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

Appellate Division – Third Department Case No. 520410

New York Supreme Court

Appellate Division: Third Department

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

Appellants,

-against-

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

Respondents.

APPELLANTS' REPLY TO THE MCCARTHY RESPONDENTS' BRIEF

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"Facts are stubborn things."[1] Respondents and their amici ignore that the Division's Order compels the Giffords to do more than "rent" their home for a ceremony that violates their conscience; they must personally coordinate and participate in it. These unique facts not only highlight the egregious harm that the Division's Order inflicts on the Giffords; they also distinguish this case from others and thus lay to rest Respondents' unfounded concern that a ruling for the Giffords will eviscerate the State's public-accommodations laws. (Mc. Br. 1).[2]

Point 1 – The Giffords Did Not Violate the Executive Law.

The Farm is not a Public Accommodation for Wedding Ceremonies.

Respondents' reliance on *Cahill v Rosa*, 89 NY2d 14 [1996], misses the mark. (Mc. Br. 8). Since the public-accommodations law explicitly includes "dispensaries, clinics, [and] hospitals," N.Y. Exec. Law § 292 [McKinney], and since the law's purpose is to ensure that no one is denied access to "basic necessities of life,"[3] like "education, training, housing or health care," N.Y. Exec. Law § 290 [McKinney], it is not surprising that *Cahill* found a dentist's office to be a public accommodation. In contrast, the Giffords do not operate a healthcare facility. Rather, they host, coordinate, and participate in wedding ceremonies on their property; their work does not involve a "basic necessity of life."

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[1] John Adams, Argument in Defense of the British Soldiers in the Boston Massacre Trials [Dec. 4, 1770].
[2] Cites to "Mc. Br." reference the Brief of the McCarthy Respondents.
[3] SONDA, 2002 Sess. Law News of N.Y. Ch. 2 [McKinney].

The Giffords Did Not Discriminate Based on Sexual Orientation.

Respondents must show that the Giffords declined their request "because of" their sexual orientation. Exec. Law § 296(2) [McKinney]. Respondents cannot meet this burden because the Giffords host events for individuals of all sexual orientations. (A-290, Hr'g Tr. 145:6-18). Thus, it is not the requesting individuals' sexual orientation, but the marriage-related message of the expressive event, that motivated the Giffords. *See Hands On Originals v Lexington-Fayette Urban Cnty. Human Rights Comm'n*, No. 14-CI-04474, slip op at 10 [Ky Cir Ct April 27, 2015] (The business's "declination to print the shirts was based upon the **message** of [the group and its event] and not on the **sexual orientation** of its representatives").

The public-accommodations law does not require the Giffords to coordinate or host every event that a person from a protected class requests. For example, if the infamous Westborough Baptist group asked the Giffords to host an event that would express their false message that God hates people in same-sex relationships, the Giffords would not be discriminating based on religion if they declined the event because they did not want to host expression that violates their belief that God loves everyone. People of all religions and all sexual orientations are welcome on the Farm, but the Giffords will not host, participate in, or help coordinate the dissemination of all messages. The statute does not require that they treat all *messages* equal.

Point 2 – The Division's Order Violates Free Exercise Rights.

Respondents claim that affirming the Giffords' free-exercise rights would conflict with all precedent. (Mc. Br. 11). But no case that Respondents or their amici cite has ordered a person to host and personally participate in a wedding ceremony that conflicts with his or her religious beliefs. It is thus the Division's Order, not the Giffords' free-exercise defense, that is unprecedented.

State Free Exercise. Contrary to Respondents' argument, the balancing analysis in *Catholic Charities of Diocese of Albany v Serio*, 7 NY3d 510 [2006], weighs decidedly in the Giffords' favor. The Division's Order requires the Giffords to host, coordinate, and in other ways participate in a wedding ceremony that they consider sacred and in conflict with their religious beliefs. This sort of compelled participation substantially harms the Giffords.

Respondents assert that they did not "request the Giffords' participation" in their ceremony. (Mc. Br. 13). That is immaterial. Respondents must take the Farm's services as they are offered. Ms. Gifford coordinates wedding ceremonies that the Farm hosts. Respondents cannot ignore that fact simply because they did not expressly discuss it with Ms. Gifford. Nor is it true that Ms. Gifford can opt-out of same-sex ceremony coodination. Given that she hosts and personally coordinates wedding ceremonies involving a man and a woman, if she were to host but decline to coordinate same-sex ceremonies, Respondents would surely contend

that she violates the public-accommodations law. They cannot have it both ways.

Respondents also claim that "nothing in the record suggests that [they] were seeking to have a religious ceremony." (Mc. Br. 13). That is beside the point because the Giffords believe that all weddings are sacred. (A-241, Hr'g Tr. 96:13-15; A-295, Hr'g Tr. 150:16-19; A-293, Hr'g Tr. 148:7-14). In addition, regardless of the overtly religious nature (or lack thereof) of Respondents' ceremony, the Division's Order will require the Giffords to host and participate in future same-sex wedding ceremonies with expressly religious character.[4]

Balanced against the grievous harm of requiring the Giffords to participate in sacred events that conflict with their faith, the State's interest in punishing the Giffords falls short. Notably, the Giffords' religious convictions conflict with the State's goal in a very limited circumstance—when they are asked to host a same-sex wedding ceremony. The Giffords otherwise welcome individuals who identify as gay and lesbian (A-290, Hr'g Tr. 145:6-18), and will gladly host many events, including wedding *receptions*, for same-sex couples. (A-290, Hr'g Tr. 145:6-18; A-293, Hr'g Tr. 148:4-17; A-368, Pet'rs' Post Hr'g Br. 2). Respondents and their amici thus impugn the Giffords, and misstate the State's interest, when they allege

[4] Citing *United States v Lee*, 455 US 252, 257 [1982], Respondents discount the harm to the Giffords because they "voluntarily enter[ed] into the business of renting a wedding facility." (Mc. Br. 15). But the *Lee* case itself found that the challenged law "interfere[d] with"—that is, burdened—the business owners' "free exercise rights." 455 US at 257; *see also Burwell v Hobby Lobby Stores, Inc.*, 134 S Ct 2751, 2770 [2014] (citing *Lee*).

that the Giffords "object on religious grounds to serv[ing a class of] customers" (Mc. Br. 12), or worse yet, that the Giffords object to "personal interaction with members of a protected class." (AG Br. 26).

Respondents and their amici also discuss the State's interest in "eliminating . . . harm to dignity." (Mc. Br. 16-17). But they ignore all the dignity harms that the Division's Order inflicts on the Giffords and others like them. The State has told the Giffords that, due to their religious beliefs about marriage, they are not free to operate their business in New York. And it has callously slammed the door on the dreams of others who share the Giffords' beliefs about marriage and aspire to, or do in fact, coordinate and plan weddings on their property. This harsh decree not only demeans the Giffords and countless other New Yorkers who share their view of marriage, it also threatens their livelihood. The *Serio* balance thus weighs heavily in favor of the Giffords.

Federal Free Exercise. Strict scrutiny applies to the Giffords' federal free-exercise claim because the public-accommodations law—which excludes (1) all public libraries, educational institutions, and distinctly private institutions, and (2) as the Attorney General admits, some "commercial businesses" (AG Br. 20)—is not generally applicable. (Appl. Br. 26-28). Contrary to what Respondents assert (Mc. Br. 12), *Serio* did not address this *general-applicability* argument, but rather a *neutrality* argument against a different law that had only one religious exemption.

7 NY3d at 522-23.[5] And because Respondents cannot satisfy strict scrutiny, as explained below, the Giffords should prevail on their federal free-exercise claim.

Point 3 – The Division's Order Violates Expressive Rights.

Expressive Association. Contrary to Respondents' assertions (Mc. Br. 21), "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Boy Scouts of Am. v Dale*, 530 US 640, 655 [2000].[6] The Giffords believe and express as a "core value" upon which they operate their business that marriage is a religious union of one man and one woman. (Appl. Br. 4). It would impair their ability to communicate their beliefs about marriage if the State forces them to coordinate and participate in weddings that contradict those beliefs. (*Id.* at 32-34). The Giffords thus have a "First Amendment right to choose to send one message [about marriage] but not . . . [an]other." *Dale*, 530 US at 655.

Respondents suggest that the Division's Order does not violate this right because they did not seek to "join[]" a group. (Mc. Br. 22). Yet "the freedom of

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[5] Nor has *Serio* rejected the Giffords' hybrid claim. (*Cf.* Mc. Br. 12-13). That case assumed that the hybrid claim exists if the companion constitutional claim is more than "insubstantial," which is the case here. 7 NY3d at 523.

[6] *See also Apilado v N. Am. Gay Amateur Athletic Alliance*, 792 F Supp 2d 1151, 1160-61 [W.D. Wash. 2011] (concluding that a softball league for the LGBT community was protected by the right of expressive association).

expressive association protects more than just a group's membership decisions." *Rumsfeld v FAIR*, 547 US 47, 69 [2006]. Infringement of "this freedom may take many forms." *Dale*, 530 US at 648. Here, the Division's Order requires the Giffords not just to host expression, but to coordinate and participate in expressive ceremonies that violate their religious beliefs. This is not analogous to *Rumsfeld*, where the schools served as passive hosts of military recruiting sessions. Thus, unlike the military in *Rumsfeld*, the Division here has infringed the right of expressive association.[7]

Respondents also claim that infringing the Giffords' expressive-association rights is "constitutionally permissible" because of the State's "interest in eliminating discrimination." (Mc. Br. 22). Not surprisingly, however, Respondents ignore the passage from *Dale* that directly refutes their argument. 530 US at 659.[8]

Compelled Speech. The speech compelled by the Division's Order is not "the bare act of engaging in commerce" with a member of a protected class (Main Street Br. 15 n.13), or discussions about "the availability of . . . wedding venues." (Mc. Br. 18). Rather, the compelled speech is the Giffords' planning and

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[7] Respondents' reliance on *Roberts v U.S. Jaycees*, 468 US 609, 634 [1984], is unavailing because the Court there did not find "any serious burdens" on the Jaycees' expressive-association rights. *See id.* at 626.

[8] *U.S. Power Squadrons v State Human Rights Appeal Board*, 59 NY2d 401 [1983], is inapposite for two reasons. (*Cf.* Mc. Br. 21). First, the organizations sued in *Power Squadrons* invoked their "rights of association and privacy," not their rights of *expressive* association. 59 NY2d at 414. Second, unlike the respondents there, Respondents here have sued the Giffords in their *personal* capacities, and thus this case reaches beyond the rights of a commercial business.

participating in wedding ceremonies that Respondents acknowledge are "certainly expressive." (Mc. Br. 20).

The compelled speech in this case is thus not akin to *Rumsfeld*. There, the law schools sent logistic information for military recruiters; they were not present at and did not help create the military's expression. 547 US at 60. Here, however, the Giffords are present at the expressive ceremonies they host, and they assist in planning and orchestrating them. In addition, the law schools in *Rumsfeld* were not required to convey messages that they considered objectionable. The law schools disagreed with the military's "Don't Ask, Don't Tell" policy; they did not object to the logistic information in the emails and flyers that they were compelled to send to students. *Id.* at 60-62. But here, the Giffords disagree with the messages about the nature of marriage that are communicated through the same-sex wedding ceremonies that they must host in their backyard. Lastly, *Rumsfeld* is limited because it involves the military context, and the Court acknowledged that "judicial deference is at its apogee when Congress legislates under its authority to raise and support armies." *Id.* at 58. In this case, however, no judicial deference is warranted.

It is thus not *Rumsfeld*, but *Hurley v Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 [1995], that controls this case. The parade organizers in *Hurley* planned and organized inherently expressive events (parades). Similarly here, the Giffords coordinate and participate in inherently expressive

events (wedding ceremonies). Therefore, *Hurley* requires a ruling for the Giffords.

Despite Respondents' arguments, it matters not whether "a bystander would think" that the Giffords support the messages communicated during same-sex wedding ceremonies on their property because "th[at] is not the test" for analyzing a compelled-speech claim. *Frudden v Pilling*, 742 F3d 1199, 1204-05 [9th Cir. 2014] (discussing *Wooley v Maynard*, 430 US 705 [1977]). Rather, "[t]he test is whether the individual is forced to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* (quotation marks omitted). The Division's Order thus violates the compelled-speech doctrine because it requires the Giffords to participate in creating and disseminating views about marriage that they deem objectionable.[9]

Point 4 – The Division's Order Fails Strict Scrutiny.

The Attorney General objects to the particularized strict-scrutiny analysis that case law requires. (AG Br. 26). But that argument conflicts with a long line of precedent. *See, e.g., Att'y Gen. v Desilets*, 636 NE2d 233, 238 [Mass. 1994]; (Appl. Br. 38) (citing additional cases).

Respondents and their amici additionally insist that the State has a compelling interest in ensuring that sexual-orientation discrimination does not

[9] Respondents and their amici speculate that "observers" would not attribute to the Giffords the views expressed at same-sex wedding ceremonies on their property because people understand that the public-accommodations law requires the Giffords to host those ceremonies. (Mc. Br. 20). That argument, however, cannot be squared with either *Hurley* or *Dale*, both of which involve public-accommodations laws that required groups to compromise their expressive rights.

leave New Yorkers without access to services. But Respondents' amici correctly acknowledge that services are widely available to "LGBT clientele," and any "bias" against that community "continues to wane." (Main Street Br. 10.)

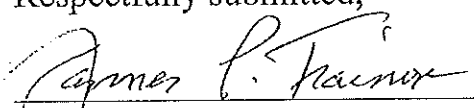
Respondents also claim that *Hobby Lobby* "explicitly" rejects the Giffords' strict-scrutiny arguments. (Mc. Br. 16). But *Hobby Lobby* did not address the questions raised here. Responding to a charge by the dissenting justices, the *Hobby Lobby* majority noted that its decision "provides no . . . shield" for "discrimination in *hiring* . . . on the basis of *race*." 134 S Ct at 2783 (emphasis added). But that observation does not control this case, which presents a claim of public-accommodation discrimination based on sexual orientation. Notably, the *Hobby Lobby* dissent also speculated that the majority's decision might protect wedding-service providers that have religious objections to same-sex wedding ceremonies. *See id.* at 2804-05 (Ginsburg, J., dissenting) (citing *Elane Photography, LLC v Willock*, 309 P3d 53 [2013]). That the Court disclaimed protection for race-based employment discrimination, but not for religiously motivated wedding-service providers, indicates that the Court intended to keep that question open.

CONCLUSION

The Court should vacate and reverse the Division's Order and order the restitution of the judgments paid by the Giffords.

Dated: August 24, 2015.

Respectfully submitted,



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