Docket No. 520410

Supreme Court of the State of New York, Appellate Division – Third Department

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CYNTHIA GIFFORD, ROBERT GIFFORD, AND LIBERTY RIDGE FARM, LLC.,

Respondents-Appellants.

v.

MELISA ERWIN, NOW KNOWN AS MELISA MCCARTHY, JENNIFER MCCARTHY, AND THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Petitioners-Appellees.

Brief of Amicus Curiae
Lambda Legal Defense and Education Fund, Inc.

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INTEREST OF AMICUS CURIAE

Amicus curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education and policy advocacy. *See, e.g.*, *Lawrence v. Texas,* 539 U.S. 558 (2003) (Texas ban on same-sex adult intimacy was unconstitutional denial of liberty); *Taylor v. Rice,* 451 F.3d 898 (D.C. Cir. 2006) (allowing challenge to U.S. Foreign Service's exclusion of HIV-positive applicants to proceed to trial); *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010) (former partner of a child's parent also was a parent to the child under Vermont law and thus could seek visitation and custody at a best-interest hearing).

From its headquarters office in New York City and regional offices in Atlanta, Chicago, Dallas and Los Angeles, Lambda Legal has represented lesbian and gay couples in many cases of sexual orientation discrimination involving assertions that neutral statutes, rules, or policies regulating businesses, professional services, and other public accommodations infringed religious freedom. *See, e.g.*, *North Coast Women's Care Med. Grp., Inc. v. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (rejecting claim that non-discrimination statute protecting LGBT patients infringed physicians' speech and religious exercise rights); *Cervelli v.*

Aloha Bed & Breakfast, No. CAAP-13-0000806 (Haw. Ct. App. filed Dec. 19, 2011) (appeal by proprietor of rejection of religious liberty defense in case concerning refusal of lodging to lesbian couple), information available at http://www.lambdalegal.org/in-court/cases/cervelli-v-aloha-bed-and-breakfast; *McCrea v. Sun Taxi Assoc.*, Charge No. 2014-CP-1093 (Ill. Dept. of Human Rights filed Oct. 28, 2013) (sexual orientation discrimination charge filed by gay couple after being ejected from taxicab), information available at http://www.lambdalegal.org/sites/default/files/mccrea_ il_20131028_charge-of-discrimination.pdf; *Odgaard v. Iowa Civil Rights Comm'n*, No. 14-0738 (Iowa Supreme Ct. filed May 1, 2014) (case filed by owners of event space who refused rental to same-sex couple, seeking to bypass agency's investigation of couple's discrimination complaint), information available at http://www.lambdalegal.org/in-court/cases/odgaard-v-iowa-civil-rights-commission.

The issues before this Court on the instant appeal are similar to those addressed in cases arising in many other states. Because the Court's decision here is likely to affect thousands of LGBT people across New York, Lambda Legal has a particular interest in assisting the Court to consider the issues with the additional legal, historical and social science context provided in this *amicus* brief.

STATEMENT OF THE CASE

Amicus curiae joins in the Statement of the Case of the Respondents.

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns sexual orientation discrimination by a couple that owns and operates a farm in upstate New York. Appellants Cynthia Gifford and Robert Gifford have chosen to augment their earnings from farming by inviting members of the general public to visit their farm to enjoy berry picking, pig races, a corn maze, and shopping for farm-harvested produce. The Giffords also have built facilities on their land to host events such as corporate outings, holiday parties, team-building events, and weddings. The Giffords rent their facilities and provide related services through their business, Appellant Liberty Ridge Farm L.L.C.

The Giffords rent their facilities and host events pursuant to negotiated contracts and an established rate schedule. They are not clergy, they do not provide religious services for such events, and they do not limit such arrangements to persons of their same religious faith. Instead, the Giffords offer a variety of secular services—such as flower arranging, catering services, parking and transportation—from which customers can select for weddings and other events.

While the Giffords decide which services to offer, they do not, of course, limit certain packages to persons of particular races or ethnicities. Likewise, and

similarly in keeping with New York law, the Giffords do not limit rentals to those who share their religious beliefs. But, unlike this routine willingness to welcome those of faiths different from their own, as well as atheists and interfaith couples, the Giffords claim a religious right to turn away same-sex couples.[1] Regardless of what motivates the Giffords personally, that is sexual orientation discrimination and it violates the Human Rights Law. N.Y. Exec. Law, art. 15, § 296.2(a).

Appellants contend that they have not violated the Human Rights Law because the venue and facilities they offer generally to the public for rental is not a public accommodation and, thus, is not subject to N.Y. Exec. Law § 296. They further contend that turning away a couple because they are of the same sex does not "demonstrate that the Giffords have any bias based on sexual orientation," and that, after all, Appellees Melisa and Jennifer McCarthy "were married in a similar type of venue." Appellants' Opening Brief ("AppBr") at 15, 20, 28.

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[1] The Giffords also claim a privilege to turn away same-sex couples based on constitutionally protected rights of expression and expressive association. *Amicus curiae* agrees with the McCarthys, and with the decision of the Human Rights Division below, as to why those arguments are mistaken. This brief addresses only the Giffords' claim that they may discriminate against same-sex couples in their rental of their event facilities notwithstanding New York's Human Rights Law, as a matter of protected exercise of religion.

Appellants miss the point. Fortunately, given our history, most Americans now do recognize that being told essentially, "we don't serve your kind here" is discrimination that inflicts dignitary harm on those rejected and stigmatizes the entire disparaged group. On this point, the United States Supreme Court has admonished firmly that non-discrimination laws "serve[] compelling state interests of the highest order." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (requiring enforcement of California's public accommodations law). The Court has emphasized in particular that public accommodations non-discrimination laws serve the essential social function of reducing the "moral and social wrong" of discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964). They "eliminate [the] evil" of when a business serves only those "as it sees fit," which demeans both the individual and society as a whole. *Id.* at 258–59.

Religious motivations cannot mitigate this harm. To the contrary, from the Crusades and the Inquisition to current disputes around the globe, too much of human history shows how religious sectarianism can exacerbate human strife when deployed to justify lesser treatment of those perceived as different. We have learned this lesson the hard way in America, too. Time and again, religion has been proffered to excuse invidious discrimination. Given the immense

demographic diversity and religious pluralism of our Nation, the law must be crystal clear that each person's religious liberty ends where harm to another begins.

That well-settled principle of American law must apply equally with regard to invocations of religious belief whether urged to justify racial, gender, or marital-status discrimination, or discrimination based on sexual orientation. Religious liberty must not become a shield for invidious deprivations of another's basic rights. Our shared pledge that we are "one nation, indivisible, with liberty and justice for *all*" demands nothing less.

The New York State Division of Human Rights considered and properly rejected Appellants' arguments for a religiously-based exemption from the Human Rights Law. *Amicus curiae* thus support Appellees' request for affirmance.

II. ARGUMENT

A. Across Generations Of Equality Struggles, Courts Repeatedly Have Confirmed That Religious Objections Do Not Trump Society's Compelling Interests In A Non-Discriminatory Marketplace.

In the United States, differing religious beliefs about family life and gender roles often have generated disputes not only in public accommodations, but also in education, employment, medical services, and other arenas. Prominent among them, in particular, have been problems arising when religious convictions prompt some to believe that others have sinned or should be kept apart, leading to

discrimination in commercial and other public settings. Although some forms of religiously-motivated discrimination have receded, our history tells a recurring saga of successive generations asking anew whether our protections for religious liberty warrant exemptions from laws protecting others' liberty and right to participate equally in civic life. Our courts rightly and consistently have recognized that the answer to that question must remain the same: religious beliefs do not entitle any of us to exemptions from generally applicable laws protecting all of us.

Thus, for example, during the past century's struggles over racial integration, some Christian schools restricted admissions of African American applicants based on beliefs that "mixing of the races" would violate God's commands. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983). Some restaurant owners refused to serve African American customers citing religious objections to "integration of the races." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944–45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). Religious tenets also were used to justify laws and policies against interracial relationships and marriage. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (invalidating state interracial marriage ban, and rejecting trial judge's justification that "Almighty God created the races white, black, yellow, malay and red, and he placed them on

separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (firing of white clerk typist for friendship with black person was not protected exercise of religion despite church's religious objection to interracial friendships).

Likewise, as our society began coming to grips with the desire and need of women for equal treatment in the workplace, some who objected on religious grounds sought exemptions from employment non-discrimination laws as a free exercise right. Despite the longstanding religious traditions on which such claims often were premised, courts recognized that these religious views could not be accommodated in the workplace without vitiating the sex discrimination protections on which workers are entitled to depend. *See, e.g.*, *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (school violated non-discrimination law by offering unequal spousal benefits to female employees); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (employer improperly refused to hire women bus drivers due to religious objection of male student bus riders).

Similarly, after state and local governments enacted fair housing laws that included protections for unmarried couples, landlords unsuccessfully sought exemptions based on their belief that they themselves would sin by providing

residences in which tenants would commit fornication. *See, e.g.*, *Smith v. Fair Employment and Hous. Comm'n*, 913 P.2d 909, 925 (Cal. 1996) (rejecting religious exercise claim of landlord because housing law did not substantially burden religious exercise); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same).

Across generations, then, these questions have been asked and answered, echoing with reassuring consistency as courts have recognized the public's abiding interests in securing fair access and peaceful co-existence in the public marketplace. Today, these common interests are tested once again as LGBT people seek full participation in American life. There is growing understanding that sexual orientation and gender expression are personal characteristics bearing no relevance to one's ability to contribute to society, including one's ability to form a loving relationship and build a family together. *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609, 628, 635 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2694–96 (2013); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). And yet, there remain pervasive and fervent religious objections on the part of many to interacting with LGBT people in commercial contexts, still inspiring widespread harassment and discrimination. *See, e.g.*, *Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (rejecting religious discrimination claim of supervisor terminated

for religiously harassing lesbian subordinate); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (rejecting religious discrimination claim of employee terminated for persisting in anti-gay proselytizing intended to provoke coworkers); *Knight v. Conn. Dep't. of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (holding visiting nurse not entitled to proselytize to home-bound AIDS patient); *Erdmann v. Tranquility, Inc.*, 155 F. Supp. 2d 1152 (N.D. Cal. 2001) (ruling in favor of gay employee harassed by supervisor who pressured employee to join workplace prayer services and warned employee that he would "go to hell"); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 539–40 (W.D. Ky. 2001) (rejecting physicians religious justifications for refusing to employ gay people), *vacated on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002); *North Coast Women's Care Med. Grp., Inc.* 189 P.3d at 967 (applying strict scrutiny and rejecting physicians' religious objections to treating lesbian patients).

As laws and company policies have begun to offer more protections against this discrimination, some who object on religious grounds are asking courts to change course and allow religious exemptions where that had not been done in past cases. For the most part, the past principle has held true and the needs of third parties have remained a constraint on religion-based conduct in commercial contexts. *See, e.g.*, *Bodett*, 366 F.3d at 736 (rejecting religious accommodation

claim); *Peterson*, 358 F.3d at 599 (same); *Knight*, 275 F.3d at 156 (same); *Erdmann*, 155 F. Supp. 2d at 1152 (antigay harassment was unlawful discrimination); *Hyman*, 132 F. Supp. 2d at 539–540 (rejecting physician's claim of religious exemption from non-discrimination law); *North Coast Women's Care Med. Grp.*, 189 P.3d at 970 (same).

The exemption Appellants seek here would mark a sea change—opening the door to similar denials of goods, access to services, and other equitable treatment for LGBT people, persons living with HIV, and anyone else whose family life or minority status is disfavored by a merchant's religious convictions. As the U.S. Supreme Court has recognized, our laws and traditions have "afford[ed] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence*, 539 U.S. at 574 (citation omitted). The Court's explanation of the "respect the Constitution demands for the autonomy of the person in making these choices," *id.*, makes clear that the "person" whose autonomy is protected is the individual himself or herself – not those offering goods or services to everyone in the marketplace. This must remain the rule. Religion must not be made into a shield for invidious deprivations of basic human rights.

B. New York's Interest In Ending Discrimination Against Gay People, Regardless Of The Motivations For That Discrimination, Is Compelling.

According to the 2010 United States Census, approximately 49,000 same-sex couples make their home in New York, with nearly 8,000 of those couples raising children. Gary J. Gates & Abigail M. Cooke, *New York: Census Snapshot: 2010*, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_New-York_v2.pdf. As of five years ago, at least 10,000 of these couples were spouses. *See id.* Because the Census pre-dated passage of New York's Marriage Equality Act in 2011 and the opening of marriage to same-sex couples elsewhere, that figure doubtless is much higher today. *See* Act of June 24, 2011, 2011 N.Y. Laws 95.

But in New York, treatment of same-sex couples, and of LGBT people generally, has not historically been kind. Despite the fact that Greenwich Village was a mecca that drew outcast gay people from all corners, hoping to find freedom and a community, vigilante attacks and police raids targeting them were commonplace in the 20th century. *See, e.g.*, George Chauncy, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* 154 (1995) (discussing the challenges of gay life in New York prior to the Stonewall riots and describing the pervasive harassment and other abuses inflicted upon gay people). Indeed, New York City is famous for the iconic events considered the

beginning of the gay rights movement in the United States: the Stonewall riots, a spontaneous community uprising protesting years of government oppression. *See, e.g.*, David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (2004); Betsy Kuhn, *Gay Power!: The Stonewall Riots and the Gay Rights Movement, 1969* (2011).

Given this history, there can be little doubt that New York's interest in ending antigay discrimination is compelling. Indeed, the Second Circuit Court of Appeals emphasized the lengthy, ignoble history of antigay discrimination when concluding that heightened constitutional scrutiny should be applied to the federal government's discrimination against married same-sex couples:

> [i]t is easy to conclude that homosexuals have suffered a history of discrimination. ... [W]e think it is not much in debate. Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal. These laws had the imprimatur of the Supreme Court. *See Bowers*, 478 U.S. at 196; *see also Lawrence*, 539 U.S. at 578 (noting that such laws "demean[ed homosexuals'] existence [and] control[led] their destiny")."

Windsor v. United States, 699 F.3d 169, 182 (2d Cir. 2012).

The U.S. Supreme Court similarly took note of the longstanding, harsh discrimination against gay people in this country when holding unconstitutional state exclusions of same-sex couples from marriage:

> Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. … Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.

Obergefell, 192 L. Ed. 2d at 621—22 (citation omitted).

It is true that, after the Stonewall riots, New York began to make legislative changes that improved conditions somewhat. In 1980, 19 years after Illinois became the first state to decriminalize sodomy, New York followed suit. *See*

People v. Onofre, 51 N.Y.2d 476 (1980). In 1986, New York City banned discrimination based on sexual orientation. The New York City Council, *LGBT History in the New York City Council*, http://council.nyc.gov/html/about/lgbthistory.shtml (last visited July 20, 2015). Sixteen years later, the New York legislature passed the Sexual Orientation Non-Discrimination Act, which added sexual orientation as a protected characteristic into the New York Human Rights Law, Civil Rights Law, and Education Law. New York State Office of the Attorney General, *The Sexual Orientation Non-Discrimination Act ("SONDA")*, http://www.ag.ny.gov/civil-rights/sonda-brochure (last visited July 16, 2015).[2]

Despite enactment of explicit public policies against antigay discrimination, the climate has been slow to change statewide. Researchers at the Williams Institute at UCLA School of Law have documented persistent discrimination against LGBT New Yorkers, reporting substantial abuse by government actors as well as the general public even after SONDA's passage. Williams Institute, *New York—Sexual Orientation and Gender Identity Law and Documentation of*

[2] A bill to create these protections was first introduced in 1971. But, the proposal then was rebuffed continually over the course of fifteen years—despite concerted calls for its passage—before finally becoming law. *See N.Y. lawmakers ban gay discrimination*, CNN.com/U.S., December 17, 2002, http://www.cnn.com/2002/US/Northeast/12/17/ny.antigay.vote/index.html?_s=PM:US.

Discrimination (UCLA School of Law, Sept. 2009), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/NewYork.pdf (cataloguing employment discrimination in New York, as part of 15-chapter study finding widespread discrimination by state governments against LGBT people).

Moreover, concern about bias-motivated hostility towards LGBT people remains prevalent in the state. According to its most recent report, the New York City Anti-Violence Project "answered over 3,000 hotline calls—an average of one call every 3 hours" in 2014. Osman Ahmed & Chai Jindasurat, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2014*, 92 (National Coalition of Anti-Violence Programs, June 2015), *available at* http://www.avp.org/storage/documents/Reports/2014_HV_Report-Final.pdf.[3] Without question, New York's interest in protecting gay people from the hostility that has animated too much of this state's history remains compelling.[4]

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[3] During the prior year, New York experienced a wave of hate crimes targeting the gay community. *See, e.g.*, *New York Man Fatally Shot In Alleged Anti-Gay Hate Crime*, HUFFINGTON POST (May 18, 2013), http://www.huffingtonpost.com/2013/05/18/new-york-gay-hate-crime-shooting-_n_3299277.html; Philip Messing, *Sick attack on gay men near Madison Square Garden; two arrested in hate crime*, NEW YORK POST (May 10, 2013), http://nypost.com/2013/05/10/sick-attack-on-gay-men-near-madison-square-garden-two-arrested-in-hate-crime/.

[4] In addition, New York law still lacks explicit prohibitions against gender identity discrimination, with bills to add such protection having been rejected repeatedly.

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The events at issue in this case did not involve epithets, let alone violence. And yet, the Supreme Court has recognized that "[n]o union is more profound than marriage" and that, "[e]specially against a long history of disapproval of their relationships," deeming same-sex couples unworthy of the dignity marriage confers "works a grave and continuing harm." *Obergefell*, 192 L. Ed. 2d at 631. Doing so "serves to disrespect and subordinate them." *Id.*

When the Giffords refused to rent their venue to the McCarthys for the couple's special day, despite offering the venue routinely to heterosexual couples of all faiths, the Giffords imposed precisely this sort of "exclusion that … demeans [and] stigmatizes." *Id.* 629. This discrimination is part of a larger context of business proprietors in many states claiming religious rights to defy civil rights laws, which humiliates and reinforces stigma for same-sex couples. For example:

- In Washington State, a florist refused to sell flowers for a gay couple's wedding. *See* Associated Press, *Ruling against florist who didn't want to do gay wedding*, KOMONEWS.COM (Jan. 7, 2015), http://www.komonews.com/news/local/Ruling-against-florist-who-didnt-

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Transgender Legal Defense and Education Fund, *TLDEF Denounces New York State Senate's Failure to Pass Gender Expression Non-Discrimination Act (GENDA)*, http://www.transgenderlegal.org/press_show.php?id=508.

want-to-do-gay-wedding-287857051.html; Sara Schilling, *Judge: Arlene's Flowers owner can be sued in her personal capacity*, TRI-CITY HERALD (Jan. 7, 2015), http://www.tri-cityherald.com/2015/01/07/3346717_judge-denies-motion-to-toss-out.html?rh=1; Am. Civil Liberties Union, *Ingersoll v Arlene's Flowers*, https://www.aclu.org/lgbt-rights/ingersoll-v-arlenes-flowers (last updated Feb. 18, 2015).

- An Oregon baker objected on religious grounds to selling a cake to a lesbian couple. Everton Bailey, Jr., *Same-sex couple files complaint against Gresham bakery that refused to make wedding cake,* THE OREGONIAN (Feb. 1, 2013), http://perma.cc/MJ5W-VJ5L; Molly Young, *Sweet Cakes by Melissa violated same-sex couple's civil rights when it refused to make wedding cake, state finds*, THE OREGONIAN (Jan. 17, 2014), http://perma.cc/66XH-5EYQ.
- In Iowa, a couple that operated an event facility, bistro, and art gallery refused on religious grounds to rent the venue to a gay couple for their wedding reception. Sharyn Jackson, *Gortz Haus owners file suit against Iowa Civil Rights Commission,* DES MOINES REGISTER (Oct. 8, 2013), http://perma.cc/B9MB-NRN2. *See also Odgaard v. Iowa Civil Rights Comm'n*, NO. CVCV046451, Verified Petition (Polk Cty., Iowa, Dist. Ct.

Oct. 7, 2013); *Odgaard v. Iowa Civil Rights Comm'n*, No. CVCV046451, Ruling on Defendants' Motion to Dismiss (Polk Cty., Iowa, Dist. Ct. Apr. 3, 2014); *see also* Lambda Legal, *Odgaard v. Iowa Civil Rights Comm'n*, www.lambdalegal.org/in-court/cases/odgaard-v-iowa-civil-rights-commission (last visited July 21, 2015).

- Finally, here in New York, a lesbian couple planning their wedding in Otisco was rejected by a bed and breakfast. *See* Douglas Dowty, *Gay couple: Otisco B&B refused to host wedding; Business: We don't discriminate*, SYRACUSE.COM (July 2, 2015), http://www.syracuse.com/crime/index.ssf/2015/07/gay_couple_otisco_bb_refused_to_host_wedding_business_we_dont_discriminate.html. In their Human Rights Division complaint, the women recounted that the proprietor had responded "with disgust" when they identified themselves as a couple and told them allowing same-sex couples to marry was against his faith. *Id.*

Moreover, this discrimination did not begin when marriage was opened to same-sex couples. Rather, lesbian and gay couples have been encountering refusals of services based on proprietors' religious objections for years and in diverse settings. For example:

- Diane Cervelli and Taeko Bufford were refused lodging at the Aloha Bed & Breakfast, despite Hawaii's non-discrimination law, due to the owner's religious objection to hosting lesbians. *See* Lambda Legal, *Cervelli v. Aloha Bed & Breakfast*, http://www.lambdalegal.org/in-court/cases/cervelli-v-aloha-bed-and-breakfast (last visited July 21, 2015).
- In Illinois, a gay couple planning their civil union reception was turned down by two establishments that routinely host weddings; one not only refused the couple but berated them with religiously condemning emails. *See* ACLU of Illinois, *Mattoon couple challenge denial of services at two Illinois Bed and Breakfast facilities* (Nov. 2, 2011), http://www.aclu-il.org/mattoon-couple-challenge-denial-of-services-at-two-illinois-bed-and-breakfast-facilities/.
- In California, Lupita Benitez was refused a standard infertility treatment because her physicians objected on religious grounds to treating her the same as other patients because she was in a relationship with another woman. *North Coast Women's Care Med. Grp.*, 189 P.3d at 959.

See generally Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1189–92 (2012).

Many business owners hold religious and other beliefs that guide their lives. Those beliefs remain with many of them when operating their businesses. As recognized in the cases and examples cited above, permitting those engaged in for-profit commerce to apply a religious litmus test to would-be customers not only would encourage other businesses to do the same, but would subvert the compelling state interests in equality served by New York law. The Giffords offer no limiting principle and, indeed, there is none. Religious critiques of marriage for same-sex couples can be leveled just as easily at interracial and interfaith marriage, at same-sex cohabiting relationships, at heterosexual cohabitation, at divorce, at contraception, sterilization, and infertility care, and at innumerable other personal decisions about family life.

Amicus sounds alarm bells here because discriminatory refusals of goods or services exacerbates the stress from social exclusion and stigma that can lead to serious mental health problems, including depression, anxiety, substance use disorders, and suicide attempts. Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCH. BULL. 674 (2003); Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HLTH. 1869 (2001).

Religious reinforcement of antigay bias and discrimination often increases the negative impact on mental health. *See* Ilan H. Meyer, *et al.*, *The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals*, WILLIAMS INST. (2014) (research shows anti-gay messages from religious leaders and organizations increases severe mental health reactions), *available at* http://williamsinstitute.law.ucla.edu/research/health-and-hiv-aids/lgb-suicide-june-2014/; Edward J. Alessi, *et al.*, *Prejudice Events and Traumatic Stress among Heterosexuals and Lesbians, Gay Men, and Bisexuals*, WILLIAMS INST. (2013), *available at* http://www.tandfonline.com/doi/full/10.1080/10926771.2013.785455#abstract; *see also* Maurice N. Gattis, *et al.*, *Discrimination and Depressive Symptoms Among Sexual Minority Youth: Is Gay-Affirming Religious Affiliation a Protective Factor?*, 43 ARCH. SEX. BEHAV. 1589 (2014) (finding that harmful effects of discrimination among sexual minority youth affiliated with religious denominations that endorsed marriage equality were significantly less than those among peers affiliated with denominations opposing marriage equality).

The case before this Court concerns a wedding venue, but the "go elsewhere" approach the Giffords defend is not necessarily confined to wedding-related services. The notion that the owner of a commercial business sins by engaging in a commercial transaction with a "sinful" customer could apply just as

well to business transactions concerning any goods or services, medical care, housing or employment. Some might find this connection implausible. But for those hoping that non-discrimination protections will reduce stigma, health disparities, wage disparities, job loss, and unequal employment benefits based on sexual orientation or gender identity,[5] the Giffords' quest for a religious exemption for commercial activity poses a potentially devastating threat with distressing historical echoes. *See generally* David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. REV. 1176, 1221 (1994) (desired exemptions "would undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws."). *See also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516 (2015) ("The distinctive features of complicity-based

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[5] *See generally* Jennifer C. Pizer, *et al.*, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A.L. REV. 715 (2012); Randy Albelda, *et al.*, *Poverty in the Lesbian, Gay, and Bisexual Community* (March 2009), *available at* http://williamsinstitute .law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf.

conscience claims matter … rather because accommodating claims of this kind has the potential to inflict material and dignitary harms on other citizens.").

Accepting the Giffords' arguments would eviscerate bedrock doctrine reaffirmed consistently over time. This settled approach permits and encourages a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation while ensuring equal opportunity for everyone in the public marketplace. The proposed alternative would transform that marketplace into segregated dominions within which each business owner with religious convictions "become[s] a law unto himself," *Emp't Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990), and would force members of minority groups to suffer the harms and indignities of being required to go from shop to shop searching for places where they will not be treated as pariahs.

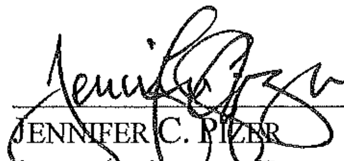
New York has enacted its Human Rights Law to protect vulnerable members of our diverse society from discrimination in public life regardless of some people's religious reasons for wanting to refuse them goods, services, or other benefits routinely offered to everyone else. Despite history's lesson that religion-based exemptions to civil and human rights laws would eviscerate these laws, the Giffords nonetheless ask the Court to let them single out gay people for rejection, humiliation, and stigma as they operate their business. The answer must be "no."

Religious freedom is a core American value and burdens on it can make for hard cases. But this is not among those hard cases, given the compelling interests served by New York's law insisting that commercial enterprises open to the public serve all members of the public without distinction based on sexual orientation.

III. CONCLUSION

For the foregoing reasons, *amicus curiae* Lambda Legal Defense and Education Fund, Inc. respectfully requests that this Court affirm the decision of the New York Division of Human Rights.

Respectfully submitted this 30th day of July, 2015.



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STATE OF NEW YORK)

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On the 30th day of July, 2015, I served a true copy of the annexed BRIEF OF AMICUS CURIAE LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. by overnight delivery service to the following, pursuant to CPLR 2103(b)(6):

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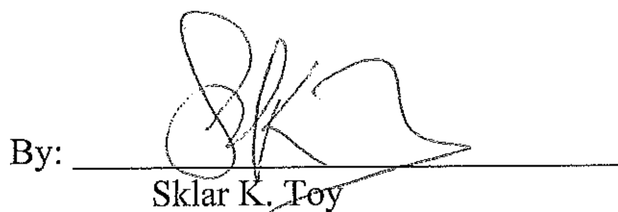

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