L.M. v M.A.

[*1] L.M. v M.A., 2023 NY Slip Op 23034
Supreme Court, New York County
Hoffman, J.

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
[This opinion is uncorrected. Subject to revision before publication in the printed Official Reports.]

Decided on February 6, 2023

Supreme Court, New York County

L.M.,

Plaintiff,

Against

M.A.,

Defendant.

Index No. XXXXX

For Plaintiff: Bonnie E. Rabin, Esq., Deirdre L. Fletcher, Esq., Rabin Schumann and Partners LLP

For Defendant Harriet N. Cohen, Esq., Ankit Kapoor, Esq., Cohen Stine Kapoor LLP

For non-party movants: David J. Labib, Esq., LAW OFFICE OF DAVID J. LABIB, LLC

Douglas E. Hoffman, J.

The Court must decide whether it should quash a subpoena requiring Coptic Orthodox Church Bishop [redacted] to testify in a matrimonial action over his objection, allegedly based on religious doctrine, where his testimony is necessary to determine whether or not he conducted a wedding ceremony for the two parties to this action.

The parties here disagree about whether they were married in 2017, with plaintiff stating that they were married, and defendant stating that the Bishop "blessed" their relationship, but did not marry them. The parties agree that their infant son was baptized, as planned, at the [redacted] on [redacted] 2017. The parties also agree that Plaintiff mother L.M., who had previously been baptized by another church, which baptism and conversion from another religion was not recognized by the subject church herein, was then baptized in front of many witnesses in the church in an unplanned ceremony immediately following the child's baptism. What occurred next is the crux of the parties' dispute. Defendant father M.A. asserts that the Bishop, the subject of the instant subpoena, who had conducted the two baptisms, then proceeded to perform a [*2]family blessing. Plaintiff mother, on the other hand, claims that the Bishop offered to marry the parties, which was apparently a "great honor," and that he then performed the parties' previously unplanned wedding ceremony after she agreed to be baptized in the Coptic Church. The Bishop performed the ceremonies in a combination of the English, Arabic and Coptic languages and most of the guests, all of whom had only been invited to the child's baptism, were not sure whether or not the final ceremony was a marriage ceremony: some aligned with Plaintiff asserted it was a wedding, and some guests aligned with Defendant have sworn that a family blessing took place.

As the Bishop has refused to testify as to which ceremony he performed, allegedly because his religious conviction prevents him from testifying in a civil action involving church members, and the parties and their witnesses have testified to diametrically conflicting views as to which ceremony took place, the Court and the parties have all asked the Bishop to testify. Defendant served a valid subpoena upon the Bishop and the Bishop, through counsel, has moved to quash the subpoena, stating through counsel and an affidavit from a Coptic theologian, that it is contrary to the tenets of the religion for the Bishop to testify in civilian court "brother against brother." Bishop A.B.[FN1] has not filed an affidavit in support of the motion to quash. Both parties expressly waived any privilege and seek to compel the Bishop's testimony.

Much is at stake here in addition to simply whether or not the parties are legally married, including numerous related rights and obligations. The child has a

presumed interest, certainly in the long run, as to whether or not his parents are married. More to the point of the parties, there appear to be millions of dollars at stake in Plaintiff's ancillary claim for equitable distribution of marital property, as well as a claim for spousal support. Defendant claims that the financial interests at stake, most of which are in his own name, belong almost exclusively to him as his own property, as the parties are not legally married.

The first obvious question is whether there is a valid marriage certificate, which, however, is not legally required in light of the claim of a religious marriage such as that which allegedly took place. DRL §§ 12, 25. The parties dispute even whether such a marriage certificate exists. Defendant father denies the existence of any marriage certificate. Plaintiff mother testified at trial that she found a copy of an unsigned marriage certificate in the visor of defendant's car, which document was produced during the ongoing trial of this matrimonial action. Of course, the church clergy could inform all as to whether there is a marriage certificate. The sole custodian of the records, however, is the priest of the church, Father H.H., who has also refused to testify or present any evidence in this action. Father H.H. also participated in each of the three ceremonies on [redacted] 2017 in the church, but was not the officiant that day. Plaintiff has issued a subpoena to Father H.H., who moved through the same counsel who represents the Bishop and the Coptic [church], to quash that subpoena. As there were arguably technical defects in the manner of service of the subpoena upon Father H.H., Plaintiff has withdrawn the subpoena at the Court's suggestion and will await the Court's determination as to whether it will compel Bishop A.B. to testify, in which case Father H.H.'s testimony may not be necessary.

Counsel for clergy has produced what he asserts are the only documents his clients have concerning the day in question, which documents included a baptismal certificate for the child, a [*3]baptismal certificate for the mother, and a typed almost blank marriage certificate, with the parties' names and the date of [redacted] 2017, but no signatures by the parties, the clergy, or any witnesses. The parties agree that there are signed baptismal certificates for the child and the mother dated [redacted] 2017.

Particularly given the absence of testimony by the clergy conducting the ceremonies, both parties have presented extensive direct, cross, redirect and re-cross examinations of non-party witnesses, qualified as experts in the requirements of a Coptic Church wedding ceremony who, in several days of testimony, have presented directly contradictory opinions as to whether a Coptic marriage ceremony took place on [redacted] 2017.

Bishop A.B. has already directly participated in this action, when he filed an affidavit in support of Defendant in early 2022. Plaintiff filed the instant action for divorce and ancillary relief on [redacted] 2021. On or about [redacted] 2022, Defendant filed a motion to dismiss this matrimonial action (by motion sequence 002), alleging that the parties were never married. Plaintiff opposed, asserting that the parties were married on [redacted] 2017. The parties do agree that they never obtained a New York State governmental marriage license (although also acknowledging that a license need not be required in New York if there was a valid religious marriage, see DRL §§ 12, 25). Specifically, Defendant alleges in his moving affidavit and in his testimony during the evidentiary hearing upon the motion that the presiding officiant, Bishop A.B., offered to "bless" the parties' relationship as the parents of the child being baptized, and that the Bishop then performed such a "blessing," but that the Bishop did not marry the parties. Defendant alleges that there were no vows, and that the parties never agreed to marry one another. Defendant alleges that the parties have never been married. In support of his motion, Defendant attached a January 21, 2022 sworn affidavit from the same Bishop A.B., with this case's caption (NYSCEF doc. 71), as well as several photographs from that day and additional affidavits.

Plaintiff, on the other hand, asserts that the parties were married that day. She states that Defendant was raised in the Coptic Church, and that he originally planned for [their child] to be baptized that day in his church as the Bishop was to be at the church that day. According to both parties, for Defendant in particular, it was a great honor to have the Bishop perform their child's baptism. The parties also agree that Defendant arranged for a post-ceremony celebration at a nearby restaurant for the many guests that day. Going into the day, Plaintiff did not know that she would be asked to be married or baptized — she explains that she had to be baptized in the Coptic Church before she could be married in the Coptic church, and therefore, when she agreed to be married, she was first baptized (after the child's baptism, which was the first event), and then, the parties were married. Plaintiff states that they were married according to Coptic religious practices, as she understands them, including both parties wearing red ribbons on their head, Defendant donning a specific robe (what she states is "traditional Coptic wedding clothing"), that he did not wear a robe during their child's baptism, and the couple walked around the church, photographs of which she attaches, along with affidavits of two witnesses from that day. She also attaches certain texts from Defendant referring to Plaintiff as "wife." Each side has also made additional arguments, and attached additional exhibits and affidavits in support of their position, not necessarily addressed herein on this motion.

Based on the contradictory affidavits, including in significant part the affidavit of the alleged marriage officiant, Bishop A.B., (whose affidavit stated that he "blessed" the relationship but did not marry the parties), this Court granted Defendant' motion to dismiss the matrimonial [*4]action to the "extent of the court conducting an evidentiary hearing concerning whether or not the parties are legally married" (Interim Order on Motion seq. 002, NYSCEF doc. 133). The Court set a pretrial conference, which both parties, each with counsel, attended, and thereafter, the Court ordered a detailed pretrial conference order, on consent of each side as to each deadline in that pretrial conference order. (Order, NYSCEF doc. 169). The hearing was set for [redacted], 2022. Id. For various reasons, both parties did not timely comply with the pretrial order, and [redacted] 2022 trial dates had to be adjourned.

In the meantime, each of the parties issued various subpoenae, including Plaintiff's subpoena to Father H.H. and to [redacted] Coptic Orthodox Church Custodian of Records (NYSCEF doc. 417), as well as the Coptic Orthodox Diocese of [redacted] custodian of records (NYSCEF doc. 418). Defendant issued a subpoena to Bishop A.B. c/o The Coptic Orthodox Diocese of [redacted] (NYSCEF doc. 421). Plaintiff alleges that Father H.H. was present for all of the ceremonies, although Bishop A.B. was the officiant.

On or about December 5, 2022, counsel for "nonparty witnesses, Bishop [A.B.], Fr. [H.H.] & [redacted] Coptic Orthodox Church, and the Coptic Orthodox Diocese of [redacted]" filed a proposed Order to Show Cause, motion sequence 008, seeking an order quashing the subpoenae and for a protective order regarding same (NYSCEF doc. 415-22). After an appearance, at which certain potential procedural concerns with these subpoenae were discussed, each of the parties consented to withdraw those particular subpoenae without prejudice, and accordingly, the non-party movants, by their counsel, withdrew motion sequence 008, also without prejudice.

Then, in December 2022, as discussed in Court during the appearance on motion sequence 008, each of the parties again issued subpoenae: from Defendant, a Judicial Subpoena Ad Testificandum issued to a nonparty witness, Bishop A.B. at The Coptic Orthodox Diocese of [redacted], [redacted]Coptic Orthodox Church (NYSCEF doc. 428) and from Plaintiff, a Judicial Subpoena Ad Testificandum & Duces Tecum to Father H.H. & [redacted]Orthodox Church custodian of records dated December 14, 2022 (NYSCEF doc. 429).

Counsel for Father H.H., [redacted]Coptic Orthodox Church, Bishop A.B., and The Coptic Orthodox Diocese of [redacted], filed instant motion sequence 009. The

briefing schedule was set and then extended, and the briefed motion was argued by all counsel on January 19, 2023. Counsel for Father H.H., [redacted] Coptic Orthodox Church, Bishop A.B., and The Coptic Orthodox Diocese of [redacted] ("Counsel for Movants") was present, as were the parties. Neither Father H.H. nor Bishop A.B. was present for the argument. This decision and order follows.

The crux of the motion to quash [FN2] is both Father H.H. and Bishop A.B. allege a First Amendment right, applied to the states through the Due Process Clause of the Fourteenth Amendment, Cantwell v. Connecticut, 310 US 296, 303 [1940], not to testify in this action, as to do so would conflict with their sincerely held religious belief that they, as clergy of the Coptic Orthodox Church, cannot testify in a non-religious court "brother against brother."

Before turning to constitutional questions, the Court first addresses the procedural objections to the Bishop A.B. subpoena (NYSCEF doc. 428). As clarified at the January [*5][redacted], 2023 appearance, Movant's Counsel has only one procedural objection to this subpoena: it is a trial subpoena Judicial Subpoena Ad Testificandum, issued after the first day of trial, with the supporting affirmation stating, "[i]t is well settled that a trial subpoena cannot be used as a means to obtain materials that could have otherwise been obtained in pre-trial discovery. (Mestel & Co. v Smythe Masterson & Judd, 215 AD2d 329, 329-330, 627 N.Y.S.2d 37 [1st Dept 1995] ... Such 'fishing expeditions' are prohibited by the court and cannot be used as a substitute for discovery when a party attempts to ascertain the existence of evidence. (Matter of Terry D., 81 NY2d 1042) 2. Courts have quashed subpoenas when a party seeks production of materials and witnesses that could have been sought during discovery. (Bour v. 259 Bleeker LLC, 104 AD3d 454 [1st Dept. 2013]." [NYSCEF doc. 427, Counsel for Movants affir. at 6].

Defendant' counsel (who issued this subpoena) stated in response that they did obtain pretrial discovery - Bishop A.B.'s affirmation, which was submitted as part of Defendant' motion to dismiss the matrimonial action. Defendant' counsel then issued the subpoena for Bishop A.B.'s testimony so that he could be subject to cross-examination, as would be necessary for the court to receive his testimony at the hearing.

The Court further notes that Movant's counsel does not cite law for an absolute prohibition against trial subpoenae if there was not pre-trial discovery, especially in matrimonial cases, where at least some portions of the matrimonial proceedings (including parenting issues) include very limited rights of discovery. Further, a "fishing expedition" means attempts to discover if there is any relevant information. Here,

there is no question but that Bishop A.B.'s testimony on whether he did or did not marry the parties will be crucial to the hearing on the very issue of whether the parties are married. There is no dispute that he was present on [redacted] 2017 in the church, officiated the two baptisms, and then either blessed the family or married the parties. His testimony is not a "fishing" expedition to see whether he might know anything relevant. It is undisputed that he was there, present, and participating during whatever the disputed events were that day. His testimony will be highly relevant. Indeed, he may be the most crucial witness (although that is, of course, not a requirement for a subpoena), and he may well be the person who knows the most of anyone concerning what exactly happened, especially, if, as the parties described the events, some parts of what he stated was in English and some parts in either Arabic or Coptic (and at least one of the parties testified that they do not understand Coptic).

As the movants acknowledge, even if there were such procedural defects with the subpoena to Bishop A.B. (which there are not in this case), it would be within the Court's discretion to allow the subpoena. Given the importance of the subject of the subpoena to Bishop A.B., the Court would utilize its discretion to waive any such procedural defects, if in fact there had been any.

First Amendment Considerations

Movant's Counsel also seeks to quash the subpoena on First Amendment grounds, stating that it is the religious belief of Bishop A.B. that he cannot testify in civilian court "brother against brother." There are several conflicting issues with this factual presentation, however, which the Court addresses before turning to First Amendment considerations.

First, in support of this position, movant's Counsel attaches an affidavit of Stephen Meawad, represented as an expert in Coptic religion, both as a professor of Theology at Caldwell [*6]University with extensive publications, and a "Coptic Christian." [NYSCEF doc. 434]. There is no affidavit, or any communication of any kind from Bishop A.B. stating that these are his religious beliefs (even though Bishop A.B. did submit a sworn affidavit on Defendant' motion earlier in this action). There is no explanation provided for what would prevent Bishop A.B. from submitting a supporting affidavit on this motion to state his religious belief that he cannot testify in civilian court "brother against brother," as any such statement of his religious belief would be a stand-alone statement, and not a testimony "against" another, let alone a fellow co-religionist. And the fact that his affidavit was filed earlier in the case

but not now undercuts movant's indirect claim of religious objection to testifying at the trial.

The Court's ability to rely on the movants' proposed expert, Stephen Meawad, is further undermined by the movants' oral argument statements that individual adherents of a faith may differ as to their beliefs and practices, and just because one member of a particular church adheres to certain tenets, does not mean that another co-religionist would as well. This statement was an attempt to differentiate published cases where representatives of a Coptic Church or its clergy testified, filed, or defended against actions in civil or criminal court, or administrative tribunals, which entities were civil and not religious in nature. This argument (that not all co-religionists' beliefs need be identical) is logical and may well be correct here as well, but it greatly undermines the Court's ability to then rely on an expert's statement of what Bishop A.B.'s beliefs are, where the expert's statements are based on certain portions of the Bible and specific other texts, without stating either that those are either necessarily Bishop A.B.'s beliefs, or even that such beliefs are canonical to his church such that every clergy would have to adhere to them as their personal sincerely held religious beliefs.

Second, there is no demonstrated basis in this action for the invocation of this prohibition of testimony of "brother against brother": Movants' do not explain how this prohibition would be applicable to this case. Bishop A.B. is not being asked to sue either party. And most crucially, both parties in this case have specifically filed opposition to the motion to quash. Both parties are affirmatively asking for Bishop A.B. to testify. The parties and the Court have informed movants' counsel that they would consent to Bishop A.B. testifying in person or virtually, with the courtroom and testimony sealed as proposed accommodations.

In New York, such requests by the parties would be sufficient to waive even the priest-penitent privilege, which is not applicable here because the ceremony was indisputably in public and not a "confidential communication" subject to the priest-penitent protections. See, e.g., De'udy v De'udy, 130 Misc 2d 168, 173 [Sup Ct, Nassau Cnty 1985] (denying a rabbi's motion to quash where both spouses waived any confidentiality and asked him to testify, stating that "the New York rule (CPLR 4505, supra) literally confers no privilege upon the clergy. The privilege is the communicant's. This is necessarily so because the confidential information is, in the first instance, the property of the communicant and does not become the property of the clergyman who receives it for safekeeping. The New York rule provides that a clergyman 'shall not be allowed to disclose [u]nless the person confessing or confiding waives the privilege.'"). See also People v Drelich, 123 AD2d 441, 443 [2d

Dept 1986] (upholding conviction based in part on a rabbi's testimony, where statements made to the rabbi "were not made by the defendant in confidence in his professional character as spiritual adviser") (citing CPLR 4505).

New York's narrow view of the priest-penitent privilege as a narrow evidentiary rule that belongs only to the penitent and only under narrow circumstances was affirmed by the New York Court of Appeals in Lightman v. Flaum, 97 NY2d 128, 134 [2001] ("the statute's protection [*7]envelops only information imparted 'in confidence and for the purpose of obtaining spiritual guidance'"). The Lightman court also stated that it cannot delve into the substance of the religious "principles which motivate or compel disclosure" by clergy:

Despite the inconsistencies in defendants' rationale for revealing plaintiff's communications (as aptly noted by the dissent in the Appellate Division), the prospect of conducting a trial to determine whether a cleric's disclosure is in accord with religious tenets has troubling constitutional implications. To permit a party to introduce evidence or offer experts to dispute an interpretation or application of religious requirements would place fact-finders in the inappropriate role of deciding whether religious law has been violated. Lightman v. Flaum, 97 NY2d at 137.

The Court notes that the New York Legislature, in adopting the CPLR 4505 priest-penitent privilege, and providing that privilege power only to the penitent (unlike other states, where it is both the right of the clergy and the parishioner, see cases discussed in De'udy), did not provide a separate religious exception to clergy to choose to not testify, even about confession or similar confidential communications.

Here, movants are asking for an even broader privilege for Bishop A.B. — to not testify about an indisputably public event, even when other clergy have been required to testify about private confession (as long as the parishioners waived the privilege). The parties here are asking the Bishop to testify to state what the public ceremony was that day. He is providing facts, he is not coming in against either party, indeed, he is legally "invited" by each of the parties.

Therefore, the Court does not have a sufficient factual basis to find that either (i) Bishop A.B. personally has a religious belief that he cannot come into a civilian court to testify "brother against brother," or that (ii) even if he had such a belief, that it is applicable here, where he is not being asked to testify against a co-religionist but instead to describe a public factual event, and both parties (the only people who could plausibly be considered to be a person "against" whom he is testifying) are instead asking him to testify about those facts.

Movants also cite Lange v. Roman Cath. Diocese of Dallas, 170 Misc 2d 43, 46 [Sup. Ct., NY Cnty 1996), aff'd sub nom. Application of L. Offs. of Paul A. Lange, 245 AD2d 118 [1st Dept 1997] for the proposition that a subpoena for then-Cardinal O'Connor was quashed to prevent "harassment" of the Cardinal. In that case, there was no allegation that the subpoena was quashed on religious grounds. Instead, the subpoena was quashed because he was called in his capacity as an official of one of the defendants in that lawsuit, the Military Vicariate, that defendant had already provided other "witnesses with knowledge of the facts and circumstances," and movants in that case did not demonstrate that those other Military Vicariate officials lacked knowledge or that Cardinal O'Connor would have any such information sought from others and not otherwise obtained. Id. Here, by contrast, no other official of the Church has been made available, and indeed, it is undisputed that Bishop A.B. personally either married or "blessed" the parties; thus, not only would his testimony be appropriate, it would be potentially critical.

Nevertheless, out of abundance of caution and in respect of the importance of First Amendment issues if they were implicated by an appropriate factual presentation, the Court will address the First Amendment claims, as if they were properly factually raised herein.

Although New York DRL § 13 requires that a marriage license be obtained prior to a marriage ceremony in New York, even where no marriage license is obtained, however, a [*8]marriage ceremony may still be valid if it was "solemnized between persons of full age" (DRL § 25). See also DRL § 12. New York recognizes as valid a religious marriage, even in the absence of a marriage certificate, where the "marriage [was] performed and solemnized in accordance with established religious ritual and practice." Ponorovskaya v Stecklow, 45 Misc 3d 597, 617 [Sup Ct, NY Cnty 2014] (collecting cases, finding no marriage to be valid in New York under the factual circumstances in that case, a ceremony in Mexico, listing the various concerns with such no-certificate marriages, including parties' unclear expectations and difficulties proving a marriage, adding in dicta a suggestion for the Legislature to consider repealing or amending DRL § 25). Currently, DRL § 25 remains the law, and this case is but one example of the conflicts raised by it: had the parties here been required to obtain a marriage license, whether before or after a religious ceremony, they may well have done so at the time, and there would have been no question but they were married (or not married, if they failed to obtain a marriage license if it were required). At this time, however, DRL § 25 would provide for recognition of a religious marriage here (if one took place, of course), even though the parties never obtained a marriage license.

The court's ability to hold such a certificate-less religious marriage as valid or invalid may not, however, depend on the parties' religious affiliation or the Court's interpretation of their religious observance. To hold otherwise would violate the First Amendment: "(t)he court has no authority to determine the validity of the alleged marriage under (religious) law; the dispute must be determined on the application of neutral principles of law and without reference to religious principles" Jackson K. v. Parisa G., 51 Misc 3d 1215(A) [Sup Ct, NY Cnty 2016] citing Storfer v Storfer, 131 AD3d 881 [1st Dept 2015] (other citation omitted).

The First Amendment consists of two separate and overlapping protections: "Congress shall make no law respecting an establishment of religion" (i.e., the "Establishment Clause"), "or prohibiting the free exercise thereof" (i.e., the "Free Exercise Clause"). (US Const Amend I). The Establishment Clause prohibits the State from supporting or establishing any one religious group or practice, while the Free Exercise Clause guarantees the right to freely choose one's own course with regard to religious observance. Torcaso v. Watkins, 367 US 488, 492-93 [1961]. Here, movants allege that the court's enforcement of a subpoena would infringe on their exercise of religion.

It may also be argued, however, that the Court must remain neutral in its enforcement of subpoena power, and may not disadvantage or give preferential treatment on the basis of religion. Most recently, the United States Supreme Court held that relevant governmental authorities in Colorado discriminated against a baker's religious beliefs when those Colorado authorities stated that the baker would have to sell cakes for single-sex marriages, while in similar circumstances finding that different bakers "acted lawfully in refusing service. It made these determinations because, in the words of the [Colorado] Division, the requested cake [in the other cases] included 'wording and images [the baker] deemed derogatory,' Jack v. Gateaux, Ltd., Charge No. P20140071X, at 4; featured 'language and images [the baker] deemed hateful,' Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X, at 4; or displayed a message the baker 'deemed as discriminatory,[’] Jack v. Azucar Bakery, Charge No. P20140069X, at 4." Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S Ct 1719, 1730 [2018]. The Supreme Court also cited to at least one of the Colorado Commissioner's statements about the movant baker, with the commissioner apparently describing the baker's religious views as "one of the most despicable pieces of rhetoric that people can use." The Commission describing the [*9]religious view as both "despicable," and apparently also "by characterizing it as merely rhetorical—something insubstantial and even insincere," together with the Commission's different holding for different bakers, lead the Supreme Court to find

that the Colorado Commission did not apply its antidiscrimination law in a "neutral" manner. Id.

Here, by contrast, the Court does not prefer one subpoenaed witness to another, and does not require or decline to require a witness to appear based on their religious beliefs. Indeed, the Court cannot deny a benefit or right to a person for following or not following any particular religious practice, as to do so would violate the Establishment Clause. Lee v Weisman, 505 US 577, 596 [1992]. The Court cannot excuse a Bishop but not non-clergy persons from all subpoenae. For example, the United States Supreme Court in Estate of Thornton v Caldor invalidated a Connecticut state law that required employers to respect a Sabbath observer's designated Sabbath day but did not require them to respect other employees' requested days off. The Supreme Court held that the law created a Sabbath preference, which is in violation of the Establishment Clause:

This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand: "The First Amendment ... gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." As such, the statute goes beyond having an incidental or remote effect of advancing religion. The statute has a primary effect that impermissibly advances a particular religious practice. Estate of Thornton v. Caldor, Inc., 472 US 703, 710 [1985] (emphasis added).

The Free Exercise Clause of the First Amendment also means that the government is prevented from "regulating, prohibiting, or rewarding religious beliefs." McDaniel v Paty, 435 US 618, 626 [1978] [Burger, J., concurring]. The Free Exercise Clause precludes conditioning a benefit or privilege on religious expression. For example, in McDaniel, the United States Supreme Court struck down a state statute that disqualified clergy from serving as delegates to a state constitutional convention, holding that establishing as a condition of office the willingness to eschew certain religious practices penalized free exercise of religion.

The New York Court of Appeals has similarly held that the government may not prefer religion over non-religion and vice-versa, stating in Griffin v. Coughlin, 88 NY2d 674 [1996] that "[t]here is no firmer or more settled principle of Establishment Clause jurisprudence than that prohibiting the use of the State's power to profess a religious belief or participate in a religious activity." Id. at 686 (holding that it is a violation of the Establishment Clause of the United States Constitution to condition an inmate's participation in extended family visitation on his attending a rehabilitation program

that included religious tenets). In Griffin, an atheist prisoner filed a grievance because he was only allowed to participate in a family reunion program if he also attended a substance-abuse program based on the Alcoholics Anonymous precepts, which including a non-denominational conception of God, "God as we understood Him." Griffin, 88 NY2d at 680. The Alcoholics Anonymous meetings were "heavily laced with at least general religious content." The court found that even if the program does "not necessarily require an atheist participant to accept the existence of God in the religious sense, or to engage in religious activity," nevertheless, the "mandatory and exclusive incorporation of A.A. doctrine and practices in the [family] program violates Establishment Clause principles requiring governmental neutrality with respect to religion and prohibiting governmental [*10]endorsement of religion." Griffin, 88 NY2d at 680 (citing Board of Educ. of Kiryas Joel Vil. School Dist. v Grumet, 512 US 687, 696-697 [1994]; Abington School Dist. v Schempp, 374 US 203, 222 [1963]; Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union, 492 US 573, 592-593 [1989]; Lemon v Kurtzman, 403 US 602, 612 [1971]).

Although not raised by movants, out of an abundance of caution, the Court addresses whether the federal Religious Freedom Restoration Act of 1993, 42 USC § 2000bb et seq. ("RFRA") would provide a different result, and whether it would require a more deferential standard than a religious-neutral application. As recently explained by the Appellate Division, Second Department, RFRA does not apply to state action, only federal:

While there are recent decisions of the United States Supreme Court which have reflected a greater solicitude to claims for religious exemptions from neutral, generally applicable laws than had previously been articulated (see e.g. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, — U.S. —, 140 S Ct 2367, 207 L. Ed. 2d 819; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 134 S. Ct. 2751, 189 L.Ed.2d 675), those cases were not decided under the First Amendment, but under the federal Religious Freedom Restoration Act of 1993 (42 USC § 2000bb et seq. [hereinafter RFRA]).RFRA was enacted in response to Employment Div., Dept. of Human Resources of Ore. v. Smith (494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876), "in order to provide greater protection for religious exercise than is available under the First Amendment" (Holt v. Hobbs, 574 U.S. 352, 357, 135 S. Ct. 853, 190 L.Ed.2d 747). The requirement that a law be the "least restrictive means" of furthering a compelling governmental interest comes from RFRA (42 USC 2000bb—1[b][2]). The requirement goes further than strict scrutiny, which requires only that the law be narrowly tailored (see Burwell v. Hobby Lobby Stores, Inc., 573 U.S. at 695 n 3, 134 S. Ct. 2751; City of Boerne v. Flores, 521 U.S. 507, 535, 117 S. Ct. 2157, 138 L. Ed. 2d 624;

Ward v. Rock Against Racism, 491 U.S. 781, 798—799, 109 S. Ct. 2746, 105 L. Ed. 2d 661 [distinguishing narrowly tailored from least restrictive means]).RFRA was held to be unconstitutional as applied to the States (see City of Boerne v. Flores, 521 U.S. at 532—536, 117 S.Ct. 2157), and, in 2000, the statute was amended to delete all references to state and local governments (see 106 PL 274, 114 Stat 803, § 7). Although a number of States responded by enacting their own state-level RFRAs, New York has not done so (see e.g. 2011—2012 NY Senate Bill S00883; 2009 Senate Bill S06869; 2007 NY Senate—Assembly Bill S06464, A09098; 2005 Assembly Bill A10870). Thus, in the absence of an applicable RFRA, the Smith rule against strict scrutiny of neutral, generally applicable laws applies (see Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n, — U.S. —, 138 S. Ct. 1719, 1731—1732, 201 L. Ed. 2d 35 [reviewing claim under neutrality principle]). . .While it is certainly conceivable that the United States Supreme Court may, in some future case, reconsider the standard for addressing a religious objector's challenge to neutrally applicable laws, we are bound to apply the constitutional principles as they now exist, rather than engage in a projection as to what principles may evolve in the future.The United States Supreme Court has recently held that COVID—19 regulations will likely not stand where they single out houses of worship for especially harsh treatment (see Roman Catholic Diocese of Brooklyn v. Cuomo, 2020 WL 6948354, — U.S. —, 141 S. Ct. 63, 208 L. Ed. 2d 206, 2020 U.S. LEXIS 5708). In so holding, the Court found [*11]that the challenged regulations were not "neutral" and of "general applicability," and therefore had to satisfy strict scrutiny by being both necessary to serve a compelling state interest and narrowly tailored (2020 WL 6948354, — U.S. —, 141 S. Ct. 63, 208 L. Ed. 2d 206, 2020 U.S. LEXIS 5708 [internal quotation marks omitted]). The Court did not, however, alter the standard by which neutral regulations of general applicability are measured. And, in viewing the challenged regulations as singling out houses of worship for adverse treatment, the Court noted that, in "red zone[s]," a church or synagogue could not admit more than 10 persons, while "essential" businesses could admit as many as they wished, with essential business including such enterprises as acupuncture facilities, camp grounds, and garages (2020 WL 6948354,— U.S. —, 141 S. Ct. 63, 208 L. Ed. 2d 206, 2020 U.S. LEXIS 5708 [internal quotation marks omitted]). As explained by Justice Kavanaugh in his concurrence, because the State created a favored class of businesses, it had to justify why houses of worship were excluded from that favored class (2020 WL 6948354, — U.S. —, 141 S. Ct. 63, 208 L. Ed. 2d 206, 2020 U.S. LEXIS 5708 [Kavanaugh, J., concurring]).We believe that the Free Exercise Clause does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability, even if the law has the incidental effect of burdening a particular religious practice.C.F. v New York City Dep't of Health & Mental Hygiene, 191 AD3d 52 [2d Dept 2020] (applying the "rational

basis" test to New York's measles school vaccination requirement, and upholding its validity when petitioner parents alleged that vaccinations violated their sincerely held religious beliefs).

Here, the Court applies a religious-neutral principle to enforcement of a subpoena. The fact that the religious believer here is a Bishop cannot provide him with a greater preference than the Court could provide to any other non-clergy religious believer who states that it is against their "sincerely held" religious belief not to answer a duly issued judicial subpoena. This Court's holding neither prefers nor punishes clergy over non-clergy, see McDaniel v Paty, 435 US at 626 [1978] [Burger, J., concurring].

Movants also attempt to distinguish civil cases where Coptic clergy have testified, including because they were required to defend and prosecute on behalf of the Church, as opposed to appear in a civil dispute against co-religionists. See, e.g., Church of Holy Spirit of Wayland v. Heinrich, 101 MassAppCt 32 [Mass App Ct 2022]; St. Mary & St. John Coptic Orthodox Church v. SBC Insurance Services, Inc., 271 CalRptr3d 773 [Cal App 1 Dist 2020]; Stephanie M. v. Coptic Orthodox Patriarchate Diocese of Southern U.S., 362 SW3d 656 [Tex App Hous 14 Dist 2011] ; Saint Mary & St. George Coptic Orthodox Church, Inc. v. Board of County Com'rs, Leon County, 743 So 2d 618, [Fla App 1 Dist 1999]; St. Mark Coptic Orthodox Church v. Tanios, 213 IllApp3d 700 [Ill App 2 Dist 1991]. To the extent that the submitted Stephen Meawad expert affidavit and the movants' reply can be read to ask the Court to become the arbiter of religious observance and practices, the Court may not do so. The First Amendment prohibits courts from resolving disputes over "religious doctrine." Commr. of Social Services ex rel. N.Q. v B.C., 147 AD3d 1, 7 [1st Dept 2016] (court may not entertain petitioner's argument that the wedding ceremony did not comply with the requirements of Islam, which, according to him, require a written marriage contract) (collecting cases). In Congregation Yetev Lev D'Satmar, Inc. v Kahana, the New York Court of Appeals held that a court may not determine [*12]ecclesiastical matters, which in that case would have required the court to decide whether a particular congregant "follows the ways of the Torah." 9 NY3d 282, 287—88 [2007]. The United States Supreme Court has also made clear that a court is prohibited from resolving "controversies over religious doctrine and practice." Presbyterian Church of U.S. v Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 US 440, 449 [1969]; see also First Presbyterian Church of Schenectady v United Presbyterian Church in U.S., 62 NY2d 110, 116 [1984]. Here, as in Commr. of Social Services ex rel. N.Q. v. B.C., the court may not decide whether Bishop A.B.'s religious belief is applicable to a certain subpoena, but not to others. Instead, if movants' arguments are to succeed,

presumably, the Court would have no power over any Coptic believer on any subpoena.

Similar to that requested here, in 1979, the New York Court of Appeals held that a priest cannot refuse to testify before a grand jury about certain topics that were not "confession" (and thus, outside of the CPLR 4505 priest-penitent privilege), holding that the "extent" of his First Amendment religious right to not testify before a grand jury may be no greater than that afforded by CPLR 4505:

Appellant [priest]'s broader contention that he would not respond to the questions posed by the Grand Jury because disclosure would unduly impinge upon the right to practice his ministry as guaranteed by both the State and Federal Constitutions is equally without merit. In our view, the constitutional rights claimed by appellant cannot serve to justify his refusal to answer.There can be little doubt that the Grand Jury serves a compelling State interest to ensure that peace and order is maintained in our society. It functions to protect the community from disruption by those who elevate and obtain their purely personal desires in ways not sanctioned by society-at-large, while, at the same time, protecting persons from unfounded accusations.In furtherance of its essential function, the Grand Jury, as an arm of society, is entitled to the assistance of all members of the community in uncovering criminal acts. The enduring command that "every man owes a duty to society to give evidence when called upon to do so" must be honored if the fundamental task of the Grand Jury is to be realized.On the record before us, appellant raises no colorable First Amendment right. His right to practice his ministry cannot serve to shield him from shedding light upon whether or not any unlawful efforts were undertaken to assist those confined in New York City penal institutions to obtain special privileges and entrance into work-release programs or to obtain a transfer to less secure institutions.In so holding, we observe that the statutory privilege (CPLR 4505) affords appellant any necessary protection against infringement of freedom of religion by Grand Jury investigations, and we reject his contention that the right to practice his ministry bestows more extensive protection beyond the scope of the priest-penitent privilege accorded by statute. Absent a showing that the conversations sought to be disclosed are embraced by the priest-penitent privilege, appellant, even though a clergyman, is, like all citizens, obligated to respond to those questions relevant to the Grand Jury's investigation. Keenan v. Gigante, 47 NY2d 160, 167—68 [1979] (citations omitted) (emphasis added).

In Keenan, the Court of Appeals relied in part on the limited scope of CPLR 4505 and its [*13]holding that the State's right to Grand Jury testimony is a "compelling State interest." Id. See also Krystal G. v. Roman Cath. Diocese of Brooklyn, 34 Misc 3d 531,

544 [Sup Ct, Kings Cnty 2011] (requiring discovery of documents from a Diocese defendant in a sex-abuse lawsuit, finding that limited scope of CPLR 4505 does not protect "inter-priest communications" and that "neutral" application of discovery rules would require production from religious and non-religious defendants) (citing Keenan).

Here, too, the Court is being asked to enforce a judicial subpoena for a witness's trial testimony, based upon neutral principles of law, and here, finds that the subpoena is valid, relevant (indeed, highly relevant), and enforceable.

Although this Court holds that there is no "strict scrutiny" test to be applied and that enforcement of this subpoena herein does not require demonstration of a "compelling" State interest, there is in fact a compelling State interest in enforcement of this subpoena. The State of New York has a compelling interest in knowing whether the parties were married, which would trigger numerous state rights and responsibilities, including the implicated-here right to divorce and determination of equitable distribution and spousal maintenance; there are also tax-law implications; estate law and decedent implications; and there may be rights related to make medical and end-of-life determinations for a spouse in the absence of advance directives. The fundamental nature of the right to marriage was most recently re-affirmed by the United States Supreme Court Obergefell decision, citing marriage as "the relationship that is the foundation of the family in our society." Obergefell v. Hodges, 576 US 644, 666 [2015] (citing Loving v. Virginia, 388 US 1 [1967] and Zablocki v. Redhail, 434 US 374 [1978]). "The right to marry, establish a home and bring up children is a central part of the liberty protected by the Due Process Clause. Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. Marriage also affords the permanency and stability important to children's best interests." Id. at 688 (citations omitted).

The corollary to this individual right of marriage is the importance to the states of recognizing and administering those rights and obligations of marriage (without, of course, infringing on the constitutional rights of individuals to marry), as discussed by the United States Supreme Court in the 2013 Windsor decision:

recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. See Williams v. North Carolina, 317 U.S. 287, 298, 63 S. Ct.

207, 87 L. Ed. 279 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." Ibid. United States v. Windsor, 570 US 744, 766 [2013].

A similarly compelling State interest is New York's (and the child's) right to know whether his parents are married. New York has a "strong presumption of marriage," especially when it concerns the legitimacy of children:

"Where persons live and cohabit as husband and wife, and are reputed to be such, a [*14]presumption arises that they have been legally married, and this presumption, especially in a case involving legitimacy, can be rebutted only by the most cogent and satisfactory evidence" (Matter of Lowney, 152 AD2d 574, 575 (2d Dept. 1989)). That court quoted Judge Andrews from the often-cited case of Hynes v. McDermott (91 NY 451 (1883)) wherein he stated, "The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy (of the couple's children). The law presumes marriage, and legitimacy . Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."Amsellem v Amsellem, 189 Misc 2d 27, 29 [Sup Ct, Monroe Cnty 2001] (collecting cases).

In Amsellem, a couple was married by a rabbi in France, apparently in violation of at least some French provisions that would have required them to first obtain a civil marriage before the religious one, and their rabbi was also supposed to conform with certain provisions or face fines. The parties then returned to New York, where they lived as husband and wife for over ten years, filed tax returns, and had five children. When the wife filed for divorce, however, the husband argued that the marriage was not valid and sought to dismiss the divorce suit. The Amsellem court upheld the marriage, finding that the husband did not overcome the "strong presumption" of marriage and legitimacy, and although he was able to establish that under French law that the rabbi violated provisions and faced fines, the husband did not sufficiently prove that the marriage itself also had to be invalidated. Id.

Here, the child's right to child support and parenting access would not necessarily be changed whether or not his parents are married; however, his financial well-being while in two households may be drastically affected by equitable distribution determinations. His ability to inherit may be affected by whether his parents are

married. When he is older, whether he is "religious" or not, whether his parents were married or not, may presumably matter a great deal to him.

The fact that New York State has marriage certificates, extensive legislative history related exclusively to marriage (including DRL), and all the attendant rights, responsibilities, and legislation around marriage — all of this is undeniable proof of the importance of marriage to the State of New York, as well as the importance of knowing whether there was (or was not) a marriage.

Notably, Movants' Counsel, at oral argument, acknowledged that the movants regularly sign and provide marriage certificates to New York State (for other couples, who obtain a marriage license in advance of their ceremony, which is then signed after the ceremony, and returned by the officiant to the relevant New York agency for processing and issuing of the New York State marriage certificate). Movants' participation with New York State governmental authorities in providing certification of certain marriages (where the couples obtained a license) is an additional acknowledgement of the importance of marriage, including to New York State, as well as examples of the movants' apparently willing communications with governmental authorities to inform them of (those other, with certificates) marriages. In this case, Bishop A.B.'s testimony is necessary to make that "compelling State interest" determination of whether or not the parties were married, with all the rights and obligations that flow from that [*15]determination.

The Court remains prepared to accept reasonable requests for an accommodation from Bishop A.B., including a sealed courtroom, remote testimony, or similar accommodations, as already consented to by the parties. Accordingly, the Court denies the motion to quash the subpoena. Bishop A.B. is ordered to testify on the next court date, February [redacted], 2023, at 10:30 am. The Court will stay its order seven days from the date of this order to permit movants to seek to obtain any appellate stay. This constitutes the decision and order of the Court.

DATE 2/6/2023

DOUGLAS E. HOFFMAN, J.S.C

Footnotes

Footnote 1: Initials for the clergypersons in this redacted matrimonial decision are not their real initials.

Footnote 2: As noted, Plaintiff's counsel agreed to withdraw without prejudice the subpoena to Father H.H. and the [redacted] Coptic Orthodox Church.