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 impled 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 it 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

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[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 sanction*s 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

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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).

interest in choosing social intimates. *See, e.g., EEOC v. Chicago Club*, 86 F.3d 1423, 1434 (7th Cir. 1996). Private club exemptions from nondiscrimination laws have been crafted to alleviate that tension. *See id.* (discussing balance struck by Title II of 1964 Civil Rights Act); *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 84 A.D.2d 318, 328, 445 N.Y.S.2d 565, 572 (App. Div. 1981) (stating that private organizations are exempt from the Human Rights Law and governmental control of such organizations may impinge on members' constitutional privacy rights), *aff'd*, 59 N.Y.2d 401, 452 N.E.2d 1199, 465 N.Y.S.2d 871 (1983). In general, groups whose associational interests merit constitutional protection are those "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984). "Whether the 'zone of privacy' established by the First Amendment extends to a particular club or entity requires a careful inquiry into the objective characteristics of the particular relationships at issue." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 547 n.6 (1987). Similar factors and a similar inquiry into objective characteristics have been used to determine whether a given club is private under the Human Rights Law. In particular, the New York Court of Appeals has held, "The essence of a private club is selectivity in its membership. It must have a 'plan or purpose of exclusiveness.' Organizations which routinely accept applicants and place no subjective limits on the number of persons eligible for membership are not private clubs." *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y.2d 401, 412, 452 N.E.2d 1199, 1204, 465 N.Y.S.2d 871, 876 (1983) (internal citations omitted).

By automatically exempting all organizations incorporated pursuant to the Benevolent Orders Law, however, the Human Rights Law exemption bypasses this fact-specific analysis, replacing it with an irrebuttable presumption that all such organizations are distinctly private, a presumption that may or may not be accurate in the context of a particular benevolent organization. As a result, an organization incorporated pursuant to the Benevolent Orders Law qualifies for the exemption regardless of the size and selectivity of its membership or the extent to which the organization opens itself to or depends on the general public in the ordinary course of its affairs. This statutory exemption of all benevolent organizations from the reach of the antidiscrimination laws does not satisfy the constitutional requirement of narrow tailoring. New York can satisfy its interest in protecting genuinely and distinctly private organizations by means of its provision that "any institution, club or place of public accommodation which proves that it is in its nature distinctly private" shall not be considered a place of public accommodation subject to the Human Rights Law. N.Y. Exec. Law § 292(9). A broad, irrebuttable presumption that all benevolent orders are distinctly private, however, is unconstitutional.

The importance of a fact-specific analysis in determining whether or not an organization is distinctly private is illustrated by those jurisdictions that do not automatically exempt benevolent orders from their public accommodations laws, where fact-specific analysis has revealed that particular benevolent orders are not private clubs. *See United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174 (E.D. Wis. 1979); *Schellenberg v. Rochester Mich. Lodge No. 2225*, 577 N.W.2d 163 (Mich. App. 1998). Because women have a compelling interest in being free from discrimination on

the basis of gender, any classification that perpetuates gender discrimination must be narrowly tailored to reflect an important governmental purpose. The overbroad and faulty presumption that all benevolent organizations are distinctly private does not substantially or effectively further the government's interest in protecting the associational rights of truly private groups. Because the exemption does not directly further the state's interest in protecting the associational rights of private groups, it serves only to provide benevolent organizations a legal shield for practicing invidious discrimination. *See Gifford v. Guilderland Lodge*, 178 Misc. 2d 707, 711-12, 681 N.Y.S.2d 194, 198 (Sup. Ct. 1998) ("The purpose . . . of the special protection afforded benevolent orders under Executive Law § 292(9) is to provide a shield in connection with the conduct of their internal affairs, including membership."). The provision of such a shield furthers no legitimate state purpose. *Cf. Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342-43 (1987) (Brennan, J., concurring) (explaining that the Court was willing to countenance the infringement on individual rights created by Title VII's broad exemption of religious organizations from its religious nondiscrimination requirements "because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities"). As a result, the exemption is unconstitutional and should not be applied in the present case.

B. In the Absence of the Benevolent Orders Exemption, Elks Lodge No. 96 Cannot Demonstrate That It Is Not a Place of Public Accommodation, Resort, or Amusement as Defined in the Human Rights Law or That It Is by Its Nature Distinctly Private.

The record in this case amply demonstrates that Elks Lodge No. 96 is a place of public accommodation, resort, or amusement ("public accommodation") as defined in the

Human Rights Law and that it cannot avail itself of the exemption for "distinctly private" clubs.

The Human Rights Law defines public accommodation "inclusively and illustratively, not specifically, and sets forth an extensive list of examples of places within the statute." *U.S. Power Squadrons*, 59 N.Y.2d at 409, 452 N.E.2d at 1203, 465 N.Y.S.2d at 874-75. Originally, the definition limited the procedures and jurisdiction of the State Human Rights Commission to those places listed, but this limiting language was deleted in 1960, thus providing "a clear indication that the Legislature intended that the definition of place of accommodation should be interpreted broadly." *Id.* at 410, 452 N.E.2d at 1203, 465 N.Y.S.2d at 875. There are two basic concepts in the statutory definition of public accommodation: "the idea of public accommodation in the broad sense of providing conveniences and services to the public, and the idea of place." *Id.* Place can, but need not, refer to a fixed location of operation. *Id.* at 411, 452 N.E.2d at 1203-04, 465 N.Y.S.2d at 875-76. Thus, the definition's emphasis is on the provision of services and conveniences to the public. Importantly, the Human Rights Law also states that its provisions "shall be construed liberally for the accomplishment of the purposes" of the Human Rights Law, N.Y. Exec. Law § 300, which include affording every individual "an equal opportunity to enjoy a full and productive life," N.Y. Exec. Law § 290(3).

The privileges and conveniences of membership in Elks Lodge No. 96 are in effect offered to the general public, since for at least the past twenty years all males whose candidacies have been submitted to the membership for a vote have been admitted, swelling current membership rolls to approximately 794. (R. Orendorff Aff. ¶¶ 15, 19.)

Members are actively encouraged to recruit new members from the general public. (*Id.* at ¶ 21.) The bar operated by Elks Lodge No. 96 is also open to members of the general public, as long as they are accompanied by a member of the Lodge, and the facilities of Elks Lodge No. 96 are regularly rented out to the general public. (*Id.*at ¶¶ 27, 22.) The general public is frequently invited to events sponsored by Elks Lodge No. 96, and the Lodge participates in events that depend on public participation. (*Id.* at ¶¶ 23, 26.) In addition, the charitable activities of Elks Lodge No. 96 are directed toward the general public. (*Id.* at ¶ 26.) In short, the current record demonstrates that Elks Lodge No. 96 provides services and conveniences to the public, and given the directives of interpreting courts and the Human Rights Law to construe its provisions broadly, Elks Lodge No. 96 is appropriately considered a public accommodation.[9] *Cf. Rogers v. Int'l Ass'n of Lions Clubs*, 636 F. Supp. 1476 (E.D. Mich. 1986) (Lions Club found to be a place of public accommodation under Michigan law); *Trustees of Fraternal Order of Eagles*, 472 F. Supp. at 1176-77 (summary judgment denied on defendant's claim that Eagles Aerie was not a place of public accommodation under federal law); *Fraternal Order of Eagles, Inc. v. City of Tucson*, 816 P.2d 255 (Ariz. Ct. App. 1991) (Eagles Aerie found to be place of public accommodation under Tucson ordinance); *Schellenberg*, 577 N.W.2d at 166 (Elks Lodge found to be place of public accommodation under Michigan law); *United States Jaycees v. McClure*, 305 N.W.2d 764 (Minn. 1981) (Jaycees found to be a public accommodation under Minnesota law).

[9] If the court finds that the record is not sufficiently developed to determine whether Elks Lodge No. 96 is in fact a public accommodation, Orendorff requests that the matter be remanded to the State Division of Human Rights for the purpose of fact-finding.

Nor does a fact-specific examination of the characteristics of Elks Lodge No. 96 demonstrate that it is "distinctly private" and thus exempt from the nondiscrimination requirements applied to public accommodations by the Human Rights Law.[10] The burden is on the institution or club claiming exemption from the nondiscrimination requirement to prove that it is "distinctly private." N.Y. Exec. Law § 292(9); *U.S. Power Squadrons*, 59 N.Y.2d at 412, 452 N.E.2d at 1204, 465 N.Y.S.2d at 876. The exemption for "distinctly private" clubs under the Human Rights Law is narrower than that provided by Title II of the Civil Rights Act of 1964, which excludes from its purview "private clubs or other establishments not in fact open to the public," 42 U.S.C. § 2000a(e), since "the State Legislature's very use of the adverb 'distinctly' in its own statutory exemption for private clubs indicates a concerted attempt to narrow its application."[11] *N.Y. State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 220, 505 N.E.2d 915, 919, 513 N.Y.S.2d 349, 353 (1987), *aff'd*, 487 U.S. 1 (1988). Therefore, not all private clubs and establishments closed to the public are included in the Human Rights Law exemption. *See U.S. Power Squadrons*, 59 N.Y.2d at 412, 452 N.E.2d at 1204, 465 N.Y.S.2d at 876.

The Human Rights Law explicitly states, "In no event shall an institution, club or place of accommodation be considered in its nature distinctly private if it has more than

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[10] Some courts have concluded that a club must either be a public accommodation or distinctly private, reasoning that the categories are two sides of the same coin and that if a club "is not a 'place of public accommodation' because of its selective membership practices, it must be private . . . ." *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 F.2d 468, 476 (3d Cir. 1986) (applying New Jersey law). These courts engage in a single analysis to determine on which side of the coin a club falls, an approach with some intuitive and logical appeal. The argument in this brief, however, follows the analysis of the New York Court of Appeals in *U.S. Power Squadrons*, which first determined that the club at issue was a public accommodation and then considered whether it was "distinctly private." Both analyses, however, rely heavily on a fact-specific examination of the selectivity of the club's membership.

[11] Because the Human Rights Law provides for a narrower exemption for distinctly private organizations than does Title II of the Civil Rights Act of 1964, *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1201-04 (D. Conn. 1974) (three judge panel), holding an Elks lodge to be a private club that Congress intended to exempt from the reach of Title II, is of little relevance to the present case.

one hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of a nonmember for the furtherance of trade or business." N.Y. Exec. Law § 292(9). In the absence of the benevolent orders exemption, this provision prevents Elks Lodge No. 96 from being considered "distinctly private," since at the time Orendorff applied for membership, the Lodge had approximately 800 members, provided regular meal service, and regularly received payment from nonmembers for rental of Lodge facilities. (R. Orendorff Aff. ¶¶ 18-19, 22.) As a result, Elks Lodge No. 96 cannot be considered "distinctly private" under the terms of the Human Rights Act.

Examination of the factors traditionally relied upon to determine whether a club is "distinctly private" confirms this conclusion. The hallmark of a "distinctly private" club is selectivity in membership. *N.Y. State Club Ass'n*, 69 N.Y.2d at 220-21, 505 N.E.2d at 919, 513 N.Y.S.2d at 353; *U.S. Power Squadrons*, 59 N.Y.2d at 412, 452 N.E.2d at 1204, 465 N.Y.S.2d at 876. "Though nominally private, [a club is] not exempt from the provisions of the Human Rights Law if [it is] not in fact private except for purposes of discrimination." *U.S. Power Squadrons*, 59 N.Y.2d at 415, 452 N.E.2d at 1206, 465 N.Y.S.2d at 878. Because they lack the required selectivity, "[o]rganizations which routinely accept applicants and place no subjective limits on the number of persons eligible for membership are not private clubs." *Id.* at 412, 452 N.E.2d at 1204, 465 N.Y.S.2d at 876. In addition, clubs with membership policies that appear selective but that in practice do not act to bar any applicants have consistently been found not to display sufficient selectivity to qualify as private, since "[t]he formalities have little meaning when in fact the club does not follow a selective membership policy." *Wright v.*

Salisbury Club, Ltd., 632 F.2d 309, 312 (4th Cir. 1980).[12] As noted above, Elks Lodge No. 96 cannot be considered selective in its membership. In the past twenty years, not one male applicant facing membership vote has been denied membership in the organization. (R. Orendorff Aff. ¶ 15.) It is thus clear that in actual practice, membership in Elks Lodge No. 96 is determined by objective, rather than subjective, standards and that these standards serve to exclude very few applicants. *See U.S. Power Squadrons*, 59 N.Y.2d at 412, 452 N.E.2d at 1204, 465 N.Y.S.2d at 876. Indeed, it appears that the only persons whom Elks Lodge No. 96 has actively sought to exclude are women, and a club is not exempt from the Human Rights Law if it is only selective for purposes of discrimination. "A purely private club does more to make certain that desirables are admitted than simply exclude persons believed to be undesirable . . . ." *Id.* at 414, 452 N.E.2d at 1205, 465 N.Y.S.2d at 877.

In addition, Elks Lodge No. 96 currently has approximately 800 members, has at least 1200 total memberships available, actively seeks out and recruits new members, and has not turned away any applicants because of a membership cap in at least twenty-three years. (R. Orendorff Aff. ¶¶ 19-21.) This too undercuts any claim of true selectivity. *Compare Kiwanis Int'l*, 806 F.2d at 475 (holding that Kiwanis Club was selective in part because club membership was limited to twenty-eight and fewer than twenty applicants

[12] *See also, e.g., Durham v. Red Lake Fishing & Hunting Club, Inc.*, 666 F. Supp. 954, 960 (W.D. Tex. 1987) (finding club was not selective despite the fact that each applicant was investigated by a Membership Committee that then made a recommendation and submitted the application to all members for a vote, when only two applicants had been rejected in fifty years); *Trustees of Fraternal Order of Eagles*, 472 F. Supp. at 1176 (contrasting the formal requirements of club's admission process with the fact that only 3 of 1,011 application had been turned down in representative year and finding that club had not demonstrated that it was private); *Concord Rod and Gun Club, Inc. v. Mass. Comm'n Against Discrimination*, 524 N.E.2d 1364, 1367 (Mass. 1988) (finding "total absence of genuine selectivity in membership" despite the fact that club applicants were required to obtain one sponsor and two co-sponsors for membership, be interviewed by board of governors, and be approved by full membership when only three applicants were denied membership in fifteen years); *Lloyds Lions Club v. Int'l Ass'n of Lions Clubs*, 724 P.2d 887, 889

had been admitted in past ten years) *with Rogers v. Int'l Ass'n of Lions Clubs*, 636 F. Supp. 1476, 1479 (E.D. Mich. 1986) (holding that Lions Club was unselective in part because the size of the club was virtually unlimited, Lions engaged in intense and continual solicitation of new members, and Lions never turned away new members for fear of growing too large).

In determining whether a club is distinctly private, a fact finder may also consider whether its facilities and services are limited to members and guests, whether it is controlled by its membership, whether it is nonprofit and operated solely for the benefit of its members, and whether it exclusively directs publicity to members. *U.S. Power Squadrons*, 59 N.Y.2d at 412-13, 452 N.E.2d at 1204, 465 N.Y.S.2d at 876. Elks Lodge No. 96 regularly rents its facilities to nonmembers for events such as weddings, line dances, and bowling banquets. (R. Orendorff Aff. ¶ 22.) While it is nonprofit, the Lodge is not operated "solely for the benefit" of members, since its charitable efforts are directed to the public at large. (*Id.* at ¶ 26.) *See Fraternal Order of Eagles*, 816 P.2d at 258 (finding fraternal organization was not operated "solely for the benefit" of its members when one of its primary functions was to raise funds for charity). The Lodge sponsors events to which the general public is invited, and seeks publicity for its activities. (R. Orendorff Aff. ¶¶ 23-24, 26.) While the Lodge is apparently controlled by its members, when an organization lacks real selectivity, even if it is controlled by membership and holds private membership meetings, it is not "distinctly private." *U.S. Power Squadrons*, 59 N.Y.2d at 414, 452 N.E.2d at 1205, 465 N.Y.S.2d at 877. The open door Elks Lodge No. 96 offers to male applicants prevents it from asserting that it is

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(Or. Ct. App. 1986) (finding that while membership application process appeared to be elaborate, formal, and structured, in reality club accepted almost all male applicants and was not selective).

a distinctly private club exempt from the nondiscrimination requirements of the Human Rights Law.

CONCLUSION

For the foregoing reasons, this Court should declare that Elks Lodge No. 96 acted in an arbitrary and capricious manner in invidiously discriminating against Orendorff on the basis of gender and refusing to admit her in violation of its own constitution, by-laws, and binding directives, and this Court should order Elks Lodge No. 96 to admit Orendorff to membership immediately.

This Court should also declare that the Human Rights Law exemption for benevolent orders does not shield Elks Lodge No. 96 from a claim of gender discrimination because the statutory exemption is itself unconstitutional and Elks Lodge No. 96 is a public accommodation that is not distinctly private, or in the alternative because the Lodge was not incorporated at the time of the relevant discriminatory acts and is a public accommodation that is not distinctly private. Accordingly, this Court should reverse the arbitrary and capricious decision of the State Division of Human Rights and order it to enter judgment for Orendorff on her complaint of unlawful gender discrimination. Finally, in the alternative, should the Court limit its holding to the conclusion that the Human Rights Law exemption for benevolent orders is either unconstitutional or inapplicable because the Lodge was not incorporated at the time of the relevant discriminatory conduct, the Court should remand to the State Division of Human Rights for further proceedings as to whether Elks Lodge No. 96 is a public accommodation or whether it is distinctly private within the meaning of the Human Rights Law.

October 15, 2001

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