Case No. 520410
Rensselaer County Index No. 248068

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

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

Appellants,

- against -

Melisa McCarthy, Jennifer McCarthy, and the New York State Division of Human Rights,

Respondents.

BRIEF FOR *AMICUS CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF RESPONDENTS

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**Admitted in the District of Columbia only*

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Interest of *Amicus Curiae*

Americans United for Separation of Church and State ("Americans United") is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is twofold: (1) to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United was founded in 1947 and has more than 120,000 members and supporters across the country.

Americans United has long supported reasonable accommodations of religious practice. *See, e.g.*, Brief of Americans United for Separation of Church and State as *Amicus Curiae* in Support of Petitioner, *Holt v. Hobbs*, 135 S. Ct. 853 (2015), 2014 WL 2361896 (supporting exemption from prison grooming policy for Muslim prisoner); Brief for Americans United for Separation of Church and State and American Civil Liberties Union as *Amici Curiae* Supporting Petitioners, *Cutter v. Wilkinson*, 544 U.S. 709 (2005), 2004 WL 2945402 (supporting religious accommodations for prisoners). Consistent with its support for the separation of church and state, however, Americans United opposes religious exemptions that harm innocent third parties.

That concern is especially salient when the purported accommodation or exemption results in discrimination against a class of people that historically has been the target of religious and moral disapproval. In oppose religious exemptions to antidiscrimination law, Americans United submitted an *amicus curiae* brief to the Colorado Court of Appeals in a case that, like this one, involves a commercial business that refused to provide equal service to gay customers who were planning their wedding. *See* Brief of *Amici Curiae* Americans United for Separation of Church and State and Freedom From Religion Foundation in Support of Petitioners-Appellees, *Masterpiece Cakeshop, Inc. v. Craig*, No. 2014CA1351 (Colo. Ct. App. Feb. 13, 2015)

(supporting application of antidiscrimination law to commercial bakery that refused to sell wedding cake to gay customer).

Introduction

New York and other states have enacted antidiscrimination laws to ensure that gay and lesbian customers will not endure "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 250 (1964). As with discrimination on the basis of race, nationality, or religion, allowing commercial businesses to withhold goods and services from gay and lesbian customers would undermine the legislature's goal of ensuring "that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state." N.Y. Exec. Law § 290(3).

Appellants Liberty Ridge Farm, LLC, and its owners, Cynthia and Robert Gifford (collectively "Liberty Ridge Farm" or "the Farm") argue that the First Amendment allows them to deny service to same-sex couples seeking to rent farmland as a venue for their weddings. In seeking a First Amendment right to discriminate, the Farm's owners invoke their "belie[f] that marriage is a religious union between one man and one woman under God," and claim that serving same-sex couples on the same terms as opposite-sex couples would "communicate[] their support for [the couples' weddings] and closely associate[] them with the messages expressed at those ceremonies." Appellants' Br. at 3, 33.

But if this argument were sufficient to excuse the Farm—a for-profit business that markets its services to the public at large—from complying with New York's antidiscrimination statute, a host of other businesses could engage in unlawful discrimination as well. This argument would apply, moreover, not only to discrimination on the basis of sexual orientation,

but also to refusals to provide service on the basis of race, national origin, and religion. The state's goal of protecting equal access to the commercial marketplace, and protecting customers from the indignity of invidious discrimination, would be undermined.

These concerns are more than hypothetical. Many other businesses have raised similar First Amendment defenses to flagrant violations of antidiscrimination laws. The owners of an Iowa art gallery argued that because gay couples' "wedding ceremonies … contradict their religious understanding of marriage," requiring the gallery to provide wedding venue and planning services on an equal basis would violate their rights to freedom of speech, freedom of religious exercise, and freedom of association. Verified Pet. at ¶ 58, *Odgaard v. Iowa Civil Rights Comm'n*, No. CVCV046451 (Iowa Dist. Ct. Oct. 7, 2013), http://bit.ly/1ECYBFp. A commercial photographer in New Mexico maintained that because her business involved "an expressive art form" and she "would prefer not to send a positive message about same-sex weddings," her free-speech and free-exercise rights entitled her to refuse to photograph a lesbian couple's wedding. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 63 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). A Washington florist cited her religious views in asserting free-speech and free-exercise rights to refuse to "use her professional skill to make an arrangement of flowers and other materials for use at a same-sex wedding." *See State v. Arlene's Flowers*, No. 13-2-00871-5 (Wash. Super. Ct. Jan. 7, 2015) (order on summary judgment motions), http://bit.ly/1CsAIQd. And bakeries in Colorado and Oregon have claimed that being required to sell wedding cakes to gay and lesbian customers would unconstitutionally burden their free exercise of religion and compel them to express support for same-sex couples' marriages. *See In the Matter of Klein*, Nos. 44-14 & 45-14 (Or. Bureau of Labor and Indus. July 2, 2015) (opinion and order) at 85–86, http://1.usa.gov/1dCsri5; *Craig v. Masterpiece Cakeshop, Inc.*, No. CR

2013-0008 (Colo. Office of Admin. Cts. Dec. 6, 2013) (initial decision), http://bit.ly/IWNwFt.

Under the Farm's reasoning, each of these businesses would be entitled to ignore a law shielding protected classes from demeaning discrimination. Indeed, the Farm's justification "might be used to refuse to provide any services at all to a vast array of individuals for fear of promoting objectionable lifestyles or practices." Mark Strasser, *Speech, Association, Conscience, and the First Amendment's Orientation*, 91 Denv. U. L. Rev. 495, 530 (2014). Restaurants, hotels, hairdressers, clothiers, and other businesses whose proprietors object to serving same-sex couples (or interracial couples, for that matter) would be entitled to violate antidiscrimination law with impunity. *See id.* at 529–30; Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, Engage: J. Federalist Soc'y Prac. Groups, Sept. 2011, at 12, 15–16.

In short, accepting the Farm's argument would allow nearly any business alleging similar concerns to discriminate as it pleased. Gay men, lesbians, and members of other protected classes would not know which businesses they could patronize, and could not expect the law to consistently protect their rights to access public accommodations on the same terms as other citizens. In some communities, same-sex couples "might be forced to pick their merchants carefully, like black families driving across the South half a century ago." Wilson & Singer, *supra*, at 16–17. Nothing in the First Amendment—not the right to free speech, not the right to free exercise, and not the right to association—requires such retrogression.

Argument

The First Amendment "preserve[s] an uninhibited marketplace of ideas," *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969), and protects from official control "the sphere of intellect and spirit" of the American people, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). It does not empower commercial entities to violate neutral, generally applicable laws protecting vulnerable citizens from discrimination. Virtually all public accommodations seeking

a First Amendment right to violate antidiscrimination statutes have lost in court. *See Elane Photography*, 309 P.3d at 63 (commercial photography company); *In the Matter of Klein*, Nos. 44-14 & 45-14 (opinion and order) at 3 n.2, 96, 105 (bakery); *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Civil Rights Comm'n May 30, 2014) (final agency order), http://bit.ly/1SdmcPi (bakery); *N. Coast Women's Care Med. Grp. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959, 967–68 (Cal. 2008) (medical doctors); *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 6145-09 (N.J. Div. On Civil Rights Oct. 22, 2012) at 11, http://bit.ly/1AUGgCu (rented wedding venue); *see also* Grant Rogers, *Grimes' Gortz Haus to Stop All Weddings in Wake of Discrimination Complaint*, Des Moines Register, Jan. 28, 2015, http://dmreg.co/1zFij28 (reporting that gallery owners settled Iowa Civil Rights Commission complaint by agreeing not to host only straight couples' weddings).[1]

As it should be. The various parts of the First Amendment speak with one voice: a secular commercial business that provides services to the public has no free-speech, free-exercise, or free-association right that would exempt it from a legal requirement that it treat customers of all sexual orientations equally.

I. Freedom of Speech Does Not Excuse Compliance with Antidiscrimination Laws.

New York's antidiscrimination law neither interferes with the Farm's symbolic speech about marriage nor compels the Farm to speak.

[1] In one case, a judge in Kentucky concluded that because a promotional printing company did not know or inquire about a customer's sexual orientation, it did not violate an antidiscrimination ordinance by refusing to print t-shirts for a LGBT pride festival; the judge went on to conclude that if the ordinance had applied, it would have violated the company's free-speech and free-exercise rights. *See Hands On Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm'n*, No. 14-CI-04474 (Fayette Circuit Ct. Apr. 25, 2015) (order granting summary judgment), http://bit.ly/1L3ql8f. But that decision is currently on appeal.

A. Antidiscrimination laws do not unconstitutionally restrict symbolic speech.

Antidiscrimination statutes like New York's do not burden or restrain business owners' symbolic speech. Neither accepting or turning away customers nor providing a rented space or event support to customers is symbolic speech protected by the First Amendment.

While "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—…such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin,* 490 U.S. 19, 25 (1989). Courts do not label "an apparently limitless variety of conduct" as "'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Instead, courts examine not only whether an actor intends to convey a message, but also whether "the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

Whatever the Farm's motives for refusing to rent their wedding venue to same-sex couples, the U.S. Supreme Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), makes clear that the *act* of limiting access to straight couples would not itself be considered symbolic speech. In *FAIR*, a coalition of law schools wished to exclude military recruiters from their on-campus employment fairs to express their disapproval of the military's discrimination against openly gay candidates. *Id.* at 66. The Supreme Court rejected the schools' First Amendment challenge: "[u]nlike flag burning," the mere act of "treating military recruiters differently from other recruiters" was "not inherently expressive." *Id.* Instead, the "actions were expressive only because the law schools accompanied their conduct with speech explaining it"; without that accompanying speech, "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether

the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.* Even a legislator's act of voting for or against a proposed statute falls short of qualifying as symbolic speech. Although the vote "*discloses* … that the legislator wishes (for whatever reason)" that a measure be adopted, the act of voting itself "symbolizes nothing" and is not "an act of communication" conveying the reasons for the vote. *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011) (emphasis in original).

Likewise, someone who observes that a business rented its space to a straight couple or declined to rent to a gay couple would not know whether the business's conduct took place because of its owners' views about marriage equality, because the venue was fully booked and could not accommodate both events, or because some of the potential customers chose to hold their wedding ceremonies at other locations. Therefore, despite the assertion by the Farm's owners that "they express [their] view about marriage throughout their lives," reserving a plot of land for straight couples' weddings does not communicate anything, let alone the owners' belief that "marriage is the union of a man and a woman." Appellants' Br. at 32. Only the Farm's accompanying speech can communicate this sentiment, and "[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien.*" *FAIR*, 547 U.S. at 66. Likewise, "the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech." *Nev. Comm'n on Ethics*, 131 S. Ct. at 2350 (emphasis in original).

The Farm's assertion that "[a] marriage ceremony is an inherently expressive event" does not change this analysis or transform all of the Farm's wedding-related conduct into protected

speech. Appellants' Br. at 32. Even the American flag, which has clear and powerful symbolic meanings, is not so inherently expressive that a court would "automatically conclude[] that any action taken with respect to our flag is expressive." *Texas v. Johnson*, 491 U.S. 397, 405 (1989). Rather, in determining whether an action is itself symbolic speech, the Supreme Court "consider[s] the context in which [the action] occurs." *Id.* For instance, merely wearing a uniform with a patch of the American flag is not symbolic speech if there is "no evidence that observers would likely understand the patch or the wearer to be *telling* them anything about the wearer's beliefs." *Troster v. Pa. State Dep't of Corrections*, 65 F.3d 1086, 1092 (3d Cir. 1995); *see also, e.g.*, *Cotto v. United Tech. Corp.*, 738 A.2d 623, 633 (Conn. 1999) ("Even though the flag is a symbol of government, [not] every work assignment involving the flag implicates an employee's constitutional rights of free speech.").

However symbolic a wedding ceremony may be to a couple or its invited guests, the Farm's preferred course of conduct—providing a wedding venue and services to straight customers but not to gay or lesbian ones—does not actually communicate the farm owner's personal philosophy of marriage. *See Elane Photography*, 309 P.3d at 68 ("While photography may be expressive, the operation of a photography business is not."). No observer would understand the Farm's commercial provision of land and services to be "telling them anything about the [Farm's] beliefs." *Troster*, 65 F.3d at 1092 (emphasis omitted).

B. Antidiscrimination laws do not unconstitutionally compel the Farm's speech.

Just as antidiscrimination law does not prevent a business from speaking, it does not force a business to say anything either. The New York statute regulates the Farm's conduct; it does not compel the Farm or its owners to speak.

Like the regulation at issue in *FAIR*, New York's law does not compel symbolic speech because there is no likelihood that an entity's compliance with the law would be viewed as

expression of a message. An observer who sees a business providing service to both gay and straight customers might conclude that the business wishes to increase its revenue by serving as many customers as possible. Or that it declined to inquire about its customers' sexual orientations because it does not consider that information relevant to its commercial transactions. Or that it wishes to comply with antidiscrimination law. *See FAIR*, 547 U.S. at 66 (observer would not be able to determine law schools' motives or views). An observer could discern a motive for these actions only from the business's accompanying speech, and the statute does not prevent businesses from notifying customers that it serves people of all orientations on an equal basis because it is required to do so as a matter of law. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (no compelled speech where business owner "could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law"); *Elane Photography*, 309 P.3d at 69 (same).

Even without any express disclaimer, New York law's prohibition against discrimination by *all* public accommodations makes it especially unlikely that the public would view a particular company's compliance as an expression of its owners' personal views. As the California Supreme Court explained in a case enforcing that state's prohibition on sexual-orientation discrimination, "simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose." *N. Coast Women's Care Med. Grp.*, 189 P.3d at 967. If obedience were deemed constitutionally protected speech, "[s]uch a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition." *Id.*

The Farm cannot change the result by claiming that weddings are "inherently expressive." Appellants' Br. at 32. A photography company's practice of "sell[ing] its expressive

services to the public" does not exempt it from antidiscrimination laws. *Elane Photography*, 309 P.3d at 66. Bakeries that provide wedding cakes to same-sex couples are not forced "to engage in expression of a message." *In the Matter of Klein*, Nos. 44-14 & 45-14 (Or. Bureau of Labor and Indus. Jan. 29, 2015) (interim order) at 44, http://bit.ly/1uYSHWJ; *see also Craig v. Masterpiece Cakeshop*, No. CR 2013-0008 (initial decision) at 8. Whether or not a business provides services with expressive elements, the antidiscrimination law does not require the business to express its support for marriage equality. *Elane Photography*, 309 P.3d at 64, 66–67; *In the Matter of Klein*, Nos. 44-14 & 45-14 (interim order) at 48–49; *Craig v. Masterpiece Cakeshop*, No. CR 2013-0008 (initial decision) at 8.

Businesses do not receive the right to discriminate from *Wooley v. Maynard*, 430 U.S. 705 (1977), in which the Supreme Court held that a state could not require a resident to display the message "Live Free or Die" on his private vehicle's license plate. *See Elane Photography*, 309 P.3d at 64; *In the Matter of Klein*, Nos. 44-14 & 45-14 (interim order) at 48–49; *Craig v. Masterpiece Cakeshop*, No. CR 2013-0008 (initial decision) at 8. *Wooley* differs from this case in three ways.

First, this case involves the regulation of a commercial business that is subject to the public accommodations law by virtue of its chosen line of activity, expressive or otherwise. *See Elane Photography*, 309 P.3d at 66 ("the fact that [Elane Photography's] services require photography stems from the nature of Elane Photography's chosen line of business"). In *Wooley*, conversely, displaying a message was "a condition to driving an automobile[,] a virtual necessity for most Americans." 430 U.S. at 715.

Second, in *Wooley* the government commandeered citizens' personal vehicles and essentially "use[d] their private property as a 'mobile billboard' for the State's ideological

message." 430 U.S. at 715. The antidiscrimination statute, however, applies only to businesses that open their doors to the public. The Farm complains that gay couples' weddings would occur "in a fenced-in area that functions as the family's backyard," Appellants' Br. at 28, but that is because the Farm's owners chose to rent that space to customers for their weddings. Appellants' Br. at 28.

Third, the antidiscrimination law does not specify any message for dissemination, let alone require one. The Farm is not required to proclaim any particular belief about gay people or marriage on its property, its owners' personal belongings, or the company's websites, signs, or promotional materials. *See In the Matter of Klein*, Nos. 44-14 & 45-14 (interim order) at 49; *Elane Photography*, 309 P.3d at 68. In *Wooley*, conversely, the state's message was affixed to a personal vehicle "readily associated with its operator." 430 U.S. at 717 n.15. And while *Wooley* involved a single message, the statute at issue here requires public accommodations to serve many different customers. *Cf. Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981) (by creating a forum in which "many views are advocated," a university "does not thereby endorse or promote any of the particular ideas aired there"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (where school facilities "had repeatedly been used by a wide variety of private organizations," there is "no realistic danger that the community would think that the [school] was endorsing religion" by allowing religious event).

While the people getting married will find meaning in their wedding ceremony, the Farm offers no evidence that its customers and their wedding guests will understand the ceremony to express the views of the Farm rather than those of the happy couple. Customers rent the Farm's land and pay for logistical support for their own enjoyment and use, not because they want to help the Farm express itself. *Cf. Elane Photography*, 309 P.3d at 69 ("It is well known to the

public that wedding photographers are hired by paying customers and … may not share the happy couple's views."). A Massachusetts court made this clear in rejecting a family-law attorney's arguments that the freedom of speech allowed her to refuse male clients. At issue was "the client's access to legal rights and remedies, rather than use of [the attorney's] speech and her law office as a vehicle for [the attorney's] own expression." *Nathanson v. Commonwealth of Mass. Comm'n Against Discrimination*, 16 Mass. L. Rptr. 761, at *6 (Mass. Super. Ct. 2003).

Wedding guests are able to understand the difference between messages that the Farm expresses on its own and customers' messages it accommodates because it is required to do so. Even "high school students can appreciate the difference between speech a school sponsors and speech the school permits pursuant to an equal access policy." *FAIR*, 547 U.S. at 65; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (attribution concern "not a plausible fear"). The same goes for viewers of cable television: "Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994); *see also Nathanson*, 16 Mass. L. Rptr. 761, at *6 ("A private attorney, when representing a client, operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself."). Unconstitutional compelled speech "involve[s] direct government interference with the speaker's own message, as opposed to a message-for-hire." *Elane Photography*, 309 P.3d at 66.

II. The Free Exercise Clause Does Not Excuse Compliance with Antidiscrimination Laws.

The Farm fares no better under the First Amendment's Free Exercise Clause. A commercial business may not engage in discriminatory conduct, even when motivated by

religion.

Although the rules are different today, laws substantially burdening religious exercise used to be subject to strict scrutiny, even if the laws applied equally to non-religious conduct. *Sherbert v. Verner*, 374 U.S. 398, 403–04, 406 (1963). Even under this earlier, more rigorous inquiry, courts universally rejected arguments that the Free Exercise Clause justified the violation of antidiscrimination laws. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court rejected a free-exercise defense of a university's discriminatory admissions practices, even though "the challenged practices … were based on a genuine belief that the Bible forbids interracial dating and marriage." *Id.* at 602 n.28. Likewise, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the Court heard the argument that requiring a restaurant to serve African-American patrons "constitutes an interference with the 'free exercise of the Defendant's religion.'" *Id.* at 403 n.5. The Court called that defense "patently frivolous." *Id.* at 403 n.5 (citation omitted).

The same arguments have been rejected in the context of employment. In *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), the Fourth Circuit enforced equal-pay laws against an employer that believed that "the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family." *Id.* at 1392, 1397–98. And in *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610 (9th Cir. 1988), the Ninth Circuit enforced Title VII's prohibition on religious discrimination despite the employer's argument that its practices were required by "the Bible and their covenant with God." *Id.* at 620–21.

So even under the earlier, more restrictive standards, the Free Exercise Clause would have provided the Farm with no defense to violations of New York's antidiscrimination law. But modern Free Exercise Clause cases make the Farm's arguments even more futile. In *Employment*

Division v. Smith, 494 U.S. 872 (1990), the Supreme Court held that religiously neutral, generally applicable laws do not implicate the Free Exercise Clause. *Id.* at 878–79. Under *Smith*, a law that does not target religious exercise "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Antidiscrimination laws like New York's are neutral and generally applicable, and so they easily survive *Smith*'s relaxed standard. A law lacks religious neutrality if its "object … is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. The "object" of proscribing discrimination on the basis of sexual orientation, as with race, sex, or national origin, is the advancement of a value "embodied in our Bill of Rights—the respect for individual dignity in a diverse population." *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 32 (D.C. 1987). The Farm does not suggest, and nothing else indicates, that the legislature prohibited discrimination based on sexual orientation for the purpose of burdening religious exercise.

The requirement of religious neutrality is "interrelated" with *Smith*'s second requirement: that the law apply generally. *Lukumi*, 508 U.S. at 531. New York's antidiscrimination law is religiously neutral and applies generally: it forbids all sexual-orientation discrimination, whether motivated by religion, tradition, customers' views, or personal discomfort. It applies to a wide range of commercial businesses but includes an exception for any "religious corporation," indicating that the statute considers any such entity to "to be in its nature distinctly private" and thus exempt from antidiscrimination requirements. N.Y. Exec. Law § 292(9). This exception to the law's otherwise broad application is rooted in the First Amendment's longstanding "special solicitude to the rights of religious organizations"

and concern for the autonomy of churches. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012). And it serves to ensure that the law's burdens fall upon religious exercise to a lesser degree than they would otherwise, which itself tends to demonstrate the law's compliance with the First Amendment. *See Locke v. Davey*, 540 U.S. 712, 724–25 (2004) (availability of scholarships for many facets of religious education negates suggestion that prohibiting funding for pursuit of devotional theology degree reflects unconstitutional animus toward religion). Because the law does not thus "selective[ly] … impose burdens only on conduct motivated by religious belief," *Lukumi*, 508 U.S. at 543, it is generally applicable for purposes of the Free Exercise Clause.

Antidiscrimination laws generally share the characteristics described above, and courts have repeatedly concluded that they are neutral and generally applicable and thus protected from free-exercise challenges. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 697 n.27 (2010) (school policy forbidding discrimination based on sexual orientation was "of general application" and only "incidentally burden[ed] religious conduct," and so Christian student group could not "moor its request for accommodation to the Free Exercise Clause"); *Christian Legal Soc'y v. Eck*, 625 F. Supp. 2d 1026, 1051 (D. Mont. 2009) (similar); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 538–39 (W.D. Ky. 2001) (rejecting free-exercise challenge to ordinance banning employment discrimination based on sexual orientation), *vacated on other grounds*, 53 F. App'x 740 (6th Cir. 2002); *Elane Photography*, 309 P.3d at 75 (rejecting wedding photographer's free-exercise challenge to application of antidiscrimination law); *N. Coast Women's Care Med. Grp.*, 189 P.3d at 967 (rejecting free-exercise challenge to law requiring doctors to provide insemination treatment to lesbian patient); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279

(Alaska 1994) (rejecting free-exercise challenge to law prohibiting landlords from discriminating on the basis of marital status); *Smith v. Fair Emp't & Hous. Com.*, 913 P.2d 909, 919 (Cal. 1996) (same). "Because protections for same-sex couples do not specifically target religious conduct or motives, the Free Exercise Clause offers no support for exemption claims." Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J. L. & Soc. Pol'y 274, 287–88 (2010).[2]

The Free Exercise Clause has been successfully invoked in the manner urged by the Farm only when necessary to preserve associational values unique to religious institutions. Thus, in *Hosanna-Tabor*, 132 S. Ct. 694, the Supreme Court held that the Clause prohibited governmental interference with the selection of a religious community's leadership. As the Court observed:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.

Id. at 706. A commercial wedding venue may not justify refusing service to same-sex couples on the same basis. No comparable religious-exercise values are at stake for a commercial establishment, which caters to customers rather than congregants. *See id*. The Supreme Court explained that a "labor union, or a social club" does not get the same free-exercise protections as "the Lutheran Church." *Id*.

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[2] Courts' have rejected Free Exercise Clause defenses to antidiscrimination law even outside the context of public accommodations. *See, e.g.*, *King v. Governor of N.J.*, 767 F.3d 216, 241–43 (3d Cir. 2014) (upholding ban on purportedly therapeutic efforts to change the sexual orientation of gay minors as applied to religiously motivated counselors); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 879–80 (11th Cir. 2011) (upholding requirement that graduate counseling student with religious objection comply with professional ethics rules requiring treatment of lesbians and gay men); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1188 (9th Cir. 2006) (upholding school policy forbidding student to wear shirt displaying messages denigrating gay people, despite student's religious motivation), *vacated on other grounds*, 549 U.S. 1262 (2007).

As the Supreme Court observed in *Smith*, "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and thus "cannot afford the luxury" of permitting religious objectors to shrug off "civic obligations" whenever they conflict with religious beliefs. 494 U.S. at 888. Whether motivated by religious belief or something else, public accommodations like the Farm may not shed their legal responsibility to respect the "individual dignity" of protected classes of customers. *Gay Rights Coal. of Georgetown Univ. Law Ctr.*, 536 A.2d at 32.

III. Freedom of Association Does Not Excuse Compliance with Antidiscrimination Laws.

As with free speech and free exercise, the freedom of association does not permit the Farm to discriminate against gay and lesbian customers. The Farm has no defense under either the freedom of intimate association or the freedom of expressive association. Neither variety of protected association is infringed when a state prohibits commercial enterprises from discriminating against gay and lesbian customers.

A. Antidiscrimination statutes do not burden the right to intimate association.

The First Amendment provides "certain kinds of *highly personal relationships* a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (emphasis added). Despite the Farm's insistence that it "would be intimately associated with" a same-sex couple's wedding "were it to occur at the farm," Appellants' Br. at 33, the interactions between the Farm and its paying customers are unlike the intimate, personal relationships protected by the First Amendment.

Intimate association arises most often from relationships related to the creation and sustenance of a family, including relationships between spouses or the relationship between a parent and a child. These "involve deep attachments and commitments to the necessarily few

other individuals with whom one shares … distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 619–20. In determining whether the right of intimate association extends beyond the family, courts "consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987). Protected associations are distinguished by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Roberts*, 468 U.S. at 620. Under this analysis, some courts have extended protection to close personal friendships or unmarried couples' romantic relationships. *See, e.g., Matusick v. Erie Cnty. Water Auth.*, 757 F.3d 31, 58–59 (2d Cir. 2014) (engaged couple); *Anderson v. City of LaVergne*, 371 F.3d 879, 882 (6th Cir. 2004) (unmarried couple living together in romantically and sexually monogamous relationship); *Akers v. McGinnis*, 352 F.3d 1030, 1039–40 (6th Cir. 2003) (close personal friendship).

Those cases do not help the Farm. For "an association lacking these [insular] qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection." *Roberts*, 468 U.S. at 620. The Supreme Court considers it "clear beyond cavil" that patrons of a commercial dance hall, for example, are not protected by the right to intimate association. *See Stanglin*, 490 U.S. at 24. Even the persistent, close relationships between coworkers, members of a sports team and their coaches, and psychoanalysts and their patients are not intimate associations. *See Roberts*, 468 U.S. at 620; *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1051–52 (5th Cir. 1996); *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000). The relationships between the Farm and its paying customers are even more casual and arm's-length.

B. Antidiscrimination statutes do not burden the freedom of expressive association.

The First Amendment also protects the right to expressive association, because "[t]he

right to speak is often exercised most effectively by combining one's voice with the voices of others." *FAIR*, 547 U.S. at 68. Because the right to expressive association is intended to safeguard the underlying right to speak, an organization asserting a violation of its expressive association rights must first demonstrate that it engages in expressive activity through its interactions, and then must also show that the alleged violation significantly impacts the organization's ability to advocate its viewpoints. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 650 (2000). Businesses like the Farm cannot meet either of these requirements.

First, "a group must engage in some form of expression." *Id.* at 648. While political-advocacy groups clearly satisfy this standard, *see, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), "the right of expressive association [also] extends to groups organized to engage in speech that does not pertain directly to politics," *Stanglin*, 490 U.S. at 25. The Boy Scouts of America, for example, engage in expressive activity by seeking to transmit a particular system of values to young people, through both what they say and what they do. *Boy Scouts of Am.*, 530 U.S. at 649–50. Groups like the Jaycees are likewise organized to "engage in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment." *Roberts*, 468 U.S. at 626–27.

Enterprises like the Farm, however, are in the business of providing goods and services in exchange for payment, not of bringing people together to promote particular viewpoints or messages. Although the Farm's interactions with customers "might be described as 'associational' in common parlance … they simply do not involve the sort of expressive association that the First Amendment has been held to protect." *Stanglin*, 490 U.S. at 24. Like those who patronized the commercial dance hall at issue in *Stanglin*, the customers who rent the Farm's facilities are mostly strangers to one another and "are not members of any organized

association; they are patrons of the same business establishment." *Id.*

Second, even if customers affiliate with a business to express a shared message, the right to expressive association would be implicated only by a requirement that imposed "serious burdens" on the group's "collective effort on behalf of its shared goals." *Roberts*, 468 U.S. at 622, 626. A majority of the Supreme Court held, for example, that requiring the Boy Scouts—an organization that exists to inculcate certain values in youth—to appoint openly gay adults as troop leaders would "significantly burden" the Boy Scouts' ability to convey, to the organization's young members, that homosexuality is immoral. *Dale*, 530 U.S. at 653. Likewise, requiring a parade sponsor to include a banner with which it disagrees—a banner that spectators will view as the "sponsor's speech itself"—infringes the sponsor's decision not to use the parade to express particular views. *See id.* at 653–54 (discussing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557 (1995)).

But where such a substantial burden does not exist, an entity cannot "erect a shield against laws requiring access simply by asserting that mere association would impair its message." *FAIR*, 547 U.S. at 69. Even groups like the Rotary Club—a non-profit organization with a longstanding policy of allowing full membership to men only—have no First Amendment right to refuse female members if they cannot "demonstrate that admitting women … will affect in any significant way the existing members' ability to carry out their various purposes." *Rotary Int'l*, 481 U.S. at 548; *see also Roberts*, 468 U.S. at 627 ("no basis in the record for concluding that admission of women … will impede the organization's ability to engage in … protected activities or to disseminate its preferred views"); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (law firm did not establish that its protected activity "would be inhibited by a requirement that it consider [a woman lawyer] for partnership on her merits").

A requirement that commercial enterprises serve gay and lesbian customers on the same terms as straight ones does not impede the businesses' ability to engage in any of their own protected activities. A retail business's interactions with its customers are so limited in scope and duration that observers are not likely to confuse the views or messages of a customer for those of the business. In *FAIR*, the Supreme Court held that the expressive association rights of law schools receiving federal funds were not infringed by a requirement that the schools allow military recruiters the same access to their campuses as other recruiters. 547 U.S. at 70. Although the schools "'associate' with military recruiters in the sense that they interact with them[,] … recruiters are not part of the school." *Id.* at 69. They are, instead, "outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." *Id.* In the same way, members of the public rent the Farm's facilities in order to have a nice wedding venue, not to adopt the ideological identity of the Farm or its owners.

Unsurprisingly, courts have routinely rejected association-based challenges to laws requiring individuals or entities to engage in arm's-length business transactions. *See, e.g., Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 269–70 (D.C. Cir. 2014) ("interacting with coverage providers that must make contraceptive coverage available … does not make those providers part of the organization's expressive association or otherwise impair its ability to express its message"); *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (requiring groups to coordinate with City officials to arrange for use of space inside City Hall does not significantly burden right of association); *cf. Fields v. City of Tulsa*, 753 F.3d 1000, 1012 (10th Cir.) (police officer's freedom of association not infringed by order regarding attendance at Islamic Society event because officer "was never required to be anything more than

an outsider with respect to the Islamic Society"), *cert. denied*, 135 S. Ct. 714 (2014).

New York's antidiscrimination law requires the Farm to engage in commercial transactions with gay and straight customers alike—nothing more. That transaction is neither intimate nor sufficiently expressive to warrant First Amendment protection.

Conclusion

The order of the Division of Human Rights should be affirmed.

Respectfully submitted,

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