STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

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

- against -

VERIFIED PETITION
Index No.
RJI No.

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

Cynthia and Robert Gifford (the "Giffords") and Liberty Ridge Farm, LLC (the "LLC"), through their attorneys, Cutler, Trainor and Cutler, LLP (James P. Trainor, of counsel), as and for their Verified Petition of Appeal, hereby state as follows:

PRELIMINARY STATEMENT

1. Petitioners appeal the Final Order of the Commissioner (the "Commissioner") of the New York State Division of Human Rights (the "Division") which incorporated the Recommended Findings, Decision and Order of Administrative Law Judge Pares ("ALJ"), seeking to have the Recommended and Final Orders overturned and nullified, having all fines and damages they've paid refunded to them, and for such other and further relief as to this Court may seem just and proper.

2. This application is timely as not more than 60 days have elapsed since the service of the Commissioner's Final Order on or after August 8, 2014.

3. Jurisdiction is vested in the New York State Supreme Court, Rensselaer County, via §298 of the Executive Law and by virtue of the location of Petitioner's residence and place of business, as well as the site of the purported discrimination at issue herein.

4. Transfer of this Appeal to the New York State Supreme Court, Appellate Division, Third Department, is requested and warranted pursuant to Executive Law §298 and CPLR 7804 (g), as the Orders being appealed from were made as a result of a Public Hearing held pursuant to Executive Law §297(4)(a), and upon such transfer, a scheduling order for submission of appellate briefs, the record, and for oral argument, is requested.

GROUNDS FOR THE APPEAL

5. When hard working citizen farmers are forced by an administrative agency of the State to host *in their own home* a religious ceremony that violates their sincerely held spiritual beliefs, their government has failed them.

6. While the Giffords have asserted their constitutional religious protections as a defense to the discrimination allegations from the beginning, neither the Division, the Administrative Law Judge (the "ALJ") or the

Commissioner herself even mentioned those fundamental rights before compelling the family to either host and "celebrate" same-sex wedding ceremonies in their own home, or go out of the wedding ceremony business altogether.

7. Ignoring substantive laws, procedural rights and common sense in this way in order to rationalize the Division's desired results is the very definition of an abuse of discretion and is clearly erroneous as a matter of law.

8. Despite heralding the Marriage Equality Act of 2011 as not "in any way, shape or form [being] deemed or construed to limit the protections and exemptions otherwise provided...under Section 3, Article I of our State Constitution,"[1], its enforcement through the Human Rights Law, and against the Giffords in particular, has been anything but "religious friendly", as the Division refused to even consider their properly pled constitutional religious freedom defenses.

9. Had the ALJ, or if not, then the Commissioner, actually weighed *all* of the evidence presented to them and not just the small portion of inconclusive material that fit the scenario the Division was looking for, no logical inferences of either the Giffords' home being open to the public or sexual orientation discrimination having taken place could have been drawn.

10. In fact, the great weight of reliable evidence submitted to the Division and the ALJ over the two year history of the case shows that the

individual Respondents were never denied services but rather were only asked to respect the Giffords' religious practices in their own home.

11. And had the trier of law actually considered the arguments of law presented, it would have concluded that, even if discrimination occurred (and it did not), constitutional protections and guarantees would have prevented the application of the nondiscrimination law to the Giffords in this instance.

12. But the trier of fact did not weigh all the evidence. And the trier of law did not consider the constitutional defenses presented.[a]

THE PARTIES

13. Petitioners Cynthia Gifford ("Cynthia" or "Ms. Gifford") and Robert Gifford ("Robert" or "Mr. Gifford") have been married thirty years, are residents of Rensselaer County and also have been the owners of Liberty Ridge Farm in Schaghticoke, New York for the last 25 years.

14. Petitioner Liberty Ridge Farm, LLC (the "LLC") is a New York entity owned by Cynthia and Robert Gifford which operates the business activities at Liberty Ridge Farm (the "Farm" or "LRF").

15. Respondents Melisa Erwin, now known as Melisa McCarthy, ("Melisa" or "Ms. Erwin") and Jennifer McCarthy ("Jennifer" or "Ms. McCarthy")

[a] Significantly, in her opinion and order, the ALJ below did not address or mention the constitutional defenses presented by the Giffords. It is not the case, as frequently happens on appeal, that the appellant disagrees with the court's analysis below. Rather, the court below offered *no* analysis of the constitutional defenses but instead ignored them. This, by itself, is sufficient to warrant reversal of the decision below.

(together "individual Respondents") were residents of 21 Magnolia Terrace, Apartment 1, Albany, New York 12209 in September 2012 and upon information and belief, presently reside at 515 Mount Prospect Avenue, Apartment 15D, Newark, New Jersey 07104. Individual Respondents commenced the matter below which is the subject of this Appeal while living in New York and now appear for jurisdictional purposes through their attorneys pursuant to CPLR 303.[2]

16. The New York State Division of Human Rights, an administrative agency of the State of New York with offices in the Bronx and in Albany, New York (the "Division"), through its Commissioner and ALJ, issued the Recommended and Final Orders being appealed herein, and is a party to this proceeding by virtue of Executive Law §298 and 22 NYCRR 202.57.

PRECEDURAL MILESTONES

17. In October, 2012 Respondents Erwin and McCarthy filed separate Complaints with the New York State Division of Human Rights alleging that Petitioners had discriminated against them based upon their sexual orientation in violation of Executive Law Article 15 (Human Rights Law). The Complaints were amended several times for various reasons (Exhibit 1).

18. After being granted a short extension of time to respond to the Complaints, the Giffords sent an initial response to the Division of Human Rights dated November 2, 2012 wherein they denied discriminating against anyone based

on sexual orientation yet asserted their constitutional right not to host a wedding ceremony that violated their sincerely held religious belief that God designed marriage to be between one man and one woman only (Exhibit 2).

19. The Division conducted a probable cause investigation and conference in January 2013 and a determination of probable cause was issued in each case on January 14, 2013. Attorney Trainor's correspondence to the Division dated January 21, 2013 (Exhibit 3) summarized the testimony during the investigation and conference and asserting that Liberty Ridge Farm was not a place of public accommodation in part because it fell within the "distinctly private" exemption in the law, the wedding areas were not open to the public, and detailing how intimately involved the Giffords were in the wedding ceremony such that their participation is an expression of their beliefs and endorsement of the ceremony itself. In addition, Ms. Gifford was very clear to distinguish between her inability to agree to the marriage ceremony on religious grounds and her willingness to host the couple's reception. Nonetheless, a probable cause determination was issued by the Division dated February 1, 2013 on each case (Exhibit 4).

20. More than eight months later, 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 (Exhibit 5). The ALJ conducted a series of

telephone conferences and e-mail exchanges with counsel regarding settlement in October, 2013 (Exhibit 6).

21. Petitioners submitted their Verified Answers dated October 30, 2013 to the Complaints of Erwin and McCarthy (Exhibit 7) asserting, inter alia, that (1) no unlawful discrimination took place based on sexual orientation, (2) that the Giffords home and backyard where wedding ceremonies and receptions take place was not a place of public accommodation, was distinctly private and is a place that they have a right to intimate association with others, (3) the Marriage Equality Act and the Public Accommodation Law (Executive Law §296) are unconstitutional as applied to them, (4) that the claim was moot because the Complainants were then married, and (5) that the Complainants failed to state a claim against Cynthia or Robert individually . At the ALJ's insistence, the Giffords' submitted Amended Verified Answers dated November 5, 2013 as well (Exhibit 7). The only reason that Petitioners submitted Amended Answers was that the ALJ directed us to revise our Answer to delete the references to the law applicable in this case. Our original Answer, however, is more representative of the defenses Petitioners had asserted throughout the two year history of this case.

22. A Public Hearing pursuant to Executive Law §297 was held before ALJ Pares on November 6, 2013 in Albany, New York and a stenographic record of the proceedings was transcribed (Exhibit 8). Unfortunately, the

stenographic record was transcribed after the hearing from a digital tape system used in the courtroom and many hearing transcript deficiencies were identified (Exhibit 9). Importantly, both the Transcript and the Joint Stipulation re: Errata included Attorney Trainor's request of the ALJ during the hearing that the ALJ take judicial notice of certain laws, copies of which were provided to the ALJ during the hearing: New York Executive Law §292 "Definitions", New York Executive Law §296 "Unlawful Discriminatory Practices", New York State Constitution Article I, in its entirety (Sections 1-18), and United States Constitution, First Amendment labeled "Freedom of Religion, Speech and Press Peaceful Assemblage Petition of Grievances" (Relevant pages attached as Exhibit 10).

23. On January 6, 2014 the Giffords submitted a Post Hearing Legal Brief including an Appendix, containing wedding financial information (Exhibit 11) and Proposed Findings of Fact and Conclusions of Law (Exhibit 12) directly to the ALJ. The Giffords remained steadfast in their defenses and were once again able to demonstrate, this time with the benefit of the testimony of all parties, that (1) no unlawful discrimination took place based on sexual orientation, (2) that Liberty Ridge Farm was not a place of public accommodation, especially in their home or backyard where wedding ceremonies and receptions take place, (3) that applying the Marriage Equality Act and Public Accommodation Laws to

the Giffords violated their right to intimate association within one's home, (4) that Robert and Cynthia Gifford acted entirely within the scope of their duties as agents of the LLC, (5) that violations of several legislative mandates by the Division and the ALJ required dismissal of the Complaints, (6) that no damages had been proven and the value of the business was nominal, (7) that the Public Accommodation Law and Marriage Equality Act are unconstitutional as applied to the Giffords in this case, (8) that the Complainants' claims were moot because they had already married before the hearing, and (9) the telephone recording, transcript and affidavits should not have been admitted into evidence at the hearing.

24. In the ensuing eight months after the Public Hearing, but before the ALJ's Decision and Findings were issued, the United States Supreme Court decided the case of *Burwell v. Hobby Lobby Stores Inc. et al*, 573 US __ (June 30, 2014) which, importantly for our case, held that closely held businesses may exercise the religious objections of their owners to government mandates. Upon hearing the news, Attorney Trainor immediately made the ALJ aware of the US Supreme Court's Decision affecting our case as we had not yet received her Decision and felt that it would be helpful to her deliberations (Exhibit 13).

25. The ALJ's Recommended Findings of Fact, Opinion and Decision, and Order ("ALJ Decision" or "Recommended Order"), although dated July 2, 2014, was not received in the mail by the Giffords or Attorney Trainor until

July 7, 2014 (Exhibit 14). The ALJ's Decision compelled Petitioners to conduct marriage ceremonies for everyone despite the Giffords' sincerely held religious beliefs, compelled them to put the Farm's employees through a re-education program to adopt the State's version of marriage, awarded mental pain and suffering damages to Erwin and McCarthy of $1,500.00 each and compelled the Giffords to pay a penalty to the New York State Division of Human Rights of $10,000.00.

26. Pursuant to the rules of practice of the Division of Human Rights, Attorney Trainor submitted Objections to the ALJ's Findings, Decision and Recommended Order (Exhibit 15), pointing out, for example, one of the most extreme of the ALJ's unsupported findings to be that LRF "admit[s] they have a discriminatory policy (p 21) based on sexual orientation". This Finding is completely contrary to the testimony in the record wherein Cynthia Gifford testified that the policy of the Farm with respect to gay people was that "everybody is welcome at the Farm" (TR 145), and to the testimony that the Giffords had consistently objected *not to* Erwin and McCarthy coming to the Farm for their wedding reception but rather to being compelled to conduct a religious ceremony that violated the Giffords' sincerely held religious beliefs right in their own home. Petitioners' Objections went into more detail on how the US Supreme Court's *Hobby Lobby* Decision should have influenced the ALJ's Decision and pointed out

that "if the same religious freedoms as involved in our case (religious expression and exercise) are protected by a federal statute (RFRA), then surely that same protection is available under our Federal Constitution as well". Indeed, Petitioners reiterated to the ALJ that "the free exercise of religious beliefs is of course guaranteed by the New York as well as the United States Constitution. The New York Court of Appeals, in fact, has recognized a higher burden on governments by requiring them to conduct a balancing test between the burden imposed by its regulations and the interest it seeks to protect. *Catholic Charities of Diocese v. Serio*, 7 NY 3rd 510, 525 (2006). Here our ALJ has failed to conduct the required constitutional analysis altogether."

27. Within two weeks of submitting our Objections, the Commissioner served her Final Order, dated August 8, 2014, essentially adopting the ALJ's Decision and Proposed Order in its entirety, except that the Commissioner enhanced the penalty on the Giffords by starting interest immediately (Exhibit 16).

28. Pursuant to the Appeal Procedure set forth in Executive Law §298, Petitioners bring this proceeding to overturn and nullify the Commissioner's Final Order of August 8, 2014 and to obtain the refund of the damages and fine paid to the individual Respondents and to the State of New York, respectively, in September, 2014.

RELEVANT FACTS

29. Liberty Ridge is a one-hundred acre working farm located near "The Turning Point of the American Revolution" and overlooking the Hoosic River in Schaghticoke, New York (the "Farm") (TR at 96). The Farm has a corn maze, pumpkin patch and produce stand that are open to groups and individuals for several weeks in the Fall (TR at 103, 111) and located on one side of the Farm (TR at 104-105, 145-146). The Giffords' home (the "Barn") and adjacent backyard, meanwhile, are not open to the public and are fenced off and gated (TR at 99, 101-103, 144, 163-164). The Barn is the Giffords' private residence; it is where they themselves live year round with their two children (TR at 99, 101, 112, 133-134, 163-164). The Giffords invite groups under contract to enter and use a portion of their home and backyard for wedding ceremonies and receptions for several hours on average twelve days per year (TR at 102, 103, 133, 144, 146-147. 163-164).

30. The Farm has been in the Gifford family for 40 years and owned and operated by Mr. and Mrs. Gifford for the last 25 years. Robert and Cynthia have been married for 30 years (TR at 94-95), are Bible-believing Christians, and attend Grace Fellowship Church in Halfmoon, New York (TR at 95-96, 121, 150).

31. Melisa Erwin, now known as Melisa McCarthy, self-identified as homosexual in October 2012 but subsequently chose to identify as bisexual in

order to make a statement for the LGBT community (TR at 79-80).

32. The Giffords allow all members of the general public to participate in the corn maze and other activities open to the public for 42 days each fall. Anyone can come onto their property for these activities (TR at 136, 137, 145, 146, 103, 111). Not so, however, for weddings. Rather, weddings are only hosted for those applicants under contract with the Giffords (TR at 104, 105, 146-147). After all, the Giffords are hosting religious ceremonies, conducted in their own home and backyard. They must be comfortable with the religious aspects of the ceremony; otherwise, their religious beliefs are violated (TR at 150, 95, 96, 121). Since 2010, Liberty Ridge Farm and the Giffords have received hundreds if not thousands of inquiries to host weddings but only on average twelve each year are reduced to contract, paid for and actually performed (TR at 161, 146-147, 138-140). To their knowledge, the inquiry from Erwin and McCarthy in September 2012 has been the only inquiry from a same-sex couple for wedding-related services ever received (TR at 156).

33. The Giffords cannot fairly be characterized as bigots or anti-gay. The Giffords and the Farm have employed openly gay employees and have hosted secular events, such as birthday parties, for same-sex couples (TR at 145). The Giffords have never objected to gay people coming onto their farm. Their objection is to an event—a same-sex wedding ceremony—being conducted in their

hosted events for homosexuals. Indeed, to this day, the Giffords have kept open their original invitation to host Erwin and McCarthy's wedding reception, just not the wedding ceremony itself.

60. Here, the remedy chosen by the Division and the Commissioner, the "all or nothing ultimatum", bears no reasonable relationship to the purported discrimination based on sexual orientation. Where that disconnect exists, the courts have held it to be an abuse of discretion and an error of law[24].

61. Moreover, decisions of this court and the U.S. Supreme Court require that the Division and Commissioner use the least restrictive means possible to achieve the State interests at stake. While the recent *Hobby Lobby* decision of the U.S. Supreme Court involved the Federal Religious Freedom Restoration Act ("RFRA") rather than the New York State Human Rights Law, the principal of imposing the least restrictive means where religious rights are involved is the same. In our case, the ALJ and Commissioner, and indeed this court, have the discretion to, for example, broaden the interpretation of the "distinctly private" exemption and include those with objections to hosting religious ceremonies on their property. Here, neither the Commissioner nor the ALJ made any effort to even articulate the conflict between hosting the marriage ceremony as opposed to hosting the wedding participants[25].

62. The Commissioner and the ALJ failed to even consider that the

Division has the burden to show that its purported interest in eliminating discrimination in public accommodations outweighs the negative impact on religious freedom in this case[26]. Here again, no consideration means no discretion was exercised to weigh these conflicting interests and as such, the Decision and Final Order must be set aside as arbitrary and capricious[27] and erroneous as a matter of law[28].

E. THE COMMISSIONER AND THE ALJ FURTHER ABUSED THEIR DISCRETION BY DENYING PETITIONERS' DUE PROCESS RIGHTS AND IGNORING LEGISLATIVE MANDATES IN THE EXECUTIVE LAW

63. It seems intuitive that the legislative mandates in the New York State Executive Law should apply to all - if "shall" means that individuals must forfeit their religious convictions to avoid being penalized for discrimination, then "shall" must also mean that the Division, the ALJ and Commissioner cannot violate the Giffords' due process and procedural rights.

64. For example, §297(4)(a) of the Executive Law states "within 270 days after a Complaint is filed…the Division *shall* cause to be issued and served a written notice…requiring the Respondents to answer the charges of such complaint and appear at a Public Hearing before a Hearing Examiner…" Here, the Giffords were forced to endure public criticism for approximately 372 days before being granted the opportunity to answer the charges in a Public Hearing (October 11, 2012 to October 18, 2013).

65. Moreover, §297(4)(c) of the Executive Law also requires that a determination be made and an order be served within 180 days after the hearing. Here, the delay was at least 210 days (ALJ's Recommended Decision) and as long as 240 days (Commissioner's Final Order). Delays such as these have been held to be prejudicial as a matter of law[29].

66. Perhaps most disturbing is the Commissioner's disregard for the legislative admonition that "no person who shall have previously made the investigation, engaged in a conciliation proceeding or caused the notice to be issued shall act as a hearing examiner in such case" (Executive Law §297(4)(a)). In the month leading up to the public hearing, ALJ Pares' conducted several telephonic conciliation conferences and e-mail exchanges with counsel for both sides and then, a short time later, became the arbiter of both the facts and the law at the public hearing and in the recommendations made to Commissioner (Exhibit 6).

67. All three of these procedural defects were raised by the Giffords as objections, but once again the Commissioner and the ALJ chose to disregard these due process violations altogether. Courts have repeatedly held that decisions of the Division and final orders of the Commissioner must be overturned where they contravene a statute, a constitutional right or the Division's own regulations[30].

68. Moreover, Attorney Trainor vociferously objected to the receipt into evidence of the purported recording made of the telephone conversation

between Ms. Gifford and Ms. Erwin (TR at 70-71). While the ALJ is not required to adhere to "strict" rules of evidence, she must insure that, at a bare minimum, the recording is reliable, complete and has not been altered[31]. Ms. McCarthy's testimony was that she had eavesdropped on the conversation and recorded it on an iphone without the knowledge or consent of Ms. Gifford, then the original recording was lost, and ultimately it was a copy of a copy a couple times removed that was present in the courtroom during the hearing (TR at 71-74). All three of the witnesses to the conversation conceded that the recording was unintelligible in at least several instances, yet the purported transcript of the lost recording was also received into evidence over objection. Some things that were not on the admitted recording appeared in the transcript, and other things that were on the admitted recording were not in the transcript (TR at 62-63). Counsel for the Complainants was unable to establish a chain of custody of the recording introduced into evidence, but the ALJ received it anyway. Secretly taping the conversation also presented a credibility issue as to the Complainants' motivation, which has yet to be considered[32].

69. To the Giffords' great prejudice, the ALJ, and then the Commissioner, approached their respective views of the evidence with a presumption of discrimination. The ALJ's Decision (at page 18) unbelievably states that the Farm "concedes its policy is to discriminate based on sexual

orientation", yet nothing could be further from the truth and the weight of the evidence. Conversely, the Giffords showed in numerous ways with reliable evidence that it allowed everyone on their property regardless of their sexual orientation. By adopting this presumption that discrimination existed, the ALJ and Commissioner never required the Complainants to actually prove their prima facie case, presumably because they were unable to show that not hosting a marriage ceremony for someone on religious grounds amounted to discrimination based on sexual orientation. Use of such presumptions is clearly erroneous as a matter of law[33].

70. Where, as here, there has been no consideration of the Petitioners' procedural and due process rights, both of which are guaranteed by the Federal and State constitutions, the ALJ and Commissioner have once again failed to exercise any discretion at all.

F. THE COMMISSIONER AND THE ALJ FURTHER ABUSED THEIR DISCRETION BY DENYING PETITIONERS EQUAL PROTECTION UNDER THE LAW BY NOT TREATING THEIR RELIGIOUS BELIEFS WITH THE SAME RESPECT AS OTHER RELIGIOUS BELIEFS PROTECTED IN LAW

71. There are numerous examples in New York law where individuals and businesses are exempted from discrimination charges based on their religious beliefs. As this case is one of the first enforcement actions of the Marriage Equality Act through the Public Accommodations Law, the ALJ and the

Commissioner should have not have decided the case in a vacuum. For example:

72. Section 6527(4) of the Education Law permits physicians to refuse to perform acts that he/she is opposed to due to religious beliefs.

73. Section 6908(g) of the Education Law permits nurses to care for the sick in compliance with their religious tenets.

74. Section 17 of the Education Law exempts private and religious schools from the Dignity for All Students Act which relates to sexual orientation discrimination.

75. Section 79-i of the Civil Rights Law allows individuals to refuse to assist in an abortion due to conscience or religious beliefs[34].

76. Social Services Law Section 463.6(b) and (d) exempts both recipients and staff members from participating in family planning services where their rights of conscience or religious convictions would be violated.

77. Public Health Law Section 2164(9) forbids the State from compelling a parent to immunize their child contrary to their religious beliefs.

78. Public Health Law Section 2994-n allows both private hospitals and individual health care providers to refuse to honor a patient's health care decision if it conflicts with their moral convictions or sincerely held religious beliefs.

79. Public Health Law Section 4210-c(1) forbids the State from

requiring on autopsy against a family's religious beliefs except for a "compelling public necessity".

80. Indeed, any organization classified as a benevolent order by appearing on a state recognized list is exempted from the operation of the Public Accommodations Law solely by virtue of being on the State's list (see Benevolent Orders Law §2 and Executive Law §292 (9)). Further, benevolent orders are exempt from the operation of the Marriage Equality Act of 2011 for the same reason (see Domestic Relations Law §10-b). In practice, this is problematic and inequitable as applied to private individuals and businesses with sincerely held religious beliefs since "no characteristic must be possessed in order to qualify as a 'benevolent order' except the characteristic of being listed by the legislature in [Benevolent Orders Law] § 2"[35].

81. For example, benevolent orders such as an American Legion post routinely host events for members of the public as well as its own members. Even though it is on those occasions open to the public and otherwise a place of public accommodation, as a benevolent order it can still choose to host only heterosexual wedding ceremonies without fear of discrimination charges. The secular benevolent order has no constitutional rights to exercise in this regard, yet a family farmer can't decline to host a same-sex wedding ceremony in his own home despite his 200 year-old federal and state constitutional protections?

82. Further, the ALJ and Commissioner abused their discretion by making a decision without reconciling (or even addressing) the conflict present in the Public Accommodations Law and the Marriage Equality Act of 2011 as applied to distinctly private entities. Although the Public Accommodations Law exempts entities that are "distinctly private" in nature, the provisions of the Marriage Equality Act of 2011 do not. In the context of providing marriage-related services to same-sex couples, this conflict makes it impossible for certain distinctly private entities to comply with the laws of New York since such an entity may be permitted to deny such marriage-related services under one law, but prohibited from doing the same under the other. For example, a Kiwanis Club is "distinctly private" under the Public Accommodations Law but is not a benevolent order exempt under the Marriage Equality Act of 2011[36] (Domestic Relations Law §10-b). This unresolved conflict caused by the enactment of the Marriage Equality Act of 2011 makes it impossible for certain entities to know their rights. The vagueness and uncertainty of the application of these laws is even more pronounced for private individuals and businesses with sincerely held religious beliefs since these statutes do not directly address them. The ALJ and the Commissioner did not conduct a responsible and conscientious review and analysis of the inherent conflict between the Public Accommodations Law and the Marriage Equality Act of 2011 as applied to marriage-related services for same-sex couples.

Consequently, the ALJ and the Commissioner could not render a reasoned, objective, and fair decision in this case - which makes their decision arbitrary, capricious, selective, and biased.

II. AS AND FOR A SECOND CAUSE OF ACTION:

THE COMMISSIONERS' FINAL ORDER BASED UPON THE ALJ'S DECISION WAS PREDICATED UPON INSUFFICIENT EVIDENCE IN THE RECORD CONSIDERED AS A WHOLE

STANDARD OF REVIEW:

83. Petitioners reallege and restate paragraphs 1 through 82 as if fully set forth herein.

84. Reviewing the factual findings of the ALJ and Commissioner is a matter of law exercisable by this court based on what has alternatively been viewed as the "arbitrary and capricious" standard and the "substantial evidence" test[37]. In general, the conclusions derived from the evidence must generate a conviction and persuade the fact finder that the conclusions to be drawn are reasonable probatively and logically[38]. Arbitrary action is without sound basis and reason and is generally taken without regard to the facts[39].

85. The substantial evidence test developed by the courts when reviewing decisions of the Division of Human Rights has been described in a variety of ways but appears to present a consensus. A mere scintilla of evidence sufficient to justify a suspicion is not sufficient [40] and in the end the finding must

be supported by the kind of evidence on which reasonable persons are accustomed to rely on in serious affairs[41]. It has also been viewed as such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact[42], yet be of a solid nature with the ability to inspire confidence[43]. The evidence must rise above the surmised, conjectured, speculation or rumor[44], is more than seeming or imaginary and it exists when proof is so substantial that from it an inference of existence of fact may be drawn reasonably[45].

86. Sufficient evidence means substantial evidence or it must be set aside[46]. Courts cannot avoid their traditional, and often difficult, role in fully reviewing whether the Division's evidence is substantial, just like in determining weight-of-the-evidence motions with regard to jury verdicts[47].

A. THE GIFFORDS' HOME HAS NEVER BEEN A PLACE OF PUBLIC ACCOMMODATION

87. The Gifford Barn is the residence of Cynthia and Robert Gifford and their two children. Events are held primarily on the first floor but brides also use the guest room on the second floor for changing, while the backyard is many times used as a ceremony site because of its picturesque views of the Hoosic River.

88. The Gifford residence is fenced in and away from the rest of the Farm and access is solely through one of several gates. Similarly, the backyard is fenced and bounded by a steep cliff. Access to the backyard is also closely

controlled.

89. Entry into the residence and the backyard is solely by invitation of the Gifford family and events are conducted exclusively as a result of a negotiated contract. There is no regular meal or beverage service, or any other type of service for that matter available on demand, nor are there any regular hours of operation for any of the activities occurring in the Giffords' residence and backyard.

90. The residence and backyard are physically separated from all other parts of the Farm, such as the corn maze and pumpkin patch, where school-related field trips are hosted for approximately six weeks in the fall.

91. Wedding ceremonies are held pursuant only to a negotiated contract, in either in the first floor of the Gifford residence or in the backyard ceremony site. However, use of the residence or the backyard for wedding ceremonies is only done on average 12 times a year for approximately an hour at a time. While the hundred acre farm is a working family farm 24 hours a day and seven days a week, fall festival events and wedding related activities only occur a very small percentage of the time.

92. As the court can clearly see, wedding-related events are a very small part of what the Gifford home and backyard is used for, and the wedding ceremony may last an hour or less, such that even if a wedding ceremony could

somehow be deemed a public accommodation, it happens on the Farm less than one percent (1%) of the time during the year. Thus, it is clearly erroneous to conclude that the Gifford home and backyard is a place of public accommodation at all times and for all purposes.

93. The evidence can also be deemed insufficient as a matter of law whenever a non-discriminatory and non-pretextual reason for declining the opportunity is sufficiently articulated[48]. In such circumstances, the burden then shifts back to the Complainants to otherwise prove that discrimination actually took place[49].

94. Whether the Giffords' home and backyard can be deemed a place of public accommodation at all times and for all purposes is of course a much more serious question than the ALJ or the Commissioner considered it to be. Indeed, Petitioners submitted competent proof that their conduct of wedding ceremonies is akin to operating a private club because, while they do not have dues-paying members, the "club" consists only of those signing a contract and paying a fee. Had the ALJ and Commissioner weighed the evidence closely, they would have determined that Petitioners demonstrated the required elements to be exempt from the Public Accommodations Law as a private club as well[50].

95. In the end, had the ALJ and Commissioner objectively weighed Petitioners' evidence they could not have found the Gifford home and backyard to

be a place of public accommodation based on solid evidence with an ability to inspire confidence in that outcome.

B. NO DISCRIMINATION TOOK PLACE DURING OR AS A RESULT OF THE SINGLE TELEPHONE INTERACTION BETWEEN THE PARTIES

96. The only interaction between the parties was a two to three minute telephone discussion between Ms. Gifford and Ms. Erwin, albeit eavesdropped upon and secretly recorded by Ms. McCarthy as well. During the conversation, when it became apparent that a same-sex wedding ceremony was being requested, Ms. Gifford informed Ms. Erwin respectfully, but firmly, that the Giffords' religious beliefs did not allow them to host same-sex wedding ceremonies at the Farm. However, Ms. Gifford had invited the couple to come visit the Farm in the hope that they would be able to host their wedding reception. That is how the proof went in at the hearing from all three witnesses to the conversation (TR at 54-55, 84-85, and 148-149).

97. In spite of that evidence, the ALJ surmised, conjectured and speculated without a scintilla of evidence that the Giffords had conceded that they discriminated against the couple based on their sexual orientation. Clearly the ALJ was unable, or unwilling, to discern a difference between the Giffords' desire to host the couple as individuals but not to host their "marriage" ceremony.

98. Throughout the proceedings the Giffords have and continue to

articulate legitimate non-discriminatory and non-protextural reasons for declining the wedding ceremony – it violates their sincerely held religious belief that God limited marriage to be between one man and one woman[51]. Courts have consistently held that only after a prima facie case is established does the purported discriminator need to articulate legitimate non-discriminatory reasons and then the burden shifts back to the Complainant and Division to show by a preponderance of the evidence that discrimination actually took place[52].

99. The Courts have been very clear that where neither the Complainants nor the Division have met their burden of proof on the key issue of the existence of discrimination based on sexual orientation, no such finding can be upheld[53]. To hold otherwise is a conclusion not reasonable probatively or logically, and therefore fails the substantial evidence test as well as the arbitrary and capricious standard.

C. THE ALJ AND THE COMMISSIONER IGNORED PETITIONERS' EVIDENCE AND SUBMISSIONS

100. A cursory examination of the Proposed Findings of Fact, Conclusions of Law and Post Hearing Legal Brief submitted by Petitioners to the ALJ shows that there was no weighing of evidence, balancing of interests or discretion that actually took place (Compare Exhibits 11, 12 and 14).

101. Wholesale adoption of one litigant's version of events after an evidentiary hearing where testimony and documents were submitted by both sides

smacks of being arbitrary and capricious and is certainly an unwarranted lack of discretion.

102. As this court has made very clear in previous cases, judicial review, whether it be by an administrative law judge or by a court with plenary or appellate jurisdiction, must be more than a rubber stamp of agency orders[54].

CONCLUSION

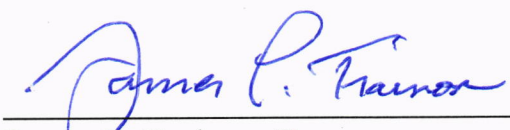
The bottom line is that there was simply no "hard look" that took place by either the Division, the ALJ, or by the Commissioner as to whether the Giffords' residence was a place of public accommodation at all times and for all purposes. The Giffords' residence and backyard is not a restaurant, bar or hotel where service can be requested anytime during operating hours, it's their home! It certainly is not a place of public accommodation when it's used by the family as their residence, and no more so when it's used on average twelve hours a year for wedding ceremonies any more than a school or YMCA that uses its gym for basketball on Saturday and church on Sunday can be held to be a place of public accommodation during the church service on Sunday.

All issues to be decided on this appeal are matters of *law* including reviewing the sufficiency of the evidence and even more so evaluating the abdication of discretion by the Division, the ALJ and the Commissioner as to the Giffords' constitutional rights and sincerely held religious beliefs. This court

should, as a matter of law, find both that the Division and its representatives abused their discretion, erred as to the law, and that the evidence considered as a whole is insufficient to support a finding of discrimination based on sexual orientation.

For all of the foregoing reasons, Petitioners request this honorable court to overturn and nullify the Commissioner's Final Order of August 8, 2014, to order the reimbursement to Petitioners of the $13,000.00 they paid in damages and fines, and such other and further relief as to this Court seems just and proper.

Dated: September 30, 2014



James P. Trainor, Esq.
CUTLER, TRAINOR & CUTLER, LLP
Allied Attorney, Alliance Defending Freedom
Attorneys for Petitioners
2 Hemphill Place, Suite 153
Malta, NY 12020
(518) 899-9200

TO: Jennifer McCarthy
c/o New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, New York 10004

Melisa Erwin, now known as Melisa McCarthy
c/o New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, New York 10004

Mariko Hirose, Esq.
Arthur Eisenberg, Esq.
New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, New York 10004

New York State Division of Human Rights
Commissioner, Helen Diane Foster
c/o Caroline J. Downey, General Counsel
New York State Division of Human Rights
One Fordham Plaza, 4th Floor
Bronx, New York 10458

Hon. Eric T. Schneiderman, Attorney General
Office of the Attorney General
The Capitol
Albany, NY 12224-0341

VERIFICATION

STATE OF NEW YORK)
COUNTY OF SARATOGA) ss.:

Cynthia Gifford, being duly sworn, deposes and says:

I am the petitioner in the within action. I have read the foregoing Verified Petition and am fully familiar with its contents; that the statements made therein are true to the best of my knowledge and belief except for those matters therein alleged upon information and belief, and as to those matters, I believe them to be true.

Cynthia Gifford, Petitioner

Sworn to before me this
30th day of September, 2014.

Notary Public

HEIDI E. YORK
Notary Public, State of New York
No. 01YO6264512
Qualified in Saratoga County
Commission Expires July 2, 2016

VERIFICATION

STATE OF NEW YORK)
COUNTY OF SARATOGA) ss.:

Robert Gifford, being duly sworn, deposes and says:

I am the petitioner in the within action. I have read the foregoing Verified Petition and am fully familiar with its contents; that the statements made therein are true to the best of my knowledge and belief except for those matters therein alleged upon information and belief, and as to those matters, I believe them to be true.

Robert Gifford, Petitioner

Sworn to before me this
30th day of September, 2014.

Notary Public

HEIDI E. YORK
Notary Public, State of New York
No. 01YO6264512
Qualified in Saratoga County
Commission Expires July 2, 2016

Endnotes:

---

[1] New York State Senator Saland introducing SS857 on June 24, 2011, adding the religious protections insisted upon by opponents in order to gain passage of the Marriage Equality Act. (See Exhibit 17)

[2] See CPLR 303, 22 NYCRR 202.57 and 670.14, and *Schor v. St. Francis Hospital*, 111 AD2d 852 (2d Dept. 1985)

[3] *New York Institute of Technology v. State Division of Human Rights*, 40 NY2d 316 (1976), on remand 54 AD2d 549 (____); Executive Law §297 (4) and §298.

[4] *Carey v. Binghamton Press Company*, 415 NY Supp 2d 523 (4th Dept., 1979); Executive Law §297 (4)(c); *Mittl v. New York State Division of Human Rights*, 100 NY2d 326 (2003), on remand 307 AD2d 881 (____); *Gamble v. State Human Rights Appeal Board*, 422 NY Supp. 2d 487 (3d Dept. 1979).

[5] *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987); *Roberts v. US Jaycees*, 468 U.S. 609, 602 (1984).

[6] *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

[7] *Roberts v. US Jaycees*, 468 U.S. 609, 620 (1984).

[8] *Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

[9] *Lynch v. Donnelly*, 465 U.S. 668, 673 (1974)

[10] *Shrum v. City of Coweta*, 449 F3d 1132, 1144 (10th CIR 2006).

[11] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

[12] *Employment Division v. Smith*, 494 U.S. 872 (1990).

[13] *Benevolent Orders Law §2*.

[14] *NYS Club Association v. City of New York*, 487 U.S. 1, Justice Scalia concurring.

[15] *People v. Life Science Church*, 113 Misc. 2d 952 (1982), Appeal dismissed, 93 AD2d 774, Appeal dismissed, 60 NY2d 643, Appeal denied, 61 NY2d 604, and certiorari denied, 105 S.Ct. 97; *M.I. v. A.I.*, 107 Misc. 2d 663 (1981)

[16] *Central Rabbinical Congress of the United States and Canada, et al. v. New York City Department of Health and Mental Hygiene, et al*, ____ F3d ___ (2d CIR August 15, 2014); *Lukumi*, supra; *O'Neil v. Hubbard*, 180 Misc. 214 (1943).

[17] *Central Rabbinical Congress*, supra; *Smith*, supra; *Burwell v. Hobby Lobby, et al.*, 573 US __ (June 30, 2014).

[18] *M.I. v. A. I.*, supra; *Hobby Lobby*, supra; *Full Gospel Tabernacle, Inc. v. Attorney General*, 142 AD2d 489 (3d Dept 1988).

[19] *Catholic Charities of Diocese of Albany v. Serio*, 7 NY3d 510 (2006), Re-argument denied, 8 NY3d 866, certiorari denied, 552 U.S. 816; *In re Miller*, 252 AD2d 156 (4th Dept. 1998); *People v. Woodruff*, 26 AD2d 236 (2d Dept. 1966), Appeal granted, 19 NY2d 579, Appeal dismissed, 20 NY2d 879, Affirmed, 21 NY2d 848.

[20] *Bronx Household of Faith v. Board of Education of City of New York*, 400 F Supp. 2d 581 (2005), vacated and remanded, 492 F3d 89, on remand, 2007 WL 7946842.

[21] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 US 557 (1995).

[22] *Hurley*, supra; *Wooley v Maynard*. 430 U.S. 715; *Turner Broadcasting*, 512 U.S. 641; *Riley v. National Federal Association of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

[23] *New York State Division of Human Rights v. Carnation Company et al.*, 53 AD2d 1053 (1976).

[24] *Schuck v. State Division of Human Rights,* 102 AD2d 673 (1st Dept. 1984); *School Board of Education of Chapel of Redeemer Lutheran Church v. New York City Commission of Human Rights*, 591 NY Supp. 2d 531 (2d Dept. 1992).
[25] *Hurley*, supra.
[26] *Rourke v. New York State Department of Correctional Services*, 201 AD2d 179 (3d Dept. 1994); *Woodruff*, supra.
[27] *Quimby v. State Division of Human Rights*, 760 NY Supp. 2d 189 (2d Dept. 2003)
[28] *NYIT*, supra; Executive Law §297 (4) and §298.
[29] *State Division of Human Rights on the Complaint of Bailey v. Board of Education of West Valley Central School District*, 386 NY Supp. 2d 166 (4th Dept. 1976)
[30] *Pan American World Airways, Inc. v. New York State Human Rights Appeal Board*, 61 NY2d 542 (1984); *New York Telephone Company v. New York State Division of Human Rights*, 561 NY Supp. 2d 401 (1990).
[31] *Grucci v. Grucci*, 2011 N. Y. Lexis 3500 (November 20, 2012); *People v. Ely*, 68 NY2d 520 (1986).
[32] *R & B Autobody and Radiator, Inc. v. New York State Division of Human Rights*, 819 NY Supp. 2d 599 (3d Dept. 2006)
[33] *Draman v. Lamar Advertising of Penn, Inc.*, 709 NY Supp. 2d 306 (4th Dept. 2000);
[34] *Larson v. Albany Medical Center*, 252 AD2d 936 (3d Dept. 1998).
[35] *NYS Club Association v. City of New York*, supra.
[36] *Kiwanis Club of Great Neck, Inc. v. Board of Trustees of Kiwanis International*, 41 NY2d 1034, cert denied 98 S.Ct.183.
[37] *Gamble*, supra; *Mittl*, supra.
[38] *State Division of Human Rights v. Syracuse City Teachers Association, Inc.*, 66 AD2d 56 (4th Dept. 1979); *Youth Action Homes, Inc. v. State Division of Human Rights*, 659 NY Supp. 2d 447 (1st Dept. 1997).
[39] *Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974).
[40] *Stork Restaurant v. Boland*, 282 NY (1940).
[41] *People ex rel.Vega v. Smith*, 66 NY2d 130 (1985)
[42] *Ridge Road Fire District v. Schiano*, 16 NY3d 494 (2011); *Mittl*, supra.
[43] *300 Gramatan Ave. Associates v. State Division of Human Rights*, 45 NY2d 176 (1978)
[44] *State Division of Human Rights on Complaint of Rappaport v. Genesee Hospital*, 418 NY2d 687 (4th Dept. 1979); *Thomas A. Gallante and Son , Inc. v. State Division of Human Rights*, 76 AD2d 1023 (3d Dept. 1980), affirmed 52 NY2d 962.
[45] *Delta Air Lines, Inc. v. New York State Div. of Human Rights*, 652 NY Supp. 2d 253(1st Dept.1996)
[46] *Id.*
[47] *Boodram v. Brooklyn Developmental Center*, 773 NY Supp. 2d 817 (2003).
[48] *Wolfson Casing Corp. v. Kirkland*, 92 AD3d 684 (2d Dept. 2012), Leave to appeal denied, 19 NY3d 803; *New York State Department of Correctional Services v. State Division of Human Rights*, 656 NY Supp. 2d 78 (3d Dept. 1997)
[49] *Lamar*, supra.
[50] *US Power Squadrons v. State Human Rights Appeal Board*, 84 AD2d 318 (2d Dept. 1981), Appeal granted, 57 NY2d 607, Affirmed, 59 NY2d 401, Re-argument dismissed, 60 NY2d 682,

Re-argument dismissed, 60 NY2d 702.

[51] Wolfson, supra; *New York State Department of Correctional Services*, supra; *State Division of Human Rights v. North Queensview Homes, Inc.*, 427 NY Supp. 2d 483 (2d Dept. 1980).

[52] *Milonas v. Rosa*, 629 NY Supp. 2d 535 (3d Dept. 1995)

[53] *Romanello v. Intesa San Paolo*, ___ NY3d NY ___ 2013, WL 5566332 (October 10, 2013)

[54] *New York State Department of Correctional Services*, supra.