing court must address a claim of discrimination from denial of service for same-sex marriage like any other discrimination claim, as the absence of exemptions is a legislative statement that no exemptions are intended.[92]

3. Municipalities Are Barred from Diluting New and Existing Protections for Religiously-Affiliated Organizations.

Domestic Relations Law section 10-b(2), added with the Marriage Equality Act, reinforces the religious organization exemptions in Human Rights Law section 296(11) by expressly overriding any other state or municipal provision that might contradict or limit the protections.[93] This language was likely included preemptively, based on concern that municipalities that provide stronger antidiscrimination protections than state law might attempt to reduce the Human Rights Law's protections for

88. *See generally* Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws 95 (McKinney) (providing only religiously-based exemptions); Act of June 24, 2011, ch. 96, 2011 N.Y. Sess. Laws 96 (McKinney) (providing only religiously-based exemptions).

89. *See* N.Y. EXEC. LAW § 296(2) (McKinney Supp. 2011) (barring discrimination by places of public accommodation on the basis of, inter alia, marital status and sexual orientation).

90. *See, e.g.*, Golden v. Paterson, 877 N.Y.S.2d 822, 832-33 (Sup. Ct. 2008) (finding that reading an exclusion of same-sex marriage into the Domestic Relations Law, which is silent on the subject, would be judicial lawmaking, given the existence of statutory bars to polygamy and closely-incestuous marriage).

91. *See* Marriage Equality Act § 2 (providing that omission of changes to other law is not to be construed as intent to preserve any distinctions between marriages).

92. *Cf. id.*, sec. 3, § 10-a (providing, inter alia, that governmental protections relating to marriage apply regardless of the sex of the parties).

93. *See* Act of June 24, 2011, sec. 1, § 10-b(2) (clarifying that the Marriage Equality Act does not limit the protections in the Human Rights Law, regardless of any other state or local provisions of law to the contrary).

religious organizations.[94] A court facing a challenge to a local ordinance's scope would look for a way to resolve the conflict without reaching the constitutional issue of balancing one party's religious freedom against the other party's right to be free from discrimination.[95] The express language in the Marriage Equality Act noting that no other provisions of law can diminish the protections provided by the Human Rights Law will allow a court to avoid the constitutional question.[96] Thus, a court will likely invalidate any local restrictions as preempted by state law, based on the state legislature's clear expression of intent to occupy that area of law.[97]

4. Religiously-Affiliated Organizations Are Now Protected from Claims of Discrimination for Refusal to Participate in Celebration of a Same-Sex Marriage.

Because the religious exemptions in the Human Rights Law apply only to claims brought under the Human Rights Law itself, a religiously-affiliated organization could still face a discrimination claim under the Civil Rights Law.[98] Domestic Relations Law section 10-b(1), added with the Marriage Equality Act, provides a broad exemption applicable to any provision of state or local law, exempting religiously-affiliated organizations from in any way supporting the celebration or solemnization of marriage.[99] Therefore, a complaint filed under the Civil Rights Law, which would have been viable prior to enactment of the Marriage Equality Act, is now expressly preempted by the new exemption that applies to all facets of state law.[100]

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94. *Compare* N.Y.C., N.Y., ADMIN. CODE §§ 8-102, 8-107 (2010) (covering gender identity by defining "gender" to include both sex and gender identity and prohibiting discrimination based on gender or sexual orientation), *with* N.Y. EXEC. LAW §§ 292, 296 (McKinney Supp. 2011) (defining only "sexual orientation" and prohibiting discrimination based on sex and sexual orientation).

95. *Cf. In re* Jacob, 660 N.E.2d 397, 405 (N.Y. 1995) (avoiding constitutional questions of the rights of parents and children in interpreting adoption law).

96. *See* Act of June 24, 2011, sec. 1, § 10-b(2) (barring any provision of state or local law that limits the religious exemptions in the Human Rights Law).

97. *See* Hoetzer v. Erie Cnty., 497 F. Supp. 1207, 1216 (W.D.N.Y. 1980) (explaining that a local law is preempted when the state legislature demonstrates intent to cover a complete statutory area via state law).

98. *See* N.Y. CIV. RIGHTS LAW § 40 (McKinney 2009) (defining sexual orientation discrimination in places of public accommodation as a violation subject to civil and/or criminal sanction); Catholic Charities of the Diocese of Albany v. Serio, 808 N.Y.S.2d 447, 465-66 (App. Div.) (noting that the Human Rights Law gives no indication that its exemptions apply to any other laws), *aff'd*, 859 N.E.2d 459 (N.Y. 2006).

99. *See* Act of June 24, 2011, sec. 1, § 10-b(1) (exempting religiously-affiliated organizations from facilitating celebration or solemnization of marriage and barring private or public sanction for such refusal).

100. *See id.* (expressly preempting any other provision of state or local law that might conflict with the exemption).

Section 10-b(1) also covers any non-profit corporation controlled by a religious organization, while the Human Rights Law exemptions depend on the purpose of the organization.[101] In this respect, section 10-b(1) appears to have been written to defeat a finding of discrimination in a scenario similar to that which arose in the New Jersey case of *Bernstein v. Ocean Grove Camp Meeting Association.*[102] However, unlike the New Jersey Law Against Discrimination, the New York Human Rights Law deems certain religious corporations "distinctly private," which strips the DHR of jurisdiction to hear a public accommodation complaint.[103] Therefore, the new exemption is only necessary for, and would only apply to, the case of a non-profit corporation that is not incorporated under the Religious Corporations Law or Benevolent Orders Law but is controlled by such a corporation.[104]

a. Without the Exemption Provided by Section 10-b(1), the New York DHR Would Reach the Same Conclusion That Its New Jersey Counterpart Did for OGCMA.

In *Bernstein*, the New Jersey Division of Civil Rights found that the Pavilion was a place of public accommodation.[105] While "boardwalk pavilion" is not enumerated in the New York Human Rights Law's definition of public accommodations, the definition is broad and controlled by what is excluded, not what is included.[106] The DHR would then look to

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101. *Compare id.* (covering "not-for-profit corporation[s] operated, supervised, or controlled by a religious corporation"), *with* N.Y. EXEC. LAW § 296(11) (McKinney Supp. 2011) (covering "organization[s] operated for charitable or educational purposes . . . operated, supervised or controlled by . . . a religious organization").

102. *See generally* Bernstein v. Ocean Grove Camp Meeting Ass'n, No. PN34XB-03008 (Div. of Civil Rights, Dec. 29, 2008), *available at* http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf (finding probable cause to support the discrimination claim brought by a same-sex couple who attempted to rent a facility for a civil union ceremony).

103. *Compare id.* at 7 (noting that the New Jersey Law Against Discrimination has no blanket exemption for facilities operated by religious groups), *with* N.Y. EXEC. LAW § 292(9) (McKinney Supp. 2011) (deeming religious corporations and benevolent orders as "distinctly private"). *See also* Gifford v. Guilderland Lodge, No. 2480, B.P.O.E., 707 N.Y.S.2d 722, 722-23 (App. Div. 2000) (affirming dismissal of a discrimination complaint based on the plain language of the benevolent order exception, irrespective of limitations that apply to other private groups).

104. *See* Act of June 24, 2011, sec. 1, § 10-b(1) (exempting "a not-for-profit corporation operated, supervised, or controlled by" a religious organization).

105. *See Bernstein*, No. PN34XB-03008, at 7-9 (analyzing New Jersey's definition of public accommodation and OGCMA's use of the Pavilion to conclude that it was a public accommodation).

106. *See* EXEC. § 292(9) (including, inter alia, roof gardens, recreation parks, resort camps, and fairs, in "place of public accommodation, resort or amusement"); *cf.* Cahill v. Rosa, 674 N.E.2d 274, 276 (N.Y. 1996) (noting that the Human Rights Law requires liberal interpretation in analyzing places of public accommodation (citing EXEC. § 300)).

the facility's usage, finding that it was previously rented to all comers based simply on availability, application, and payment of a rental fee, including for religious weddings of different faiths, and that a state property tax exemption had been granted based on the owner's promise to keep the facility open to all.[107] The DHR would conclude that the facility was a place of public accommodation, because the owner had failed to meet its burden of proving that the facility is "distinctly private."[108] Therefore, denial of access for same-sex marriages, while allowing access for opposite-sex marriages, would be discrimination based on sexual orientation.[109]

The hypothetical owner would likely argue that the denial was based on religious doctrine, not sexual orientation, and hence protected under section 296(11); but, having routinely rented for marriages of other faiths, that argument would likely fail because the law does not protect blanket discrimination.[110] Similarly, arguments that the bar on discrimination based on sexual orientation infringes constitutional religious freedoms would also fail because, as was the case for the statute at issue in *Catholic Charities of the Diocese of Albany v. Serio*, the Human Rights Law is a neutral law of general applicability, which does not require that the court apply heightened scrutiny.[111] Therefore, under the Human Rights Law, without the new exemption included in section 10-b(1), the New York DHR would likely find probable cause to support the claim of discrimination based on sexual orientation.[112]

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107. *Accord Bernstein*, No. PN34XB-03008, at 7-9 (reviewing the factors the NJDCR examined in its determination that the Pavilion was a place of public accommodation).

108. *Accord Cahill*, 674 N.E.2d at 277 (clarifying that a dental office had the burden to show that it was "distinctly private").

109. *Cf. Bernstein*, No. PN34XB-03008, at 9 (noting that denial of access for civil union ceremonies while allowing them for marriages was discrimination based on civil union status).

110. *Cf.* Logan v. Salvation Army, 809 N.Y.S.2d 846, 848-49 (Sup. Ct. 2005) (holding that while the exemptions allow religious organizations to choose to discriminate in hiring, they do not protect it from claims of religious harassment after hiring).

111. *See* Catholic Charities of the Diocese of Albany v. Serio, 808 N.Y.S.2d 447, 455 (App. Div.) (holding that a law requiring all employer-provided health insurance programs to cover contraception was a neutral law of general applicability that did not unconstitutionally infringe religious freedom), *aff'd*, 859 N.E.2d 459 (N.Y. 2006); *accord Bernstein*, No. PN34XB-03008, at 12 (finding that New Jersey's Law Against Discrimination is neutral and generally applicable).

112. *Cf. Bernstein*, No. PN34XB-03008, at 12 (finding probable cause of discrimination under New Jersey's Law Against Discrimination).

b. The Exemption Added by Section 10-b(1) Will Prevent DHR from Finding Discrimination Based on Sexual Orientation, but Would Not Prevent Loss of a Tax Exemption.

Because the hypothetical owner is a religiously-affiliated organization and the rental is for celebration of marriage, section 10-b(1) clearly bars a claim of discrimination for denial of the rental.[113] Conversely, loss of the property tax exemption would likely not be barred by section 10-b(1).[114] In *Bernstein*, the property tax exemption was granted years earlier after OGCMA promised that the facility would be open to all comers, and the loss of the tax exemption was based on the decision to stop renting out the facility, not due to the refusal to rent the Pavilion for a civil union ceremony.[115] In New York, were the hypothetical owner to keep the facility open, except for weddings, section 10-b(1) would likely bar retraction of the tax exemption.[116] In *Bernstein*, removal of public access was in response to the discrimination complaint, and to avoid future similar complaints.[117] Under section 10-b(1) in New York, there would be no reason to withdraw public use of the facility because the law bars the discrimination complaint, which would appear to moot the tax exemption question.[118] Were the owner to close the facility to the public, the tax exemption could be revoked based on termination of the equal-access condition, but if the tax exemption were revoked following refusal to rent the facility for marriage, a New York court would likely strike down that action as a clear violation of section 10-b(1).[119]

B. New York Rules of Statutory Interpretation Imply That the Inseverability Clause Should Be Given Effect.

None of the provisions in the Marriage Equality Act point to new

113. *See* Act of June 24, 2011, ch. 96, sec. 1, § 10-b(1), 2011 N.Y. Sess. Laws 96 (McKinney) (exempting religiously-affiliated organizations from providing accommodations for marriage ceremonies and barring private claims and government sanctions for such refusal).

114. *Cf. id.* (limiting exemptions to solemnization and celebration of marriages).

115. *See Bernstein*, No. PN34XB-03008, at 4-6 (reviewing grant and then removal of the pavilion's property tax exemption by the New Jersey Department of Environmental Protection).

116. *See* Act of June 24, 2011, sec. 1, § 10-b(1) (barring penalty for marriage-related denials of service).

117. *See Bernstein*, No. PN34XB-03008, at 5 (discussing termination of rentals of the pavilion).

118. *See id.* at 4-6 (finding that removal of the tax exemption followed causally from the initial discrimination complaint).

119. *See* Act of June 24, 2011, sec. 1, § 10-b(1) (barring government penalty or loss of benefits for refusal to provide facilities for solemnization or celebration of marriage).

constitutional interpretations, and courts place a high priority on avoiding questions of constitutionality.[120] However, the amendment that strengthened the religious exemptions also included an inseverability clause, which warrants exploration of what might happen should a court find a reason to hold the exemptions unconstitutional.[121] While there is little case law on inseverability, case law on severability supports the conclusion that a court interpreting New York law would find the Marriage Equality Act's inseverability clause enforceable.[122]

Under New York law, unconstitutional statutory provisions are severed only if the remaining provisions can still function and the legislature clearly would have enacted the remaining statutory language.[123] The inseverability clause is a clear statement that the legislature *would not* have enacted the Marriage Equality Act in the absence of the religious exemptions.[124] Because the primary requirement of statutory interpretation is to give effect to the intent of the legislature, the only avenue by which a court could reject enforcing the inseverability clause would be to find that doing so would create hardship or injustice for same-sex couples.[125]

In response to an argument that invalidating the entire Marriage Equality Act would result in injustice for married same-sex couples, a court would likely reference the history of common law marriage in New York.[126] While New York eliminated common law marriage by statute in 1933, marriages entered into prior to that date remained valid.[127] With this analogous precedent, a court that invalidated the Marriage Equality Act

120. *See, e.g.*, LaValle v. Hayden, 773 N.E.2d 490, 494 (N.Y. 2002) (arguing that courts must try to avoid interpreting a presumptively valid statute to find it unconstitutional).

121. *See* Act of June 24, 2011 § 3 (invalidating the entire Marriage Equality Act if any section is found invalid).

122. *See, e.g.*, N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 603 F. Supp. 2d 715, 734 (S.D.N.Y. 2009) (reviewing the criteria by which New York courts will sever provisions of a statute, with or without a severability clause), *aff'd*, 612 F.3d 97 (2d Cir. 2010).

123. *See* Nat'l Adver. Co. v. Town of Niagara, 942 F.2d 145, 148 (2d Cir. 1991) (applying New York law to invalidate an entire statute because the remaining provisions could not function alone, even though the statute contained a severability clause).

124. *See* Act of June 24, 2011 § 3 (requiring that the Act be construed as a whole).

125. *See* N.Y. STAT. LAW § 146 (McKinney 1971 & Supp. 2011) (requiring that statutes not be construed to create hardship or injustice); *cf.* Braschi v. Stahl Assocs., 543 N.E.2d 49, 53-54 (N.Y. 1989) (refusing to read "family member" in a rent-control statute in a way that would result in injustice for the lessee's eleven-year live-in same-sex partner).

126. *See generally In re* Benjamin's Estate, 311 N.E.2d 495, 496-97 (N.Y. 1974) (finding that absence of documentary evidence was insufficient to conclude there was not a common law marriage).

127. *See id.* at 496 (noting that common law marriages remained valid if the parties were otherwise competent to have been married at the time the law went into effect).

would likely hold that existing same-sex marriages remain valid.[128] In addition, an argument that barring same-sex marriage was itself an injustice would also likely fail based on prior decisions finding no constitutional right to same-sex marriage.[129]

C. The Lack of Public Employee Exemptions Creates Minimal Burdens.

While the Marriage Equality Act provides exemptions for religiously affiliated organizations, it provides no exemptions for public employees and officials involved in the process of civil marriage.[130] Proponents of such additional exemptions argue that public employees face special burdens when required to facilitate marriages that violate their religious beliefs.[131] However, existing provisions of New York law requiring accommodations ensure that the burden on public employees and officials will be minimal, if any at all, obviating the need for such exemptions.[132]

1. Town and City Clerks Could Be Charged with Official Misconduct.

Upon presentation of a marriage license application, town and city clerks, such as the Ledyard town clerk, are required to issue the license after ensuring that the parties are eligible to be married under the Domestic Relations Law.[133] The clerk of New York City is also required to solemnize marriages for couples whose license was issued by the New York City clerk's office; no other town or city clerks have that responsibility.[134] The Domestic Relations Law's use of the term "shall" renders these responsibilities presumptively mandatory, not

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128. *Cf.* Strauss v. Horton, 207 P.2d 48, 122 (Cal. 2009) (affirming California's constitutional amendment barring same-sex marriage but maintaining same-sex marriages performed prior to the amendment because the amendment was not retroactive).

129. *See* Hernandez v. Robles, 855 N.E.2d 1, 12 (N.Y. 2006) (finding no constitutional violation in restriction of marriage to opposite-sex couples under the Domestic Relations Law).

130. *Cf.* Act of June 24, 2011, ch. 96, sec. 1, § 10-b, 2011 N.Y. Sess. Laws 96 (McKinney) (providing exemptions for religiously-affiliated organizations only).

131. *See* Wilson, *supra* note 9, at 324-39 (explaining that the lack of exemptions forces religious objectors to violate their beliefs or leave their jobs, with concomitant loss of benefits, and arguing that providing exemptions creates minimal burdens).

132. *See* N.Y. EXEC. LAW § 296(10)(a) (McKinney Supp. 2011) (requiring employers to provide reasonable accommodations for employee religious practices); N.Y. DOM. REL. LAW § 15(1)(a) (McKinney 2010) (providing that deputies can issue marriage licenses).

133. *See* DOM. REL. § 15(2) (specifying that the clerk "shall" issue the license if the provided information is sufficient); *id.* § 15(1)(a) (specifying the information to be obtained from the bride and groom, such as age, residence, and status of any prior marriage).

134. *See id.* § 11-a(1)(b) (establishing a duty for the city clerk or one of his deputies to solemnize the marriage upon request).

discretionary.[135] Since no statutory provision appears to defeat this presumption, courts will likely continue to find that the language creates a mandatory duty.[136]

As the Nassau County District Attorney warned, a clerk who refuses to issue a license may be charged with official misconduct, as might the New York City clerk for refusing to solemnize a marriage.[137] Failing to issue a marriage license would deprive the couple of the benefit of the license, and refusing to solemnize a marriage would deprive the couple of the benefit of being married.[138] Because the clerk is a public servant, the express refusal demonstrates knowledge of the duty, and the couple was deprived of a benefit, most of the elements of the prima facie case for official misconduct are easily satisfied.[139] Whether a clerk is found culpable, however, will turn on whether the clerk actually intended to deprive the couple of the benefit of the marriage license or of the solemnization.[140] A defense argument that the clerk intended to have someone else provide the service, and did not intend that the couple be denied a license or solemnization, might suffice to defeat the mens rea for official misconduct.[141]

2. Individual Clerks Can Avoid Facing an Official Misconduct Charge via Existing Provisions of Law.

The Ledyard town clerk deferred responsibility for issuing marriage licenses to a deputy, and in so doing, likely will avoid a charge of official

135. *See* N.Y. STAT. LAW § 177 (McKinney 1971 & Supp. 2011) (directing that command words like "must" and "shall" in statutes are presumptively mandatory, while discretionary words like "may" are presumptively permissive).

136. *See* Seymour v. Holcomb, 790 N.Y.S.2d 858, 861-62 (Sup. Ct. 2005) (noting that clerks lack discretion in issuing licenses), *aff'd*, 811 N.Y.S.2d 134 (App. Div.), *aff'd sum nom.* Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006).

137. *See* Rice, *supra* note 73 (threatening to charge any clerk in her county who refuses to issue a license to a same-sex couple with official misconduct); *see also* N.Y. PENAL LAW § 195.00 (McKinney 2010) (defining the crime of official misconduct as including both performance of unauthorized acts and refusal to perform duties imposed by law).

138. *See* PENAL § 10.00(17) (including advantage to beneficiary, or third person as desired by the beneficiary, in the definition of "benefit"); *cf.* DOM. REL. § 13 (requiring couples to obtain a license from a town or city clerk in order to get married).

139. *See* PENAL § 195.00 (defining one form of official misconduct as a public servant depriving a person of a benefit by knowingly refraining from performing a duty imposed by law).

140. *See id.* (requiring that the deprivation of a benefit be intentional); *id.* § 15.05(1) (defining intent as conscious objective to cause the result).

141. *Cf.* Hill, *supra* note 79 (explaining that the Ledyard town clerk is referring license applications to a deputy to avoid religious conflict). *But cf.* People v. Feerick, 714 N.E.2d 851, 858 (N.Y. 1999) (finding intent to commit official misconduct by obtaining a benefit when officers illegally entered premises to retrieve a lost radio, benefiting the officers by avoiding ridicule and/or discipline for the loss).

misconduct.[142] The Human Rights Law requires that employers reasonably accommodate employees' religious practices when practical.[143] Because this requirement applies to public as well as private employers, the burden will be on the town or city management to show that accommodating a request from the clerk would cause undue hardship to the town or city.[144] As provided by the Domestic Relations Law, accommodations can be made by having a deputy clerk issue marriage licenses, and in the case of the New York City clerk, having a deputy solemnize marriages.[145] For towns and cities that do not currently have a deputy, the clerk can appoint one or have the municipal leadership do so.[146]

The Human Rights Law allows denial of the request if the accommodation presents a significant economic burden, if it will significantly interfere with operations, or if it will cause the employee to be unable to perform the essential function of employment.[147] Because most cities and larger towns are likely to have existing deputies, and town clerks are allowed to appoint unpaid deputies, an economic burden would only arise if the cost to hire a deputy was burdensome to a small town and the clerk was unable to find a volunteer.[148] Provision of a deputy would not cause the clerk to be unable to complete the essential functions of the office and would only minimally interfere with office operations; as such, the accommodation would not be an undue hardship on those bases.[149]

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142. *See* Kingkade, *supra* note 76 (noting that marriage license applications have been deferred to the deputy clerk).

143. *See* N.Y. EXEC. LAW § 296(10)(a) (McKinney Supp. 2011) (requiring reasonable accommodations for employee religious practices, unless such accommodations would cause undue hardship to the employer).

144. *See id.* § 296(10)(d) (placing burden of proof on employer); *accord* N.Y.C. Transit Auth. v. State Div. of Human Rights, 674 N.E.2d 305, 310 (N.Y. 1996) (noting that the city did not attempt to show a burden from accommodating the request for alternative time off for religious observances).

145. *See* N.Y. DOM. REL. LAW § 15 (McKinney 2010) (specifying that the duty of the town or city clerk to issue marriage licenses may be performed by the clerk or one of his or her deputies); *id.* § 11-a(1)(b) (providing that the New York City clerk's deputies can solemnize marriages in the clerk's stead).

146. *See* ADF Memo, *supra* note 75, at 3-4 (noting that the clerk must make the request ahead of time).

147. *See* EXEC. § 296(10)(d)(1) (defining "undue hardship" as one that causes significant expense or difficulty, and enumerating factors to be considered in the determination).

148. *See* N.Y. TOWN LAW § 30(10)(a) (McKinney Supp. 2011) (specifying that deputy town clerks are uncompensated, unless otherwise approved by the town board); *cf.* Robert Harding, *Residents Blast Gay Marriage Stance at Ledyard Town Board Meeting*, AUBURNPUB.COM (Sept. 13, 2011, 3:05 AM), http://auburnpub.com/news/local/article_521150c6-ddc5-11e0-8849-001cc4c03286.html (noting that the most Ledyard has paid for deputy clerks was $200 in 2010).

149. *See* TOWN § 30 (defining the duties of town clerks, encompassing many functions beyond issuing marriage licenses); *cf.* Harding, *supra* note 148 (noting concern from Ledyard citizens that anyone seeking a marriage license would now be

Therefore, in almost all situations, a clerk's request for the accommodation of having a deputy facilitate marriage-related duties should be granted.[150]

The clerk can then delegate marriage-related tasks to the deputy, as the Ledyard town clerk has done.[151] A town or city clerk who has requested a deputy, but where that request has not been granted, could still potentially be charged with official misconduct for failing to issue marriage licenses or solemnize marriages.[152] However, should such charges be brought, the clerk's request for an accommodation will likely rebut the mens rea of intent to deprive of a benefit.[153]

3. Almost No Conflict Can Arise over Solemnization of Marriage.

Clergy, certain state and local officials, and some members of the federal judiciary are empowered, but not required, to solemnize marriages.[154] Other than the New York City clerk, the discretionary nature of marriage solemnization should provide no basis for a charge of official misconduct.[155] Only if a court were to construe solemnization of marriage as a duty that is "clearly inherent in the nature of" the officiant's office could such a charge be made, but this interpretation is rarely applied.[156] In the case of "marriage officers," a court might consider the duty to solemnize inherent in the nature of the office, but, while the statute empowers "marriage officers" to solemnize marriages, it does not impose a duty.[157] Therefore, it is unlikely that a court would sustain a charge of official misconduct for refusal to solemnize a marriage.

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required to make an appointment to see the deputy clerk).

150. *See* EXEC. § 296(10)(d) (requiring the employer to prove "undue hardship").

151. *See, e.g.*, TOWN § 30(10)(a) (empowering the clerk to define the duties of the deputy clerk).

152. *See* N.Y. PENAL LAW § 195.00 (McKinney 2010) (defining official misconduct as failure to perform a duty imposed by law).

153. *See id.* (requiring intention to deny the benefit).

154. *See* N.Y. DOM. REL. LAW § 11 (McKinney 2010) (specifying eligible officiants without placing a requirement on any); *id.* § 11-c (allowing municipalities to appoint "marriage officers" with the authority, but not obligation, to solemnize marriages). *But see id.* § 11-a (requiring the New York City clerk to solemnize marriages for licenses issued by that office).

155. *See id.* §§ 11, 11-c (allowing, but not requiring, municipal and judicial officials to solemnize marriages).

156. *See* PENAL § 195.00(2) (including failure to perform either express or inherent duties in the definition of official misconduct); People v. Mackell, 366 N.Y.S.2d 173, 181-82 (App. Div. 1975) (noting, in dicta, possible application to discretionary duties, but dismissing charges for failure to prosecute), *aff'd*, 351 N.E.2d 864 (N.Y. 1976).

157. *Compare* DOM. REL. § 11-c(1) (granting marriage officers "the authority to solemnize" marriages), *with id.* § 11-a(1)(b) (stating that "it shall be the duty of" the New York City clerk to solemnize the marriage).

4. Clerks and Officiants Must Still Perform Their Duties in a Non-discriminatory Fashion.

Another important factor is that the Ledyard town clerk delegated *all* license applications to the deputy clerk.[158] A town or city clerk who delegates duties to a deputy as a religious accommodation must do so for all couples, not just same-sex couples, as the Marriage Equality Act requires that there be no distinctions between same-sex and opposite-sex marriage, and discrimination based on sexual orientation is a civil rights violation.[159] Similarly, a public official who refused to solemnize a marriage because of the sexual orientation of the parties could also potentially face charges under the Civil Rights Law, but proof of intentional discrimination sufficient to overcome the discretionary nature of the act would be difficult to ascertain.[160] Therefore, existing New York law protects public employees who avail themselves of the religious accommodation provisions and continue to perform their duties in a non-discriminatory fashion, without needing new exemptions.

IV. POLICY RECOMMENDATIONS

The addition of religious exemptions to the Marriage Equality Act caused much turmoil but was a necessary political bargain to secure passage of the Act.[161] Even though New York declined to enact the full set of exemptions proposed by a group of legal scholars, the language enacted still sweeps broadly.[162] Legislators in other states considering marriage equality statutes should be wary of the scope of these proposed exemptions, and follow a model of protections and exemptions represented by New York's Human Rights Law.

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158. *See* Kingkade, *supra* note 76 (noting that the deputy clerk is handling all marriage license applications).

159. *See* Marriage Equality Act, ch. 95, § 2, 2011 N.Y. Sess. Laws 95 (McKinney) (specifying legislative intent that same-sex and opposite-sex marriages be treated equally under the law); N.Y. CIV. RIGHTS LAW §§ 40-c(2), 40-d (McKinney 2009) (criminalizing discrimination on the basis of sexual orientation).

160. *Cf.* Butler v. City of Batavia, 545 F. Supp. 2d 289, 292 (W.D.N.Y. 2008) (dismissing a federal civil rights complaint against police, holding that plaintiffs had shown disparate treatment based on sexual orientation, but had failed to sufficiently allege intent to discriminate), *aff'd*, 323 F. App'x 21 (2d Cir. 2009).

161. *See, e.g.*, Kenneth Lovett, *Gay Marriage Bill Dead Without Church Exemptions, Says State Sen. Greg Ball*, N.Y. DAILY NEWS (June 6, 2011), http://articles.nydailynews.com/2011-06-06/local/29645229_1_marriage-bill-gay-marriage-gay-couples (opining that without stronger religious exemptions the bill could not garner sufficient votes to pass the Republican-led State Senate).

162. *See generally* Skelos Letter, *supra* note 10, at 3-4 (proposing exemptions for individuals, non-religiously-affiliated small businesses, and public employees); Act of June 24, 2011, ch. 96, sec. 1, § 10-b(1), 2011 N.Y. Sess. Laws 96 (McKinney) (providing exemptions for *all* marriages, not just same-sex marriages).

A. Proposed Religious Exemption Language Threatens Much Antidiscrimination Law.

The scholarly proposal would exempt religiously affiliated groups from not only providing any services to support solemnization and celebration of marriage, but also from "treat[ing] as valid any marriage."[163] It would allow individuals, small businesses, and public employees to discriminate in a range of areas where antidiscrimination law generally applies.[164] While the proposal provides a "hardship exception," the scope is still breathtaking.[165]

The proposal's proponents appear to dismiss concerns that it applies to all marriages, not just to same-sex marriages.[166] But not even fifty years ago, a Virginia court used a sincerely held religious belief to affirm the anti-miscegenation statute that the Supreme Court later struck down in *Loving v. Virginia*.[167] As recently as 2009, a Justice of the Peace in Louisiana refused to marry an interracial couple, constitutionally suspect behavior that would appear to be sanctioned by these proposed exemptions.[168] The proposed exemption language is also quite vague; it does not define what it means to "assist" or "promote" marriage, and it does not clarify what it means to be exempt from treating a marriage as valid.[169]

The proponents of these exemptions also suggest that those who deny

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163. *See* Skelos Letter, *supra* note 10, at 3 (proposing statutory exemption for clergy and religiously-affiliated organizations, applicable to all marriages, not just same-sex marriages); *see also infra* Appendix II (presenting the complete proposed statutory language).

164. *See* Skelos Letter, *supra* note 10, at 3 (providing exemptions from provision of goods and services related to marriages, from provision of employee spousal benefits, and from renting to any married couple).

165. *See id.* at 3 (providing that the exemptions do not apply if the party to a marriage is unable to obtain goods and services elsewhere without "substantial hardship").

166. *See* Wilson, *supra* note 9, at 335, 340 (positing that including a same-sex qualification would create a constitutionally questionable facial classification, but that allowing exemptions for race discrimination, for example, is not likely to be a concern).

167. *See* Loving v. Virginia, 388 U.S. 1, 3 (1967) (highlighting the state court's statement that God put the races on separate continents because he did not intend them to mix).

168. *See, e.g.*, Elyse Siegel, *Interracial Couple Denied Marriage License by Louisiana Justice of the Peace*, HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), http://www.huffingtonpost.com/2009/10/15/interracial-couple-denied_n_322784.html (noting that the refusal was based on concern for the children they might have).

169. *Accord* Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL'Y 236, 243-44 (2010) (questioning whether a jeweler could refuse to sell rings to a same-sex couple, and whether rejecting the validity of marriage is limited to questions of religious tenets or applicable to provision of services).

services to same-sex couples could inform the public of this by messages on their websites or signs in their shops.[170] This hearkens back to a time when "Whites only" or "Irish need not apply" signs were common, which was the very reason that antidiscrimination laws were originally enacted.[171] While cloaked as exemptions to same-sex marriage, the proposed language seems more like an attempt to fundamentally alter the balance between antidiscrimination law and religious freedom.[172] So far no legislature has adopted these proposals, and none should.[173]

B. States Should Continue to Follow the Model of Broad Antidiscrimination Laws and Broad Religious Exemptions.

New York's broad antidiscrimination law and equally broad religious exemptions provide little, if any, need for marriage-specific exemptions.[174] The cases raised by marriage-equality opponents as evidence of the impact of same-sex marriage on religious objectors primarily relate to protection of sexual orientation under antidiscrimination law, not to marriage.[175] Cases from states that do not even recognize same-sex marriages are raised as reasons why marriage-specific exemptions are needed.[176] Even when arguing specifically for exemptions for public employees involved in the marriage process, the exemption proponents fail to explain why existing employment accommodation laws are insufficient.[177]

The argument for marriage-specific exemptions appears to come down to a belief that same-sex marriages are somehow different from other marriages.[178] This argument can carry no weight under antidiscrimination

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170. *See id.* at 254-56 (discussing "sign-posting" proposals by proponents of these exemptions).

171. *Accord id.* at 255-57 (discussing these and other examples of such explicit or implicit messaging enabling discrimination).

172. *Accord id.* at 258 (surmising that the real complaint of the proponents is not with same-sex marriage, but rather with antidiscrimination law more broadly, especially protections based on sexual orientation).

173. *But see* R.I. GEN. LAWS § 15-3.1-5(a)(3) (LEXIS through Jan. 2011 Sess.) (exempting religiously-affiliated organizations from recognizing a civil union as valid in Rhode Island's newly-enacted civil union statute).

174. *See supra* Part III (analyzing the existing protections and obligations of New York's antidiscrimination law in the context of the Marriage Equality Act).

175. *See, e.g.*, Lupu & Tuttle, *supra* note 66, at 280-81 (concluding that the OGCMA case, posited as one of same-sex civil unions impacting religious freedom, was actually about public accommodations and sexual orientation discrimination).

176. *See, e.g.*, Wilson, *supra* note 9, at 318 n.1 (highlighting a New Mexico decision finding that a wedding photographer violated the state's antidiscrimination law for refusing to photograph a same-sex commitment ceremony).

177. *Cf. id.* at 346-57 (analyzing cases under federal law to argue that marriage-specific exemptions are constitutional, without discussing why existing laws are insufficient).

178. *Accord* Flynn, *supra* note 169, at 251-54 (arguing that proponents' position is

law that covers marital status and sexual orientation and following statements of legislative intent that the law retains no distinctions between opposite-sex and same-sex marriage.[179]

As more states consider legislative implementation of marriage equality, a system of broad antidiscrimination protections, with broad exemptions for religiously affiliated organizations and religious accommodations for employment, should be used as a model.[180] The burden should be placed on proponents to explain the necessity of additional exemptions specific to same-sex marriage, as well as ensuring that any such exemptions are narrowly tailored to that necessity.

V. CONCLUSION

New York antidiscrimination law has barred most forms of discrimination on the basis of marital status and sexual orientation for many years, while providing broad exemptions for religiously-affiliated organizations and requiring employers to accommodate the religious practices of their employees.[181] The Marriage Equality Act provides exemptions for clergy and religiously affiliated organizations, allowing them to refuse to participate in celebration and solemnization of same-sex marriages.[182] Although courts are required to interpret statutory language as having some legal effect, courts called upon to interpret the Act will find it challenging to distinguish the new provisions from the existing statutory and constitutional protections.[183]

Perhaps more importantly, the New York legislature left out new

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the misunderstanding of homosexual identity versus homosexual conduct); *see also* William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 660-64 (2011) (analogizing the status/conduct distinction used to oppose same-sex marriage to arguments used to oppose desegregation and to support antimiscegenation law).

179. *See* N.Y. EXEC. LAW § 296 (McKinney Supp. 2011) (including marital status and sexual orientation discrimination in all categories of unlawful discrimination); Marriage Equality Act, ch. 95, § 2, 2011 N.Y. Sess. Laws 95 (McKinney) (specifying legislative intent that same-sex and opposite-sex marriage be treated identically under the law).

180. *See* EXEC. §§ 292(9), 296(2) (defining public accommodations broadly, but deeming religious and benevolent corporations as "distinctly private"); *id.* § 296(10) (requiring employers to accommodate religious practices of their employees); *id.* § 296(11) (exempting religious organizations from many provisions of the Human Rights Law).

181. *See generally id.* § 296 (proscribing many forms of private discrimination while providing religion-based exemptions).

182. *See* Marriage Equality Act, sec. 5, § 11 (exempting clergy from requirement to solemnize marriages); Act of June 24, 2011, ch. 96, sec. 1, § 10-b, 2011 N.Y. Sess. Laws 96 (McKinney) (providing exemptions from celebration and solemnization of marriages for religiously-affiliated organizations).

183. *See supra* Part III.A (analyzing the new religious exemptions in light of existing law and finding little impact).

exemptions for public employees as well as broader exemptions for religiously-affiliated and unaffiliated organizations.[184] Religious accommodation requirements in New York law make public employee exemptions unnecessary.[185] Because proposed alternate exemption language would significantly alter antidiscrimination law, the New York legislature was correct in excluding the extensions, and other states are well advised to follow New York's model when they consider marriage equality legislation.[186]

184. *Compare* Act of June 24, 2011 sec. 2, § 10-b (exempting only religiously-affiliated organizations), *with* Skelos Letter, *supra* note 10, at 3-4 (proposing significantly broader exemptions).

185. *See supra* Part III.C (explaining existing statutory provisions that allow almost all objecting public employees to be accommodated under existing law).

186. *See supra* Part IV (concluding that the effect of the exemption language proposed to, but not adopted by, the New York legislature would be to radically roll back protections from discrimination based on sexual orientation).

APPENDIX I. SELECTED PROVISIONS OF THE NEW YORK MARRIAGE EQUALITY ACT

The following provisions of the New York Marriage Equality Act are discussed in detail in the Background and Analysis:[187]

Statement of legislative intent:

> It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law. The omission from this act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage. The legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.[188]

Provisions of the religious exemptions, as adopted:

> 1. Notwithstanding any state, local or municipal law, rule, regulation, ordinance, or other provision of law to the contrary, a religious entity as defined under the education law or section two of the religious corporations law, or a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof, being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation as described in this subdivision, shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. Any such refusal to provide services, accommodations, advantages, facilities, goods, or privileges shall not create any civil claim or cause of action or result in any state or local government action to penalize, withhold benefits, or discriminate against such religious corporation, benevolent order, a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation.

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187. *See supra* Parts II-III (providing background on New York Marriage Law and analyzing the new statutory language in context of existing antidiscrimination and marriage law).

188. Marriage Equality Act, ch. 95, § 2, 2011 N.Y. Sess. Laws 95 (McKinney).

2. Notwithstanding any state, local or municipal law or rule, regulation, ordinance, or other provision of law to the contrary, nothing in this article shall limit or diminish the right, pursuant to subdivision eleven of section two hundred ninety-six of the executive law, of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.

3. Nothing in this section shall be deemed or construed to limit the protections and exemptions otherwise provided to religious organizations under section three of article one of the constitution of the state of New York.[189]

The inseverability clause:

This act is to be construed as a whole, and all parts of it are to be read and construed together. If any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the remainder of this act shall be invalidated. Nothing herein shall be construed to affect the parties' right to appeal the matter.[190]

189. Act of June 24, 2011, sec. 1, § 10-b.

190. *Id.* § 3.

APPENDIX II. ACADEMIC PROPOSAL FOR RELIGIOUS EXEMPTION LANGUAGE

The following statutory language, discussed in detail in the Policy Recommendations section, was proposed by a group of academic authors to the President of the New York State Senate, but was not adopted as part of the Marriage Equality Act.[191] Versions of this statutory language have been proposed in each state that has considered marriage equality legislation; the New York version is only the most recent.[192]

Section XX

(a) Religious organizations protected.

No religious or denominational organization, no organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

(1) provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage; or
(2) solemnize any marriage; or
(3) treat as valid any marriage

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs.

(b) Individuals and small businesses protected.

(1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required to

(A) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or
(B) provide benefits to any spouse of an employee; or
(C) provide housing to any married couple

if providing such goods, services, benefits, or housing would cause

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191. *See supra* Part IV (analyzing the ramifications of adopting such broad religious exemptions). *See generally* Skelos Letter, *supra* note 10 (proposing exemptions for individuals, non-religiously-affiliated small businesses, and public employees).

192. *See, e.g.*, Letter from Thomas C. Berg et al., to Hon. Christopher G. Donovan, Speaker, Connecticut House of Representatives (Apr. 20, 2009), *available at* http://www.nationformarriage.org/atf/cf/%7B39D8B5C1-F9FE-48C0-ABE6-1029BA77854C%7D/Berg.etal.pdf (proposing broad religious exemptions with "hardship" provisions to the Connecticut legislature prior to its enactment of the first marriage equality statute).

such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.

(2) Paragraph (b)(1) shall not apply if

(A) a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship; or

(B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; *provided that* no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

(3) A "small business" within the meaning of paragraph (b)(1) is a legal entity other than a natural person

(A) that provides services which are primarily performed by an owner of the business; or

(B) that has five or fewer employees; or

(C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing.

(c) No civil cause of action or other penalties.

No refusal to provide services, accommodations, advantages, facilities, goods, or privileges protected by this section shall

(1) result in a civil claim or cause of action challenging such refusal; or

(2) result in any action by the State or any of its subdivisions to penalize or withhold benefits from any protected entity or individual, under any laws of this State or its subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.[193]

193. Skelos Letter, *supra* note 10, at 3-4.