Mariko Hirose
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DOCKET NO. 520410

Supreme Court of the State of New York
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.

BRIEF OF RESPONDENTS MELISA AND JENNIFER McCARTHY

ROSE A. SAXE
JAMES D. ESSEKS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
LGBT & HIV PROJECT
125 BROAD STREET, 18TH FLOOR
NEW YORK, NEW YORK 10004
212.549.2900

MARIKO HIROSE
ROBERT HODGSON
ARTHUR EISENBERG
NEW YORK CIVIL LIBERTIES UNION
FOUNDATION
125 BROAD STREET, 19TH FLOOR
NEW YORK, NEW YORK 10004
212.607.3300

Counsel for Respondents
Melisa and Jennifer McCarthy

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PRELIMINARY STATEMENT

Appellant Liberty Ridge Farm LLC is an Albany-area business that advertises a "one of a kind" wedding venue with "breathtaking views that dazzle and delight," along with a complete package of wedding services. Jennifer and Melisa McCarthy were thrilled when they found Liberty Ridge's website in their search for an ideal wedding venue. When they called Liberty Ridge, however, they learned that this "one of a kind" venue is only available for weddings of different-sex couples—not for same-sex couples like them. The New York State Division of Human Rights correctly held below, based on substantial evidence, that Liberty Ridge's policy of refusing to make its business available to same-sex couples on an equal basis as to different-sex couples, and the application of this policy to refuse business to the McCarthys, violated the New York State Human Rights Law.

The Division of Human Rights' order should be affirmed on appeal. Liberty Ridge's challenge to the evidence supporting the determination and the remedy is meritless in light of the narrow scope of this Court's review and the broad scope of the Human Rights Law's prohibition on sexual orientation discrimination by a place of public accommodation. Liberty Ridge's constitutional challenge is also meritless and—as this brief and the briefs of *amici curiae* supporting the McCarthys make clear—repeats familiar arguments that were rejected by courts decades ago in earlier fights for equal access to public accommodations. These are the same arguments being rejected by courts around the country when businesses assert a right to refuse to serve gay and lesbian couples in violation of their state laws.

What Liberty Ridge demands is a society in which businesses open to the public are permitted to discriminate against prospective customers as they see fit. But in passing the Human Rights Law and then amending it to add protections from discrimination based on sexual

orientation, New York made a determination that certain types of discrimination by businesses are not tolerated. This Court should follow well-settled law in this case and uphold the promise of the Human Rights Law to guarantee a society where lunch counters serve Black and white customers alike, where bars serve men and women alike, and where businesses rent facilities to same-sex couples and different-sex couples alike.

COUNTER-STATEMENT OF QUESTIONS

1. Does substantial evidence establish that the Appellants violated the Human Rights Law's prohibition on sexual orientation discrimination by operating a wedding venue and service business that refuses to serve same-sex couples on equal terms as different-sex couples?

The Division of Human Rights held in the affirmative.

2. Does the application of the Human Rights Law's prohibition on sexual orientation discrimination to the Appellants' wedding venue and service business violate the State or Federal Constitutions?

The Division of Human Rights did not address this question in applying the Human Rights Law's well-settled prohibition on sexual orientation discrimination to the Appellants' business.

3. In light of the Appellants' violation of the Human Rights Law's prohibition on sexual orientation discrimination, did the Division of Human Rights act within its discretion in awarding compensatory damages, imposing a civil penalty, and issuing injunctive relief?

The Division of Human Rights held in the affirmative and ordered these remedies.

COUNTER-STATEMENT OF THE FACTS

As the Appellants (collectively, "Liberty Ridge") state in their opening brief, Appellant Liberty Ridge Farm, LLC, is a limited liability corporation owned by Appellants Cynthia Gifford and Robert Gifford (brief for appellants at 4-5). Liberty Ridge is engaged in the business of renting its property as a wedding venue and offering related event services, and it has served as the setting for many weddings since 2012 (*id.* at 5). When in September of 2012 Respondents Melisa and Jennifer McCarthy inquired about Liberty Ridge's wedding services, however, Mrs. Gifford told them that Liberty Ridge does not host same-sex weddings (*id.* at 9-10.)

The following facts supplement Liberty Ridge's description of its wedding business, describe the McCarthys' interest in marrying there, and correct inaccuracies in Liberty Ridge's account of the conversation in which Mrs. Gifford refused services to the McCarthys.[1]

Liberty Ridge's Wedding Business Markets to and Solicits from the Public.

Liberty Ridge is a business engaged in renting venues and offering related services for a range of events from corporate parties, holiday parties, contracted lunches, dinners, and teambuilding events to wedding ceremonies and receptions (A.64 [Recommended Findings of Fact, Opinion and Decision, and Order, July 2, 2014 ["Order"] ¶ 17]; A.65 [Order ¶¶ 22-28]; M.R.A. 45-54 [Ex. J-1 to J-3]). Liberty Ridge advertises its venues and wedding business on its website and on Facebook, and has advertised at a bridal show, all in hopes of attracting customers (A.66 [Order ¶¶ 29-32]; M.R.A.10-44 [Ex. C-7]).

On its website, Liberty Ridge calls itself a "one of a kind" wedding venue with "breathtaking views that dazzle and delight" that can "accommodate any size guest list" (M.R.A.10 [Ex. C-7-A at 1]). In addition to renting its venue for wedding ceremonies and

[1] Citations to the Appellants' Appendix are indicated by "A." followed by the page number. Citations to the Appendix of Respondents Jennifer and Melisa McCarthy are indicated by "M.R.A." followed by the page number.

receptions, Liberty Ridge offers packages of wedding-related services, including transportation of guests in a trolley within its premises, catering, provision of a light beverage station, decoration and set-up services, and event coordination (A.65 [Order ¶ 28]; A.66 [Order ¶ 34]).

The couples who have held their weddings at Liberty Ridge have been paying customers whom the Giffords did not know prior to contracting with them to provide a wedding venue and related services (A.67 [Order ¶ 41]; A.68 [Order ¶ 52]). None of them were screened for their religious or political beliefs, or their views on marriage equality, nor were they asked prior to entering into a contract with Liberty Ridge whether they were going to have a religious ceremony (A.67 [Order ¶ 40]). All of them were different-sex couples (A. 68 [Order ¶ 51]).

The McCarthys Wanted to Hold Their Wedding at Liberty Ridge.

In 2011—three years into their relationship after meeting at college—Jennifer McCarthy proposed to Melisa McCarthy (then, Erwin)[2] while apple picking at an orchard (A.68 [Order ¶ 54]; A.159-60 [tr at 14:23-15:20]). To honor the memory of their romantic engagement, the McCarthys decided that they wanted to hold a rustic, farm-themed wedding (A.68 [Order ¶ 55]).

It took the McCarthys some time to find an ideal venue (A.204-05 [tr at 59:19-60:2]; *see* A.162 [tr at 17:11-23]). After the couple moved to Albany, however, they searched the Internet for Albany-area wedding venues at farms and came upon Liberty Ridge's website (A.68 [Order ¶¶ 56-57]; A.162-63 [tr at 17:24-18:9]; A.204-05 [tr at 59:15-60:2]). On the website they found photographs of previously held events and weddings, pricing packages for wedding services, and catering information (A.68 [Order ¶ 58]).

The McCarthys were "very grateful and very excited" to find out that Liberty Ridge was available as a wedding venue (A.68 [Order ¶ 59]). Jennifer recalled having been there for an

[2] The Division of Human Rights amended the caption to reflect that Melisa changed her last name to McCarthy after her marriage (A.62 [Order at 2]). The Appellants were directed to respect this name change (A.228-229 [tr at 84:4-9]) but have used a caption in this proceeding that leads with Melisa's former last name.

event and finding the venue beautiful, and the price was within the range that the couple was seeking (A.164-65 [tr at 18:10-19:21]). The couple called their parents to share the news that they had found the venue for their wedding (A.167 [tr at 22:3-8]). Melisa's mother warned them at that point that Liberty Ridge might refuse to host weddings of same-sex couples, but the McCarthys could not believe that their business would be turned away and dismissed the concern as a misunderstanding (A.197 [tr at 52:3-11]; A.220-21 [tr at 75:17-76:14]). Nothing on Liberty Ridge's website indicated to the McCarthys that Liberty Ridge has a policy of refusing to rent the venue for weddings of same-sex couples (A.70 [Order ¶ 76]).

Liberty Ridge Refused to Serve the McCarthys Because They Are a Same-Sex Couple.

The McCarthys reached out to Liberty Ridge to inquire about having their wedding there, and, in a phone call that they recorded, Melisa spoke to Mrs. Gifford about renting the barn for the reception and scheduling the wedding between June and August 2013 (A.68-69 [Order ¶¶ 60-64]; A.169 [tr at 24:3-19]; *see also* M.R.A.1-9 [Ex. C-4]). Mrs. Gifford then invited the couple to visit Liberty Ridge (A.69 [Order ¶ 65]). However, when Melisa used the female pronoun to refer to Jennifer, thus indicating that she was engaged to a woman, Mrs. Gifford stated that there was "a little bit of a problem" because "we do not hold same-sex marriages here at the farm" (A.69 [Order ¶¶ 66-67]).

Contrary to Liberty Ridge's assertions (brief for appellants at 9-10), Mrs. Gifford did not tell the McCarthys on this call that this refusal was rooted in religious opposition to wedding ceremonies of same-sex couples. She merely stated that Liberty Ridge has a policy of not allowing same-sex marriages (A.70 [Order ¶ 75]) and that as a privately owned business she and her husband had decided together that "[same-sex marriages are] not what we wanted to have on the farm" (A.69 [Order ¶¶ 69-71]). Nor did Mrs. Gifford inform the McCarthys that they were

welcome to hold their reception at Liberty Ridge, just not the ceremony. Although immaterial to the case, Mrs. Gifford did not distinguish between the ceremony and the reception. After hearing that Liberty Ridge does "not hold same-sex marriages," Melisa understood that she and Jennifer were excluded from using Liberty Ridge as the venue for their wedding ceremony and reception (A.70 [Order ¶ 77]).

Melisa felt "[s]hell shocked" and "horrible" after being told that Liberty Ridge would not extend its wedding business to them (A.70 [Order ¶ 78]). Jennifer found the rejection to be "heartbreaking" (A.70 [Order ¶ 78]). Jennifer was "very upset" because Liberty Ridge's rejection was "a blow" to her "feeling a lot more comfortable with [her]self" after recently going through the process of coming out about her sexual orientation (A.70 [Order ¶¶ 80-81]).

Liberty Ridge's rejection upset the McCarthys so much that they were uncertain for some months that they would feel comfortable holding their wedding in the Albany area (A.71 [Order ¶¶ 82-85]). Although they ultimately found another wedding venue (A.71 [Order ¶ 86]), the McCarthys filed complaints with the Division of Human Rights in October 2012 to ensure that other couples do not experience the same discrimination that they experienced (M.R.A.55-69 [Ex. ALJ-1];[3] A.189-90 [tr at 44:25-45:12]; A.228 [tr at 83:1-6]).

COUNTER-STATEMENT OF THE CASE

Liberty Ridge correctly describes the sequence of events that led to the Final Order of the Commissioner of the Division of Human Rights, dated August 8, 2014, but mischaracterizes the Recommended Findings of Fact, Opinion and Decision, and Order issued by the Administrative Law Judge ("ALJ") on July 2, 2014, and adopted in its entirety with two amendments that are not relevant to the appeal. The ALJ did not, as Liberty Ridge contends (brief for appellants at

[3] The Verified Complaint included in the Appellants' appendix is incomplete; a complete version was submitted in the Public Hearing as Exhibit ALJ-1.

12), "adopt[] wholesale" the post-hearing proposed findings of fact and conclusions of law that the McCarthys submitted on January 6, 2014 (M.R.A.70-95). Rather, the ALJ independently held, based on the evidence, that Liberty Ridge is a place of public accommodation under the Human Rights Law because it provides goods and services to the public in its wedding and events business (A.74-75). The ALJ further held that Liberty Ridge discriminated on the basis of sexual orientation by refusing business to the McCarthys because of its policy of not allowing same-sex marriages on the property (A.78).

Having found a violation of the State Human Rights Law, the ALJ ordered Liberty Ridge to cease and desist from engaging in discrimination and, among other remedial measures, to train its employees on their legal obligations (A.81-83). Based on the evidence, the ALJ awarded $1,500 each to the McCarthys in damages and imposed a civil penalty of $10,000 (A.79-81).[4]

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION THAT LIBERTY RIDGE VIOLATED THE HUMAN RIGHTS LAW BY OPERATING A WEDDING VENUE AND SERVICE BUSINESS THAT REFUSES TO SERVE SAME-SEX COUPLES.

This Court should affirm the Division of Human Rights' conclusion that Liberty Ridge violated the Human Rights Law. The Division is "entitled to considerable deference due to its expertise in evaluating discrimination claims" (*Tosha Rests., LLC v New York State Div. of Human Rights*, 79 AD3d 1337, 1339 [3d Dept 2010] [internal quotation marks omitted]) and, as described below, its findings of fact in this case should be considered "conclusive" as they are "supported by sufficient evidence on the record considered as a whole" (Executive Law § 298).

[4] Although the record supported a higher damages award, the McCarthys voluntarily limited their damages request in the post-trial filings because their interest in pursuing their complaints was not to obtain damages but to ensure that other same-sex couples do not experience the same discrimination that they did (M.R.A.94; A.189-90 [tr at 44:25-45:12]; A.228 [tr at 83:1-6]).

A. Liberty Ridge Is a Place of Public Accommodation.

The Division's determination that Liberty Ridge is a place of public accommodation regulated by the Human Rights Law is supported by substantial evidence and well-established law. The definition of a "place of public accommodation, resort or amusement" includes "establishments dealing with goods or services of any kind" (Executive Law § 292 [9]). The Division found that Liberty Ridge is just such an establishment that offers the rental of venues for events, including wedding ceremonies and receptions, as well as catering, decorating, and other event planning services (A.74-75). The Division further found that Liberty Ridge markets its goods and services to the general public (A.76-77), which is the hallmark of a public accommodation (*see Matter of United States Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401, 410-11 [1983] [finding that an organization is a public accommodation because of "widespread public activities to promote [organizational] goals and to solicit public interest and participation"]; *cf. Ness v Pan Am. World Airways*, 142 AD2d 233, 240-41 [2d Dept 1988] [holding that an incentive program for travel agents was not intended for the general public and therefore not a place of public accommodation]).

In objecting to this determination, Liberty Ridge argues that even if its business generally qualifies as a public accommodation, its wedding ceremony business does not because "wedding ceremony venue" on "scenic farmland" does not explicitly appear in the definition of public accommodation, because the venue is on fenced-off private property, and because it is not open to the public except by appointment (brief for appellants at 17-19). But in *Cahill v Rosa* (89 NY2d 14 [1996]), the Court of Appeals rejected such constricted readings of the Human Rights Law. Instead, the Court observed that the list of public accommodations in the definition is illustrative and that the definition must be interpreted broadly to encompass any business that

"provide[s] services to the public" and is "generally open to all comers" (*id.* at 21). The Court held that this was so regardless of whether the business is operated on private property and requires an appointment (*id.* at 23 [holding that a dentist's office on private property that provides services by appointment is a public accommodation]). If private property that is generally inaccessible to the public is nonetheless available to the public to rent as a venue for events, as is Liberty Ridge's wedding ceremony venue, it is a place of public accommodation for that purpose (*see Matter of Mill Riv. Club, Inc. v NY State Div. of Human Rights*, 59 AD3d 549, 554 [2d Dept 2009] [finding that, even in the context of a private membership organization, club was a "public accommodation" because, among other things, "nonmember individuals and institutions paid the club directly for use of its facilities" and "the club was essentially providing commercial catering services in hosting nonmember events"]).

Contrary to Liberty Ridge's assertion, the relevant question is not whether the Legislature explicitly included wedding venues in the illustrative list of public accommodations but whether Liberty Ridge has met its burden of proving that the Legislature intended to exempt its business (*see Cahill*, 89 NY2d at 23). Liberty Ridge did not meet that burden: the definition of public accommodations contains no exemptions for private event venues, or wedding venues, or "wedding ceremony venue" on "scenic farmland" (*see* Executive Law § 292 [9] [listing exemptions, including public libraries, educational institutions, and any distinctly private institutions]; *Cahill*, 89 NY2d at 22 [noting that dentists' offices are not one of the places of public accommodations exempt from the provision of the statute]). Under *Cahill* as well as the

clear language of the Human Rights Law, Liberty Ridge is a place of public accommodation, whether viewed as an events business, a wedding business, or a wedding ceremony business.[5]

B. Liberty Ridge Discriminated on the Basis of Sexual Orientation.

The Division's determination that Liberty Ridge unlawfully discriminated on the basis of sexual orientation is supported by substantial evidence that it refused to extend its wedding business to the McCarthys because they are a same-sex couple (A.78). In fact, Liberty Ridge freely admits before this Court that it has a policy of "not host[ing] a same-sex wedding ceremony" (brief for appellants at 20). Even taking as true Liberty Ridge's belated declaration that the McCarthys would have been welcome to have their *reception* there, or its argument that the McCarthys are welcome there for any purpose other than holding their wedding ceremony, it is still unlawful discrimination for a wedding business open to the public to refuse to offer same-sex couples the same, complete array of services available to different-sex couples (*Batavia Lodge No. 196 v NY State Div. of Human Rights*, 35 NY2d 143, 145 [1974] [describing unlawful discrimination as "blatant and intolerable" where Black complainants were invited to a fashion show but, unlike the white attendees, refused service at the private bar inside the event]).

The argument that Liberty Ridge did not discriminate on the basis of sexual orientation but on the basis of the Giffords' religious beliefs is similarly beside the point (brief for appellants at 21). The fact that their discrimination may be religiously motivated does not render the conduct non-discriminatory under the Human Rights Law. Rather, it raises the question of whether religious beliefs excuse their discriminatory conduct (*see, e.g., Bob Jones Univ. v United States*, 461 US 574, 605 [1983] [holding that a policy discriminating against interracial couples

[5] Liberty Ridge's reliance on the legislative history of the Sexual Orientation Non-Discrimination Act is similarly unavailing, as the passages cited have no relevance to any legislative intent to exclude wedding venues from the reach of the Human Rights Law (brief for appellants at 23).

because of religious beliefs discriminates on the basis of race]). As described below, the answer to this question is no.

II. THE APPLICATION OF THE HUMAN RIGHTS LAW TO LIBERTY RIDGE'S WEDDING VENUE AND SERVICE BUSINESS DOES NOT VIOLATE THE STATE OR FEDERAL CONSTITUTION.

Thirty years ago, the New York State Court of Appeals stated: "It is much too late in the day to challenge the constitutionality of civil rights legislation generally" (*Power Squadrons*, 59 NY2d at 414). Much later in the day, this Court should reject the battery of constitutional defenses raised against the application of the Human Rights Law to Liberty Ridge, as courts around the country have done when faced with similar constitutional challenges levied by businesses that refuse to serve gay and lesbian customers.[6]

A. Constitutional Claims Based on Religious Beliefs Do Not Grant Liberty Ridge the Right to Violate the Human Rights Law.

Free exercise claims similar to Liberty Ridge's have been raised throughout modern history by those seeking to justify unlawful discrimination through religious beliefs—and rejected by courts (*see* brief of *Amicus Curiae* NAACP LDF at 16-18 [motion returnable Aug. 3, 2015]; brief of *Amicus Curiae* Lambda Legal at 6-11 [motion returnable Aug. 10, 2015]). In 1968, the Supreme Court called such a claim "patently frivolous" when raised by restaurant and

[6] *See generally Elane Photography, LLC v Willock*, 309 P3d 53 [NM 2013], *cert denied* 134 S Ct 1787 [2014] [rejecting free speech, expressive association, and free exercise claims to the state public accommodation law raised by a wedding photographer who refused to provide services for a same-sex couple]; *State v Arlene's Flowers*, No. 13-2-00871-5 [Wash Super Ct Jan. 7, 2015] [same for flower shop], http://bit.ly/1CsAIQd, *appeal filed* No. 916152 [Wash Apr. 27, 2015]; *Matter of Klein*, Nos. 44-14 & 45-14 [Or Bureau of Labor and Indus July 2, 2015][opinion and order] at 85-86 [same for bakery], http://1.usa.gov/1dCsri5; *Craig v Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 [Colo Civil Rights Commn May 30, 2014] [final agency order] [bakery], http://bit.ly/1SdmcPi, *appeal pending* No. 2014CA1351 [Colo App]; *N. Coast Women's Care Med. Group v San Diego County Superior Ct.*, 189 P3d 959, 967-68 [Cal 2008][doctors]; *Bernstein v Ocean Grove Camp Mtg. Assn.*, No. CRT 6145-09 [NJ Div on Civil Rights Oct. 22, 2012] [wedding venue], http://bit.ly/1AUGgCu; brief of *Amicus Curiae* Americans United for Separation of Church and State at 3-5 [motion returnable July 27, 2015]. *Hands on Originals, Inc. v Lexington-Fayette Urban County Human Rights Commn.* (No. 14-CI-04474 [Fayette Cir Ct Apr. 25, 2015], http://bit.ly/1L3ql8f, *appeal filed* No. 2015-CA-000745 [Ky Ct App May 15, 2015]), cited by Liberty Ridge, involved a far different circumstance in which a t-shirt printer refused to print shirts supportive of a lesbian, gay, bisexual, and transgender pride festival without any inquiry about the sexual orientation of the customers. Under these specific circumstances, the trial court found the conduct was not discrimination based on sexual orientation that could be constitutionally prohibited (*id.*).

sandwich shop owners who objected on religious grounds to serving Black customers as required by Title II, the federal public accommodation law (*Newman v Piggie Park Enters., Inc.*, 390 US 400, 403 n 5 [1968] [awarding fees in case in which businesses argued that Title II interferes with the free exercise of their owners' religion]). In 2015, there is no question that both Liberty Ridge's federal and state free exercise claims fail.

1. The Federal Free Exercise Clause Does Not Grant Liberty Ridge the Right to Violate the Human Rights Law.

Liberty Ridge's federal free exercise claim fails under *Employment Division v Smith* (494 US 872 [1990]), in which the Supreme Court held that there can be no such claim against "a valid and neutral law of general applicability" (*id.* at 879, 885 [internal quotation marks omitted]). The Human Rights Law is undoubtedly a neutral law under *Smith* as it does not "target[] religious beliefs" and does not have the object to "infringe upon or restrict practices because of their religious motivation" (*cf. Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 US 520, 532-34 [1993]). It is also generally applicable as it does not selectively impose burdens only on conduct motivated by religious belief (*see id.* at 542). The New York State Court of Appeals, in applying these principles, already rejected Liberty Ridge's argument that a law is not neutral and generally applicable if it does not apply to *every* entity (*compare* brief for petitioner at 29 [arguing that the Human Rights Law is not generally applicable because it contains certain exemptions] *with Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510, 522 [2006] [rejecting argument that a law requiring employers to provide contraceptive coverage is not a law of general applicability because it contains exceptions for some religious organizations]).

Liberty Ridge cannot save this failed free exercise claim by reference to other constitutional principles. The Court of Appeals has also already rejected Liberty Ridge's "hybrid

rights" theory that a failing federal free exercise challenge can be revived by speech and association claims (brief for appellants at 30) when those companion claims are "insubstantial" (*Serio*, 7 NY3d at 523). As explained below, Liberty Ridge's speech and association claims are as insubstantial and meritless as its free exercise claim (*see* Part II.B, *infra*).

Nor can Liberty Ridge's free exercise claim be saved by its citation of *Lee v Weisman* (505 US 577 [1992]), an Establishment Clause challenge to school prayer, for the proposition that the Human Rights Law cannot compel them to participate in religious ceremonies against their beliefs (brief for appellants at 24-25).[7] Nothing in the record suggests that the McCarthys were seeking to have a religious ceremony, much less requesting the Giffords' participation in it. And in any event, requiring that a business open to the public not engage in discrimination is dramatically different from the coercive context of state-directed religious exercise in a public school (*compare Weisman* [505 US at 587] *with United States v Lee*, 455 US 252, 261 [1982] ["When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."]).

The Human Rights Law is no different from antidiscrimination laws around the country that have been shielded from federal free exercise challenges because they are neutral laws of general applicability under *Smith* (*see, e.g.*, *Elane Photography, LLC*, 309 P3d at 75 [New Mexico antidiscrimination law]; *N. Coast Women's Care Med. Group, Inc.*, 189 P3d at 967 [California civil rights law]; *Vigars v Val. Christian Ctr. of Dublin, California*, 805 F Supp 802, 809 [ND Cal 1992] [Title VII]; *see also Smith*, 494 US at 888-89 [citing "laws providing for

[7] The other cases cited by Liberty Ridge for this point are even farther afield. One rejected an Establishment Clause challenge to the municipal funding of transportation to religious schools (*Everson v Bd. of Educ. of Ewing Twp.*, 330 US 1, 18 [1947]), and the other supports the McCarthys' position as it rejected a Free Exercise Clause challenge to a financial aid program that prohibited pursuing a degree in devotional theology on the basis that it is a facially neutral program (*see Locke v Davey*, 540 US 712, 720 [2004]).

equality of opportunity for the races" as an example of laws immune to free exercise challenges under its rule]). *Smith* requires the dismissal of Liberty Ridge's federal free exercise claim.

2. The State Free Exercise Clause Does Not Grant Liberty Ridge the Right to Violate the Human Rights Law.

Liberty Ridge does not fare any better under the State Free Exercise Clause. In *Serio*, the Court of Appeals rejected a state free exercise claim similar to the claim at issue here, when raised by faith-based social services organizations challenging the constitutionality of a state law requiring that employers provide contraceptive coverage as part of employees' health plans (7 NY3d at 520, 524-26). *Serio* held that New York courts should uphold neutral laws of general applicability against state free exercise challenges as the "usual, though not the invariable, rule" (*id.* at 526). The Court further held that the State's legislative determination, including its determination to carve out only narrow exemptions to a law, is entitled to "substantial deference," and the "party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom" (*id.* at 525).

Liberty Ridge failed to meet its burden under *Serio*. On the state interest side of the balance, New York has a long-recognized, compelling interest in eliminating discrimination through the Human Rights Law (*see NY City Tr. Auth. v NY State Div. of Human Rights*, 78 NY2d 207, 216 [1991] [noting "the extremely strong statutory policy of eliminating discrimination" embodied by the Human Rights Law]; *Batavia Lodge*, 35 NY2d at 145-46 [recounting a history of "the strength and importance of the State's policy in combating discrimination"]; *Mill Riv. Club*, 59 AD3d at 555 [citing the Commissioner of Human Rights' "compelling state interest in preventing discrimination"]). On the other side of the balance, Liberty Ridge has failed to show that complying with the Human Rights Law interferes with,

much less unreasonably interferes with, the Giffords' religious freedom. No matter what the Giffords' religious beliefs might prescribe about the morality of same-sex relationships, nothing in the record indicated that their Christian beliefs require discriminating against same-sex couples in the provision of business.[8] Nor did anything in the record indicate that prohibiting Liberty Ridge from discrimination on the basis of sexual orientation interferes with the Giffords' right to "believe and profess whatever religious doctrine one desires" (*Smith*, 494 US at 877). The Giffords are free to adhere to and profess their beliefs that same-sex couples should not marry. But when they voluntarily enter into the business of renting a wedding facility and offering related services for a fee, they are under the obligation to provide such business without discrimination (*see Serio*, 7 NY3d at 527 [reasoning that the challenged law does not literally compel faith organizations to purchase contraceptive coverage because they can choose not to provide any prescription coverage]; *see also Lee*, 455 US at 261 [1982] [holding that the Amish farmer must pay social security taxes despite his beliefs as a condition of entering into commercial activity as an employer]. Providing commercial services like renting a space does not mean the business or its owners are endorsing anyone's wedding or agreeing with the customers; it simply means they are providing services to the public. The State's compelling interest in combating discrimination thus weighs decidedly against Liberty Ridge's claimed interest in denying services in the name of religion.

Burwell v Hobby Lobby Stores, Inc. (134 S Ct 2751 [2014]), which challenged the federal mandate requiring employers to provide contraceptive insurance coverage, does not alter this

[8] For example, Mrs. Gifford testified that she believes that marriage should be between one man and one woman because she was raised as a Catholic (A.295 [tr at 150:12-19]). The Catholic church has stated that although it opposes marriage of same-sex couples, "[e]very sign of unjust discrimination in their regard should be avoided" (Synod14 - "Relatio Synodi" of the III Extraordinary General Assembly of the Synod of Bishops: "Pastoral Challenges to the Family in the Context of Evangelization" [5-19 October 104], 18.10.2014, at 55-56 [internal quotation marks omitted], http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2014/10/18/0770/03044.html).

conclusion. That case was decided under the strict scrutiny standard of the federal Religious Freedom Restoration Act ("RFRA"), which does not apply here (*compare Hobby Lobby*, 134 S Ct at 2761, *with Serio*, 7 NY3d at 526 [in upholding the state contraceptive coverage mandate, stating that "strict scrutiny is not the right approach to constitutionally-based claims for religious exemptions"]). Moreover, the Court in *Hobby Lobby* explicitly noted that the application of an antidiscrimination law to commercial enterprises—a law prohibiting race discrimination in hiring—would withstand even strict scrutiny because there are no more tailored alternatives to achieve the government's compelling interest in eradicating discrimination (*see Hobby Lobby*, 134 S Ct at 2783; *see also NY State Club Assn., Inc. v City of New York*, 69 NY2d 211, 223-24 [1987] [holding, in the context of a freedom of expression challenge, that the New York City Human Rights Law's public accommodation provision, which is similar to its state counterpart, employs the least restrictive means to achieve its ends], *affd* 487 US 1 [1988]; *Mill Riv. Club*, 59 AD3d at 555 [holding, in the context of a freedom of association challenge, that the Human Rights Law is narrowly tailored to serve a compelling state interest]).

That the McCarthys were ultimately able to find another venue for their wedding (brief for appellants at 28), or that other businesses will likely serve same-sex couples even if Liberty Ridge does not (*id.* at 40-41), does not suggest that there are more tailored or less burdensome alternatives to accomplishing the government's antidiscrimination goal. The point of the Human Rights Law is not to ensure that *some* businesses will be available to individuals protected under it but that *all* businesses open to the public will be available on an equal basis to individuals under its protection (*see* Executive Law § 290 [3] [declaring that "the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life"]). Equal enforcement of the Human Rights Law is the only way to

realize the State's interest in achieving equality and eliminating the grave harm to dignity that comes from the injurious concept of "separate but equal" (*see id.*; 2002 McKinney's Session Law News of NY Ch. 2 at A-1971 [Dec. 2002] [noting that "discrimination . . . menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants"]; *see also* S Rep 88-872, 88th Cong, 2d Sess, reprinted in 1964 US Code Cong & Admin News at 2370 ["Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public . . . ."]). The Human Rights Law would be rendered meaningless if religious beliefs permitted discrimination whenever the customer might be able to obtain service elsewhere.

B. Constitutional Claims Based on Speech and Expression Do Not Grant Liberty Ridge the Right to Violate the Human Rights Law.

Given that Liberty Ridge does not have the right to discriminate in violation of the Human Rights Law on the basis of the Giffords' religious beliefs, it also does not have the right to do so based on their more generalized expressive rights. This Court should reject Liberty Ridge's compelled speech and freedom of expressive association arguments, as Liberty Ridge is a commercial entity well within the constitutional ambit of public accommodations laws (*see Boy Scouts of Am. v Dale*, 530 US 640, 657 [2000] [noting that conflicts between the First Amendment and public accommodation laws have arisen when the latter has been applied to entities beyond "clearly commercial entities"]; *see also NY State Club Assn., Inc.*, 487 US at 20 [O'Connor, J., concurring] ["Predominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law."], *affg* 69 NY2d 211 [1987]).

1. The Freedom From Compelled Speech Does Not Grant Liberty Ridge the Right to Violate the Human Rights Law.

Liberty Ridge's compelled speech argument (brief for appellants at 35-37) is foreclosed by *Rumsfeld v F.A.I.R.* (547 US 47 [2006]), in which the Supreme Court held that law schools had no First Amendment right to refuse to make their facilities available to military recruiters as required by law, "regardless of how repugnant the law school considers the recruiter's message" (*id.* at 70). As a commercial entity, Liberty Ridge has even less of a cognizable compelled speech claim against the regulation of its facilities rental business than the law schools in *F.A.I.R.* (*see Elane Photography, LLC*, 309 P3d at 65 [rejecting a compelled-speech claim asserted by a commercial wedding photographer refusing to serve same-sex couples, and noting that "the United States Supreme Court has never found a compelled-speech violation for the application of antidiscrimination laws to a for-profit public accommodation"]).

This case is nothing like the compelled speech in *Wooley v Maynard* (430 US 705 [1977]), the first case cited by Liberty Ridge in support of its position (brief for appellants at 35), which held that the government cannot compel individuals to affirm and promote a specific governmental ideology (*see Wooley*, 430 US at 715 [rejecting state's attempt to require drivers to "use their private property as a 'mobile billboard' for the State's ideological message"]). Unlike in *Wooley*, but much like in *F.A.I.R.*, any "speech" in which Liberty Ridge must engage here (for example, discussing the availability of its wedding venues with same-sex couples) is "plainly incidental" to the Human Rights Law's constitutional regulation of conduct (*F.A.I.R.*, 547 US at 62 [using enforcement of antidiscrimination laws as an example of permissible incidental speech regulation]; *see also Pittsburgh Press Co. v Pittsburgh Commn. on Human Relations*, 413 US 376, 389 [1973] [rejecting First Amendment challenge to application of antidiscrimination law even to a newspaper clearly engaging in speech, where "the restriction on advertising is

incidental to a valid limitation on economic activity"]). Additionally, the Human Rights Law "does not dictate the content of the speech at all," and the "speech" is "compelled" only to the extent that Liberty Ridge makes such "speech" available to different-sex couples (*F.A.I.R.*, 547 US at 62).

This case also bears no relationship to the cases cited by Liberty Ridge in which the government commandeered an entity's expression and imposed others' expression on it (*see, e.g.*, *Hurley v Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 US 557, 572-73 [1995] [forcing march to include a group's message]; *Pac. Gas and Elec. Co. v Pub. Util. Commn. of California*, 475 US 1 [1986] [forcing utility to include views of a third-party in its newsletter]; *Miami Herald Publ. Co. v Tornillo*, 418 US 241 [1974] [compelling newspapers to print third-party responses to editorials]). Unlike in these cases, Liberty Ridge cannot be insulated from nondiscrimination laws by characterizing its conduct in renting its facility and hosting weddings as constitutionally protected speech (*see F.A.I.R.*, 437 US at 64 [distinguishing the same set of cases because "the schools are not speaking when they host interviews and recruiting receptions"]). Nor is Liberty Ridge engaging in any constitutionally protected expressive conduct when it refuses business to potential customers, as no one would glean any "overwhelmingly apparent" message of opposition to the customers' wedding from such refusal alone without accompanying explanatory speech (*see F.A.I.R.*, 437 U.S. at 66 [quoting and distinguishing *Texas v Johnson*, 491 US 397, 406 [1989], in finding that refusing to host military recruiters on campus was not expressive conduct because without accompanying explanatory speech the refusal did not convey the law school's disagreement with the recruiters]). Because there is simply "nothing inherently expressive in the secular business activity" of renting a venue and offering event services (*Bernstein*, No. CRT 6145-09 at *12 [holding that the business of

renting a wedding venue is not inherently expressive]), requiring the business to serve customers with protected characteristics does not interfere with any message of the business (*see also F.A.I.R.*, 437 US at 64 ["A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."]).

Finally, weddings are certainly expressive, but it is Liberty Ridge's customers who are engaged in expression. Liberty Ridge as a business does not adopt the expression of its customers when it rents its facilities to them or offers services. Regardless of whether the customers' expression takes place on the Giffords' own property (brief for appellants at 32-33), given that the Giffords have opened the property to the general public for business there is little risk that an observer will confuse the expression of Liberty Ridge's customers with that of Liberty Ridge as a business or with that of the Giffords as the proprietors (*see F.A.I.R.*, 547 US at 65 [rejecting compelled-speech claim where law students can tell the difference between speech a school sponsors and speech the school is required to permit]; *PruneYard Shopping Ctr. v Robins*, 447 US 74, 87 [1980] [requiring shopping mall to permit literature distribution is not compelled speech in part because the mall is open to the public and views of those distributing the literature are unlikely to be associated with those of the mall owner]; *see also* brief of *Amici Curiae* Main Street Alliance et al. at 15-17 [motion returnable Aug. 17, 2015]). The Giffords cannot demonstrate under the State or the Federal Constitutions that compliance with the Human Rights Law would violate their right to be free from compelled speech.[9]

[9] Liberty Ridge's passing reference to the State Constitution is inadequate to establish that the analysis would be any different under state law. Neither of the state court cases cited by Liberty Ridge was decided under the State Constitution (*see Holmes v Winter*, 22 NY3d 300, 308 [2013] [finding a subpoena unenforceable under New York's

2. The Freedom of Expressive Association Does Not Grant Liberty Ridge the Right to Violate the Human Rights Law.

Liberty Ridge's expression-based argument is no more viable when framed as the freedom of expressive association (brief for appellants at 31-34). As the Court of Appeals held in *Power Squadrons*, entities like Liberty Ridge that fall within the scope of the Human Rights Law's definition of "public accommodation" do not have the freedom of association to discriminate in violation of the law (59 NY2d at 414-15 [holding that the First Amendment claim to right of association and privacy fails because the entity does not fall under the "distinctly private" exception to the Human Rights Law]).

Liberty Ridge ignores *Power Squadrons* and relies on *Dale* and *Hurley*, but those cases about non-profit entities engaging in expressive association are inapposite because, as described above, Liberty Ridge is not engaging in any expressive activity in its commercial dealings (*Compare Dale*, 530 US at 648 [holding that the Boy Scouts is an expressive association] *and Hurley*, 515 US 557, 568-69 [1995] [noting that a parade is inherently expressive], *with supra* Part II.B.1). Liberty Ridge could only avail itself of this defense if its own business is an expressive enterprise, and there is no evidence that it is: Liberty Ridge was formed for the purpose of making a profit (A.63 [Order ¶ 7]; A.258 [tr at 113:15-17]) and it welcomes customers regardless of their religious or political views (A.67 [Order ¶ 40], *see also City of Dallas v Stanglin*, 490 US 19, 25 [1989] [rejecting expressive association argument by a dance hall that "admits all who are willing to pay the admission fee" and where patrons do not take positions on public questions]).

Even if Liberty Ridge were an expressive enterprise (which it is not), *Dale* and *Hurley* are further inapposite because unlike in those cases the McCarthys were not seeking to become

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press shield law]; *Cahill v Pub. Serv. Commn.*, 76 NY2d 102, 112 [1990] [striking down under the First Amendment a public utility's policy of passing costs of political and religious charities to ratepayers]).

part of or be included in Liberty Ridge's expression. In *F.A.I.R.*, the Supreme Court found the distinction "critical" in holding that requiring law schools to host outsiders for limited purposes does not infringe on the schools' freedom of expressive association recognized by *Dale* (437 US at 69). Just as the law challenged in *F.A.I.R.* could constitutionally require schools to make their facilities available to military recruiters who do not become a part of the school and do not affect the membership of the school (*id.*), the Human Rights Law can constitutionally require Liberty Ridge to make its facilities available to same-sex customers and different-sex customers alike where those customers are entering into business dealings with Liberty Ridge for the purpose of holding a one-time event, not for the purpose of joining its expressive association.

Finally, regardless of whether Liberty Ridge is an expressive association or whether the Human Rights Law infringes on that expression (which it is not, and it does not), that infringement would be narrowly tailored, and thus constitutionally permissible, to carry out New York's well-established compelling interest in eliminating discrimination through the enactment of the Human Rights Law (*see* Part II.A.2, *supra* [citing cases upholding antidiscrimination laws in New York against freedom of association challenges]; *see also, e.g.*, *Bd. of Directors of Rotary Intl. v Duarte*, 481 US 537, 549 [1987] [holding that any infringement on the right of expressive association of the organization by a state antidiscrimination law is justified]; *Roberts v US Jaycees*, 468 US 609, 623-24 [1984] [same]).[10] Any holding to the contrary would gut New York's longstanding civil rights laws by allowing any commercial entity to frame private discrimination as the right to free association (*see Power Squadrons*, 59 NY2d at 414; *Hishon v King & Spalding*, 467 US 69, 78 [1984] [holding that freedom of association does not permit a law firm partnership to engage in invidious private discrimination]).

[10] On appeal, Liberty Ridge has abandoned its challenge based on freedom of intimate association. Such challenge was meritless as that right only protects intimate relationships and not a proprietor's relationship with his or her customers (*see Duarte*, 481 US at 545).

III. THE DIVISION OF HUMAN RIGHTS DID NOT ABUSE ITS DISCRETION IN ORDERING RELIEF.

Having found that Liberty Ridge violated the Human Rights Law, the Division of Human Rights did not abuse its discretion in ordering relief (*see NY City Tr. Auth.*, 78 NY2d at 217 [holding that the relief ordered by the Division need only be reasonably related to the discriminatory conduct, and that a damages award is not erroneous as a matter of law unless it is so arbitrary and capricious as to constitute an abuse of discretion]). Liberty Ridge's challenge to the damages award, the training requirement, and the civil penalty must fail.

A. The Damages Award Should Be Affirmed.

Liberty Ridge calls this case an "orchestrated set-up" in arguing for a reduction of damages (brief for appellants at 41), but it has not—and cannot—dispute the Division's finding based on substantial evidence that the McCarthys were sincerely interested in and excited about holding their wedding at Liberty Ridge (A.68 [Complaint ¶ 59]). The McCarthys were arguably warned about the possibility of Liberty Ridge's discriminatory policy in the sense that Melisa's mother had suggested that Liberty Ridge might turn away their business, but in their excitement to book Liberty Ridge, the McCarthys believed that these concerns were unfounded (A.197 [tr at 52:3-11]; A.220-21 [tr at 75:17-76:14]). In any event, being forewarned about possible discrimination hardly diminishes the harm of discrimination. To suggest it does betrays Liberty Ridge's lack of comprehension about the seriousness of the harm perpetuated by discriminatory acts (*see* brief of *Amicus Curiae* Natl. Ctr. for Lesbian Rights at 9-13 [motion returnable Aug. 24, 2015].)

B. The Training Requirement Should Be Affirmed.

Liberty Ridge cites no law in support of its contention that the order requiring Liberty Ridge to train its staff on the Human Rights Law violates free speech or free exercise rights

(brief for petitioners' at 26, 37). This order is consistent with the Commissioner's statutory authority (*see* Executive Law § 297 [4] [c] [authorizing the Commissioner to require affirmative action to combat discrimination]; *see also, e.g., Consol. Edison Co. of NY v NY State Div. of Human Rights*, 77 NY2d 411, 420 [1991] [upholding Division order to "remind supervisory level employees, in writing, that racial or sexual discrimination is illegal"]); *NY State Dept. of Corr. Servs. v NY State Div. of Human Rights*, 225 AD2d 856, 857 [3d Dept 1996] [affirming order to provide training to supervisory personnel on employment discrimination based on race and color]). For the reasons described above, this order does not violate Liberty Ridge's constitutional rights, and any incidental burden it has on speech is necessary to ensure Liberty Ridge's compliance with the Human Rights Law (*see* Part II.B, *supra*).

C. The Civil Penalty Should Be Affirmed.

In arguing that the civil penalty should be vacated, Liberty Ridge disputes the Division's finding that it had a discriminatory policy (brief for appellants at 41-42). But as discussed above, substantial evidence supports the Division's determination that Liberty Ridge instituted a discriminatory policy that violates well-established law (*see* Part I, *supra*). The civil penalty here was consistent with the Division's authority (Executive Law § 297 [4] [c] [vi]), and with the compelling need to deter Liberty Ridge from engaging in clearly established discrimination (*see NY State Div. of Human Rights v Stennett*, 98 AD3d 512, 514 [2d Dept 2012] [affirming $25,000 civil penalty fine imposed by the Division for sexual orientation discrimination in light of the "extremely strong statutory policy of eliminating discrimination"]).[11]

[11] Liberty Ridge cannot be heard to complain that the record did not furnish adequate financial information for assessing the civil penalty, given that the ALJ took into account the financial information submitted by Liberty Ridge in response to the ALJ's request for that information (A.321-22 [tr at 176:12-177:23]; A.409-11; A.51).

CONCLUSION

For these reasons, this Court should affirm the order of the Commissioner of Human Rights in its entirety.

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Mariko Hirose
Robert Hodgson
Arthur Eisenberg
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th floor
New York, New York 10004
mhirose@nyclu.org
(212) 607-3300
(212) 607-3318

Rose A. Saxe
James D. Esseks
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
LGBT & HIV PROJECT
125 Broad Street, 18th floor
New York, New York 10004

Counsel for Respondents Melisa and Jennifer McCarthy