

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ONEIDA

In the Matter of the Application of
Bonnie D. Orendorff,
Petitioner,

-against-

Index No. 01-01812

Benevolent and Protective Order of Elks
Lodge No. 96, and New York State Division
Of Human Rights,
Respondents.

**PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF PETITION**

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STATEMENT OF FACTS

Petitioner Bonnie Orendorff (“Orendorff”) first applied for membership in the Rome, New York, Benevolent and Protective Order of Elks Lodge No. 96 (“Elks Lodge No. 96” or “the Lodge”) in 1999. (B. Orendorff Aff. ¶ 8; R. Orendorff Aff. ¶ 10.) Prior to 1999, Orendorff had worked for ten years as an assistant cook and waitress at the Lodge. (B. Orendorff Aff. ¶ 2.) Her husband had been a member of Elks Lodge No. 96 for twenty years (R. Orendorff Aff. ¶ 3) and Orendorff had often socialized there (B. Orendorff Aff. ¶ 2). As an employee of the Lodge and the wife of a member, Orendorff had observed the charitable activities that Elks Lodge No. 96 sponsored and the valuable social and business contacts made by members of the Lodge. (*Id.* at ¶ 3.) Her desire to participate in these activities and networks and her belief that she could assist and contribute to Elks Lodge No. 96 motivated her decision to apply for membership. (*Id.*) Elks Lodge No. 96 has about 800 members, all of whom are men. (R. Orendorff Aff. ¶¶ 19, 8.)

Local Elks Lodges are governed by the national organization, the Grand Lodge of Elks (“Grand Lodge”), and are bound by the by-laws and constitution adopted by the Grand Lodge. (B. Orendorff Aff. ¶ 7.) In 1995, the Grand Lodge amended the Elks’ constitution and by-laws to permit women to be admitted to the Elks. (*Id.* at ¶ 6.) In communications to local lodges’ leaders (known as “Exalted Rulers”), which described the change in the by-laws and constitution, the Grand Lodge clearly stated that “if a female candidate has been properly sponsored, received a favorable report from the lodge membership committee, and meets all other qualifications for membership, she cannot be rejected solely on the basis of her gender. *The lodge must treat female candidates the*

same as male candidates.” (B. Orendorff Aff. Ex. 1 at 2 (emphasis added).) Should a local lodge discriminate against a woman seeking admission, these materials explained, the Grand Lodge would likely take administrative action against the local lodge, including the possible revocation of its charter. (*Id.*) In response to these requirements, local lodges across New York and across the country have admitted women to membership. (R. Orendorff Aff. ¶¶ 6, 7.)

To become a member of Elks Lodge No. 96, an individual must be sponsored by a current member, investigated by the investigating committee, and if recommended by the committee, approved in a vote of the membership present at a Lodge meeting. (*Id.* at ¶ 9.) Candidates must receive the approval of two-thirds of the membership present to be admitted to the Lodge. (*Id.*) In the past twenty years, no adult male applicant who has been recommended by the investigating committee has ever been denied membership in Elks Lodge No. 96. (*Id.* at ¶ 15.) Nevertheless, when Orendorff and two other women submitted applications to join Elks Lodge No. 96 in 1999, they were all rejected, despite the fact that all three had been sponsored by members of the Lodge, despite the fact that the Lodge investigating committee recommended the candidacy of all three, despite the nondiscrimination requirements of the Elks’ constitution and by-laws, and despite the explicit directives of the Grand Lodge not to discriminate on the basis of gender in making membership determinations. (B. Orendorff Aff. ¶¶ 9, 6.) At the meeting where the women’s applications were rejected, all male candidates submitted to membership vote were admitted. (B. Orendorff Aff. ¶ 9.)

After the rejection in 1999, Orendorff renewed her application in August 2000. (*Id.* at ¶ 10.) This renewal was properly sponsored, and the application was

recommended by the investigating committee. (*Id.*) Nevertheless, the application was voted down by membership. (*Id.*) Rick Vernold, the Exalted Ruler of Elks Lodge No. 96, declared that the vote was discriminatory and void and called for a revote. (*Id.* at ¶ 12.) The revote produced the same result, and Orendorff's most recent application for membership in Elks Lodge No. 96 was again denied in January 2001. (*Id.*) The two women who first applied with Orendorff in 1999 have also been rejected multiple times. (*Id.* at ¶ 11.) At the meetings where the women's applications were rejected, all male applicants submitted to membership vote were admitted. (*Id.* at ¶¶ 11, 12.) With the exception of Rick Vernold's statement that the second vote against her reflected discrimination on the basis of gender, Orendorff has never been given any reason for any of these rejections. (*Id.* at ¶ 14.)

In April 2001, Elks Lodge No. 96 elected a new Exalted Ruler. In his column for the Lodge newsletter, he quoted a definition of the word "fraternity" as "men of the same class, profession or tastes," underlining the word "men." (*Id.* ¶ 10, Ex. 6.)

On April 19, 2001, Orendorff filed a complaint with the State Division of Human Rights against Elks Lodge No. 96, alleging that the Lodge had denied her equal terms, facilities, and privileges in a place of public accommodation on the basis of gender in violation of the New York Human Rights Law ("Human Rights Law"). On June 19, 2001, the State Division of Human Rights dismissed Orendorff's complaint on the ground that Elks Lodge No. 96 is exempt from the Human Rights Law as a benevolent order incorporated under the Benevolent Orders Law, N.Y. Ben. Ord. Law § 2. Orendorff thereafter initiated the present Article 78 proceeding in Oneida County Supreme Court against Elks Lodge No. 96 and the State Division of Human Rights

seeking equitable relief from Elks Lodge No. 96's arbitrary and capricious action in denying her application for membership on the basis of her gender and from the State Division of Human Rights' arbitrary and capricious action in dismissing her complaint in error of law.

ARGUMENT

I. **ELKS LODGE NO. 96'S ACT OF DENYING MEMBERSHIP TO ORENDORFF IN VIOLATION OF ITS OWN CONSTITUTION AND BY-LAWS ON THE BASIS OF HER GENDER IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF N.Y. C.P.L.R. § 7803(3).**

By refusing to extend membership to Bonnie Orendorff solely because of her gender, Elks Lodge No. 96 acted arbitrarily and capriciously, and an Article 78 proceeding is the appropriate method to compel Elks Lodge No. 96 to remedy this action. N.Y. C.P.L.R. § 7802(a) includes corporations and "aggregation[s] of persons" in its definition of the "bod[ies] or officer[s]" subject to Article 78 proceedings, and case law confirms that private non-profit corporations such as Elks Lodge No. 96 are included within the sweep of judicial review under Article 78. *See, e.g., Gray v. Canisius Coll.*, 76 A.D.2d 30, 33, 430 N.Y.S.2d 163, 166 (App. Div. 1980); *Lane v. Sierra Club*, 183 Misc. 2d 944, 948-49, 706 N.Y.S.2d 577, 580 (Sup. Ct. 2000); *Vanderbilt Museum v. Am. Ass'n of Museums*, 113 Misc. 2d 502, 508-09, 449 N.Y.S.2d 399, 404 (Sup. Ct. 1982).

"Historically, a writ of mandamus has been made applicable to corporations, both public and private, because these institutions are creations of the government and a supervisory or visitorial power is always impliedly reserved to see that corporations act agreeably to the end of their institution, that they keep within the limits of their lawful powers, and to correct and punish abuses of their franchises." *Gray*, 76 A.D.2d at 33, 430 N.Y.S.2d at 166 (internal quotation marks and citation omitted); *see also Weidenfeld v. Keppler*, 84

A.D. 235, 237-38, 82 N.Y.S. 634, 635-36 (App. Div. 1903), *aff'd*, 176 N.Y. 562, 68 N.E. 1125 (1903). Thus, Article 78 is an appropriate vehicle to challenge the arbitrary and capricious decisions and actions of Elks Lodge No. 96.

A. Elks Lodge No. 96 Acted Arbitrarily and Capriciously When It Failed to Comply With the Binding Constitution, By-Laws, and Directives Promulgated by the Grand Lodge and Refused to Admit Orendorff Because of Her Gender.

On September 29, 1995, the Grand Lodge, the Elks' governing body, amended the Elks' constitution to provide for the admission of female candidates. (B. Orendorff Aff. ¶ 6.) *See Gifford v. Guilderland Lodge*, 178 Misc.2d 707, 709, 681 N.Y.S.2d 194, 196 (Sup. Ct. 1998), *aff'd*, 272 A.D.2d 721, 707 N.Y.S.2d 722 (App. Div. 2000). The Elks' constitution governs all lodges, and as a result, this constitutional amendment was binding on all local lodges, *see id.*, including Elks Lodge No. 96. (B. Orendorff Aff. ¶ 7.) According to materials the Grand Lodge distributed to Exalted Rulers of local lodges, including the Exalted Ruler of Elks Lodge No. 96, as a result of this amendment, a female candidate for membership in the Elks "cannot be rejected solely on the basis of her gender. The [local] lodge must treat female candidates the same as male candidates." (B. Orendorff Aff. Ex. 1 at 2.) The Grand Lodge has stated that any discrimination against female applicants by local lodges is likely to lead to severe sanctions by the Grand Lodge, including the possible revocation of a lodge charter. (*Id.*) In conformance with the constitutional amendment and Grand Lodge directives, Elks lodges in New York and around the country have admitted women since 1995. (R. Orendorff Aff. ¶¶ 6,7.) But despite these explicit instructions and requirements, Elks Lodge No. 96 arbitrarily, capriciously, and in bad faith ignored the Elks' constitution and by-laws, as well as the Grand Lodge's directives, by repeatedly refusing to admit Bonnie Orendorff on the basis

of her gender. Failure by Elks Lodge No. 96 to adhere to this nondiscrimination requirement “give[s] rise to a cause of action by an eligible individual to require her candidacy for membership to be entertained and considered in accordance with proper [nondiscriminatory] procedure.” *Gifford*, 178 Misc. 2d at 712, 681 N.Y.S.2d at 198. As an individual injured by Elks Lodge No. 96’s failure to adhere to its constitution, by-laws, and Grand Lodge directives, Orendorff has standing to bring this action. *Gifford v. Guilderland Lodge*, 272 A.D.2d 721, 723, 707 N.Y.S.2d 722, 724 (App. Div. 2000) (denying Elks lodge’s motion to dismiss an applicant’s claim that lodge failed to follow its constitution and by-laws when it discriminated on the basis of gender).

Elks Lodge No. 96, an organization incorporated under the laws of New York (R. Orendorff Aff. ¶ 17), has failed to comply with its own constitution and by-laws and has thus acted arbitrarily and capriciously in violation of N.Y. C.P.L.R. § 7803(3).

Corporations that have accepted a state charter, “having thus become a quasi-governmental body, can be compelled in an article 78 proceeding to fulfill not only obligations imposed upon them by State or municipal statutes *but also those imposed by their internal rules.*” *Gray*, 76 A.D.2d at 33, 430 N.Y.S.2d at 166 (emphasis added, internal citations omitted)¹; *see also Mitchell v. Dowdell*, 172 A.D.2d 1032, 1032, 569 N.Y.S.2d 291, 292 (App. Div. 1991) (holding an Article 78 proceeding in the nature of

¹ New York courts have often declined to specify whether such actions are appropriately characterized as resting on an implied contract, principles of fundamental fairness, or the law of associations. *See, e.g., DePetris v. Union Settlement Ass’n*, 86 N.Y.2d 406, 412, 657 N.E.2d 269, 272, 633 N.Y.S.2d 274, 277 (1995) (suggesting Article 78 cases brought against private universities for failure to follow personnel rules rest “on implied contract . . . , or the law of voluntary associations, or on other grounds”); *Murphy v. St. Agnes Hosp.*, 107 A.D.2d 685, 687, 484 N.Y.S.2d 40, 43 (App. Div. 1985) (indicating that an Article 78 respondent’s responsibility to comply with its own by-laws “is grounded in principles of fundamental fairness, principles of contract law or the law of associations”). Whatever the underlying basis, however, there is broad agreement that Article 78 offers relief when a corporation arbitrarily and capriciously violates its own rules.

mandamus is appropriately brought against a private not-for-profit corporation where petitioner contends that the corporation violated its own rules and regulations)²; *Paglia v. Staten Island Little League*, 38 A.D.2d 575, 575, 328 N.Y.S.2d 224, 226 (App. Div. 1971) (holding under Article 78, action unlawful when corporation suspended its own constitution and by-laws); *Lane*, 183 Misc. 2d at 948-49, 706 N.Y.S.2d at 580 (holding an Article 78 proceeding against private nonprofit membership corporation is appropriate when corporation fails to adhere to its own by-laws and written procedures); *Vanderbilt Museum*, 113 Misc. 2d. at 508-09, 449 N.Y.S.2d at 404 (stating that in an Article 78 proceeding against a private non-profit incorporated organization, the courts “will examine the record to ascertain whether the challenged procedure was in accordance with the association’s constitution and by-laws”); *cf. Dalmolen v. Elmira Coll.*, 279 A.D.2d 929, 934, 720 N.Y.S.2d 573, 577 (App. Div. 2001) (declining to exercise mandamus to require College’s revocation of a letter of reprimand because petitioner “failed to demonstrate that either the issuance of the letter with the conditions or the procedures employed transgressed the College’s rules”).

Nor can Elks Lodge No. 96 defend against such a proceeding by arguing that its decision not to admit Orendorff was discretionary and thus nonreviewable. The mandates of the Elks’ constitution and the directives from the Grand Lodge banning local lodges from discriminating on the basis of gender clearly demonstrate that Elks Lodge No. 96 had absolutely no discretion as to whether it could base its decision to admit or

² While *Mitchell*’s narrow holding (*i.e.*, a discharged at-will employee can seek relief under Article 78 for violations of procedures set out in an employee handbook) was arguably overruled by *DePetris*, 86 N.Y.2d 406, 657 N.E.2d 269, 633 N.Y.S.2d 274, *DePetris* was specifically motivated by a suspicion of judicially-created limits on an employer’s right to discharge an at-will employee, and in no way undermines the broader rule that Article 78 relief is available when a corporation arbitrarily and capriciously violates its own constitution, rules, or by-laws.

reject Orendorff on the fact that she was a woman. *Compare Auer v. Dressel*, 306 N.Y. 427, 431, 118 N.E.2d 590, 592 (1954) (ordering corporate officer to call a special meeting of shareholders pursuant to Article 78 because officer had no discretion as to whether to call a meeting once a demand had been made by owners of a required number of shares) with *Salter v. N.Y. State Psychological Ass'n*, 14 N.Y.2d 100, 104, 198 N.E.2d 250, 251, 248 N.Y.S.2d 867, 869 (1964) (noting that when association's directors were under no duty to accept petitioner for membership, but could have done so in their discretion, mandamus-type relief would generally be unavailable). The record fails to reveal or even suggest any rationale for Elks Lodge No. 96's repeated denial of Orendorff's applications other than the prohibited discrimination on the basis of gender. Thus, the question of whether Article 78 permits courts to review organizations' authorized, discretionary decisions is not presented here. Instead, the situation is analogous to that presented in *Waskewicz v. Guy*, 141 Misc. 2d 983, 535 N.Y.S.2d 345 (Sup. Ct. 1988). There, the Supreme Court of Suffolk County ordered a local fire district's board of commissioners to admit a hearing-impaired applicant to membership as a volunteer fireman, in the event the applicant's hearing loss was so severe that he was protected by New York's antidiscrimination statutes, because the antidiscrimination statutes fettered the board's discretion in membership decisions. *Id.* at 985-87, 535 N.Y.S.2d at 347-48. Regardless of whether a binding antidiscrimination mandate flows from a statute or a corporation's own constitution and by-laws, such a mandate trumps any exercise of discretion, and thus a decisionmaker acting under such a mandate has no discretion to base a decision on discriminatory grounds. Just as antidiscrimination provisions eliminate the fire district board of commissioners' discretion to admit or reject

members on the basis of a disability, so do the Elks' constitution, by-laws, and Grand Lodge directives eliminate the discretion of Elks Lodge No. 96 to admit or deny members on the basis of gender. *See also Gray*, 76 A.D.2d at 36, 430 N.Y.S.2d at 167-68 (holding that when college rules provided that tenured professors could only be discharged for cause, college did not have discretion to fire employee based on her pursuit of gender discrimination charges against it).

While “action undertaken in furtherance of a legitimate corporate purpose will generally not be pronounced ‘arbitrary and capricious or an abuse of discretion’ in article 78 proceedings,” *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 542, 553 N.E.2d 1317, 1324, 554 N.Y.S.2d 807, 814 (1990), when Elks Lodge No. 96 refused Orendorff's application for membership simply because she was a woman and thereby violated its constitution and by-laws, as well as the explicit directives of the Grand Lodge, it acted in bad faith, unmotivated by any legitimate organizational purpose. Such arbitrary and capricious discrimination by a corporation in violation of its own rules and requirements is precisely the evil that Article 78 review is meant to guard against. As a result, this court should order Elks Lodge No. 96 to comply with its own internal rules and requirements and admit Orendorff to membership immediately.

B. Elks Lodge No. 96 Acted Arbitrarily and Capriciously When It Refused to Admit Orendorff Because of Her Gender, Because Discrimination on the Basis of Gender Is Inherently Arbitrary and Capricious.

Elks Lodge No. 96 rejected Orendorff's repeated applications for membership and those of other women despite the fact that it had not voted down any application from a man for at least twenty years. This action, in combination with the Lodge's failure to give any reason for its repeated denial of membership to Orendorff and other female

applicants, amply demonstrates that Orendorff was rejected solely on the basis of her gender, as Exalted Ruler Vernold explicitly recognized after the December 2000 membership vote. (B. Orendorff Aff. ¶¶ 12-14.)

Invidious discrimination on the basis of gender without legitimate purpose epitomizes arbitrary and capricious corporate action. *See generally Miramax Films Corp. v. Motion Picture Ass'n of Am.*, 148 Misc. 2d 1, 8-9, 560 N.Y.S.2d 730, 735 (Sup. Ct. 1990) (indicating that clear and intentional discrimination is inherently arbitrary and capricious); *see also Levandusky*, 75 N.Y.2d at 540, 553 N.E.2d at 1323, 554 N.Y.S.2d at 813 (indicating that Article 78 relief is available when a petitioner “demonstrates that the [respondent’s] action . . . deliberately singles out individuals for harmful treatment”). Discriminatory treatment on the basis of an individual’s gender, without regard to her particular situation or abilities, is in almost all cases irrational and arbitrary, as gender is a grossly imperfect proxy for an individual’s talents, capacities, or preferences. *See generally Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). The New York Court of Appeals has held that an overriding concern of reviewing courts in Article 78 proceedings must be whether the respondent acted in good faith, in furtherance of a legitimate organizational purpose. *See Levandusky*, 75 N.Y.2d at 542, 553 N.E.2d at 1324, 554 N.Y.S.2d at 814. Elks Lodge No. 96 has not attempted to articulate any reason for its rejection of Orendorff other than her gender or to demonstrate what legitimate organizational purpose might be served by invidious and irrational discrimination on the basis of gender; it strains credulity to imagine that such discrimination could be characterized as an act of “good faith” on the part of the Lodge. Accordingly, this Court should, pursuant to Article 78, order Elks Lodge No. 96 to cease

its arbitrary and capricious discrimination on the basis of gender and to admit Orendorff as a member immediately, since the record clearly demonstrates that in the absence of discrimination, Orendorff would have gained membership upon her first application.

II. THE STATE DIVISION OF HUMAN RIGHTS' DISMISSAL OF ORENDORFF'S DISCRIMINATION CLAIM WAS ARBITRARY AND CAPRICIOUS AND AFFECTED BY AN ERROR OF LAW BECAUSE THE NEW YORK HUMAN RIGHTS LAW'S EXEMPTION OF BENEVOLENT ORDERS FROM ITS NONDISCRIMINATION REQUIREMENTS VIOLATES ORENDORFF'S EQUAL PROTECTION RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND AS A RESULT, ELKS LODGE NO. 96 MUST BE CONSIDERED A PUBLIC ACCOMMODATION THAT IS NOT DISTINCTLY PRIVATE AND THAT IS SUBJECT TO NONDISCRIMINATION REQUIREMENTS UNDER STATE LAW.

A. By Encouraging Benevolent Orders to Discriminate on the Basis of Gender, the Human Rights Law Violates the Equal Protection Clause.

The Human Rights Law provides that it is an unlawful discriminatory practice to withhold any of the accommodations, advantages, facilities, or privileges of a public accommodation on the basis of gender. N.Y. Exec. Law § 296(2)(a). It also states that the opportunity to use places of public accommodation without discrimination on the basis of gender is a civil right. N.Y. Exec. Law § 291(2). However, in defining "place of public accommodation," the Human Rights Law not only exempts from the reach of its prohibition on discrimination "any institution, club or place of accommodation which proves that it is in its nature distinctly private," but also, as the result of a 1994 amendment, 1994 N.Y. Laws 262, creates an irrebuttable presumption that "a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state . . . shall be deemed to be in its nature

distinctly private.”³ N.Y. Exec. Law § 292(9). By granting benevolent orders such as Elks Lodge No. 96 explicit license to practice invidious discrimination on the basis of gender (as well as on the basis of race, creed, color, national origin, disability, and marital status) without analysis as to whether any particular benevolent order is in fact “distinctly private,” the state unconstitutionally encourages and involves itself in the discrimination practiced by Elks Lodge No. 96 and other benevolent orders.⁴

The Fourteenth Amendment does not require the state to prohibit private discrimination.⁵ *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Nevertheless, it has long been recognized that when a state affirmatively encourages discrimination by private parties, its actions may violate the Equal Protection Clause. Thus, the United States Supreme Court has found that a state constitutional provision serving to authorize and shield racial discrimination in the private housing market violates the Equal Protection Clause, as it significantly involves the state in private

³ Elks Lodge No. 96 first incorporated in June 2001, after Orendorff filed her discrimination complaint with the State Division of Human Rights. At the time of the votes denying Orendorff membership on the basis of her gender, Elks Lodge No. 96 therefore was *not* “a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state,” N.Y. Exec. Law § 292(9) (emphasis added), and was not exempted from the antidiscrimination requirements of the Human Rights Law. Even if questions regarding the constitutionality of the benevolent orders exemption are put to one side, this Court should not reward Elks Lodge No. 96’s attempts to shield its discriminatory practices in response to litigation by applying the benevolent orders exemption in the present case.

⁴ While New York courts have held that the benevolent orders exemption shields Elks lodges from suit under the Human Rights Law, *see Gifford v. Guilderland Lodge*, 272 A.D.2d 721, 707 N.Y.S.2d 722 (App. Div. 2000), *Dodd v. Middletown Lodge*, 264 A.D.2d 706, 695 N.Y.S.2d 115 (App. Div. 1999), *Cummings v. Watertown Lodge*, 262 A.D.2d 1007, 693 N.Y.S.2d 786 (App. Div. 1999), no court has ever considered the constitutionality of this exemption.

⁵ Equal Protection analysis under Art. I, § 11 of the New York Constitution mirrors federal Equal Protection analysis. *See, e.g., People v. Kern*, 75 N.Y.2d 638, 653-57, 554 N.E.2d 1235, 1243-46, 555 N.Y.S.2d 647, 655-58 (1990) (relying on federal Equal Protection analysis to determine whether state action existed implicating state Equal Protection Clause); *Under 21 v. City of New York*, 65 N.Y.2d 344, 360 n.6, 482 N.E.2d 1, 8 n.6, 492 N.Y.S.2d 522, 529 n.6 (1985) (stating that the state Equal Protection Clause is equivalent in coverage to the federal provision).

discrimination. *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967) (state constitutional amendment providing the state would not limit the right of any real property owner to sell or rent to whomever he chose impermissibly involved state in private racial discrimination). In short, a state may violate the Equal Protection Clause “even where the state can be charged with only *encouraging*, rather than commanding discrimination.” *Id.* at 375 (internal quotation marks omitted, emphasis added). “What the Equal Protection Clause forbids is state action that implements *or sanctions* invidious discrimination.” *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 868 (2d Cir. 1996) (emphasis added).⁶ A state may engage in unconstitutional sanctioning of discrimination by exempting private actors from a general nondiscrimination requirement. In *Hsu v. Roslyn Union Free School District No. 3*, the United States Court of Appeals for the Second Circuit, confronted with the Equal Protection implications of a school district specifically exempting religious clubs from its general nondiscrimination requirements, held that, “[i]f authorized by the School, [a] private act of invidious

⁶ In considering challenges brought under the Due Process Clause of the Fourteenth Amendment, the United States Supreme Court has concluded that there is no state action and thus no constitutional violation when a state statute does not compel a private act, but simply permits a private actor to undertake the relevant act. *Flagg Bros. v. Lefkowitz*, 436 U.S. 149, 164-65 (1978). This holding is distinguishable from the present case in two important ways. First, when discrimination on the basis of a constitutionally suspect classification such as race or gender is present, a lesser degree of state involvement may constitute “state action” than would otherwise be the case, since the relevant inquiry looks not only at the level of state involvement, but the nature of the right infringed, and since particular suspicion attaches to state encouragement of class-based discrimination. *Weise v. Syracuse Univ.*, 522 F.2d 397, 405-06 (2d Cir. 1975) (discussing sex discrimination); *Under 21*, 65 N.Y.2d at 363, 482 N.E.2d at 9-10, 492 N.Y.S.2d at 530-31 (discussing race discrimination); *see generally* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (finding unconstitutional state action when private restaurant owner discriminated on the basis of race because restaurant was housed in public building and participated in mutually beneficial relationship with the state). Second, of relevance to a constitutional analysis of the benevolent orders exemption is the state of the law prior to the enactment of the exemption; the exemption was enacted in 1994, narrowing the scope of the Human Rights Law’s previous prohibition of discrimination in public accommodations. When the state has affirmatively acted to change the state of the law from one in which discrimination is restricted to one in which it is affirmatively authorized, this factor weighs toward a finding of unconstitutional state involvement with private discrimination. *See* *Reitman*, 387 U.S. at 375-77; *Larsen v. Kirkham*, 499 F. Supp. 960, 962-63 (D. Utah 1980).

discrimination by a student club also constitutes a state act of invidious discrimination.” *Id.* at 869. Similarly, because the Human Rights Law exemption for benevolent orders authorizes Elks Lodge No. 96 to discriminate invidiously, the Lodge’s refusal to admit Orendorff on the basis of her gender constitutes a state act of invidious discrimination.

Laws permitting discrimination on the basis of gender are subject to at least heightened scrutiny. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531-33 (1996); *J.E.B. v. Alabama*, 511 U.S. 127, 136-37 and n.6 (1994). This means that to pass constitutional muster, any such law must be narrowly tailored to relate closely and substantially to an important governmental objective. *See Heckler v. Mathews*, 465 U.S. 728, 748-49 (1984). “The use of heightened scrutiny for all cases of racial and sex discrimination implements both the suspicion that such discrimination is almost always invidious, and the policy that only the strongest reasons justify advantages based on race or sex.” *Hsu*, 85 F.3d at 868. In the particular circumstances in *Hsu*, the private acts of discrimination on the basis of religion authorized by the nondiscrimination exemption for religious groups were found not to constitute invidious discrimination. The Second Circuit noted, however, if an exemption permitting race or gender discrimination were at issue, “we would have a different case,” and suggested that any exemption permitting race or gender discrimination would be subject to heightened scrutiny, since race and gender discrimination are almost always invidious. *Id.* at 868-69.

Just such a “different case” is presented here. By expressly shielding the Elks’ right to discriminate on the basis of gender, New York has violated Orendorff’s Equal Protection rights.⁷ Orendorff has a compelling interest in being free from discrimination

⁷ In *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 18 (1988), the United States Supreme Court held that on the record before it, a similar exemption for benevolent protective orders in a New York

in public accommodations on the basis of her gender, an interest New York has recognized through passage of the Human Rights Law.⁸ This compelling interest can only be abridged by laws narrowly tailored to relate closely and substantially to an important governmental interest. However, New York's exemption of benevolent orders from the requirements of the Human Rights Law is not narrowly tailored to promote any important governmental interest. While provisions exempting private clubs from antidiscrimination laws *can* be designed to further important associational interests closely and substantially, the wholesale exemption of benevolent orders from the requirements of the Human Rights Law is not crafted with the necessary precision to protect directly the constitutional right of freedom of association enjoyed by truly private groups.

Courts have recognized that there is an inevitable tension between preventing discrimination in public accommodations and protecting individuals' constitutional

City antidiscrimination law survived rational basis review when an Equal Protection challenge was brought by clubs that did not benefit from the exemption. Such an exemption allows benevolent orders to discriminate in a way that other similar organizations may not, and the Supreme Court considered the rationality of a law arguably favoring benevolent orders over similar organizations in this way. But this is not the only Equal Protection problem posed by the benevolent orders exemption. What the Supreme Court did not consider in *New York State Club Ass'n*, and has never considered, is whether the exemption violates the Equal Protection rights of those individuals, such as Bonnie Orendorff, whom benevolent orders are empowered to discriminate against. This is the question presented here.

⁸ The Human Rights Law states,

The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

N.Y. Exec. Law § 290(3). It further specifies, "[T]he use of places of public accommodation . . . without discrimination because of age, race, creed, color, national origin, sex or marital status . . . is hereby recognized as and declared to be a civil right." N.Y. Exec. Law § 291(2).