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INTRODUCTION

In the summer of 2016, at 10:30 AM every Wednesday morning, lifeguards at the Metropolitan Recreation Center in Brooklyn, New York blew their whistles and ordered all men out of the pool.[1] The Metropolitan Recreation Center, owned and operated by New York City, had a decades-old policy of only allowing female members to use the pool for one hour increments, a few days a week.[2] There was no such policy for male members. The City created these gender specific pool hours to accommodate Brooklyn's large number of women who are Hasidic Jews and abide by strict codes of modesty.[3] Although the regulation was enacted to accommodate women who practice Judaism, Muslim women, who also abide by strict modesty regulations, took advantage of the female only hours as well.[4]

Hasidic Jews follow a practice referred to as *tzniut* which means "modesty"; this belief encourages individuals to follow a code of moral conduct "related to humility."[5] Furthermore, this policy encourages followers to dress in a "sexually modest" manner and not attract undue attention both physically and in other aspects of life.[6] Similarly, Muslim women are also encouraged to follow certain dress code restrictions. These dress codes can vary but all reflect the idea that women should dress modestly, particularly around any man they could potentially marry.[7]

1. Sarah Malin Nir, *Pool Rules: No Running, No Eating, and Three Times a Week, No Men*, N.Y. TIMES (June 29, 2016), https://www.nytimes.com/2016/06/30/nyregion/pool-rules-no-running-no-eating-or-drinking-no-men.html [https://perma.cc/8ELK-UCQR].

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Yosef Ahituv, *Modesty and Sexuality in Halakhic Literature*, JEWISH WOMEN: A COMPREHENSIVE HISTORICAL ENCYC (March 9, 2009), https://jwa.org/encyclopedia/article/modesty-and-sexuality-in-halakhic-literature [https://perma.cc/U9VS-3YKD].

6. *Id.*

7. *Women in Islam and Muslim Realms: Dress Code*, CORNELL U. LIBR. (March 7, 2019), http://guides.library.cornell.edu/IslamWomen/DressCode [https://perma.cc/6ND2-X6MV].

Until the summer of 2016, there had been no complaints about the female only pool hours at Metropolitan Recreation Center. However, in 2016 New York City's Human Rights Commission received an anonymous complaint about the gender specific pool hours.[8] After receiving the complaint the Human Right's Commission sent a notice to the City Parks Department warning that the female only pool hours may violate laws that forbid gender discrimination in places of public accommodations.[9] The complaint sparked public outrage and lead to the City Parks Department and the Human Rights Commission creating an agreement which granted the Recreation Center an exemption to New York City's public accommodations laws as long as they reduced their female only swim hours from six times per week to four.[10] The Recreation Center's practice of creating gender segregated swimming hours is not unique, as there are several other cities who have used gender specific pool hours to accommodate people following strict modesty codes because of their religion.[11]

The Supreme Court has upheld various forms of gender segregation in public settings.[12] However, the Supreme Court has not ruled explicitly on whether gender segregation policies used to accommodate religious minorities in places like public pools and beaches are constitutional. This note will focus on the constitutionality of such policies through analyzing a proposed initiative by a New York City councilman, Chaim Deutsch. Specifically, this note will hold the initiative, which proposes to segregate a public beach by gender for two days during the summer, is constitutional.[13]

8. Malin Nir, *supra* note 1.

9. *Id.*

10. Eli Rosenberg, *Gender Segregated Swimming Cut Back at 2 Public Pools Near Brooklyn Hasidic Areas*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/07/nyregion/gender-segregated-swimming-cut-back-at-2-public-pools-near-brooklyn-hasidic-areas.html [https://perma.cc/TZ36-4XDZ].

11. *See* Malin Nir, *supra* note 1 (a public pool in Toronto, Canada that has gender specific pool hours received praise for creating the opportunity for Muslim Women to swim); Rosenberg *supra* note 10 (St. Johns Recreation Center in Crown Heights, Brooklyn implemented a two-hours-per-week swim period for females, and two-hours-a-week swim period for males. The Recreation Center had to eliminate the male only block in order to receive the same exemption from the Human Rights Commission that the Metropolitan Recreation Center received).

12. *See* Johnathan N. Reiter, *California Single-Gender Academies Pilot Program: Separate but Really Equal*, 72 S. CAL. L. REV. 1401, 1409 (1999) (noting that the Supreme Court has not held single-gender public schools are "per se unconstitutional"); Christopher H. Pyle, *Women's Colleges: Is Segregation by Sex still Justifiable?*, 77 B.U.L. REV. 209, 209-11 (1997) (this article shows how there are various single-gender universities); Miriam A. Cherry, *Exercising the Right to Public Accommodations: The Debate over Single-Sex Health Clubs*, 52 ME. L. REV. 97, 99-101 (2000) (various states have allowed single-sex health clubs).

13. Carol Kuruvilla, *New York To Have Special Gender-Segregated Days This Summer*, HUFFINGTON POST (June 7, 2018), https://www.huffingtonpost.com/entry/new-york-councilman-announces-gender-segregated-beach-days-for-jewish-muslim-constituents_us_5b197371e4b09d7a3d701c92 [https://perma.cc/58QP-KWBT].

Councilman Deutsch represents a district in Brooklyn, where many of his constituents are Orthodox Jews and Muslims. To accommodate his constituents, Deutsch has rented a New York City owned beach, located in Brooklyn, for two days during the summer. The two days Deutsch plans to rent the public beach, which are June 29 and July 27, are days the beach is normally closed. Deutsch intends to open the beach with private funding on each day. Deutsch plans to open the beach exclusively to men on June 29 and to women on July 27.[14] The purpose behind Deutsch's initiative is to provide a real beach experience to those who have never been because their religious modesty practices prevent them from attending co-ed beaches.[15]

There are several arguments both for and against Deutsch's proposed initiative. Critics of the initiative argue the gender segregated beach days should be illegal because the policy violates both the separation between church and state and public accommodation laws.[16] On the contrary, supporters of the initiative argue the segregation is perfectly legal because it provides a reasonable accommodation for religious minorities and it creates an opportunity for certain people to swim and enjoy a beach from which they have been traditionally excluded from because of their religious beliefs. Supporters also argue the initiative provides a safe place for women who have a history of sexual harassment or abuse.

The purpose of this note is to explain why Deutsch's initiative should be passed because it does not violate the Constitution or any public accommodation statute. The first issue this initiative raises is whether the beach is still considered a state actor when Deutsch opens it with private funds. Section I of this article finds the beach is still considered a state actor on the days it is opened by Councilman Deutsch because the beach is still operated and run in the exact same way the City operates the beach.[17]

The issue of a state actor segregating public areas by gender to accommodate certain religions raises two major constitutional issues: (1) the government regulation at issue must not violate the equal protection clause of the Fourteenth Amendment, and (2) the regulation must not violate the establishment clause of the First Amendment. Section II finds the initiative constitutional under the equal protection clause because it is substantially related to an important government objective. Section III finds the initiative constitutional under the establishment clause because it serves a compelling government interest and history and tradition affirm that narrowly tailored

14. *Id.*
15. *Id.*
16. *See id.*
17. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

accommodations that work to include individuals are legal under the establishment clause. Finally, Section IV finds the initiative does not violate public accommodation laws because it complies with the purpose of these statutes.

I. THE BEACH IS STILL CONSIDERED A STATE ACTOR WHEN OPENED BY COUNCILMAN DEUTSCH ON JUNE 29 AND JULY 27

The initiative triggers the protections of the First and Fourteenth Amendment because the beach still qualifies as a state actor on June 29 and July 27, the two days Councilman Deutsch plans to open the beach with private funding. Councilman Deutsch hopes using private donations and funds to open the beach on days it is normally closed will eliminate any constitutional issues arising from segregating what is normally a city owned and operated beach. Specifically, Councilman Deutsch wants to protect himself from violating the constitutional principle of separation between church and state.[18] However, there is a very strong likelihood that the beach will still be considered a state actor while under Deutsch's control because the beach will still be operating in the exact same manner as when it is opened by the city.

In determining whether a private entity is still considered a state actor, the Supreme Court has created the "state action doctrine."[19] The state action doctrine stems from case law involving the equal protection clause of the Fourteenth Amendment.[20] A private entity becomes a state actor when "it carries out actions of the state either directly or indirectly through its relationship with that governing body."[21] The Supreme Court has created four tests to determine whether a private entity is considered a state actor, and these tests are often all used in conjunction with one another.[22] These four tests are: (1) the public function test, (2) the state compulsion test, (3) the close nexus or symbiotic relationship test, and (4) the entwinement test.[23] These tests serve more as a starting point, the determination of state action is done on a case-by-case basis looking to the totality of the facts

18. Rich Calder & Nolan Hicks, *Councilman Wants to Host Gender-Segregated Beach Days*, NEW YORK POST (June 6, 2018), https://nypost.com/2018/06/06/councilman-wants-to-host-gender-segregated-beach-days/ [https://perma.cc/ZR4A-TNES].

19. Bradley T. French, *Charter Schools: Are For Profit Companies Contracting For State Actor Status?*, Charter Schools, 83 U. DET. MERCY L. REV. 251, 261-62 (2006).

20. *Id.*

21. *Id.*

22. *Id.* at 262.

23. *Id.* at 263.

and circumstances and the decision of one test is not definitive in finding state action.[24]

A. The Public Function Test

First, the public function test focuses on "the function being carried out by the actor in question."[25] Under this test, the question is more than whether the private entity is serving a "public function," the question is whether the function performed is "traditionally the exclusive prerogative of the State."[26] The "exclusivity" requirement is a key factor in this test.[27] In *Rendell-Baker v. Kohn*, the Court found a privately operated school was not a government actor when it fired a counselor that was hired using federal grant money.[28] The Court found the school's action of educating maladjusted high school students was a public function, but these services were not the "exclusive province of the state" because educating students who could not be educated in the public system was never a prerogative the state took on; the Court held just because a private entity serves the public does not automatically mean its actions are state action.[29]

Contrary to the decision in *Kohn*, opening the beach with private funding on days it is normally closed still allows the beach to operate a function that is traditionally the exclusive prerogative of the state. Aside from the days Deutsch plans to open the beach, the beach is a state actor that is operated and funded by the government. Therefore, even if opened with private funding, the beach is still performing the same exact function it does when it is opened any other day of the year. This situation is significantly different from *Kohn* where the school was operating in a way that is not traditionally a government function because the educating of maladjusted high school students is not considered a traditional government function. Here, the use of a public beach, even if opened with private funding, is still performing the traditional public function the beach is intended for.

Moreover, this initiative differs from other similar cases that have failed the public function test because of the fact the beach still serves its intended government function when opened by Councilman Deutsch.[30]

24. *See* Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n., 531 U.S. 288, 303 (2001).

25. *Id.*

26. Rendell-Baker v. Kohn, 457 US 830, 842 (1982).

27. French, *supra* note 19, at 263.

28. *Kohn*, 457 U.S. at 832-34, 840-842.

29. *Id.* at 842-43.

30. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (the Court held providing utility services is not a traditional government function); Flagg Bros., Inc. v. Brooks, 436 US 149 (1978) (the

Notably, this situation is comparable to the facts of *Marsh v. State of Alabama*, where the Court held a town owned and operated by a private corporation was still considered a state actor because the town operated the same as any other town, and the operation of a municipality is a function traditionally reserved for the government.[31] The Court compared the town to other facilities that are "built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation."[32] Comparably, the operation of a public beach is a municipality that is intended primarily to benefit the public, and even on the days Councilman Deutsch plans to open the beach with private funding, the beach is still serving members of the public. In conclusion, the beach passes the public function test and is still considered a state actor even when opened by Councilman Deutsch.

B. The State Compulsion Test

Second, the state compulsion test, sometimes known as the nexus test, focuses on how much influence the government has over a private entity.[33] This test hinges on whether the government body has "exercised coercive power . . . either overt or covert . . . over a private entity" to a degree that the decisions of the private entity should be attributed to the government.[34]

In *Blum v. Yaretsky*, respondents were a class of Medicaid patients who sued private nursing homes claiming the homes' decisions to discharge or transfer patients violated their Fourteenth Amendment rights.[35] The Court looked to whether the extensive state regulation of the private nursing homes was enough to make the decisions state action; the Court held mere regulation is not enough to prove state action.[36] The Court stated the complaining party must show there is a close "nexus" between the regulated entity and the state, and a state can only be held responsible when "it has exercised coercive power or has provided such significant encouragement, either overt or covert" that the challenged action must be considered state action.[37] Additionally, the mere approval of "initiatives of a

Court held a private warehouse that stored and could sell the petitioner's possessions after she was evicted was not considered a state actor because the settlement of disputes between creditors and debtors is not a traditional exclusive government function).

31. 325 US 501, 507, 509 (1946).
32. *Id.* at 506.
33. French, *supra* note 19, at 264.
34. *Id.* at 264.
35. Blum v. Yaretsky, 457 U.S. 991, 993 (1982).
36. *Id.* at 1004.
37. *Id.*

private party" is not enough to hold the state responsible; "the required nexus may be present if the private entity has exercised powers that are 'traditionally the exclusive prerogative of that State.'"[38] The Court held the discharge and transfer decisions were not state action because these decisions were made by "physicians and nursing home administrators" who were all private parties, and there was no evidence that suggested these decisions were influenced by the state's obligation to regulate Medicaid.[39]

In regard to Councilman Deutsch's initiative, there is likely no state compulsion here because the state is not forcing Deutsch to open and segregate the beach by gender. However, the beach is owned and operated by the state, which would support a showing of a close nexus between the state and the days Deutsch opens the beach because Deutsch would be exercising powers traditionally reserved to the state. Yet, there is no evidence of state coercion here because Deutsch is merely opening the beach on days the beach is normally closed. Similar to the state in *Blum*, the decision to segregate the beach by gender is only that of a private actor, Councilman Deutsch, and is not the result of state regulation or influence.

Importantly, this test is not definitive in finding state action, just because there is no state compulsion here does not mean the days Deutsch opens the beach is not considered state action. The overall facts of the situation support state action. As the Supreme Court stated in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, no one fact or test result "can function as a necessary condition across the board for finding state action."[40] Here, when looking at the totality of the circumstances there is overwhelming evidence the beach is still performing a public function normally done by the state when opened by Deutsch and is therefore still considered a state actor.

C. The Symbiotic Relationship Test

Third, the symbiotic relationship test finds state action if the government has created some sort of interdependence between the state actor and the private entity. Generally, there must be some sort of showing that the government is a joint participant in the challenged conduct.[41] This test is the most subjective of all of the four tests and resembles a fact-specific, totality of the circumstances test.[42]

38. *Id.* at 1004-05 (citing Jackson v. Metro. Edison Co., U.S. 345, 353 (1974)).
39. *Id.* at 1005.
40. Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295 (2001).
41. *See id.* at 725.
42. French, *supra* note 19, at 264-65.

In *Burton v. Wilmington Parking Authority*, the plaintiff sued a privately owned coffee shop for violating his constitutional rights under the equal protection clause after the shop refused to serve him because he was not white.[43] The coffee shop rented space that was part of a government owned pubic parking lot, the rent from the shop helped the government finance the building and in return the shop got favorable lease terms and tax treatment; the Court found the shop's discrimination amounted to state action because of the mutual benefits between the shop and the government.[44] Similar to the Court in *Burton*, in *Lugar v. Edmonson Oil Co., Inc.*, the Court held cooperation between a private oil company and the state, where the oil company invoked state procedures to ensure the plaintiff did not dispose of their property before paying a debt to the oil company, constituted joint action and the oil company was deemed a state actor.[45]

However, courts have been reluctant to find interdependence or joint action based on mere regulation by a state.[46] In *Lansing v. City of Memphis*, the court held mere cooperation between a private festival organizer and the city was not enough to rise to state action, even if the festival organizer was subject to state regulation and the city did receive economic benefits from the festival organizer.[47] In *Rendell- Baker v. Kohn*, the Court found the fact the school received about ninety-percent of its funding from the government was not enough to make the school a state actor because the government did not have any role in management of the school.[48]

Here, there is interdependence between the government and the days Councilman Deutsch plans to open the beach. Similar to facts in *Burton*, New York City will likely benefit in some way from the $400 dollar a day rental fee it takes to open the beach, and Deutsch will benefit by providing his constituents an opportunity to use the beach when they normally cannot. Furthermore, Deutsch must adhere to the regulations and requirements set by the city on the days he opens the beach. The beach must operate in adherence with city regulations and serve the public in the same way it does on any other day the beach is open, and it is likely the same staff that works for the beach when opened by the city will also work when the beach is opened by Deutsch. Although the decision to segregate by gender is not necessarily one of state policy, the evidence that Deutsch cannot

43. 365 U.S. 715, 716 (1961).
44. *Id.* at 719-720, 722-25.
45. 457 U.S. 922, 942 (1982).
46. *Lansing v. City of Memphis*, 202 F.3d 821, 832 (6th Cir. 2000).
47. *Id.*
48. Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

open the beach unless he follows city regulations, he pays the city, and he likely must use city workers all favors interdependence. The city and Deutsch must act together in order for the initiative to succeed. Therefore, there is a symbiotic relationship between the city and Deutsch's beach days.

D. The Entwinement Test

Fourth, the entwinement test is the most recent test created by the Supreme Court.[49] This test was developed in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n* and is arguably the most demanding of all of the four tests.[50] For this test, when a private entity is "overborne by the pervasive entwinement of public institutions and public officials in its composition and workings" then the government is substantially intertwined with the private entity and there is state action as long as holding the private entity to constitutional standards is fair.[51] This test requires the court to analyze the composition of the private entity and determine who has the most involvement.[52] Some courts have simply analyzed the entwinement test as part of the close nexus test.[53]

In *Brentwood Academy*, after a state athletic association sanctioned a high school for recruitment violations, the high school sued the state athletic association for violating its constitutional rights.[54] The Court held the association, a private entity, was considered a state actor because of the "pervasive entwinement" of the public high schools and public officials in the association's structure and daily work.[55] The public schools made up eighty-four percent of the association's membership, half of the board and council meetings were held during official school hours, the public schools provided financial assistance to the association, and members of the state's board of education were also members of the association's governing board.[56] The Court also explained when there are prevailing facts that show entwinement between the government and a private entity to the point where it seems the identities of the two parties overlap, then the finding of state action is not negated by any facts that may not favor state action.[57]

49. French, *supra* note 19, at 265.
50. *Id.* at 266.
51. Brentwood Acad. v. Tennessee Secondary Sch.Athletic Ass'n., 531 U.S. 288, 298 (2001).
52. French, *supra* note 19, at 266.
53. *Id.*
54. *Brentwood Acad.*, 531 U.S. at 291.
55. *Id.* at 291-92.
56. *Id.*
57. *Id.* at 303.

Here, the city and Deutsch's beach days will have overlapping identities. Deutsch must use the city's facilities and resources when he opens the beach and the beach will be used in the exact same way as it would when opened by the city, except for the fact it will be segregated by gender. These prevailing facts show overlapping identities and entwinement between the two parties and this entwinement overrules any facts that do not favor a showing of state action.

In conclusion, the public beach near Brooklyn is still considered a state actor on the two days Deutsch opens the beach. When opened by Deutsch the beach will still be used in accordance with its original public function, which is to provide the public a space to be outside and swim. The beach will be subject to the same rules, operations, and likely the same staff the city uses when opened by Deutsch, and the beach will appear to still be owned by the city when opened by Deutsch. Therefore, the beach should still be considered a state actor even when opened with private funds, thus the initiative must pass the constitutional muster of the equal protection clause and the establishment clause.

II. COUNCILMAN DEUTSCH'S INITIATIVE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

One of the main criticisms by those who oppose Deutsch's initiative is that it is never okay to segregate based on gender in a public place. The equal protection clause forbids the government to using any form of segregation, including gender segregation, unless there is a compelling interest to do so. The equal protection clause is found in the Fourteenth Amendment and ensures no state shall "deny to any person within its jurisdiction the equal protections of the law."[58] Courts use various levels of scrutiny when determining whether a state law or regulation violates the equal protection clause. These levels of scrutiny include: strict scrutiny, the highest standard of review; intermediate scrutiny, a medium standard of review; and rational basis review, the lowest standard of review.[59] When evaluating whether Deutsch's initiative violates the equal protection clause courts would use the intermediate scrutiny standard.

However, courts have used strict scrutiny when evaluating cases involving religious minorities and discrimination claims.[60] Strict scrutiny is

58. U.S. CONST. amend. XIV § 1.

59. *See* United States v. Virginia, 518 U.S. 515, 531 (1996).

60. Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMP. L. REV. 95, 119 n. 134 (1996).

triggered when a government regulation or statute targets a suspect class or infringes on a fundamental right. [61] Race and national origin are two examples of a suspect class.

There is an argument that religious minorities are considered a suspect class, and thus any law involving the oppression of a certain religion is subject to strict scrutiny.[62] Nonetheless, the strict scrutiny standard does not apply here because this standard requires a challenged law to be facially or purposefully discriminatory.[63] Under Deutsch's initiative no religious minority is being discriminated against, in fact this initiative is working to include religious minorities. To pass strict scrutiny, a law must be necessary, not merely rationally related, to the promotion of a compelling, not merely legitimate, government interest.[64] In order to be necessary to the promotion of the compelling interest, the law must be narrowly tailored.

Thus, even if an individual were to manage to bring a claim under strict scrutiny, the initiative would still be constitutional because it serves a compelling government interest of inclusion and is narrowly tailored to fulfilling this interest because the initiative only segregates the beach for a total of two days out of the entire summer.

When assessing whether a government action or regulation resulting in gender segregation violates the equal protection clause, the Court uses a standard of intermediate scrutiny**.**[65] The Court's precedent of using some form of intermediate scrutiny when analyzing gender discrimination cases solidifies this is the standard that should be used to determine if Deutsch's initiative violates the equal protection clause.

Deutsch's initiative passes the intermediate scrutiny standard because his plan is substantially related to his government purpose of creating equality for religious minorities. Before the 1970s, courts used the standard of rational basis review to determine whether facially discriminatory laws based on gender were constitutional.[66] In 1971, the Supreme Court started to move towards a heightened level of scrutiny. In *Reed v. Reed*, the Court used a stricter form of rational basis review, referred to "rationality with bite," to strike down a statue that automatically preferred males over fe-

61. *See* Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 292 (2015).

62. Mannheimer, *supra* note 60, at 119.

63. *See* Loving v. Virginia, 388 U.S. 1, 8 (1967) (when a statute creates racial classifications it triggers strict scrutiny review).

64. Spece & Yokum, *supra* note 61, at 296.

65. *See id.*; Craig v. Boren, 429 U.S. 190, 198 (1976).

66. *See generally* Goesaert v. Cleary, 335 U.S. 464 (1948).

males when appointing an administrator of an estate.[67] "Rationality with bite" is a term used when a court applies rational basis review, but looks to the actual, illegitimate, purpose of the legislation or government action to determine if the purpose of the challenged action is to discriminate.[68] In 1976, in *Craig v. Boren*, the Court adopted an intermediate scrutiny level of review to find a law that facially discriminated based on gender was unconstitutional.[69]

Under intermediate scrutiny review, the government must show the challenged regulation is "substantially related to the achievement of important governmental objectives."[70] In 1996, the Court tweaked this intermediate scrutiny standard in *United States v. Virginia* declaring that state sanctioned gender discrimination can be upheld if it is "substantially related to an important government purpose" and the government offers an exceedingly persuasive justification for the classification.[71] In *Virginia*, the Court held the Virginia Military Institute, a very intense military school, violated the equal protection clause because it only allowed boys to attend the school and there was no government purpose of persuasive justification to support this segregation. Specifically, the Court found the institute's justifications for excluding women, which were that a single-sex education contributes to "diversity in educational approaches" and provides important benefits to male students, were not persuasive justifications that would allow the segregation.[72] The Court did state that if the institute had a separate and equal school available only to women, then there would be no equal protection clause violation.[73] Similar to the reasoning in *Virginia*, in *Mississippi University for Women v. Hogan*, the Court used intermediate scrutiny to find a nursing school that only accepted women violated the equal protection clause.[74]

Following intermediate scrutiny review, Councilman Deutsch's initiative should be constitutional under the equal protection clause because the initiative is substantially related to the important government purpose of ensuring all members of the public have access to a beach, regardless of their religion. Evidence that religious minorities are traditionally excluded from enjoying the beach and that fact the initiative is so limited in terms of

67. Reed v. Reed, 404 U.S. 71, 75 (1971)
68. *Id.*
69. *Boren*, 429 U.S. at 198.
70. *Id.* at 197.
71. United States v. Virginia, 518 U.S. 515, 531-33 (1996).
72. *Id.* at 515, 531, 535.
73. *Id.* at 533.
74. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982).

when the gender segregation occurs satisfies the "exceedingly pervasive justification" requirement. Furthermore, as illustrated in *Virginia*, the Court has stated separate but equal in regard to gender discrimination can be constitutional, as long as the separate entities are actually equal.[75] Here, the exact same facilities with the exact same amenities and regulations will be used for both men and women on their respective days. Deutsch's initiative passes a separate but equal standard because it differs significantly from the alternatives offered in *Virginia* and *Hogan*. In *Virginia*, the educational institutions available to men and women were not equal because the alternate school available to women offered a significantly different curriculum, and in *Hogan* there was no alternate school open to men. On the contrary, under Deutsch's initiative the exact same facility, amenities, and activities are given to both men and women.

Additionally, in analyzing gender discrimination cases, the Supreme Court has found laws based on "overbroad generalizations," meaning the regulation is based on a gender stereotype, unconstitutional under the intermediate scrutiny standard.[76] However, the Court has allowed the government to take into account "real differences" between males and females when passing statutes.[77] In *Virginia* and *Hogan* the Court found the reason for the gender segregation in each school was based on stereotypes that only certain genders are suited for certain professions, thus the segregation at each school was based on overbroad generalizations and therefore unconstitutional.[78]

Here, unlike the generalizations used in *Virginia* and *Hogan*, Deutsch's initiative is simply adhering to the fact men and women have inherent biological differences. These inherent differences are integral to why certain religious groups feel they cannot dress a certain way in front of someone of the opposite sex; thus, Deutsch's initiative is not based on gender stereotypes. Clearly, Deutsch's initiative is based on real differences between men and women and his plan provides separate and equal facilities to both genders on their respective days.

Most importantly, Deutsch's initiative is substantially related to the important government purpose of protecting religious minorities and allowing every member of the public to enjoy the beach and learn how to swim. Without Deutsch's plan to segregate the beach, large portions of his constituents would never get the chance to explore and swim at the beach be-

75. *Virginia*, 518 U.S. at 533.
76. *See id.* at 533.
77. *See* Michael M. v. Super. Court of Sonoma Cty., 450 U.S. 464 (1981).
78. *See Virginia*, 518 U.S. at 533.

cause of their deep-rooted religious beliefs. The Constitution provides a strong argument that protection of religious minorities is an important government purpose. The protection of religious minorities is strongly rooted in our Constitution, as shown through the passage of the establishment clause, which arguably was passed as a way to protect religious minorities.[79] The equal protection clause and clauses protecting religion all have the same goal, which "is to safeguard minorities and outsiders with respect to religious beliefs," and protect those who do not believe in religion; this goal fits perfectly with the "overriding goal of the Bill of Rights to protect vulnerable groups in American Society."[80]

Scholars have recognized there is an equality principle to the establishment clause, arguing that equality is reflected in the idea of "non-establishment" of any religion.[81] This equality idea would also explain why there is a lack of case law regarding religious minorities and the equal protection clause because these equality issues are often decided under the establishment clause.[82] A main goal of equality is "to open up previously exclusionary communities to those who have been excluded from them."[83] A remedy for exclusion is to "expand boundaries" or simply allow access to those who have been or are normally excluded from a certain community.[84] In this case, Muslim and Orthodox Jews are constantly excluded from enjoying the benefits of an outdoor co-ed beach based on their religious practices.

This exclusion not only prevents these religious minorities from learning the fundamental life skill of swimming, but it also denies them the ability to enjoy a day outside by the beach, a luxury most people can take advantage of without any thought. Furthermore, an individual's religion is often considered to be at the "core" of one's self identity.[85] For individuals who abide by strict modesty codes because of their religion, they do so because their religion is such an integral part of their life and being. Deutsch's initiative will allow religious minorities who follow these strict modesty codes to enjoy an important activity without sacrificing their religious integrity.

79. *See generally* Mannheimer, *supra* note 60, at 117 n. 126.

80. *Id.* at 122. (quoting Norman Dorsen, *The Religion Clauses and Non-Believers*, 27 WM. & MARY L. REV. 863, 868 (1986)).

81. *Id.* n. 125

82. *Id.* at 117-18.

83. *Id.* at 117.

84. *Id.*

85. *Id.*

Deutsch's objective of allowing certain religious minority groups access to a public beach is important because it ensures equality for minorities as protected by the Constitution, and it allows a minority group access to a resource that majority of the population can use without any second thought. Previous case law has found public pools cannot deny access based on race, which solidifies that there is some sort of government interest in ensuring everyone has an equal opportunity to use a public swimming facility.[86] Deutsch's initiative passes intermediate scrutiny review because inclusion of religious minorities is an important government objective and segregating the beach based on gender is substantially related to this objective because it allows certain religious groups to feel comfortable and safe while using the beach. Additionally, the beach can be used equally by both men and women, and the initiative is not based on overbroad generalizations.

In sum, Deutsch's plan to segregate the beach by gender is constitutional under the equal protection clause. Similar to the equal protection clause, this initiative is also constitutional under the establishment clause of the First Amendment.

III. COUNCILMAN DEUTSCH'S INITIATIVE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

Critics of Deutsch's initiative also fear that the program violates the separation between church and state required by the establishment clause of the First Amendment.[87] The establishment clause is the first clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion."[88] The establishment clause is incorporated to the states through the Fourteenth Amendment.[89] Essentially, the establishment clause forbids a state or the federal government from passing a law that aids or favors one religion over another or forces a person to adopt a certain belief. Those who oppose Deutsch's plan argue that through his initiative the government is endorsing minority religions and forcing strict modesty practices on the rest of the public. Majority of the case law today surrounding the establishment clause involve the relationship between religion and public schools, religious symbols in government build-

86. *See* Lawrence v. Hancock, 76 F.Supp. 1004 (S.D. W. Va. 1948); Draper v. City of St. Louis, 92 F. Supp. 546 (E.D. Mo. 1950).

87. Rosenberg, *supra* note 10.

88. U.S. CONST. amend. I.

89. David W. Cook, *The Un-Established Establishment Clause: A Circumstantial Approach to Establishment Clause Jurisprudence*, 11. TEX. WESLEYAN L. REV. 71, 77 (2004).

ings or property, or issues where the government provides religious symbols.[90]

Most courts have read some sort of equality idea into the establishment clause, so the analysis between the equal protection clause and the establishment clause is often considered one in the same.[91] Therefore, we can expect Deutsch's initiative to not violate the establishment clause because it does not violate the equal protection clause. Looking to the history and purpose behind both the equal protection clause and the establishment clause, both clauses were enacted to ensure some degree of "community participation," meaning certain people or groups are not excluded from being part of a community.[92] Under this rationale, it makes sense the Supreme Court has allowed both state and federal governments to "take action that appears to endorse or disapprove of religion" in situations where the government is working to ensure equality for a specific religious group.[93] The Court has only allowed this type of government action when there is "a compelling reason for doing so and the action is narrowly tailored to effect [a] government interest."[94] This compelling interest standard strongly resembles the strict scrutiny standard used in equal protection clause analyses.

In determining whether a government action violates the establishment clause, the Supreme Court has used multiple tests over the years: (1) the *Lemon* test, (2) the endorsement test, (3) a coercion test, and (4) an originalist and history and tradition test.[95] For awhile, the Supreme Court relied on the *Lemon* test which found any government action that had a "primary purpose or effect" of promoting or favoring religion unconstitutional.[96] However, in *County of Allegheny v. A.C.L.U.*, the Supreme Court, in a very divided decision, adopted the endorsement test when deciding whether a nativity scene located inside a county courthouse violated the establishment clause.[97]

Recently, in 2014, the Supreme Court moved away from the endorsement test, which gained popularity after the *County of Allegheny* decision,

90. *See generally* Cook, *supra* note 89, at 73.

91. Mannheimer, *supra* note 60, at 121.

92. *Id.* at 98, 132.

93. *Id.* at 129

94. *Id.*

95. Caroline Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 622 (2019).

96. *Id.* at 622-23.

97. BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 1:42 (2019 ed.).

and adopted a history and tradition test to find a town's opening of legislative meetings with prayer constitutional because the practice mirrored the tradition of the United States and the prayer did not compel the town's citizens to engage in religious observance.[98] However, not all courts have adopted this history and tradition test and some still follow the endorsement test, therefore this note will only use the endorsement and history and tradition test to find the proposed initiative does not violate the establishment clause.[99]

A. The Endorsement Test

First, when using the endorsement test, courts look to "whether the challenged state action is intended to send a message to adherents that they are political insiders and to non-adherents that they are political outcasts (or vice versa), and whether the action has that effect."[100] This test essentially looks to whether the government is providing its support or endorsement, or disapproval, towards a certain religion; if the regulation is found to either endorse or disapprove of a certain religion, the regulation is unconstitutional.

Determining the government's intention in whether they are endorsing or disapproving of a certain religion is generally based upon subjective viewpoints and is determined by a two-step inquiry established by Justice O'Connor.[101] The first inquiry is whether the actual purpose of the challenged regulation is to "treat some members of the relevant community as outsiders and others as insiders."[102] If the actual purpose is found not to treat members as outsiders or insiders, the second question is whether the state's action has that effect anyway.[103] Often, this test hinges on the second inquiry, which proves to be more subjective than the first question, which is more objective.[104]

In *Larson v. Valente*, the Court used the compelling interest standard, which is closely tied to the endorsement test, to find a Minnesota statute that required specific reporting and registration requirements for religious organizations that solicited over fifty-percent of their funds from nonmem-

98. Town of Greece, New York v. Galloway et al., 134 S. Ct. 1811, 1919, 1825 (2014).
99. *See* Blaesser & Weinstein, *supra* note 98, § 1:42 ft. 20.
100. Mannheimer, *supra* note 60, at 129.
101. *Id.* at 131.
102. *Id.*
103. *Id.*
104. *Id.*

bers unconstitutional.[105] The Court found the rule was not closely fitted to the state's alleged compelling interest and used a version of the endorsement test to come to this conclusion.[106] Even though the regulation's actual purpose was not to exclude, the Court reasoned that the state's regulation could come across to the public as trying to favor certain religious groups as opposed to others by requiring reporting requirements for some religious organizations but not others.[107]

The Court used the endorsement standard established in *Valente* in *Hernandez v. C.I.R.*[108] In *Hernandez*, the Court held a decision by the IRS to not deduct certain contributions made to a Church of Scientology did not violate the establishment clause because the deduction process implemented by the IRS did not differentiate among various religions and was neutral in its purpose.[109] The IRS policy did not enhance or inhibit any certain religion and the regulation did not threaten "excessive entanglement between church and state" because it did not delve into the religious doctrine of the various organizations that took part in the deduction regulation.[110]

The Second Circuit has also used the rationale in *Valente* to hold religious displays in a contract postal unit, which is a post office unit subordinate to a main post office, located inside a church violated the establishment clause because the displays could indicate the U.S. Postal Office endorsed the religion, even though there was no actual purpose of favoring one religion over another.[111]

Deutsch's test passes the compelling interest standard used by the endorsement test. First, the initiative meets the compelling interest of ensuring religious minorities who are normally excluded from using public beaches are included. This initiative is also narrowly tailored because it only segregates the beach two days out of the entire summer on days the public normally would not have access to the beach. The initiative satisfies the endorsement test because the state is not favoring or disfavoring one religion over the other. Here, the actual purpose of Deutsch's initiative is to allow people access to a public facility who have been regularly excluded. This purpose is articulated through various interviews with Deutsch himself, where he states he simply wants to provide a way to include those who

105. Larson v. Valente, 456 U.S. 228, 251 (1982).
106. *Id.* at 252.
107. *Id.* at 253.
108. Hernandez v. C.I.R., 490 U.S. 680, 696 (1989).
109. *Id.* at 696-97.
110. *Id.*
111. Cooper v. U.S. Postal Service, 482 F. Supp. 2d 278, 298 (D.Conn. 2007).

are traditionally excluded.[112] Therefore, this initiative does not have the effect of treating certain members of a community as insiders or outsiders. In fact, the initiative actually has quite the opposite impact.

Unlike the government action in *Valent*e, this initiative will not have the same impact as the government favoring one religion or organization over the other. Here, Deutsch's initiative is simply working to allow access to a group of religious minorities who normally cannot go to the beach. In *Valente*, the regulation only allowed benefits to certain religious organizations but not others. Here, everyone is allowed access to the public beach except for one day out of the entire summer. Normally, the beach would be closed on the days Deutsch plans to open it, so technically Deutsch is allowing members of the community one extra day to use the beach. The narrowness of this statue favors its non-exclusive effect because it only prevents access to the beach to one gender one day out of the entire summer.

The benefit of allowing religious minorities access to this public facility outweighs any minor harm that may result from preventing one gender from using the beach one day out of the entire summer. This initiative is also significantly different from the religious displays at issue in the Second Circuit case because the government is not using any symbols or language to favor one religious-group over another, Deutsch is simply trying including people in a place where they are normally excluded.

This initiative is similar to the IRS regulation at issue in *Hernandez*. The purpose of this regulation is neutral, and the initiative does not delve deeply into any religious doctrine. The purpose of this initiative is not to favor religious minorities as opposed to those who do not abide by strict modesty laws; the purpose is simply to include those who have been traditionally excluded. The initiative's purpose here is quite clear that it is meant to include a group of religious minorities in a popular and life-saving activity, swimming at the beach. Clearly, the initiative's actual purpose here is not to treat members as outsiders or insiders but to include all members in the enjoyment of the beach.

Therefore, under Justice O'Connor's two-step inquiry, the second question that must be answered is whether the initiative has the effect of excluding people anyway, even though the purpose of the initiative is inclusiveness. Here, Deutsch's policy only excludes people of the opposite sex from using the beach for one day of the entire summer, on a day when the beach is normally closed to the public. This provides for such a minor

112. Calder & Hicks, *supra* note 18.

exclusion of individuals of a certain sex that this exclusion cannot have the impact of creating insiders or outsiders, the policy is simply meant to include a group of religious minorities. As Justice O'Connor emphasizes in her concurring opinion in *County of Allegheny*, use of the endorsement test relies on looking to the specific and unique aspects of each situation to determine whether the government is acting in a way that endorses a religion.[113] Here, Councilman Deutsch is not endorsing the religious minorities over any other religion or group, he is simply using his initiative as a specific way to remedy an issue of exclusion that takes place in his community.

The goal of the endorsement test is to determine whether government action sends a message to the public "that religion or a particular religious belief is favored or preferred."[114] This test satisfies the purpose of the establishment clause, which is to prevent the government from favoring one religion over another.[115] Here, it is clear that government is not favoring one religion over another by adopting Deutsch's initiative, it is simply working to include those who have been excluded due to their religious beliefs. In conclusion, Deutsch's initiative does not violate the establishment clause because his initiative passes satisfies the endorsement test by having an important and neutral purpose, and the implementation of his initiative is narrow.

B. The History and Tradition Test

Second, the history and tradition test requires all inquiries involving the establishment clause to be interpreted "by reference to historical practices and understandings."[116] Specifically, the test focuses on the principle that in all establishment clause cases, the court must "acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change" because eliminating such practices would lead to new religious divisions and controversies that the establishment clause was created to protect against.[117] According to *Town of Greece, NY v. Galloway et al.*, the key inquiry the court must look to under this test is

113. Cty. of Allegheny v. A.C.L.U, 492 U.S. 573, 629 (1989) (O'connor, J., concurring in judgment).

114. Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'connor, J., concurring in judgment)

115. *Id.*

116. *Cty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part).

117. Town of Greece, New York v. Galloway et al., 134 S. Ct. 1811, 1819 (2014).

whether the practice fits within the "tradition long followed by Congress and the state legislatures."[118]

However, different from the question posed in *Town of Greece, NY*, the inquiry here is whether state sanctioned segregation by gender to accommodate minority religions violates the establishment clause. In order to answer this question under the history and tradition test, courts must look to whether state actions to accommodate religious minorities is a long-followed tradition in the United States, similar to the tradition of opening prayer in Congress and state legislatures.[119] Historically, the principle of protecting religious outsiders, such as those individuals who practice marginalized religions, has been a common thread for both decisions in free exercise and establishment clause decisions.[120] While finding a universal original intent of the Founders regarding the meaning and purpose of the establishment clause can be difficult to pinpoint, the protection of minority religions can be interpreted as being at the core of the Founder's purpose for drafting the establishment clause because our nation was founded on a "hodge-podge" of religious minorities that is still reflected in our country today.[121]

Further, the Founders of our nation are credited with creating a country that contrasted sharply from the European monarchy, and in creating this new nation the Founders drafted our Constitution based on a foundation of principles that opposed the several unpopular principles in Europe.[122] One principle that sharply contradicted one of the governing principles in Europe was the freedom of practicing religion, and the freedom to practice any religion one desires. Emphasized in the decision of *County of Allegheny*, the meaning of the establishment clause is "at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference of Christianity over other religions)."[123] Therefore, history proves the goal of the establishment clause is inclusion of all religions, not a domination of one religion, and Councilman Deutsch's initiative complies with this purpose by including religious minorities on a public activity that they are normally excluded from.

118. *Id.*

119. *Town of Greece, New York*, 134 S. Ct. at 1819 (the Court upheld a town's practice of opening monthly board meetings with prayer because this practice has been followed by Congress and state legislatures for 200 years, since the founding of the United States).

120. Jim Wedeking, *Quaker State: Pennsylvania's Guide to Reducing the Friction for Religious Outsiders Under the Establishment Clause*, 2 N.Y.U. J. L. & LIBERTY 28, 30 (2006).

121. *Id.* at 32, 34.

122. *Id.* at 36.

123. Cty. of Allegheny v. A.C.L.U, 492 U.S. 573, 605 (1989).

As Justice Kagan affirms in her dissent in *Town of Greece, NY*, our Constitution makes a commitment to all Americans that regardless of an individual's worship, every individual will count as a full and equal American citizen.[124] Justice Kagan further emphasizes that "[a] Christian, Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government."[125] Justice Kagan dissented from the majority opinion in *Town of Greece, NY* because she felt the majority violated the constitutional idea that "our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian."[126]

Specifically, Justice Kagan felt the facts of *Town of Greece*, *NY* differed from precedent decisions that upheld the practice of opening prayer before legislative meetings because the meetings in *Town of Greece, NY* involved ordinary citizens and the town's Board did nothing to recognize religious diversity.[127] Even when picking clergy to open the town meetings, the Board never made any effort to "involve, accommodate, or in any way reach out to adherents of non-Christian religions."[128]

Here, while the gender segregation will impact all citizens, the impact is very minimal and serves the greater purpose of including a religious minority group. Justice Kagan's dissent and the history and founding principles of our nation support the idea that religious inclusion is at the heart of the establishment clause and the initiative here is furthering this idea by including a religious minority group in a manner that does not force others to adopt these religious minority beliefs and is narrowly tailored as to not infringe on others rights. Therefore, this initiative satisfies the history and tradition test and does not violate the establishment because inclusion of religious minorities is a tradition that this nation was founded on and continues to practice. Finally, Deutsch's regulation does not violate New York state's public accommodation law.

IV. COUNCILMAN DEUTSCH'S INITIATIVE DOES NOT VIOLATE NEW YORK STATE'S PUBLIC ACCOMMODATION LAW

Deutsch's proposed initiative does not violate any public accommodation law because it adheres to the purpose of inclusion provided in the New York public accommodation statute. Federally, public accommodation law

124. *Town of Greece, New York*, 134 S. Ct. at 1841 (KAGAN, J., dissenting in judgment).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 1842.

only applies to restaurants and hotels, however similar to several other states, New York's law specifically includes swimming pools as a place of public accommodation in its statute.[129] Therefore, this note will only focus on the New York state public accommodation statute.

Generally, the purpose of public accommodation laws is to ensure equal enjoyment of goods, services, and facilities presented by any place that offers public accommodation.[130] A place of public accommodation violates public accommodation statutes when it discriminates against a certain individual or community.[131] New York expressly lists "swimming pools" and any place where one seeks "health" or "recreation" as a place of public accommodation.[132] Here, Deutsch's initiative does not discriminate against a certain group to the point of violating New York's public accommodation statute.

The federal public accommodations provision can be found under Title II of the Civil Rights Act of 1964.[133] The statute states all people shall be free from discrimination or segregation based on the grounds of "race, color, religion, or national origin" by any place of public accommodation.[134] New York's statute is very similar to the federal provision, except it is more specific in what constitutes discrimination and public accommodations.[135] The New York statute finds it illegal for any place of public accommodation to discriminate based on "race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status."[136] The idea behind government action to accommodate religion mirrors the anti-discriminatory purpose found in both the federal and New York statutes.

The general purpose behind religious accommodation is equality, a way to accommodate religious minorities who are often ignored or excluded because the government automatically adheres to the "majority" or "preferred" religions.[137] Under this idea, the government is not endorsing or promoting one religion over another, but it is actually expanding religious

129. 42 U.S.C. § 2000 (a)(b)

130. Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L. J. 631, 633 (2016).

131. *Id.*

132. N.Y. EXEC. LAW, ART. 15, STATE HUMAN RIGHTS LAW, §292(9), https://dhr.ny.gov/law [https://perma.cc/NPL8-SN3X].

133. 42 U.S.C. § 2000(a).

134. *Id.*

135. N.Y. EXEC. L. § 292(2a) (2015).

136. *Id.* § 296.

137. Harvard Law Review, *Accommodation of Religion in Public Institutions*, 100 HARV. L. REV. 1639 (1987).

freedom by making it easier for religious minorities to take part in activities or events they would normally be prevented from based on their religious beliefs.[138] Even some justices and legal scholars have used this "religious accommodations" idea to encourage activities like allowing the practice of religion in public schools to make students and schools more perspective of different religions and cultures.[139]

Here, Deutsch's initiative does not violate New York public accommodation law because it is not working to discriminate against any certain group. In fact, the initiative creates social inclusion of religious minorities. The beach is open to the public the entire summer, with no gender segregated days or restrictions, except for the two days Deutsch proposes. Obviously, it is a good thing the beach does not segregate based on gender, but these public beaches and pools show an automatic adherence to the "preferred" religions in the United States by not even considering some people may not be able to use co-ed beaches because it is deeply at odds with their faith. Deutsch's initiative works to spark a conversation and open society to religious minorities by allowing these minorities to use the beach in a way that does not violate their religious virtues and allows them to feel comfortable. Even better, Deutsch's proposal sparks this conversation in a way that does not infringe on the rights of those who either do not practice religion or practice a religion that does not have any modesty requirements.

Those who are considered "outside" of these religious minority groups would, at most, only be excluded from using the beach one day out of the entire summer, and on a day the beach would otherwise be closed. This minor infringement on these "outsiders" rights does not outweigh the larger benefits that stem from the initiative, which include allowing access to those normally excluded from the beach and sparking a deeper conversation about acceptance. It is clear that Deutsch's initiative should not violate New York public accommodation law because the purpose of Deutsch's initiative is equality, not exclusion. Further, the use of single-sex health clubs throughout the United States shows that Deutsch's initiative does not violate New York public accommodation law.

A. SINGLE SEX HEALTH CLUBS PROVE DEUTSCH'S INITIATIVE DOES NOT VIOLATE PUBLIC ACCOMMODATION LAWS

There have been several states that have found health clubs that only allow admission to a certain gender do not violate public accommodation

138. *Id.* at 1642-43.
139. *Id.* at 1643.

laws, and the acceptance towards these gender specific clubs provide support for Deutsch's initiative. In the late 1990s the Massachusetts Superior Court held a women's only sex club violated the state's public accommodations law.[140] After this decision, there was a campaign to encourage the Massachusetts legislature to change its law because an all-women's health club had various benefits which included: providing safe place for those recovering from sexual abuse to exercise, to accommodate those who prefer an all-women's exercise space based on their religious beliefs, and to appease those who "simply [do] not want to be stared at by men."[141] In response to the Massachusetts court decision, the legislature passed a bill that allowed both male only and female only health clubs.[142] In 1992, a Pennsylvania court upheld single sex health clubs by granting them a "privacy exemption" which exempted these clubs from complying with the state's public accommodation law.

As noted by the campaign in Massachusetts, single-sex health clubs have benefits beyond just accommodating those who are of certain religions. These benefits include: avoiding unwanted sexual advances or harassment from men that occurs at co-ed health clubs, and providing a safe space for women with a history of domestic or sexual abuse who may be deterred from exercising if their only options are co-ed gyms.[143] If these single-sex health clubs violated public accommodations laws, then women could be deterred from exercising all together because there would be no gym where they feel comfortable.

These benefits are easily transferable to the public beach at issue here. Beaches provide a place where friends and families can gather together and enjoy time outdoors and provide a place for people to learn the lifesaving skill of swimming. Women who have suffered any history of sexual harassment or abuse could be deterred from going to the beach for many reasons, ranging from not wanting to feel exposed around men to wanting to avoid the "unwanted gaze" by men while they are trying to enjoy the outdoors or learn how to swim. Beyond accommodating religious minorities, having one day during the summer where the public beach is only open for women could create an opportunity for women who normally feel uncomfortable going to the beach a chance to embrace all the benefits the beach has to offer. If Deutsch's initiative violates any public accommodation law,

140. Miriam A. Cherry, *Exercising the Right to Public Accommodations: The Debate over Single-Sex Health Clubs*, 52 ME. L. REV. 97, 99 (2000).

141. *Id.* at 99.

142. I*d.* at 100.

143. *Id.* at 132-33.

then certain women would never have the opportunity to enjoy the beach like other people can. Single-sex health clubs provide a great insight into why Deutsch's initiative should be implemented and should not violate any public accommodations law. In conclusion, Councilman Deutsch's initiative does not violate New York state public accommodation laws because the purpose of his plan is equality, at a very low cost, and this purpose mirrors the purpose of the public accommodation statutes.

B. Policy Justifications for Deutsch's Initiative

Similar to the justifications for single-sex health clubs, there are several overwhelming policy rationales favoring Deutsch's initiative. First, not only will this initiative benefit religious minorities, it will also provide a safe space for women to swim and enjoy the beach who have a history of domestic violence or sexual abuse. Second, there is evidence that in certain situations gender segregation seems to be somewhat more accepted than other types of segregation, like racial segregation. For example, clothing stores have floors that are separated by gender, and no one seems to be challenging the constitutionality of this segregation. However, there would likely be an uproar if stores began to segregate floors by race. Additionally, there are several examples of schools that are segregated by gender.[144]

As the Supreme Court mentioned in *United States v. Virginia*, separate does not necessarily mean inherently unequal when it comes to gender. Especially in situations where gender segregation could provide a safe environment for women in a place where they would normally feel uncomfortable or unsafe. Therefore, gender segregation can have benefits when used for the right reasons. Here, the segregation is so limited it will hardly impact members of the public who are against the idea of any sort of gender segregation because the segregation is only for two days during the entire summer. The benefits of allowing religious minorities to use a facility they are normally excluded from and providing a safe environment for women certainly outweighs any cost of segregating the beach by gender for two days out of the entire year.

CONCLUSION

Deutsch's proposed initiative is constitutional because it does not violate the equal protection clause or the establishment clause and it does not violate any public accommodation laws. Deutsch's initiative will not only

144. *See* Reiter, *supra* note 12.

spark a deeper conversation about accommodating and understanding religious minorities, but it will give those who have never been to the beach a chance to embrace and explore all the beach has to offer. Deutsch's initiative strikes the perfect balance of including religious minorities without infringing on the majority of individuals' rights. Both this deeper understanding and inclusion of religious minorities far outweighs any minor harm that may stem from preventing people from using the beach one day out of the entire summer.