ORIGINAL

*To be argued by James P. Trainor*
*Time Requested: 15 minutes*

Appellate Division – Third Department Case No. _____

# New York Supreme Court

Appellate Division: Third Department

**Cynthia Gifford, Robert Gifford, and Liberty Ridge Farm, LLC,**

*Appellants,*

-against-

**Melisa Erwin, now known as Melisa McCarthy, Jennifer McCarthy, and the New York State Division of Human Rights,**

*Respondents.*



## APPELLANTS' BRIEF



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**Sup. Ct. Rensselaer County Index No. 248068**
**RJI No. 41-1136-2014**

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1. Whether a discreet portion of family farm land is a public accommodation under New York Executive Law § 292(9) [McKinney] when it is occasionally contracted out to closed private events such as weddings and corporate meetings.

   Unsupported by substantial evidence, the State Division of Human Rights below held in the affirmative.

2. Whether a family discriminates "because of" sexual orientation under Executive Law § 296(2) [McKinney] when they host events, including wedding receptions, for all individuals, including same-sex couples, and hire individuals who identify with diverse sexual orientations, but decline to enter into a contract to host a wedding ceremony that conflicts with their religious belief that marriage is a sacred union between one man and one woman.

   Unsupported by substantial evidence, the State Division of Human Rights below held in the affirmative.

3. Whether requiring a family to host and participate in a wedding ceremony on their family farm violates the Free Exercise provisions of the New York and United States Constitutions when the family holds sincere religious beliefs that marriage is a sacred union between one man and one woman and when it would violate their conscience to host and participate in any other wedding ceremony.

   The State Division of Human Rights below did not acknowledge or address this question presented.

4. Whether requiring a family to host and participate in an expressive wedding ceremony on their family farm violates the First Amendment's protection of expressive association when participating in the ceremony would contradict their own message that marriage is a sacred union between one man and one woman.

   The State Division of Human Rights below did not acknowledge or address this question presented.

5. Whether requiring a family to host and participate in an expressive wedding ceremony on their family farm violates the First Amendment protection against compelled speech when participating in the ceremony would contradict their own message that marriage is a sacred union between one man and one woman.

   The State Division of Human Rights below did not acknowledge or address this question presented.

6. Whether there is sufficient evidence to warrant a $3,000 award for mental anguish when the complaining party had prior knowledge that the family who owns the farm hosts and participates in wedding ceremonies only between one man and one woman, and whether a $10,000 punitive-damages award to the State of New York is warranted without evidence of animus.

   Unsupported by substantial evidence, the State Division of Human Rights below held in the affirmative.

## STATEMENT OF THE CASE

"Discrimination in the name of civil rights is as abhorrent as discrimination which does violence to the concept of civil rights." *Matter of State Comm'n for Human Rights v Suburban Assocs., Inc.*, 55 Misc 2d 920, 924 [NY Sup Ct 1967]. In this case, the New York State Division of Human Rights ("Division"), in the name of human rights, has mandated religious discrimination by requiring a family to host and participate in a marriage ceremony that violates their faith, and by imposing a heavy fine on them because they are unwilling to do so. New York law does not require this result, and in fact, the state and federal Constitutions forbid it.

The Giffords live on and operate a family farm. They host wedding ceremonies in a scenic portion of their backyard and directly participate in those

ceremonies. Their participation includes serving as wedding coordinators, decorators, greeters, and personal assistants to the bride—"the only thing [they] don't do is . . . officiate." (A-287-89, Hr'g Tr. 142:14–144:2, Nov. 6, 2013). Indeed, Respondents admit that the Giffords are directly involved in the ceremonies they host. (A-221, Hr'g Tr. 76:23-25). These ceremonies are important to the Giffords because they are Christians who sincerely believe that marriage is a religious union between one man and one woman under God.

In the Fall of 2012, Respondents, a same-sex couple who were recently engaged, heard about the Giffords' beliefs regarding marriage. Respondents nevertheless called the Farm and secretly recorded their conversation with Mrs. Gifford. During that conversation, Mrs. Gifford politely invited Respondents to the Farm, but let them know that because of the Giffords' beliefs about marriage, they would be unable to host a same-sex wedding *ceremony* on their property. Nevertheless, the Giffords happily host wedding *receptions*, parties, and other events for couples in same-sex relationships.

Following this, Respondents filed the complaints that originated this action. At the conclusion of the administrative proceedings, the Division concluded that the Giffords violated the State's public-accommodations law, fined the Giffords $13,000, and ordered them to participate in same-sex wedding ceremonies just the

same as they do for wedding ceremonies between a man and a woman. Failure to abide by this order threatens further fines and up to a year in jail.

The Division's Order disregards the Legislature's intent to exclude personal wedding services from the public-accommodations statute and tramples on the Giffords' constitutional rights to free speech and free exercise. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v Barnette*, 319 US 624, 642 [1943].

## STATEMENT OF FACTS

### The Giffords and Liberty Ridge Farm

Mr. and Mrs. Gifford have been married for over 30 years. (A-239-40, Hr'g Tr. 94:25-95:4; A-275, Hr'g Tr. 130:14-17) and were both raised in religious families. (A-240, Hr'g Tr. 95:5-8; A-295, Hr'g Tr. 150:12-15). The Giffords believe that marriage is a religious union of one man and one woman before God. (A-241, Hr'g Tr. 96:13-15; A-295, Hr'g Tr. 150:16-19; A-293, Hr'g Tr. 148:7-14). This belief about marriage is a "core value[]" of the family's faith, upon which they operate their family business. (A-296, Hr'g Tr. 151:6-17).

Liberty Ridge Farm, LLC ("the Farm") is a farm that grows, harvests, and sells produce on approximately 100 acres. (A-241, Hr'g Tr. 96:3-10). The Farm is

incorporated as a limited liability company. (A-258, Hr'g Tr. 113:10-12). It is exclusively owned and operated by Mr. and Mrs. Gifford, who have lived on the property and operated the Farm for over 25 years. (A-274, Hr'g Tr. 129:3-9; A-275, Hr'g Tr. 130:14-25).

**Wedding Ceremonies at Liberty Ridge Farm**

The Giffords advertise a portion of their farm property as a wedding-ceremony site on an individual contract basis. (A-247-48, Hr'g Tr. 102:21-103:1; A-283-84, Hr'g Tr. 138:22–139:6; A-284-85, Hr'g Tr. 139:21-140:13; A-289, Hr'g Tr. 144:3-16). The fenced-in site, bordered by a cliff on a river bank, is not open to the public (A-247-48, Hr'g Tr. 102:16–103:1), and is separate from other event sites such as the reception sites on the property. (A-274, Hr'g Tr. 102:4-23; A-289, Hr'g Tr. 144:3-16). Since 2012, the Giffords have utilized this discreet site to host approximately 35 wedding ceremonies. (A-299, Hr'g Tr. 154:11-13).

The Giffords are intimately involved in these wedding ceremonies. Their participation includes, but is not limited to, serving as wedding coordinators, decorators, greeters, personal assistants to the bride, and chauffeurs. (A-287-89, Hr'g Tr. 142:14–144:2). They also stage the ceremony site, arrange the flowers, pin boutonnieres on groomsmen, and fluff the bride's dress. (*Id.*). "[T]he only thing [they] don't do is . . . officiate" the ceremony. (*Id.*).

Because of their religious belief that marriage is a religious union of one man and one woman before God (A-241, Hr'g Tr. 96:13-15; A-295, Hr'g Tr. 150:16-19; A-293, Hr'g Tr. 148:8-14), and because of their direct participation in the wedding ceremonies on their property (A-287-89, Hr'g Tr. 142:14–144:2), the Giffords do not host wedding ceremonies for any union other than one man and one woman. (A-293, Hr'g Tr. 148:4-14). The Giffords religious beliefs about marriage, however, do not prohibit them from hosting other events (such as receptions or parties) for same-sex couples. (A-290, Hr'g Tr. 145:6-18; A-293, Hr'g Tr. 148:4-17; A-368, Pet'rs' Post Hr'g Br. 2).

Neither the Giffords nor the Farm sell goods while hosting wedding ceremonies. (A-291, Hr'g Tr. 146:22-24). A wedding ceremony on the Farm occurs only pursuant to a written contract (A-291-92, Hr'g Tr. 146:25–147:11), and is not open to the public. (A-247-48, Hr'g Tr. 102:4-103:1; A-289, Hr'g Tr. 144:3-16).

The Gifford home, also called the "Gifford Barn," is located on the farm, fenced in, and gated. (A-244, Hr'g Tr. 99:1-3; A-246, Hr'g Tr. 101:10-14). It is not open to the public. (A-246, Hr'g Tr. 101:15-21). The first floor of the Gifford home is a large open-floor area where the Gifford children and their friends hangout, but that is also privately contracted out for events approximately twenty times a year. (A-308-09, Hr'g Tr. 163:17–164:7). The Giffords have raised their

two children upstairs in the Gifford Barn on the first floor of which some wedding ceremonies and most of the receptions are hosted. (A-240, Hr'g Tr. 95:9-17; A-154, Hr'g Tr. 9:2-6).

When someone inquires about the ceremony site, Mrs. Gifford follows procedures that include (1) sending a form letter with information about the Farm (A-285-86, Hr'g Tr. 140:22–141:2); (2) setting up an appointment for a tour (A-286, Hr'g Tr. 141:3-5); (3) discussing potential pricing and contract options (A-286, Hr'g Tr. 141:5-7); (4) encouraging the couple to look at other venues (A-286, Hr'g Tr. 141:18-22); and (5) if a date is available and the details are worked out, Mrs. Gifford will develop a contract specifically for that couple. (A-286-87, Hr'g Tr. 141:18–142:3).

**Other Activities at Liberty Ridge Farm**

In addition to operating as a full-time farm, the Farm hosts events on its property during certain seasons, including a fall festival that is conducted for 42 days of the year. (A-248, Hr'g Tr. 103:16-24; A-256, Hr'g Tr. 111:5-19). During that festival, the sale of produce and cooked foods occurs only in the areas of the Farm that are open to the public, such as at the Farm Market, "the Pitchfork," and "the Junction." (A-290-91, Hr'g Tr. 145:23–146:11). The outdoor sites for the fall festival are open to the public during the festival and are separate from the fenced and gated Gifford home and wedding-ceremony site. (A-249, Hr'g Tr. 104:2-16;

A-250, Hr'g Tr. 105:15-20). The Farm has only certain areas open to the public that are separately accessible from Bevis Lane, including areas where the public can pick blueberries, raspberries, pumpkins, gourds, squash, mums, and field corn. (A-248, Hr'g Tr. 103:7-14).

The areas open to the public are separate from the areas where private events are held. In addition to the wedding-ceremony site, there is an Event Tent on the Farm that is separate from the Gifford home and is where some events are held. (A-246-47, Hr'g Tr. 101:22–102:3). None of the event areas are open to the public. (A-246-48, Hr'g Tr. 101:10–103:1). The Giffords separately price, and contract for, wedding receptions, wedding ceremonies, and other events. (A-283, Hr'g Tr. 138:22–139:1; A-284-85, Hr'g Tr. 139:24–140:13; A-289, Hr'g Tr. 144:3-16).

The Giffords' policy is that "everybody is welcome at the farm." (A-290, Hr'g Tr. 145:6-18). In fact, the Giffords have always hosted events for and hired individuals who identify as gay. (A-290, Hr'g Tr. 145:6-18).

**The Conversation Between Mrs. Gifford and Mrs. Melisa McCarthy**

Sometime in the "early fall 2012," Respondent Melisa McCarthy (née Melisa Erwin) called the Farm to inquire about its wedding services (A-205, Hr'g Tr. 60:3-10), but was only able to leave a message and missed the Farm's return call. (A-205, Hr'g Tr. 60:11-16). Prior to contacting the Farm, Respondents were

aware of the Giffords' religious beliefs about hosting wedding ceremonies on their property. (A-196-99, Hr'g Tr. 51:12-54:6).

Sometime in September 2012, Melisa called the Farm and spoke to Mrs. Gifford. (A-167-68, Hr'g Tr. 22:12–23:13). Because they were previously aware of the Giffords' wedding-ceremony policy, Jennifer secretly recorded the call. (A-169, Hr'g Tr. 24:9, 16-19; A-198, Hr'g Tr. 53:4-14; A-199, Hr'g Tr. 54:3-6; A-220-21, Hr'g Tr. 75:17–76:2). Melisa spoke to Mrs. Gifford without disclosing the recording or Respondent Jennifer McCarthy's presence on the line. (A-168-69, Hr'g Tr. 23:10–24:6).

According to a transcript of Jennifer's recording of the conversation, after discussing generalities of the available facilities, Mrs. Gifford invited Melisa to visit the facilities. (A-212, Hr'g Tr. 67:9-10). Melisa then mentioned that her fiancée was female. (A-212, Hr'g Tr. 67:9-13). Mrs. Gifford then notified Melisa of her and her husband's religious belief regarding wedding ceremonies and indicated that there could be "a problem." (A-212-13, Hr'g Tr. 67:14–68:7). Mrs. Gifford said that she was "sorry" and that it was "great that [they]'re getting married," but she affirmed that she could not compromise the family's beliefs because those beliefs are "who we are." (A-212-13, Hr'g Tr. 67:14–68:7). After receiving confirmation of the Giffords' religious beliefs, Melisa ended the conversation. (A-213, Hr'g Tr. 68:8-10).

Jennifer understood from the call that Respondents were welcome at the Farm, but that the Farm does not host same-sex wedding ceremonies. (A-200, Hr'g Tr. 55:1-10, 22-25; A-201, Hr'g Tr. 56:1-7). Mrs. Gifford understood from the call that she invited Respondents to the Farm and that they were welcome to have their reception there (just not their wedding ceremony). (A-293-94, Hr'g Tr. 148:18–149:6).

The Giffords did not turn away Respondents' business or deny them any services during the telephone conversation. (A-293-94, Hr'g Tr. 148:18–149:9). Respondents did not have any further contact with the Giffords before filing their complaints. (A-199-200, Hr'g Tr. 54:25–55:1).

Even though Respondents found another similar location to host their wedding ceremony that took place on August 3, 2013 (A-195-96, Hr'g Tr. 50:21–51:6), Respondents filed their complaints because they were upset that the Giffords would not "celebrate" their wedding ceremony with them. (A-221, Hr'g Tr. 76:23-25).

## PROCEDURAL HISTORY

1. In October, 2012 Respondents each filed a separate complaint with the Division alleging that the Giffords discriminated based on sexual orientation in violation of Executive Law Article 15 (Human Rights Law). Respondents amended their complaints several times for various reasons. (A-86-90, A-92-93).

2. The Giffords sent an initial response to the Division dated November 2, 2012, wherein they denied discriminating against anyone based on sexual orientation and asserted their constitutional right not to participate in a wedding ceremony that violates their sincerely held religious beliefs (A-94-95).

3. The Division conducted a probable-cause investigation and conference in January 2013, and issued a determination of probable cause in both cases on February 1, 2013. (A-98-99).

4. In October 2013, a Notice of Public Hearing was issued and Administrative Law Judge Magdalia Pares ("ALJ") was assigned to conduct the hearing and recommend findings to the Commissioner pursuant to § 297 of the Executive Law. (A-100-102).

5. The Giffords submitted their Verified Answers dated October 30, 2013 (A-105-17; A-126-38), asserting, inter alia, that (1) they did not unlawfully discriminate based on sexual orientation, (2) the fenced-in location where they host wedding ceremonies and receptions is not a place of public accommodation, (3) the public-accommodations law is unconstitutional as applied to the Giffords in this case, (4) the claims are moot because Respondents were already married, and (5) the complaints failed to state claims against the Giffords individually. At the ALJ's request, the Giffords submitted Amended Verified Answers dated November 5, 2013. (A-118-25; A-139-46).

6. A Public Hearing pursuant to Executive Law § 297 was held before the ALJ on November 6, 2013, in Albany, New York, and a stenographic record of the proceedings was transcribed. (A-147-351). Unfortunately, the stenographic record was transcribed after the hearing from a digital tape system, and many transcript deficiencies were identified. (A-352-57). The parties entered a Joint Stipulation errata sheet addressing these deficiencies. (*Id.*).

7. On January 6, 2014, the Giffords submitted a Post Hearing Legal Brief including an Appendix, containing wedding financial information and Proposed Findings of Fact and Conclusions of Law. (A-367-403).

8. The ALJ's Recommended Findings of Fact, Opinion and Decision, and Order ("ALJ Decision"), although dated July 2, 2014, was not received by the Giffords or their counsel until July 7, 2014. (A-61-83). The ALJ Decision adopted wholesale Respondents' Recommended Findings of Fact and Conclusions of Law. It requires the Giffords to host and participate in marriage ceremonies for same-sex couples just the same as they do for marriages between a man and a woman, regardless of the Giffords' sincerely held religious beliefs. It also requires them to implement "anti-discrimination training and procedures" that will likely contradict—and seek to change—the Giffords' religiously motivated views and practices regarding marriage. And it awarded mental pain and suffering damages to

Respondents of $1,500.00 each and compelled the Giffords to pay a penalty to the Division of $10,000.00.

9. Pursuant to the rules of practice of the Division, the Giffords submitted Objections to the ALJ Decision. (A-422-29). But the Commissioner's Final Order, dated August 8, 2014 (the "Order"), essentially adopted the ALJ Decision in its entirety, except that the Commissioner enhanced the penalty on the Giffords by starting interest immediately. (A-51-53).

10. Since the Order, the Giffords have paid the judgments against them and have ceased entering into contracts to host any wedding ceremony for anyone on their property. (A-441-49).

11. Pursuant to the appeal procedure set forth in Executive law § 298, the Giffords bring this proceeding to reverse the Division's Final Order and to obtain a refund of the damages and fine paid to Respondents and the State of New York.

## SUMMARY OF THE ARGUMENT

The Divison's order applying the executive law to the Giffords lacks substantial evidence because the Giffords' wedding-ceremony site on their farm is not a public accommodation and because they did not discriminate based on sexual orientation.

Additionally, the Division's Order violates the Giffords' free exercise of religion, freedom of expressive association, and freedom against coerced

expression under the United States and New York Constitutions because it forces them to convey messages and endorse views about marriage that are contrary to their sincerely held religious beliefs.

Finally, the Division's award of damages and penalties are based on a misapprehension of the facts and are unsupported by substantial evidence.

## STANDARD OF REVIEW

"The standard used by reviewing courts for findings made by an administrative agency is whether the determination is supported by substantial evidence." *Matter of Goldsmith v De Buono*, 245 AD2d 627, 628 [3d Dept 1997]. Substantial evidence exists only "when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably." *Id.* (quotations and citations omitted). "Marked by . . . its solid nature and ability to inspire confidence, substantial evidence does not rise from bare surmise, conjecture, speculation or rumor." *300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176, 179-81 [1978]. "Whether an administrative agency determination is shored up by substantial evidence is a question of law to be decided by the courts." *Id.* at 181.

## ARGUMENT

### Point 1 – The Giffords Did Not Violate the Executive Law by Refusing to Host a Same-Sex Wedding Ceremony.

#### A. Liberty Ridge Farm is not a Public Accommodation for Purposes of Hosting Wedding Ceremonies.

By offering to enter into contract negotiations to host and personally facilitate wedding ceremonies on their property, the Giffords do not transform a fenced-in area of their home into a "public accommodation" under Executive Law §§ 292, 296 [McKinney].

Executive Law § 292 defines "public accommodation" to include six categories of accommodations, including:

1. Inns . . . or restaurants, or eating houses, or any place where food is sold for consumption on the premises;
2. buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold;
3. ice cream parlors, confectionaries, soda fountains, and all . . . where beverages of any kind are retailed for consumption on the premises;
4. wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors;
5. garages, all public conveyances . . .
6. public halls and public elevators of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants.

Exec. Law § 292(9) [McKinney] (numbers added for clarity). These six categories may be summarized as: (1) hotels and restaurants, (2) bars and liquor stores, (3)

boutique beverage and dessert establishments, (4) wholesale, retail, and service stores, including entertainment facilities, (5) public conveyances, and (6) public pathways in buildings open to the public. In addition to the specifically listed public accommodations, the law applies to "all places included in the meaning of such terms." *Id.* But not every business that "satisfies wants or needs of citizens" is a "public accommodation." *Ness v Pan Am. World Airways*, 142 AD2d 233, 239, 241 [2d Dept 1988] (concluding that an airline's travel agent rewards program was not a public accommodation).

When determining if an entity is a public accommodation, the analysis focuses on the particular service or request at issue, rather than other activities or the full range of services provided by an entity. *See, e.g., id.* at 241 (concluding that an airline's rewards program was not a public accommodation even though the airline, as part of its other services, clearly qualified as a "public conveyance" under the statute); *Donaldson v Farrakhan*, 762 NE2d 835, 839 [Mass 2002] (dismissing complaint by woman denied access to a theater because the theater was not a public accommodation when used for the specific purpose of hosting a men-only religious meeting); *Wazeerud-Din v Goodwill Home & Missions, Inc.*, 737 A2d 683, 688 [NJ Super Ct App Div 1999] (construing a similar statute and holding that "even if some of the [organization's] other activities were considered public accommodations," the court must look to the specific activities at issue).

The specific accommodation at issue here is use of a particular portion of the Giffords' property for the purpose of conducting a wedding ceremony. (A-247-48, Hr'g Tr. 102:16–103:1; A-293-94, Hr'g Tr. 148:18–149:6). The list of public accommodations in the statute does not include scenic farmland. Nor is a wedding-ceremony venue "included in the meaning of [the] terms" specifically enumerated in the statute. Exec. Law § 292 [McKinney].

The Division's determination that the Farm is a public accommodation under the circumstances of this action constitutes error as a matter of law and is not supported by substantial evidence. First, the Division concluded that "Respondents provide both goods and services to the public" because the Giffords host events such as "pick-your-own blueberries and raspberries" and the annual "fall festival" where the public is invited. (A-74, Order 14). These factual findings and any other discussion of non-wedding-ceremony services are legally irrelevant to the question of whether the Giffords' fenced-off private property is a "public accommodation" for the purpose of hosting wedding ceremonies. *See Ness*, 142 AD2d at 239, 241. The evidence shows that the public is *not* invited to this fenced-off area during the fall festival or other farm events. (A-247-48, Hr'g Tr. 102:4–103:1). In fact, that area is never open to the public. (A-246-48, Hr'g Tr. 101:10–103:1). The wedding area is accessible only when the Giffords enter into a contract with someone who wants to hold their wedding ceremony there. (*Id.*). Thus, the Division's finding

regarding the public use of some areas for fruit picking and festival events is not relevant to the question of whether the private property used for wedding ceremonies is a public accommodation.

Second, the Division discusses the Giffords' wedding-ceremony venue, but does not link the venue to any specific "public accommodation" listed in the statute. (A-74-75, Order 14-15). Instead, the Division discusses services and goods offered during wedding *receptions*, which are separately contracted-for events and which the Giffords would have hosted for Respondents and thus are not at issue. (*Id.*).

Finally, discussing the services offered during wedding *ceremonies*, the Division notes that, as part of contracting to host a wedding ceremony, the Giffords may additionally contract to provide greeting services or light beverage services to the guests that attend the ceremony. (*Id.*; *see also* A-285, Hr'g Tr. 140:1-8). Based on these services sometimes provided to wedding guests, the Division concludes that the Farm "provides both goods and services to the public. Therefore, it is a place of public accommodation." (A-75, Order 15). This conclusion is not supported by the evidence.

The goods and services identified (greeting and light beverage services) are not provided to the "public," and no evidence suggests that they are. The Division makes an unsupported leap when it concludes that because these services are

provided to guests at a private wedding ceremony, they are provided to the "public." They are no more available to the public than the beverages that individuals provide to invited guests in their home. These goods and services are provided to wedding guests at privately contracted events, not to the public.

In short, there is no evidence to support the finding that offering to enter into negotiations to host private ceremonies on private property transforms a fenced-in field into any of the legislative categories of public accommodation.

### B. The Giffords Did Not Discriminate Based on Sexual Orientation.

"[I]t is simply not the law that every dispute that arises between people of different [protected classes] constitutes [unlawful] discrimination." *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 298 [2004]. In this case, like in *Forrest*, Respondents have failed to establish "that [they were] unlawfully discriminated against on the basis of [their sexual orientation]." *Id.*

The Division's presumption that the Giffords' religious beliefs regarding marriage constitute discrimination "based on" sexual orientation contradicts the weight of the evidence and lacks substantial support. (*See* A-77-78, Order 17-18). In order to establish their claim, Respondents must show that the alleged discrimination took place "because of" a protected characteristic. Exec. Law § 296(2) [McKinney]. Here, however, no evidence supports the Division's conclusion that the Giffords' religious beliefs about marriage and their decision not

to host wedding ceremonies that conflict with those beliefs constitute sexual-orientation discrimination.

The evidence instead shows that the Giffords have a sincerely held religious belief about marriage—"that it is between one man and one woman under God." (A-295, Hr'g Tr. 150:16-19; A-293, Hr'g Tr. 148:8-11). This belief about marriage is a "core value[]" of the family's faith (A-296, Hr'g Tr. 151:6-12)—one shared by most people "throughout the history of civilization." *United States v Windsor*, 133 S Ct 2675, 2689 [2013]. Respondents called Mrs. Gifford and, without identifying their sexual orientation, requested information about having a same-sex wedding ceremony on the Giffords' property. (A-168-69, Hr'g Tr. 23:10–24:6). "Because of" their belief about marriage as a religious institution, Mrs. Gifford politely stated that they could not host a same-sex wedding ceremony. The Giffords are nevertheless happy to host a reception for Respondents. (A-290, Hr'g Tr. 145:6-18; A-293, Hr'g Tr. 148:4-17; A-368, Pet'rs' Post Hr'g Br. 2). This does not constitute sexual-orientation discrimination.

Furthermore, no evidence in the record demonstrates that the Giffords have any bias based on sexual orientation. The evidence shows that "everybody is welcome at the farm." (A-290, Hr'g Tr. 145:6-18). "Everybody" includes people who identify as gay or lesbian. No evidence suggests that the Giffords have ever inquired into any visitor's sexual orientation, but to the contrary, they have always

welcomed employees and hosted events for any individual regardless of their sexual identity. (*Id.* (stating in testimony from Mrs. Gifford: "I had a woman call me and say that . . . my son is having his birthday party here at the farm on Saturday and he has two moms, is that okay? And I said sure, can't wait to see you, and they booked again this year as well. . . . [E]verybody is welcome at the farm.")). In sum, the evidence shows that it is the Giffords' religious belief about marriage, not any other reason, that motivated them to notify Respondents of the Farm's policy regarding wedding ceremonies. *Cf. Hands On Originals v Lexington-Fayette Urban Cnty. Human Rights Comm'n*, No. 14-CI-04474, slip op at 10 [Ky Cir Ct April 27, 2015] ("In short, [the business's] declination to print the shirts was based upon the **message** of [the group and its event] and not on the **sexual orientation** of its representatives . . . . In point of fact, there is nothing in the record . . . that the sexual orientation of any individual that had contact with [the business] was ever divulged or played any part in this case.").

The Division ignored the evidence that the Giffords do not discriminate against any class of persons, do not ask about visitors' sexual orientation, and do happily welcome to the Farm persons who identify as gay or lesbian. Thus, in direct conflict with the record, and without explanation or citation to the record, the Division "surmis[ed]," "conjectur[ed]," and "speculat[ed]," *300 Gramatan Ave. Assocs.*, 45 NY2d at 179-81, that the Giffords' policy on wedding ceremonies

constitutes discrimination "based solely on . . . sexual orientation." (A-79, Order 19).

To reach this conclusion, the Division misrepresents the evidence and speculates in ways unsupported by substantial evidence. Notably, the Division states that because of the Giffords' belief about marriage, "they apply the selective criteria of only allowing heterosexual couples to rent their facilities for a wedding ceremony and reception." (*Id.*). Yet no portion of the record supports this claim. The evidence instead shows that the Giffords' policy regarding wedding ceremonies is limited to *ceremonies* only, not receptions. The Giffords' religious beliefs about marriage do not prevent them from hosting receptions or other events for same-sex couples. Thus, the Division erroneously concludes that the Giffords do not host "receptions" for certain classes of people.

The Division also mistakenly speculates that the Giffords only "allow[] heterosexual couples to rent their facilities." (*Id.*). While the Giffords' wedding ceremony grounds are available only for weddings between "one man and one woman," no evidence in the record supports the Division's assumption that the Giffords discriminate because of the sexual orientation of persons who are interested in renting their property.

Moreover, the Division's claim that the Giffords "concede[] that [their] policy . . . discriminate[s] based on sexual orientation," (A-78, Order 18), is

likewise unsupported by substantial evidence. No such concession exists in the record. To the contrary, the record demonstrates the Giffords' inclusive policy that welcomes people of all sexual orientations to the Farm. (A-290, Hr'g Tr. 145:6-18). The Division's allegation of such a "concession" is inexplicable and unsupported by the evidence.

Legislative history further indicates that the public-accommodations law was not intended to require individuals to host or participate in same-sex wedding ceremonies. In 2002, the legislature added "sexual orientation" to the list of classes protected by the public-accommodations law in order to ensure "access to employment, housing and other basic necessities of life." Sexual Orientation Non-Discrimination Act of 2002, 2002 Sess. Law News of N.Y. Ch. 2 (A. 1971§§1, 7) [McKinney's].

> In so doing, the legislature makes clear its action is not intended to promote any particular attitude, course of conduct or way of life. Rather its purpose is to ensure that individuals who live in our free society have the capacity to make their own choices, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law.

*Id.* Thus, the legislature proclaimed that its purpose was to "ensure that [all] individuals," including the Giffords, "have the capacity to make their own choices, follow their own beliefs and conduct their own lives as they see fit . . . ." *Id.* The Division's conclusion that the Giffords' policy violates the public-accommodations statute is thus contrary to the express intent of the legislature.

**Point 2 – Applying the Human Rights Law to Coerce the Giffords to Host and Participate in Same-sex Wedding Ceremonies Violates the Free Exercise Provisions of the United States and New York Constitutions.**

The Division erred as a matter of law by refusing to even acknowledge the direct impact of its decision on the Giffords' constitutional rights. Although the constitutional issues were raised before the Division, the Division did not address them. Despite this error, this Court should address the constitutional claims. *Cf. Cooper v Morin*, 49 NY2d 69, 78 [1979] ("While neither the Trial Judge nor the Appellate Division considered State constitutional claims, the complaint clearly presents them and they may, therefore, be reached by us.").

Both the United States and New York Constitutions protect the free exercise of religion. *See* U.S. Const. amend. I; NY Const. art. I, § 3. The Division's Order requires the Giffords to host and participate in what they consider to be a sacred event that violates their religious beliefs. Neither the federal nor the state constitution permits this egregious intrusion on the Giffords' free-exercise rights.

1. *Requiring Participation in an Event that the Giffords Consider Sacred Violates Both the Federal and State Constitutions.* The "exercise of religion" protected by the Constitution includes the "abstention from[] physical acts" such as "assembling with others" for ceremonies that they deem religious. *Emp't Div., Dep't of Human Res. of Or. v Smith*, 494 U.S. 872, 877 [1990]. Few infringements on free exercise are as pernicious as forcing individuals to participate in a sacred

ceremony that violates their conscience. *See Lee v Weisman*, 505 US 577, 599 [1992] (noting that the government cannot compel students to attend ceremonies where limited religious exercise occurs); *Everson v Bd. of Educ. of Ewing Twp.*, 330 US 1, 9 [1947] (acknowledging that the religious persecution in the colonies included requiring all persons, "whether believers or non-believers," to attend religious services); *Locke v Davey*, 540 US 712, 722 n 6 [2004] (similar). Yet the Division's Order does just that. It interjects the government into events that the Giffords consider sacred. Regardless of the generic free-exercise analysis outlined in *Smith*, 494 US 872, and *Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510 [2006], both of which are explored below, neither the state nor the federal Constitution permits the government to compel participation in the sacred. Where such blatant intrusions into free exercise occur, the State so obviously violates constitutional principles that the courts need not engage in the *Smith* or *Serio* framework discussed below.

2. *Mandating Participation in the Training and Re-education Program Violates Both the Federal and State Constitutions.* The Division's mandate that the Giffords and their employees must attend an "anti-discrimination training" program violates both the federal and state Constitutions. (*See* A-83, Order 23). Under these circumstances, such a re-education program will necessarily endeavor to change the Giffords' religiously motivated views and practices. It is plainly

intended to subvert the Giffords' desire to act on their religious convictions. Such government indoctrination will inevitably contradict—and perhaps demean—their religiously formed convictions. Forcing the Giffords to endure, and forcing them to compel their employees to undergo, such government re-education violates the Giffords' free-exercise rights. This kind of state action is palpably repugnant to our constitutional liberties.

3. *The Division's Order Violates the Free-Exercise Protection in the State Constitution.* The New York Constitution is more protective of religious freedom than its federal counterpart. *See Serio*, 7 NY3d at 525. Under the State Constitution, the government may not apply a law (even "a generally applicable, neutral statute") in a manner that, "as applied to th[e] party" before the court, "unreasonabl[y] interfere[s] with religious freedom." *Id.* When discussing this standard, our Court of Appeals has already recognized that the application of nondiscrimination laws, in certain circumstances, will fall "well beyond the bounds of constitutional acceptability." *Id.* at 527 (discussing certain application of laws prohibiting "discrimination on the basis of sex or marital status"). This case presents just such an unreasonable interference with the Giffords' religious freedom.

The Division's Order undoubtedly interferes with the Giffords' free-exercise rights. It does so in at least two ways. First, it requires the Giffords to host and

participate in ceremonies that violate a "core value[]" of the faith upon which they operate their family business. (A-296, Hr'g Tr. 151:6-12). Where the government requires religious adherents to engage in conduct that violates their beliefs, the burden on their religious exercise is substantial. *Holt v Hobbs*, 135 S Ct 853, 862 [2015] (noting that a substantial burden on religious exercise occurs when the government requires a person to "engage in conduct that seriously violates [his] religious beliefs") (quoting *Burwell v Hobby Lobby Stores, Inc.*, 134 S Ct 2751, 2775 [2014]); *Sherbert v Verner*, 374 US 398, 403 [1963]. This is particularly true here because a violation of the Division's Order is punishable by additional fines and imprisonment. Exec. Law § 299 [McKinney]. Second, the Division's Order requires the Giffords to attend and to force their employees to attend an "anti-discrimination training" program, which will invariably seek to undermine and change the Giffords' religiously motivated views and practices. Such government indoctrination substantially interferes with the Giffords' religious exercise.

Moreover, the Division's significant interference with the Giffords' religious freedom is patently unreasonable. The Giffords serve everyone, including individuals who identify as gay and lesbian. (A-290, Hr'g Tr. 145:6-18 ("[E]verybody is welcome at the farm.")). In fact, the Giffords will gladly host myriad events, including wedding *receptions*, for same-sex couples. It is only same-sex wedding *ceremonies* that the Giffords cannot host or participate in. The

State thus acts unreasonably in punishing the Giffords for declining to participate in this narrow category of events.

Other factors underscore the unreasonableness of the Division's Order punishing the Giffords under these circumstances. First, the Giffords are different from many other wedding-ceremony venues because they personally participate in the ceremonies they host and because those ceremonies occur in a fenced-in area that functions as the family's backyard. (A-287-89, Hr'g Tr. 142:14–144:2). Second, many other local wedding-ceremony venues are more than happy to host same-sex ceremonies. Indeed, Respondents were married in a similar type of venue. (A-195-96, Hr'g Tr. 50:21–51:6). For these and other reasons discussed in Point 5 below, the Division's Order unreasonably interferes with religious freedom and thus violates the Free Exercise Clause of the New York Constitution.

4. *The Division's Order Violates the Free-Exercise Protection in the Federal Constitution.* Under the United States Constitution, "[a] law burdening religious practice that is not neutral or not of general application must undergo [strict] scrutiny." *Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 546 [1993]; *Cent. Rabbinical Cong. of U.S. & Can. v New York City Dep't of Health & Mental Hygiene*, 763 F3d 183, 186 [2d Cir 2014]. Here, the public-accommodations law is not generally applicable because it grants exemptions for other religious and secular purposes but not for the Giffords' religiously motivated

conduct. *Cf. Cent. Rabbinical Cong.*, 763 F3d at 186. For example, the public-accommodations law does not apply to "public libraries, kindergartens, primary and secondary schools, high schools, academies, colleges and universities, extension courses, and all educational institutions under the supervision of the regents of the state of New York." Exec. Law § 292(9) [McKinney]. Neither does the statute apply to "distinctly private" institutions, religious corporations, or benevolent orders. *Id.* Nor does the law govern any establishment that falls outside the six categories enumerated in Executive Law § 292(9) [McKinney]. Thus, the public-accommodations law is not generally applicable because it "grant[s] exemptions . . . for various secular and religious . . . purposes," but not for similar conduct motivated by the Giffords' sincerely held religious beliefs. *See Tenafly Eruv Ass'n, Inc. v Borough of Tenafly*, 309 F3d 144, 167-68 [3d Cir 2002]; *Cent. Rabbinical Cong.*, 763 F3d at 186.

Nor has the Division neutrally applied its public-accommodation law. A statute is not neutrally applied if it "targets a religious practice for special burdens." *Cent. Rabbinical Cong.*, 763 F3d at 186. Here, even though the public-accommodation statute's legislative history demonstrates that it was not meant to apply to the Giffords' conduct, *supra* Point 1(b), the Division's Order targets the Giffords' religious conduct and beliefs. By assuming facts not in the record, *supra* Point 1(b), and ordering the Giffords to participate in wedding ceremonies that

violate their beliefs, the Division demonstrated bias against the religious beliefs of the Giffords and targeted the exercise of their faith for punishment in a way not required by the public-accommodations law. *Cf. Lukumi*, 508 US at 540 ("[Courts] may determine the [government's] object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge [and] the specific series of events leading to the enactment or official policy in question . . . .") (citations omitted).

Furthermore, strict scrutiny also applies under the federal Constitution because this case presents a "hybrid situation" where free-exercise rights and other constitutional rights like freedom of expressive association are implicated by the same government action. *Smith*, 494 US at 881-82. Because the Division's Order burdens the Giffords' freedom of expressive association and freedom from compelled expression, strict scrutiny applies here.

Given that strict scrutiny applies to the Giffords' federal free-exercise claims, Respondents cannot prevail unless they meet that stringent standard. But as explained below, Respondents cannot show that strict scrutiny is satisfied under these circumstances, and thus the Division's Order violates the Free Exercise Clause of the United States Constitution.

**Point 3 – Applying the Human Rights Law to Coerce the Giffords to Host and Participate in Same-sex Wedding Ceremonies Violates the Right to Expressive Association.**

Both the United States and New York Constitutions protect the freedom of expressive association. *See* U.S. Const. amend. I; NY Const. art. I, §§ 8-9; *see also Matter of Cahill v Pub. Serv. Comm'n*, 76 NY2d 102, 109 [1990] ("The First Amendment protects the right to speak and to associate freely, as well as the right not to speak or associate."). This freedom protects the right "to express those views, and only those views, that [one] intends to express." *Boy Scouts of Am. v Dale*, 530 US 640, 648 [2000]. It "presupposes a freedom not to associate" with those messages that one does not want to express. *Id.* This right "is crucial in preventing the majority from imposing its views on" others. *Id.* at 647-48.

"Government actions that . . . unconstitutionally burden this freedom may take many forms." *Id.* at 648. U.S. Supreme Court case law illustrates that States often apply sexual-orientation public-accommodations laws, like the one at issue here, in ways that violate the freedom of expressive association. In *Dale*, for example, the Court held that a State may not apply its public-accommodations law to compel a group to associate with individuals who espouse messages about sexuality that conflict with the group's own views. *Id.* at 659. And in *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court unanimously concluded that a State may not use its public-accommodations law to

force someone to host the expression of pro-gay messages. 515 US 557, 572-73 [1995]. Yet much like the State in *Dale* and *Hurley*, the Division here has required the Giffords to host and participate in a ceremony that communicates messages about marriage in conflict with their religious beliefs. *Dale* and *Hurley* illustrate that the Constitution forbids the Division from applying the public-accommodations law under these circumstances.

The State infringes the freedom of expressive association whenever it requires individuals or groups to associate with a message or an expressive event that would "significantly affect [their] ability to advocate public or private viewpoints." *Dale*, 530 US at 650. That is exactly what the Division has done here. The Giffords believe that marriage is the union of a man and a woman, and they express that view about marriage throughout their lives. But forcing them to host and participate in a wedding ceremony that communicates contrary messages about marriage would significantly impair their own expression on that topic.

A marriage ceremony is an inherently expressive event. *See* Dom. Rel. Law § 12 [McKinney] ("[T]he parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife."). And a wedding ceremony involving a same-sex couple necessarily communicates messages about marriage that are antithetical to the Giffords' religious views on that issue.

The Giffords would be intimately associated with that expressive event were it to occur at the Farm. Not only would the expression occur on their property, it would take place in a fenced-off area that functions as their backyard, and it would be broadcast to all who pass by the Farm. Moreover, the Giffords themselves would be present and directly participate in the ceremony—indeed, they coordinate the wedding ceremonies hosted at the Farm, decorate the venue, greet the guests, assist the marrying couple with day-of-ceremony needs, and help with all aspects of the ceremonies except officiating. (A-287-89, Hr'g Tr. 142:14–144:2). The Giffords' direct participation in wedding ceremonies communicates their support for those events and closely associates them with the messages expressed at those ceremonies.

Requiring the Giffords to closely associate with messages about marriage that directly contradict their view that marriage is a sacred union between one man and one woman would significantly burden their ability to communicate their views. *See Dale*, 530 US at 653 (observing that courts "must . . . give deference to [a group's] view of what would impair its expression"). This is because hosting and participating in a same-sex ceremony "would, at the very least, force the [Giffords] to send a message . . . to . . . the world" that they support Respondents' view of marriage, which is antithetical to the Giffords' own beliefs. *See Dale*, 530

US at 653. This would undoubtedly make it difficult for the Giffords to communicate their own views about marriage.

Part of this difficulty stems from the fact that the Giffords would be in a position of apparent hypocrisy, where they are hosting and participating in the ceremonial expression of ideas about marriage that conflict with their religious beliefs. That pressures the Giffords to respond and explain their participation in the messages communicated by ceremonies like Respondents'. But that pressure to "respon[d]," as the U.S. Supreme Court has acknowledged, "is antithetical to the free[dom of expression] that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v Pub. Utils. Comm'n of Cal.*, 475 US 1, 16 [1986 plurality].

In *Dale*, the U.S. Supreme Court held that the "state interests embodied in [its] public accommodations law do not justify" requiring a group to associate with messages about sexuality that it disagrees with. 530 US at 659. Because this case also involves the "state interests embodied in [a] public accommodations law," *Dale* establishes that the Division's governmental interests do not justify this significant burden on the Giffords' "rights to freedom of expressive association." *Id.*

**Point 4 – Applying the Human Rights Law to Coerce the Giffords to Host and Participate in Same-Sex Wedding Ceremonies Violates the First Amendment Prohibition on Compelled Speech.**

Both the United States and New York Constitutions protect freedom of expression from government coercion. U.S. Const. amend. I; NY Const art. I, § 8. The constitutional right to free speech "includes both the right to speak freely and the right to refrain from speaking." *Wooley v Maynard*, 430 US 705, 714 [1977]; *see also Matter of Holmes v Winter*, 22 NY3d 300, 307 [2013] (noting that the drafters of the New York State Constitution "chose . . . to adopt more expansive language" protecting free speech).

As our Court of Appeals noted in *Cahill*, a long line of U.S. Supreme Court precedent establishes that the government cannot force citizens or organizations to host messages that they deem objectionable; nor may the State punish them for declining to facilitate such messages. 76 NY2d at 109-11, 114 (collecting cases and holding that the State's policy permitting public utilities to pass along to ratepayers part of the cost of charitable contributions violated the First Amendment prohibition on compelled expression).

This constitutional freedom applies not only when the State compels a person to speak an unwanted message, but also when the State forces a person to host or facilitate the message of another. *See, e.g.*, *Hurley*, 515 US at 572-73 (government may not require a public accommodation to host the messages of a

gay advocacy group); *Pac. Gas*, 475 US at 20-21 [plurality] (government may not require a business to include a third party's expression in its billing envelope); *Wooley*, 430 US at 717 (government may not require citizens to display state motto on license plates); *Miami Herald Publ'g Co. v Tornillo*, 418 US 241, 258 [1974] (government may not require a newspaper to include a third party's writings in its editorial page). This right applies here because the Division's Order requires the Giffords to host wedding ceremonies that conflict with their beliefs and because, as the Domestic Relations Law makes clear, those ceremonies are inherently expressive events. *See* Dom. Rel. Law § 12 [McKinney].[1]

Furthermore, that right is violated in this case because forcing the Giffords to host and participate in same-sex wedding ceremonies would negatively affect their own speech on that topic. The Giffords believe that marriage is the union of a man and a woman, and they express that view about marriage throughout their lives. But for all the reasons explained above, forcing the Giffords to host and participate in a wedding ceremony that communicates messages about marriage in conflict with their own beliefs would significantly affect their own expression on that topic. *See supra*, Point 3.

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[1] This constitutional freedom from compelled speech protects commercial businesses like the Farm and individuals like the Giffords. It is not limited to nonprofit or advocacy groups. Indeed, the U.S. Supreme Court has continually affirmed that the freedom from compelled speech is "enjoyed by business corporations generally." *Hurley*, 515 US at 574; *see also Citizens United v FEC*, 558 US 310, 342 [2010] (collecting cases); *Pac. Gas*, 475 US at 16 [plurality].

The Division's Order violates the compelled-speech doctrine in another way. The compulsory "anti-discrimination training" program required by the Order constitutes compelled speech because through that state-mandated program the Giffords are forced to present to their employees speech that will almost certainly conflict with their own religiously informed views and practices. The Giffords strongly object to communicating these messages to their employees. The Division cannot through this directive force them into serving as a mouthpiece for the State.

The most stringent constitutional standard of review—strict scrutiny—applies to government action (like the Division's Order) that compels a person to host, or that punishes them for declining to facilitate, an unwanted message. *Pac. Gas*, 475 US at 19 [plurality]. For all the reasons discussed below, the State cannot satisfy that stringent standard here.

**Point 5 –Forcing the Giffords to Host and Participate in Same-sex Wedding Ceremonies Is Not a Narrowly Tailored Means of Accomplishing a Compelling Government Interest.**

Because the Division's Order substantially burdens the Giffords' constitutional rights, the burden shifts to the Division to satisfy strict scrutiny—which means that the government action at issue "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 US at 546 (noting that the "compelling interest standard that we apply . . . is not watered down but really means what it says") (quotations and original

alterations omitted). The Division did not even acknowledge the infringement of the Giffords' constitutional rights, much less meet its burden to prove a compelling interest and narrowly tailored method of achieving that interest.

1. *No Compelling Interest.* Strict scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" and determines whether this searching form of scrutiny "is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 546 US 418, 430-31 [2006]; *see also Hobby Lobby*, 134 S Ct at 2779. The Division cannot meet this exacting test simply by proffering a generic interest in eradicating discrimination. Instead, under strict-scrutiny analysis, the Division must prove that it has an interest sufficiently compelling to justify requiring the Giffords to host Respondents' wedding ceremony in violation of their religious convictions. *Id.*

But the government has no significant interest in forcing the Giffords to host same-sex wedding ceremonies because, as Respondents admit, other venues are available. (A-195-96, Hr'g Tr. 50:21–51:6). Indeed, Respondents have already gotten married at another venue. (*Id.*)

The State has also belied a general interest in forcing all corporations to celebrate same-sex ceremonies by exempting a host of entities from the law's

application, *see* Exec. Law § 292(9) [McKinney], and by failing to reach all the establishments that fall outside the six categories enumerated in Executive Law § 292(9). Such an inconsistently pursued objective is not compelling because "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 US at 547 (quotation marks and alterations omitted).

When the government punishes a person for declining to host or otherwise facilitate the expression of messages, preventing claims of subjective "suffering" or "mental anguish," (A-79, Order 19), does not qualify as a compelling government interest. *Hurley* illustrates this. The parade organization there distributed applications to members of the public who wanted to participate in the parade, and although it generally accepted all comers, it denied the gay advocacy group's request to participate. *See Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v City of Bos.*, 636 NE2d 1293, 1295-96 [Mass 1994], *rev'd by Hurley*, 515 US 557. That message-based decision undoubtedly hurt the feelings of the advocacy group and its members. But notwithstanding this, the Court did not mention the government's interest in preventing the subjective offense or hurt feelings because "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are . . . hurtful." *Hurley*, 515 US at 574. Therefore, the Division cannot use its desire to avoid these sorts of subjective offenses as justification for

infringing First Amendment rights.

2. *Not Narrowly Tailored.* Nor can the Division satisfy strict scrutiny's narrow-tailoring requirement. For example, the government could exempt from the public-accommodations law individuals who host and personally participate in weddings on the property where their home is located. Even if the State were to create such an exemption, it could still fulfill its object of remedying certain types of discrimination. The Executive Law in fact already contains a categorical exemption for all public libraries, schools, religious corporations, distinctly private institutions, and benevolent orders. Exec. Law § 292(9) [McKinney]. Extending these categorical exemptions to all or certain wedding service providers is less restrictive than the Division's decision to apply the law to the Giffords. Notably, the existence of these categorical exemptions proves that the government could still achieve its interests even if it were to accommodate religiously motivated individuals like the Giffords. *See Hobby Lobby*, 134 S Ct at 2782 (noting that an already-established "accommodation for nonprofit organizations with religious" convictions "demonstrate[s] that [the government] has at its disposal" a less restrictive alternative).

Moreover, protecting the constitutional rights of people like the Giffords poses no risk that large numbers of wedding-ceremony venues will decline to host same-sex ceremonies. After all, financial considerations weigh against other

businesses declining potential customers. *See Smith v Fair Emp't & Hous. Comm'n*, 913 P 2d 909, 975 [Cal. 1996] (Baxter, J., concurring and dissenting) ("Th[is] case does not raise the spectre of floodgates opened to a myriad of exemptions from the state antidiscrimination law. . . . In fact, the economic interests of [business owners] as a class would counsel otherwise.") (quotation marks omitted); *id.* at 954 (Kennard, J., concurring and dissenting) (similar).

**Point 6 – The $13,000 Judgment Against the Giffords Is Unwarranted Because Respondents Knew about the Giffords' Marriage Policy and There is No Evidence of Actual Sexual-Orientation Discrimination.**

The Division awarded Respondents $3,000 for "mental anguish" resulting from the phone call between Mrs. Gifford and Respondents. (A-79, Order 19). The evidence, however, indicates that Respondents were aware of the Giffords' beliefs and chose specifically to call and record Mrs. Gifford for the purposes of documenting the Giffords' policy. (A-169, Hr'g Tr. 24:9, 16-19; A-198, Hr'g Tr. 53:4-14; A-199, Hr'g Tr. 54:3-6; A-220-21, Hr'g Tr. 75:17-76:2). Such an orchestrated set-up can hardly form the basis for "mental anguish" and suffering.

Furthermore, the Division directed the Giffords to pay $10,000 into the State's own coffers based on unsupported conjecture. (A-81, Order 21). The Division justified its penalty because it said that the Giffords "admit they have a discriminatory policy based on sexual orientation." (*Id.*). As noted above, however, the evidence on the record flatly contradicts such a conclusion. No such

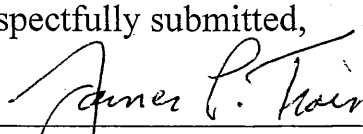
"admission" was ever made, and the evidence clearly indicates that the Giffords welcome individuals of all sexual orientations. In addition, the Division admitted that the "record does not furnish" the necessary financial information that it needs to calculate a penalty. (A-81, Order 21). Thus, the penalty can be nothing less than arbitrary, based on speculation, unsupported by substantial evidence.

## CONCLUSION

For the foregoing reasons, the Court should enter judgment vacating and reversing the Division's Order and declaring that the Division's application of the Executive Law to the Giffords under these circumstances violates the Giffords' free exercise of religion, freedom of expressive association, and freedom of expression protected under the United States and New York Constitutions. The Court should further order the restitution of the judgments paid by the Giffords.

Dated: June 18, 2015

Respectfully submitted,



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