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Andrew R. Hamilton

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NOTE

THE NEW YORK MARRIAGE EQUALITY ACT AND THE STRENGTH OF ITS RELIGIOUS EXCEPTIONS

ANDREW R. HAMILTON†

INTRODUCTION

Religious organizations have long worked in New York to provide social services for people of the state. Following the Civil War, as a result of increasing immigration from mostly Catholic countries, Catholic religious societies and lay volunteers began developing local institutions to support the new, poor, uneducated masses. These organizations provided schools, foundling homes, orphanages, shelters for women, services for youth, and family casework. Over time these organizations, "anchored in child-care," would house thousands of infants and children whose parents were either deceased or whose parents believed the organizations could provide their children a better life than they themselves could.

From this beginning, over a century and a half ago, Catholic social welfare organizations have continued to grow. The national umbrella group of these organizations, Catholic Charities USA, was recently ranked as the third largest charity

† Senior Staff Member, St. John's Law Review; Student Fellow, Center for Law and Religion; J.D. Candidate, 2013, St. John's University School of Law; A.B., 2004, Dartmouth College. I would like to thank Professors Mark L. Movsesian and Marc O. DeGirolami for their guidance and encouragement. I would also like to thank my wife Maria for her constant support.

1 At first, the majority of these organizations were Protestant Christian by nature, mirroring the population of New York as a whole. See DOROTHY M. BROWN & ELIZABETH MCKEOWN, THE POOR BELONG TO US: CATHOLIC CHARITIES AND AMERICAN WELFARE 2 (1997).

2 Id. at 3.

3 Id.

4 Id.
in the United States. One area of social need in which Catholic Charities is especially important today is foster care placement. The foster care system in the United States deals with one of the most vulnerable populations in the country. Children are in the foster care system because their families cannot care for them. The cause of this may be the death of the child’s parents or a court determination of abuse and neglect. The number of children in the foster care system is staggering. In New York City, there are currently 16,000 children in foster care. In any given year, Catholic Charities of the Archdiocese of New York places 6,545 of these children with families.

This history of service has been challenged recently by the advent of same-sex marriage. The reason: anti-discrimination laws. All same-sex marriage statutes contain provisions prohibiting discrimination between same-sex and traditional marriages. However, such prohibitions conflict with Catholic doctrine. The Catholic Church considers marriage to be an institution exclusively between a man and a woman. It also considers “homosexual acts [to be] acts of grave depravity, [and Catholic] tradition has always declared that ‘homosexual acts are intrinsically disordered.’” In 2003, the Congregation for the Doctrine of the Faith issued a statement reiterating the Church’s stance on homosexuality and same-sex marriage. This document also raised the fear that same-sex marriage legislation would lead to same-sex couples adopting children. To avoid a conflict between state law and religious beliefs, all statutes

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8 Protecting and Nurturing Children and Youth, supra note 6.

9 See infra note 106.


11 Id. ¶ 2357 (footnote omitted).

12 CARDINAL JOSEPH RATZINGER, PASTORAL LETTER CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS (Congregation for the Doctrine of the Faith, June 3, 2003).

13 Id. ¶ 5.
creating same-sex marriages have offered varying degrees of religious exceptions from the general anti-discrimination provisions.\textsuperscript{14}

The actual protection these exceptions have provided to religious organizations varies from location to location. In some jurisdictions, Catholic Charities has ceased offering foster care placement services altogether rather than test the exceptions through costly litigation. Such is the case in Massachusetts, Washington, D.C., and the Rockford Diocese of Illinois.\textsuperscript{15} In other jurisdictions, including other Illinois dioceses, Catholic Charities has tested the exception in court and lost.\textsuperscript{16} Still, in other jurisdictions like New Hampshire, Vermont, and Connecticut, religious exceptions have allowed Catholic Charities to continue following Catholic doctrine by refusing to place children with same-sex couples.\textsuperscript{17}

Whether or not New York’s same-sex marriage law will provide Catholic Charities with a sufficient religious exception remains to be seen. The New York Marriage Equality Act ("MEA") was passed on June 24, 2011.\textsuperscript{18} Codified at Domestic Relations Law ("DRL") sections 10-a and 10-b, this law grants same-sex couples the right to marry, and includes an anti-discrimination provision prohibiting discrimination based on the spouses’ genders.\textsuperscript{19} The New York legislature created an exception to this anti-discrimination provision which purports to prevent religious organizations from being required to solemnize

\textsuperscript{14} See infra notes 106–09 and accompanying text.


\textsuperscript{16} See infra notes 112–16 and accompanying text.

\textsuperscript{17} See infra note 106.


\textsuperscript{19} N.Y. DOM. REL. LAW § 10-a (McKinney 2012).
or recognize same-sex marriages.\textsuperscript{20} In addition, the exception also adopted language from the New York Human Rights Law ("HRL"), exempting religious organizations from anti-discrimination requirements when the organization acts to promote its religious principles. One year after its passage, it remains to be seen whether this exception will allow Catholic Charities to follow its religious dictates by refusing to place foster children with same-sex couples.

This Note will argue that the religious exception of the MEA, codified at DRL section 10-b(2), indeed covers the decision by religious organizations, such as Catholic Charities, not to place foster children with same-sex couples.\textsuperscript{21} Part II will analyze New York court decisions interpreting identical religious exception language under the State’s HRL. Part III will examine the language of the MEA as well as other jurisdictions’ same-sex marriage laws. This textual analysis, along with a look at the MEA’s legislative history, suggests that the New York legislature intended the exception to provide broad protections to religious organizations. With this textual analysis, legislative history, and judicial precedent in mind, Part IV will discuss how Catholic Charities’ decision not to place foster children with same-sex couples falls neatly within the exception’s protection. Finally, Part V will conclude this Note by identifying other challenges to Catholic Charities in carrying out its foster care placement services.

I. THE NEW YORK HUMAN RIGHTS LAW AND JUDICIAL INTERPRETATIONS OF ITS RELIGIOUS EXCEPTION

The New York Human Rights Law, codified at Executive Law ("EL") section 290, et seq., is the basis of the State’s anti-discrimination policy. The law identifies certain actors who are liable under the law\textsuperscript{22} for "unlawful discriminatory practice[s]"\textsuperscript{23} and identifies the consequences for violating the law.\textsuperscript{24} An exception was created for otherwise discriminatory action taken

\textsuperscript{20} Id. § 10-b.
\textsuperscript{21} Whether such discrimination violates constitutional rights—for example, the Establishment Clause, the Equal Protection Clause or the Due Process Clause—federal statute or other state laws, while obviously important, are beyond the scope of this Note.
\textsuperscript{22} N.Y. EXEC. LAW §§ 296(1)-(10) (McKinney 2012).
\textsuperscript{23} Id.
\textsuperscript{24} Id. § 299.
by religious organizations when "such action... is calculated... to promote the religious principles for which [the organization] is established or maintained." This language is similar to religious exceptions in other states and territories, as well as under federal employment non-discrimination law. New York courts have interpreted the exception on several occasions and, in doing so, have balanced public policy favoring anti-discrimination with the religious freedom of religious organizations. The resulting case law has upheld religious organizations' ability to discriminate against non-members and homosexuals in employment and the rental of property, but has denied religious organizations the ability to participate in "odious[]" discrimination.

A. *The Language of the New York Human Rights Law and Its Religious Exception*

In enacting the HRL, the legislature adopted a clear statement against discrimination. The legislature viewed discrimination as threatening not only "the rights and proper privileges" of New Yorkers but also menacing "the institutions and foundation of a free democratic state," and harming "the peace, order, health, safety and general welfare of the state and its inhabitants." The statute recognizes that access to employment, education, public accommodations, housing, and commercial space without discrimination is a civil right. To
protect this right, the statute prohibits specific "unlawful discriminatory practice[s]."\(^{31}\) based on specific characteristics, including "creed" and "sexual orientation."\(^{32}\)

Despite this clear policy against discrimination, the legislature excluded from the definition of discrimination certain actions by religious organizations when those actions are intended to effectuate their religious principles.\(^{33}\) The exception, in part, reads:

Nothing contained in this section shall be construed to bar [1] any religious ... organization ... [2] from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion ... or [3] from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.\(^{34}\)

To better analyze what is covered under this exception, this Note divides the exception into three parts. The first part identifies the qualifying religious actors. The second part enumerates specific actions falling within the exception. The third part identifies a broad catch-all which includes other, unenumerated actions.\(^{35}\) Read alone, the breadth of this catch-all is potentially unlimited. As such, a primary concern of courts has been determining what actions actually fall within its province.

**B. New York Court Interpretations of the Human Rights Law's Religious Exception**

Although New York courts have, in general, narrowly interpreted the exception under EL section 296(11), when it comes to discrimination based on sexual orientation, the courts have opened the door for a broader interpretation. In broad strokes, the case law holds that religious organizations: may not discriminate on the basis of protected characteristics other than

\(^{31}\) Id. §§ 296(1)-(10).
\(^{32}\) E.g., id. §§ 296(1)-(2).
\(^{33}\) See Scheiber v. St. John's University, 84 N.Y.2d 120, 126, 638 N.E.2d 977, 980, 615 N.Y.S.2d 332, 335 (1994) (interpreting the religious exception under N.Y. EXEC. LAW § 296(11)).
\(^{34}\) EXEC. § 296(11).
religion; may not influence other—non-religious—organizations to discriminate on the basis of religion; may only discriminate on the basis of religion when such action is calculated to effectuate its religious mission; may, in choosing its employees, discriminate against people who do not adhere to the lifestyle presented by the organization, if such action is calculated to effectuate its religious mission; may not retaliate against employees who sue the organization; nor “harass” employees or treat them in an “odiously discriminatory manner.”

The exception only applies to the HRL and does not preclude subsequent legislatures from imposing affirmative duties on religious employers to prevent conduct which they may find offensive.

In the earliest interpretation of the HRL, the Appellate Division gave a religious organization broad discretion to discriminate against those not sharing its faith. In Cowen v. Lily Dale Assembly, a Spiritualist organization was sued after it rented its resort facilities to non-members during the summer but refused to do so during the rest of the year. The organization argued that renting the property during the summer was part of its mission to make non-members conversant with the organization’s beliefs. The court accepted the organization’s argument and affirmed the dismissal of the complaint.

In reaching its decision, the court adopted a deferential tone: “It is not for this court nor any other secular

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37 See Jews for Jesus, 968 F.2d at 295.
38 See Scheiber, 84 N.Y.2d at 127, 638 N.E.2d at 980, 615 N.Y.S.2d at 335.
40 See id. at 254–55.
42 See Catholic Charities of the Diocese of Albany v. Serio, 28 A.D.3d 115, 137, 808 N.Y.S.2d 447, 466 (3d Dep’t 2006) (holding that N.Y. EXEC. LAW § 296(11) (McKinney 2012) does not preclude the New York legislature from requiring a Catholic charitable organization to provide insurance coverage for artificial contraception to its employees, even though the use of such devices is “a grave sin” within the Church).
43 44 A.D.2d 772, 354 N.Y.S.2d 269 (4th Dep’t 1974).
44 See id. at 772, 354 N.Y.S.2d at 270–71.
45 Id. at 772–73, 354 N.Y.S.2d at 271–72.
46 Id. at 773, 354 N.Y.S.2d at 271–72.
institution to regulate the manner in which respondent exercises its ecclesiastical judgment."47 This ecclesiastical judgment is part of an organization's "fundamental rights under the Free Exercise clause," and these rights can only be diminished if they are harmful to society.48

Twenty years later, the New York Court of Appeals rejected this deferential position and instead required a religious organization to prove that its actions were undertaken to effectuate its religious mission. In Scheiber v. St. John's University,49 the court refused to dismiss a wrongful termination suit brought by a Jewish vice president against a Catholic university because an "undisputed factual predicate [was] lacking" as to whether the university actually fired the vice president for religious reasons.50 In defending its action, the university invoked the exception under section 296(11) and raised a "rhetorical question" whether, considering the "strong religious position taken by the Catholic church" on a variety of hot-button social issues, "it [would] be unlawful for a Catholic University to prefer that its Vice President of Student Life have the same religious convictions as that of the Catholic [Ch]urch?"51 Unlike the Appellate Division, which refused to investigate the "ecclesiastical judgment" of the Spiritualist organization, the Court of Appeals demanded that the university prove it had dismissed the Jewish vice president in order to hire a Catholic one.52 Although the court admitted the "potential for excessive entanglement in religious affairs,"53 it appeared primarily concerned with avoiding "wholesale discrimination": "A religious employer may not discriminate against an individual for reasons having nothing to do with the free exercise of religion and then invoke the exemption as a shield against its unlawful conduct."54

47 Id. at 773, 354 N.Y.S.2d at 271 (citing Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) and Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929)).
48 Id. at 773, 354 N.Y.S.2d at 272.
50 Id. at 127–28, 638 N.E.2d at 980, 615 N.Y.S.2d at 335.
51 Id. at 124–25, 638 N.E.2d at 979, 615 N.Y.S.2d at 334.
52 Id. at 125, 127, 638 N.E.2d at 979–80, 615 N.Y.S.2d at 334–35.
53 Id. at 127–28, 638 N.E.2d at 980, 615 N.Y.S.2d at 335.
54 Id. at 127, 638 N.E.2d at 980, 615 N.Y.S.2d at 335. The Court of Appeals' requirement in Scheiber that the religious organization show that its actions were actually related to promoting its religious mission was foreshadowed by the New York Supreme Court in Priolo v. St. Mary's Home for Working Girls, Inc., 157 Misc.
In both Cowen and Scheiber, the courts dealt with religious organizations that discriminated against those belonging to different religions. It would seem, however, that a categorically different situation arises when a religious organization discriminates on the basis of someone's sexual orientation. A non-Spiritualist, by definition, is not a Spiritualist; likewise a Jew is not a Catholic. There is nothing that excludes a person with same-sex attraction, by definition, from a particular religion; rather, it is often homosexual acts that are inconsistent with a particular religion. This is the position that is laid out in the sacred tradition of the Catholic Church. On the one hand, the Church strongly condemns homosexual acts. On the other hand, "men and women who have deep-seated homosexual tendencies must be accepted with respect, compassion, and sensitivity." [I]f they are Christians," they are called to unite the difficulties of their same-sex attraction "to the sacrifice of the Lord's Cross." Through chastity, people with same-sex

2d 494, 597 N.Y.S.2d 890 (Sup. Ct. N.Y. Cnty. 1993). In Priolo, the religious organization, the Congregation of the Daughters of Divine Charity, operated a residence for single women as part of its chief ministry "to provide temporary homes under proper moral influence for young women of limited means who come into cities seeking to establish themselves and begin an independent life." Id. at 495, 497, 597 N.Y.S.2d at 891–92. The Congregation was sued under N.Y. EXEC. LAW § 296(2) (McKinney 2012) when it attempted to exercise its rule prohibiting boarders over the age of forty-five. Id. at 495–96, 597 N.Y.S.2d at 891. Although the Congregation moved for summary judgment under the exception of § 296(11), the court denied the motion. Id. at 497, 500, 597 N.Y.S.2d at 892–94. The court found that "[a] catch-all phrase allowing 'such action as is calculated ... to promote' cannot be used to broaden the specific exemption granted by EL § 296(11) to allow discrimination against another protected group. The discrimination on the basis of age alleged here offends the principle of equal opportunity and defendants' mission can be achieved without resort to such discrimination." Id. at 498, 597 N.Y.S.2d at 892 (alteration in original).

55 See, e.g., Southern Baptist Convention, Position Statement: Sexuality, SBC.NET, http://www.sbc.net/aboutus/pssexuality.asp (last visited Aug. 15, 2013) ("Homosexuality is not a 'valid alternative lifestyle.' The Bible condemns it as sin. It is not, however, unforgivable sin. The same redemption available to all sinners is available to homosexuals. They, too, may become new creations in Christ.").


57 CATECHISM OF THE CATHOLIC CHURCH, supra note 10, ¶ 2357.

58 Id. ¶ 2358 (emphasis added).

59 Id.
attraction can “approach Christian perfection.” Therefore, it appears—at least within the Catholic Church—that a person with same-sex attraction may still be a member of the religion. In such a case, a religious organization firing its employee on the basis of his sexuality—rather than the fact that he was not a Spiritualist or not a Catholic—would not be covered under the exception because the person is “of the same religion.”

New York courts have not been troubled by this distinction, and so in the two cases in which homosexuals have alleged employment discrimination by religious organizations, the courts have assumed that such discrimination may fall within the exception. In both cases, the defendant was the Salvation Army, a Christian movement that provides social services, including foster care placement, as part of its religious mission. The plaintiffs brought claims on the basis of religious and sexual orientation discrimination. Taken together, the pair of cases suggest that religious organizations can fire or refuse to hire people on the basis of sexual orientation and still fall within the protection of EL section 296(11). However, the exception does

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60 Id. at ¶ 2359.
61 However, once this attraction is acted upon, and the person engages in homosexual acts, the person may be in a state of mortal sin and therefore prohibited from receiving holy communion. See GUIDELINES FOR PASTORAL CARE, supra note 56, at 5–6.
64 Lown, 393 F. Supp. 2d at 228–29; see also Logan, 10 Misc. 3d at 758, 809 N.Y.S.2d at 848. The Salvation Army describes itself as “an international movement, [which] is an evangelical part of the universal Christian church.” Lown, 393 F. Supp. 2d at 230 (quoting from the Salvation Army’s Reorganization Plan which gave rise to the litigation). It “is ‘not a Social Service Agency [but] a Christian Movement with a Social Service program.’ ” Id. at 229 (alteration in original).
65 The addition of “sexual orientation,” as a protected characteristic under EXEC. § 296, was approved by the New York Legislature on December 17, 2002, as part of the Sexual Orientation Non-Discrimination Act (“SONDA”), and became effective on January 16, 2003. 2002 N.Y. Sess. Laws A. 1971 § 296 (McKinney 2003). The discriminatory events in Lown began in March 2003, after this law became effective. See Lown, 393 F. Supp. 2d at 230. However, the discriminatory events described in Logan occurred before the law was approved, between October 2001 and January 2002. See Logan, 10 Misc. 3d at 757, 809 N.Y.S.2d at 848. The court acknowledged as such and rejected the plaintiff’s argument that SONDA should be read to apply retroactively. Id. at 760, 809 N.Y.S.2d at 849–50.
66 See Lown, 393 F. Supp. 2d at 252–53; Logan, 10 Misc. 3d at 758–59, 809 N.Y.S.2d at 848–49.
not allow religious organizations to retaliate against employees who assert discrimination claims against them⁶⁷ or to “harass their employees and treat [them] in an odiously discriminatory manner.”⁶⁸ In deciding these cases, the courts did not seem concerned that the Salvation Army was discriminating, at least in part, on sexual orientation while EL section 296(11) only explicitly allows discrimination on the basis of religion. Rather, the courts seemed satisfied that in limiting employment to homosexuals, the Salvation Army’s actions fell into the catch-all language of EL section 296(11)—“taking . . . action . . . calculated . . . to promote the religious principles for which it is established or maintained.”⁶⁹

In the first case, *Logan v. Salvation Army*, the plaintiff alleged that the Salvation Army discriminated against him because he was Jewish and a homosexual.⁷⁰ His supervisor was hostile towards him at work, undermined his job performance, and treated him differently from heterosexual employees.⁷¹ On one occasion the supervisor stated: “I wonder how the officers would feel if they knew they had a Jewish fag working for them.”⁷² Upon bringing his grievances to his human resources representative, he was reprimanded, and shortly thereafter, terminated.⁷³ The New York Supreme Court, while refusing to grant the Salvation Army’s motion to dismiss under the facts of this particular case, did not foreclose the application of EL section 296(11) in other discrimination cases brought by homosexuals. In its decision, the court noted that the Salvation Army is a religious organization under EL section 296(11), and it does have the right to “promote the religious principles of the organization”; in this case, however, the organization’s actions

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⁶⁷ *Lown*, 393 F. Supp. 2d at 254–55. “Retaliation” is an action prohibited under the HRL and is defined as an employer “discharging or otherwise taking action against an individual because the employee ‘opposed any practice forbidden under [the Human Rights Law] or because the [employee] has filed a complaint, testified or assisted in any proceeding under this article.’” Sharon F. Stiller, 13A New York Practice: Employment Law § 4:315 (2011) (quoting N.Y. EXEC. LAW § 296(1)(e) (McKinney 2012)).

⁶⁸ *Logan*, 10 Misc. 3d at 758, 809 N.Y.S.2d at 848.

⁶⁹ *Logan*, § 296(11).

⁷⁰ *Logan*, 10 Misc.3d at 757, 809 N.Y.S.2d at 848.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 758, 809 N.Y.S.2d at 848.
were "a far cry" from the law's "limited exemptions." Instead, these actions, described by the court as "harass[ment]," "odiously discriminatory," and "derogatory," were not covered by the exception.

While this case is important in understanding how a court may apply EL section 296(11) in the context of sexual orientation, it is ultimately inconclusive since the complained of actions occurred before "sexual orientation" was added as a protected characteristic to the HRL. In the same year that Logan was decided, the United States District Court for the Southern District of New York decided a case in which the complained of action occurred after "sexual orientation" was added. In Lown v. Salvation Army, Inc., former employees alleged that they were fired or "constructively terminat[ed]" for refusing to follow a Reorganization Plan, the stated goal of which was to "ensure[] that 'a reasonable number of Salvationists along with other Christians [will be employed].'" In implementing this plan, upper management asked human resources staff to name homosexuals who were working in the organization. The upper management also included a new section in the Employee Manual entitled "The Rules of Conduct," which stated "that although '[t]he Salvation Army does not make employment decisions on the basis of an individual's sexual orientation or preference[,] it nonetheless 'reserve[s] the right to make employment decisions on the basis of an employee's conduct or behavior that is incompatible with the principles of the Salvation Army.'" Finally, the Salvation Army generally increased the "manifestations of Christian faith" in the workplace as well as required employees to disclose their present church and minister.

The court found that the discrimination undertaken by the Salvation Army fell within the exception's catch-all. The court accepted that the Salvation Army was a religious organization.

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74 Id. at 758, 809 N.Y.S.2d at 848–49.
75 Id. at 758–59, 809 N.Y.S.2d at 848–49.
76 See supra note 65.
78 Id. at 229.
79 Id. at 230.
80 Id. at 231.
81 Id. at 233.
82 Id. at 231.
under the statutory language.\textsuperscript{83} It then dismissed the discrimination and hostile environment claims under EL section 296(11) because "the complained of actions [were] plainly 'calculated . . . to promote the religious principles for which it [was] established or maintained,'" and therefore fell under the exception.\textsuperscript{84} However, the court refused to dismiss the plaintiffs' retaliation claims because it could not conclusively determine that the actions were in furtherance of the organization's religious principles.\textsuperscript{85}

Logan and Lown are the only cases in which New York courts—or any other courts—have interpreted religious exceptions to anti-discrimination provisions in the context of sexual orientation discrimination. Although several other jurisdictions have adopted identical or similar religious exceptions to their anti-discrimination laws,\textsuperscript{86} no court in these jurisdictions has yet decided whether discrimination based on sexual orientation fits within its religious exception.\textsuperscript{87} In Logan and Lown, one can observe the courts' attempt to stay true to the broad public policy aims of the HRL, namely preventing prejudice, intolerance and inequality.\textsuperscript{88} However, unlike Scheiber, the courts were willing to stretch the exception's catch-all and find that sexual orientation discrimination may be "calculated . . . to promote the religious principles for which [the religious organization] is established or maintained."\textsuperscript{89}

\textsuperscript{83} Id. at 252.
\textsuperscript{84} Id. at 252–53 (quoting N.Y. EXEC. LAW § 296(11) (McKinney 2012)).
\textsuperscript{85} Id. at 254–55.
\textsuperscript{86} See sources cited supra note 26.
\textsuperscript{87} A tangentially related issue was decided in Pedreira v. Kentucky Baptist Homes for Children, Inc., 579 F.3d 722 (6th Cir. 2009). In this case, the plaintiff brought a discrimination claim against a religious organization after it fired her for being a lesbian. Id. at 727–28. Since Kentucky's Civil Rights Law did not prohibit sexual orientation discrimination, she claimed that her former employer had fired her because of religious discrimination—in essence arguing that she was fired because she was living openly as a lesbian in contradiction with the organization's religious belief that homosexuality is sinful. Id. Acknowledging the undisputed fact that the organization fired the plaintiff on the basis of her sexuality, the Sixth Circuit nevertheless dismissed the claim because the plaintiff had "not explained how this constitutes discrimination based on religion." Id. at 728.
\textsuperscript{88} See EXEC. § 296(1).
\textsuperscript{89} Id. § 296(1).
II. THE NEW YORK MARRIAGE EQUALITY ACT AND ITS RELIGIOUS EXCEPTIONS

The Marriage Equality Act became law on June 24, 2011.90 In addition to granting same-sex couples the right to marry, the MEA also prohibits discrimination on the basis of the spouses’ genders.91 Although the Assembly had previously passed same-sex marriage bills, both bills failed to pass the Senate.92 The MEA, for the first time, incorporated the religious exception language from the HRL.93 Once the bill passed the Assembly, additional exceptions were added in the Senate, specifically to gain majority support.94 The inclusion of these exceptions was integral to the passage of the bill.95

This part of the Note will explain how, in creating the religious exceptions to the MEA, the legislature intended the exceptions to give religious organizations broad protection from the law’s anti-discrimination language. This intention is present in both the statute’s text as well as in its legislative history.

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90 Confessore & Barbaro, supra note 18.
91 N.Y. DOM. REL. LAW § 10-a (McKinney 2012).
93 Transcript of New York State Assembly Session, at 81–82 (June 15, 2011) [hereinafter 6/15/11 Assembly Transcript], available at http://assembly.state.ny.us/write/upload/session/2011/20110615.pdf (statement of Assemb. O’Donnell). In introducing the bill, Assembly Member O’Donnell stated: The bills that we passed in 2007 and 2009 were amended by this Governor to include language that was not previously in the bill, but referenced law that already exists; specifically, it chose to add sections of the Executive Law, 292, subdivision 9, as well as 296, subdivision 11. Those provisions are the carveouts in the Human Rights Law that exempt certain entities and organizations from being required to be compliant with the Human Rights Law. So, essentially, this is a marriage bill with the identical language in the Domestic Relations Law that we passed before, with these additional references to currently existing law and on the books in the Executive Law.
A. The Text of the Marriage Equality Act

The MEA provides for the right of same-sex couples to marry in the state of New York.\(^{96}\) In its statement of intent, the Act recognizes that “[m]arriage is a fundamental human right,” and “[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage.”\(^{97}\) To achieve these goals, the MEA creates a new section, section 10-a, under the DRL. The first part of the section, section 10-a(1), provides that a marriage shall be valid regardless of the sex of the parties.\(^{98}\) The second part, section 10-a(2), prohibits discrimination based on the sexes of the parties in the marriage.\(^{99}\)

At the same time that section 10-a grants these rights to same-sex couples, DRL section 10-b carves out two religious exceptions.\(^{100}\) The first exception is aimed at the actual solemnization and celebration of the marriage itself. DRL section 10-b(1) provides that “religious entit[ies]” or corporations formed under the benevolent orders law, and their employees are not “required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of marriage.”\(^{101}\)

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\(^{97}\) Marriage Equality Act § 2.


\(^{99}\) Id. § 3.

\(^{100}\) In addition to creating the right for same-sex couples to marry and prohibiting discrimination, the Act provides that in implementing spousal rights and responsibilities, all statutory gender-specific language shall be construed in gender-neutral language. Id.

\(^{101}\) Id.
of a marriage."\textsuperscript{101} Failing to provide such services "shall not create any civil claim or cause of action or result in any state or local government action to penalize, withhold benefits, or discriminate against such" religious organizations.\textsuperscript{102}

The second exception, section 10-b(2) adopts the language of EL section 296(11) and in doing so, applies to more parties as well as more actions than the first exception. First, the exception reaches beyond religious entities and corporations formed under the benevolent orders law to religious organizations in general. Second, the exception reaches beyond solemnization and celebrations of marriages to a seemingly limitless range of possibilities. In its entirety, the exception provides:

Notwithstanding any state, local or municipal law or rule, regulation, ordinance, or other provision of law to the contrary, nothing in this article shall limit or diminish the right, pursuant to subdivision eleven of section two hundred ninety-six of the executive law, of [1] any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, [2] to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination or [3] from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.\textsuperscript{103}

As it did with EL section 296(11), this Note divides DRL section 10-b(2) into three parts: The first part identifies the organizations which qualify, the second part enumerates specific actions and specific areas which are exempted, and the third part identifies a broad catch-all for other actions that may be exempted.

The religious exceptions provided in DRL section 10-b are comparable to those of other jurisdictions which have legalized same-sex marriage. As of September 2012, same-sex marriage is legal in seven jurisdictions.\textsuperscript{104} In two of these jurisdictions—Iowa

\textsuperscript{101} Id. § 1.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
and Massachusetts—same-sex marriage was created as the result of court decisions. In the other jurisdictions—Connecticut, New Hampshire, Vermont and Washington, D.C.—same-sex marriage was created by statute. Each of these jurisdictions has included an exception, similar to DRL section 10-b(1), which allows clergy, religious congregations, and religious organizations to refuse to solemnize or celebrate same-sex marriages.

This is where the statutes' similarities end. Indeed, when it comes to extending religious exceptions beyond solemnizing and celebrating same-sex marriage, the jurisdictions offer varying levels of protection to religious organizations. Connecticut has perhaps the most restrictive exception. The statute only states that the same-sex marriage law will not affect how religious organizations provide adoption, foster care, or social services, but only if the organization "does not receive state or federal funds for that specific program or purpose." Another example of a statute with a rather limited exception is the Washington, D.C. statute, which allows religious organizations to refuse services, accommodations, facilities, or goods, but only when "promotion of marriage through religious programs, counseling, courses, or retreats ... is in violation of the religious society's beliefs." In contrast to these relatively narrow exceptions, New Hampshire and Vermont have exceptions almost identical to DRL section 10-b.

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105 See Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003), aff'd sub nom. Largess v. Supreme Judicial Court for State of Mass., 373 F.3d 219, 229 (1st Cir. 2004). Since courts created same-sex marriage in these jurisdictions, there are no religious exceptions in the law. In Massachusetts, the governor and members of the legislature tried to create a religious exception in the law, however, this attempt was unsuccessful. See Patricia Wen, In Break From Romney, Healey Raps Gay Adoption Exclusion, BOSTON GLOBE, Mar. 3, 2006, http://www.boston.com/news/local/massachusetts/articles/2006/03/03/in_break_from_romney_healey_raps_gay_adoption_exclusion. As of yet, there has not been a similar push in the Iowa legislature.


107 CONN. GEN. STAT. ANN. § 46b-35b.

108 D.C. CODE § 46-406(e)(1).


Nothing contained in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated
Although these jurisdictions may vary in the degree to which they grant exceptions, they all begin from the same place: They all state the parties to whom the exceptions apply and in what circumstances these parties may invoke the exceptions. Illinois—which offers civil unions as opposed to same-sex marriages—offers an alternate scheme and is notable because it is the only state that has faced litigation over its exception. Perhaps relying on the adage "less is more," the Illinois legislature, in drafting its civil union law, created a relatively spartan religious exception: "Nothing in this Act shall interfere with or regulate the religious practice of any religious body. Any religious body...is free to choose whether or not to solemnize or officiate a civil union." Any such reliance on this adage, however, was misguided. Shortly after the law went into effect in June 2011, the Illinois Department of Children and Family Services ("DCFS") decided not to renew its contract with Catholic Charities for foster-care placement because the organization refused to place children with same-sex couples. DCFS informed Catholic Charities that its refusal violated the anti-discrimination provision of the new civil union law. Catholic Charities sought an injunction against DCFS's action, arguing, inter alia, that as a religious organization, its actions were...
exempt from the law. In August, an Illinois Circuit Court judge found that Catholic Charities had no legally recognizable property interest in government contracts and granted summary judgment in favor of DCFS. Three months later, Catholic Charities ceased its appeals and started transferring more than one thousand children to other foster agencies.

B. The Legislative History of the Marriage Equality Act

The legislative history of the MEA shows that the New York legislature, particularly the Senate, intended to give religious organizations broad exemptions from the statute's anti-discrimination provisions. There is a tension in the MEA, similar to that in the HRL, between preventing discrimination against same-sex couples and protecting the rights of religious organizations to stand against something contrary to their religious beliefs. This tension animated much of the MEA's history, especially its evolution from an Assembly bill to a Senate bill. In their debates, as well as in explaining their votes, Assembly members and Senators repeatedly acknowledged that religious organizations would not be required to recognize same-sex marriages nor be subjected to civil claims or government recrimination for refusing to do so. The strengthened religious exceptions and the inseverability clause, which were integral to the Senate passing the bill, reflect these values. Both the floor debate and the additions to the bill show that the Legislature balanced competing interests, and in the end, favored religious freedom over non-discrimination.

The floor debate in the Assembly on the original draft of the bill often mentioned the protection that would be provided to religious organizations. The original version of the MEA, Assembly Bill 8354, was passed on June 15, 2011, by a vote of

eighty to sixty-three. In presenting the bill, Assembly Member Daniel O'Donnell noted that it was similar to same-sex marriage bills passed by the Assembly in 2007 and 2009, but that this bill added language from EL section 296(11), which he described as a “carveout[]” that “exempt[s] certain entities and organizations from being required to be compliant with the Human Rights Law.” That the Assembly believed these exceptions would protect the religious organizations is well supported in the record. In arguing for the bill, Assembly Member Janet Duprey noted that the “legislation will not force any religion to...recognize same-sex marriages in any way.” In a similar vein, Assembly Member Harry Bronson noted that the law “will not interfere with your religious beliefs, and I would not try to convince anybody to change their religious beliefs, being a religious person myself.” In fact, at least one member suggested that requiring religious groups to recognize same-sex marriages would violate both the state and federal constitutions. Yet another member stated one of the reasons he was voting for the bill was the fact that “no religion will be forced to do anything” different after the bill becomes law.

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119 6/15/11 Assembly Transcript, supra note 93, at 82.
120 Id. at 100.
121 Id. at 122.
122 Assembly Member Kevin Cahill stated:

Our Federal Constitution says that we may not establish religions, we may not prohibit religions or the free exercise thereof, and this legislation today respects religion, it does not establish religion. It does not prevent the free exercise of religion. Our own New York State Constitution says that we must continue forever to allow for the free exercise and enjoyment of the religious profession and worship without discrimination or preference for all people, for all mankind, all humankind. We are respecting the United States Constitution today, we are respecting the New York State Constitution today and we are respecting religion today.

Id. at 140. Additionally, [c]hanging the definition of civil marriage in the State of New York no more defines the religious institution of marriage than the statute as it exists today defines the religious institution of marriage. It does not, ladies and gentlemen. We, in this Body, of all people, are specifically prohibited from doing that. The law as it exists doesn't do that. The law as we will change it cannot do that and will not do that.

Id. at 142 (statement of Assemb. Kevin Cahill).
123 Id. at 176–77 (“When everybody wakes up in the next couple of days and this is signed by the Governor into law, no religion will be forced to do anything. Nobody
For the Senate, the religious exceptions in Assembly Bill 8354 were not sufficient. Before the Senate voted on the bill, Senators amended the bill to add additional exceptions and an inseverability clause. The purpose of this amendment, according to one of its chief drafters, Senator Stephen Saland, was to "to assure that organized religions, . . . benevolent associations[,] and not-for-profit associations or corporations affiliated with or controlled by religious corporations would not be subject not merely to civil actions but also to government actions." To this end, the amendment revised the language of DRL section 10-b(1) to protect a greater variety of religious organizations and activities, as well as to prevent government retribution against organizations that exercise their rights under the exception.

The Senate amendment also revised the language of DRL section 10-b(2). Most importantly, the revision provided that the exception adopted from EL section 296(11) would have force, "[n]otwithstanding any state, local or municipal law or rule, regulation, ordinance, or other provision of law to the contrary." This language was added to avoid any "encroachment" on this exception by other municipal, county, or state laws.

will be forced to believe a different way. Only a certain segment of people will be able to have those relationships respected the same way by their State that everybody else's is. For that reason, Mr. Speaker, I will be voting in the affirmative.")


125 6/24/11 Senate Transcript, supra note 94.
126 See 2011 N.Y. Sess. Laws A. 8520. Not only are "religious entit[ies]" and "corporation[s] incorporated under the benevolent orders law," included under the exception but also "not-for-profit corporation[s]" which are "operated, supervised, or controlled by a religious corporation," as well employees of any of those organizations. Id.
127 Id. In addition to "accommodations, advantages, facilities . . . or privileges," the amendments added "goods" and "services" to the list of what these organizations would not be required to provide "for the solemnization or celebration of a marriage." Id.
128 Id. ("Any such refusal to provide services, accommodations, advantages, facilities, goods, or privileges shall not . . . result in any state or local government action to penalize, withhold benefits, or discriminate against such religious organizations.").
129 Id.
130 6/24/11 Senate Transcript, supra note 94, at 31-32. Senator Saland explained that "the reason that language has been added is to make sure that there are no encroachments on Section 296(11) of the Executive Law . . . . [T]he concern
and (2), the amendment also added an inseverability clause.\textsuperscript{131} As to this inseverability clause, Senator Saland remarked that it was “very, very critically important,” and noted “for the third time, [the MEA is] required to be treated as a whole and all parts are to be read and construed together.”\textsuperscript{132}

The addition of this amendment was integral to the bill passing the Senate. Prior to the amendment being introduced on June 24, 2011, the outcome of the vote was still unclear. The bill needed thirty-two votes to pass. Only thirty-one senators had voiced their support for the bill.\textsuperscript{133} When the vote was called, two additional Republicans crossed party lines and voted for the bill.\textsuperscript{134} Both of these Senators stated that the religious exceptions were critical to their votes. Senator Saland, a drafter of the amendment, issued a press release stating: “For me to support marriage equality, however, it was imperative that the legislation contain all the necessary religious exemptions, so as not to interfere with religious beliefs which I hold as important as equal rights. I believe this legislation satisfactorily resolves the religious exemptions.”\textsuperscript{135} The second Senator to cross the aisle, Mark Grisanti, explained his vote in similar terms, noting that as a Catholic and a lawyer, he felt confident that the exceptions protected “the religious aspects and beliefs” of

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being that there might be encroachments in some other state statute or, every bit as importantly if not more so, by some local action by a county, a city, or any other municipality.” \textit{Id.}
\end{quote}

\textsuperscript{131} 2011 N.Y. Sess. Laws A. 8520. The inseverability clause in its entirety reads: This act is to be construed as a whole, and all parts of it are to be read and construed together. If any part of this act shall be adjudged by any court of competent jurisdiction to be invalid, the remainder of this act shall be invalidated. Nothing herein shall be construed to affect the parties’ right to appeal the matter. \textit{Id.}

\textsuperscript{132} 6/24/11 Senate Transcript, \textit{supra} note 94.


\textsuperscript{134} Confessore & Barbaro, \textit{supra} note 18.

churches and religious organizations. The amendment's importance is also demonstrated by the fact that the amendment was voted on before the bill-in-chief.

The legislative history of the MEA shows that the legislators carefully balanced the competing interests of non-discrimination and religious freedom. However, in the end, the balance weighed more heavily in favor of religious freedom. Numerous legislators promised that the law would protect the freedom of religious organizations not to recognize same-sex marriage. Fearing the existing exceptions insufficient, the Senate added additional exceptions covering more organizations and more actions. The deciding votes were cast by senators only after those senators were assured that the exceptions provided sufficient protection for religious organizations. And finally, in adding the inseverability clause, the legislature signaled that it was willing to sacrifice marriage equality altogether if a court ruled the religious exceptions unconstitutional.

III. APPLYING DOMESTIC RELATIONS LAW SECTION 10-B(2) TO DISCRIMINATION BY CATHOLIC CHARITIES IN FOSTER PLACEMENT SERVICES

The anti-discrimination provisions of the MEA will not infringe on the right of Catholic Charities to refuse to place foster children in the homes of same-sex couples. Such action falls within the plain meaning of the Act's religious exceptions because Catholic Charities is a religious organization and this action is "calculated . . . to promote the religious principles for which it is established or maintained." One may argue a plain reading of the text renders parts of the law redundant or inconsistent. However, a look at the Act's legislative history, as well as judicial interpretations of identical language in the HRL, resolves any redundancy or inconsistency that one may find.

136 6/24/11 Senate Transcript, supra note 94, at 39 ("[T]here's another important point here that this bill brings up, and that's its religious protections. Because I am Catholic. Under this bill the religious aspects and beliefs are protected, as well as for not-for-profits. There's no mandate that the Catholic Church or any other religious organization perform ceremonies or rent halls. There cannot be a civil claim or an action against a church. It protects benevolent organizations such as the Knights of Columbus and many others. And as a lawyer, I feel confident that the religious organizations and the others are protected.").

137 See id.

138 N.Y. EXEC. LAW § 296(11) (McKinney 2012).
Furthermore, public policy demands a broad interpretation of the exception to protect not only religious freedom but also to keep one of the State's largest private social welfare providers in business.

A. The Plain Text of the Statute Exempts Catholic Charities from the MEA's Anti-Discrimination Provision

A purely textual interpretation of the MEA's religious exceptions is sufficient to exempt Catholic Charities' decision to not place children with same-sex couples. It is a well-established canon of statutory interpretation that when the language of a statute is unambiguous, that language should be given its plain meaning. The MEA's language is unambiguous. DRL section 10-a(2) prohibits same-sex marriages from being denied any "right, benefit, [or] privilege" accorded traditional marriages. An exception to this general anti-discrimination provision is provided at DRL section 10-b(2). First, this exception identifies that the type of actor exempted is "any religious . . . organization." Second, the exception, in particular the catch-all in section 10-b(2) identifies the kind, as well as under what circumstances, the action is exempted: when "taking such action [...] is calculated by such organization to promote the religious principles for which it is established or maintained." Therefore, since the statutory language is unambiguous, it should be interpreted according to its plain meaning.

Catholic Charities' refusal to place foster children with same-sex couples, in accordance with its religious beliefs, falls within the plain meaning of the exception. First, Catholic Charities is a religious organization. Although a precise definition of "religious organization" may be elusive, Catholic Charities certainly falls within that definition. Catholic Charities touts its humble beginning in post-Civil War New York, when it was comprised of a number of both Catholic religious societies and lay groups serving poor Catholic

140 N.Y. DOM. REL. LAW § 10-a(2) (McKinney 2012).
141 Id. § 10-b(2).
142 Id.
immigrants. Even though the organization has since then expanded to serve all people regardless of religion, it still works in close concert with the leadership of the Archdiocese of New York, and it follows a decidedly Catholic mission. Second, by placing foster children only with couples in a traditional marriage rather than with those in a same-sex marriage, Catholic Charities is promoting a religious principle for which it was established. According to its vision statement, "[b]elieving in the presence of God in our midst, [Catholic Charities] proclaim[s] the sanctity of human life and the dignity of the person by sharing in the mission of Jesus given to the Church." According to Catholic tradition, "the sanctity of human life and the dignity of the person" is expressed through the natural law. Under this same tradition, "homosexual acts are intrinsically disordered" and "contrary to the natural law." Placing children with couples in traditional marriages and refusing to recognize same-sex marriages therefore proclaims the dignity of the human person, and promotes a religious principle for which Catholic Charities was established. As such, this situation falls within the statutory exception.

Despite this plausible plain reading of the statue, it is possible to raise two textual arguments against such a reading. The first is an objection based on the presumption against redundancy. According to this interpretative canon, one statutory provision should not be read in a way that renders another provision superfluous or unnecessary. In support of this argument, one need only look at the two exceptions in the MEA. The first, narrow exception (DRL section 10-b(1)) applies

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145 Our Vision and Mission, CATHOLIC CHARITIES USA, http://www.catholiccharitiesusa.org/page.aspx?pid=1407 (last visited Feb. 11, 2012) ("To this end, Catholic Charities works with individuals, families and communities to help them meet their needs, address their issues, eliminate oppression, and build a just and compassionate society.").
146 Id.
148 Id. ¶ 2357 (internal quotation marks omitted).
only to "religious entit[ies]" in the context of "soleminiz[ing] or celebrat[ing]" marriages. The second exception—DRL section 10-b(2)—in particular the catch-all, applies to any "religious . . . institution or organization" in any "action . . . calculated . . . to promote the [organization's] religious principles." If the statute is read according to its plain meaning, the second exception appears to swallow the first. All "religious entit[ies]" are presumably "religious organization[s]" and refusing to "solemniz[e]" or "celebrat[e]" a wedding is presumably an action calculated to "promote the religious principles" for which the organization is established. Accordingly, both exceptions cannot be read according to their plain meaning because doing so would make the narrow exception superfluous and contradict the intent of the legislature.

The second argument is based on a presumption of statutory consistency. According to this canon, a statutory provision should not be read in a way that is inconsistent with another provision. The catch-all of DRL section 10-b(2) does not exist by itself. It is preceded by specific discriminatory actions, which a religious organization can lawfully carry out when it acts on the basis of a person's religion. An argument could be made that the catch-all should be read in a consistent way, namely that it should only apply when the religious organization discriminates on the basis of another's religion. Interpreting the catch-all to apply to discrimination based on another's sexual orientation, distinct from a person's religion, is inconsistent with what the legislature intended in drafting the statute. Under this interpretation, Catholic Charities' refusal to place foster children with a non-Catholic couple would be exempted because it would be acting on the basis of the couple's religion; however, its refusal to place foster children with same-sex couples would not be exempted because it would be acting on the basis of the couple's sexual orientation.

150 See supra notes 101–02 and accompanying text.
151 See supra note 103 and accompanying text.
152 See supra notes 101–03 and accompanying text.
154 See supra note 103 and accompanying text.
155 See supra notes 55–62 and accompanying text.
These arguments, whatever validity they may have, are directly contradicted by the legislative history of the MEA and the judicial interpretations of the HRL's identical religious exception.

B. The MEA’s Legislative History Shows the Legislature’s Intent To Exempt Catholic Charities from the Statute’s Anti-Discrimination Provision

The legislative history of the MEA, especially the history of its religious exceptions, shows that the legislature intended DRL section 10-b(2) to exempt Catholic Charities’ decision not to place foster children with same-sex couples. Protection of religion and religious organizations was a primary concern of the legislature. In both Assembly debate on the original bill and Senate debate on the amendments, legislators repeatedly expressed the desire and expectation that the MEA would not force religions or religious organizations to accept same-sex marriages. During the Assembly debate, Assembly Member O’Donnell, the primary sponsor of the bill, in response to a question posed by another Assembly member, announced that the bill would “[a]bsolutely not” compel any religious person to solemnize a same-sex marriage. Another Assembly member noted that doing so might violate the federal and state constitution.

In the Senate, the two Senators who cast the deciding votes in favor of the bill expressed the importance of their own religious beliefs and certainty that the bill would not infringe on the ability of religious organizations to carry out their missions.

Indeed, one might even argue that, in balancing the competing interests of marriage equality and religious freedom, the legislature intended religious freedom to occupy the favored position. This was certainly true in the Senate where the two deciding senators did not agree to vote for the bill-in-chief until after a more robust amendment was adopted. Additionally, beyond strengthening the exceptions for religious groups, the Senate amendment included an inseverability clause to the

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156 See supra Part II.B.
158 6/15/11 Assembly Transcript, supra note 93, at 90.
159 See discussion supra note 122.
160 See supra notes 135–39 and accompanying text.
161 See supra notes 133–35 and accompanying text.
bill. This "very, very critically important" addition not only guaranteed that the whole law would be struck down if any part of it was found unconstitutional, but showed that the legislature was willing to sacrifice the whole bill if the religious exceptions were subsequently eliminated.

This strong legislative support for religious exception is inconsistent with the first textual objection that a broad reading of the catch-all makes the narrow exception redundant. The intent of the legislature is clear: Whenever there is a conflict between the religious exceptions and any other law, or the exceptions and civil claims, the conflict is to be "resolved in favor of the religious exception." If the exceptions appear to be redundant, it is only because the legislature intended to vigorously protect religious freedom. The resulting language is not a result of an intention to limit religious protections, but a result of over-legislating. Read in light of the legislative history, the reason the second exception appears to swallow the first exception is not because the legislature intended the second exception to be narrowly read, but because the legislature wanted to protect religious freedom against all eventualities.

C. New York Judicial Interpretation of the Human Rights Law Suggests the MEA Exempts Catholic Charities from the Statute's Anti-Discrimination Provision

New York precedent suggests that Catholic Charities' decision not to place foster children with same-sex couples falls within the exception granted at DRL section 10-b(2). When faced with an identical exception under the HRL, the Court of Appeals in Scheiber found that the exception applied only in instances where there was an actual connection between the discriminatory action and the organization's religious mission. Unlike the university in Scheiber, Catholic Charities would present not merely a hypothetical question but rather an "undisputed factual predicate" that same-sex marriage is one of the hot-button social issues on which the Church has taken a "strong religious position," and that in refusing to place children with same-sex couples, Catholic Charities would be taking an

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162 See supra note 131 and accompanying text.
163 See supra note 132 and accompanying text.
164 6/24/11 Senate Transcript, supra note 94.
165 See supra note 50 and accompanying text.
action that is calculated to effectuate its religious mission. Because of this tight fit between action and religious mission, there is little danger—as the court feared the university was doing in Scheiber—of Catholic Charities discriminating “for reasons having nothing to do with the free exercise of religion and then invok[ing] the exemption as a shield against its unlawful conduct.”

New York precedent also refutes the second textual objection that a presumption of consistency requires DRL section 10-b(2) be read to protect religious organizations only when they discriminate on the basis of another’s religion. In Lown and Logan, the only New York cases dealing directly with sexual orientation, the courts did not hesitate in applying identical language to discrimination based on another’s sexual orientation, rather than his or her religion. In these decisions, the courts implicitly accepted that the Salvation Army may limit employment of homosexuals under the catch-all exception of EL section 296(11). While the cases ultimately had different outcomes, both courts used the catch-all language as a starting point to analyze this particular discrimination. While the courts did not explain their reasons for treating these two types of discrimination the same, they likely focused on the Salvation Army’s argument that in denying employment to homosexuals, it was promoting its religious principles. The motivation for the discrimination—in other words, the Salvation Army’s desire to promote its religious belief that homosexuality is wrong—was

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167 Id. at 126–27, 638 N.E.2d at 980, 615 N.Y.S.2d at 335.
169 See supra note 84 and accompanying text.
170 While the Supreme Court in Logan ultimately denied the Salvation Army’s motion to dismiss, the decision was not due to sexual orientation discrimination not being covered in the “catch-all” language, but rather was due to the particular “harass[ment],” and “derogatory expressions,” especially in the “odiously discriminatory manner” they were conducted, being beyond the scope of the exception. Logan, 10 Misc. 3d at 758–59, 809 N.Y.S.2d at 848–49. In this way, the court seems to have found that the specific discrimination of the case, not discrimination in general, was not covered as a matter of law.
more important than the nuanced distinction between discriminating on the basis of another's religion and discriminating on the basis of another's sexual orientation.

The courts may also be more likely to ignore this distinction in this situation because of the very public nature of a marriage. In Lown, the Salvation Army was allowed to discriminate against homosexuals in hiring, even though sexual preference can be a very private phenomenon. The Salvation Army, as well as the public in general, may never know that an employee is homosexual. In such a situation, the organization can continue to effectuate its religious mission with integrity. However, in the case of same-sex marriage, where there are public records of the marriage and other outside displays of the marriage—such as wedding bands, shared last names, and shared insurance—providing foster placement services to couples in a same-sex marriage may appear as tacit approval. Indeed, Catholic Charities would be unable to proclaim its conception of human dignity without appearing hypocritical. Of course, none of these considerations would excuse Catholic Charities from acting towards same-sex couples in an odiously discriminatory manner. As the court noted in Logan, it is a “far cry” from simply limiting employment of homosexuals to harassing and using derogatory language toward homosexual employees.

D. Public Policy Favors that Catholic Charities Be Exempted from the MEA’s Anti-Discrimination Provision

In addition to these arguments from textual interpretation, legislative history, and case law, public policy also supports finding Catholic Charities' decision not to place children with same-sex couples within the exception. As noted previously, the foster care system in New York deals with one of the most vulnerable populations in the state. Children enter this system because their families cannot care for them. The cause of this may be the death of the child's parents or a court determination of abuse and neglect. In New York City, there are currently over 16,000 such children in foster care. Catholic Charities is at the forefront of placing these children in safe foster homes. For example, Catholic Charities of the Archdiocese of New

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171 Protecting and Nurturing Children and Youth, supra note 6.
172 Become a Foster or Adoptive Parent, supra note 7.
York—which covers the New York City boroughs of Manhattan, The Bronx and Staten Island, as well as Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester counties—placed 6,545 children in foster care in 2010. Utilizing a national network and volunteers, as well as the infrastructure of the Church, Catholic Charities is able to provide these services extremely efficiently. Catholic Charities spends about eighty-eight cents of every dollar directly for program expenses. If the exception did not cover Catholic Charities in the State of New York, it would likely leave the foster care placement business, as it did in Massachusetts, Illinois and Washington, D.C. The segment of society forced to bear the brunt of this outcome would be the segment least capable of bearing it: New York's foster children.

CONCLUSION

Although the religious exception in the MEA protects Catholic Charities decision not to place foster children with same-sex couples, the ability of religious organizations to freely practice their religious beliefs is by no means safe. This Note has been largely concerned with a hypothetical legal challenge against a religious organization by a same-sex couple that had been denied services. The text of the religious exception as well as its legislative history suggest that this is the kind of challenge that the legislature had in mind. However, there are other challenges, at both the state and federal level, that threaten the ability of Catholic Charities and other religious organizations to freely practice their beliefs.

One such challenge could come from the State of New York if it refused to renew a social services contract with Catholic Charities. Similar to what happened in Illinois, the State could decide to give more weight to non-discrimination than religious freedom. In granting summary judgment for the State, the Illinois trial court found that under state law, Catholic Charities did not have a legally recognized property interest in

173 Protecting and Nurturing Children and Youth, supra note 6.
175 See supra notes 112–16 and accompanying text.
government contracts. However, the language of DRL section 10-b might prevent such a decision in New York. The religious exception appears to prevent New York from doing exactly what Illinois did, namely retaliating against a religious organization that refuses to provide services to same-sex couples. The statute provides: “Any such refusal to provide services, accommodations, advantages, facilities, goods, or privileges shall not . . . result in any state or local government action to penalize, withhold benefits, or discriminate against such . . . a not-for-profit corporation operated . . . by a religious corporation.” However, the outcome is not certain. This language comes from DRL section 10-b(1), which as noted previously, deals with solemnizing and celebrating marriages as applied to religious entities and corporations formed under the benevolent orders law. Whether a court would extend this provision to cover a religious organization like Catholic Charities that refused to place foster children with same-sex couples is still unknown, although the legislative history, especially the statements of Senator Saland, support its application.

Another possible challenge comes not from the State, but from federal legislation. On October 28, 2011, US Senator Kirsten Gillibrand of New York introduced a bill entitled: “Every Child Deserves a Family Act.” This bill was also introduced in the House of Representatives and had eighty-one co-sponsors. The legislation is intended to end discrimination against adoptive and foster parents based on sexual orientation and marital status. To that end, the bill would prohibit an organization that receives federal funding or contracts with an entity that receives federal funding from “deny[ing] to any person the opportunity to become an adoptive or a foster parent on the

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177 N.Y. DOM. REL. LAW § 10-b(1) (McKinney 2012).
178 See supra notes 101–02 and accompanying text.
179 See supra notes 132–34 and accompanying text.
183 See Press Release, Kirsten Gillibrand, supra note 180.
basis of the sexual orientation...or marital status of the person." The bill provides no exception for religious organizations. As it now stands, if this bill passes, it could preempt the MEA's religious exception in regards to foster care placement. In such an event, Catholic Charities and other religious organizations across the nation would have to choose between following the dictates of the faith and providing foster care services.

The goal of actions such as those undertaken by Illinois and the supporters of Every Child Deserves a Family Act is an important one. Non-discrimination, especially regarding non-traditional families, is integral to a healthy, functioning society. However, non-discrimination, without protection for the fundamental right of religious freedom, only weakens society. In the case of Catholic Charities, this weakening would result from the loss of diverse beliefs as well as the loss of an important welfare provider. It would truly be a shame if after a century and half of dedication, Catholic Charities was forced to choose between serving one of the most vulnerable groups in society and following its religious dictates. Without a doubt, other groups would step in and take over, as they have done in Massachusetts, Washington, D.C. and Illinois. But the question we must ask as a state, and more generally as a nation, is whether religious organizations should be forced to make this choice in the first place?

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