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

CYNTHIA GIFFORD, ROBERT GIFFORD, and LIBERTY RIDGE FARM, LLC,	:	
	:	Case No. 520410
Appellants,	:	
- against -	:	
MELISA MCCARTHY, JENNIFER MCCARTHY, and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,	:	
Respondents.	:	

AMICI CURIAE BRIEF OF THE MAIN STREET ALLIANCE AND MAKE THE ROAD NEW YORK IN SUPPORT OF RESPONDENTS

MAYER BROWN LLP
Hannah Y.S. Chanoine
Alex O. Kardon
Rory K. Schneider
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500

Counsel for amici curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

Article 15 of New York's Executive Law ensures that members of certain protected classes—including gay, lesbian, and bisexual residents and visitors—are not stigmatized or treated like second-class citizens. It prohibits businesses that provide goods or services to the public from discriminating against members of those classes by refusing to accommodate them. Broad and uniform application of antidiscrimination laws like Article 15 is good for business and the New York economy as a whole. Perforating Article 15 with exceptions that provide an excuse for discrimination, on the other hand, would foster a reputation for divisiveness and intolerance that would drive talent and customers away from this State and its business community. The recognition of exceptions to Article 15's clear rule of nondiscrimination would also make it difficult for small businesses to know how to conform their conduct to the law.

In this case, Appellants categorically refused to host same-sex wedding ceremonies at their place of business, Liberty Ridge Farm, even though they were perfectly willing to offer out that space to any interested opposite-sex couples for their wedding ceremonies. Appellants defend this policy by arguing, *intra alia*, that they do not wish to communicate their approval for the marriage of same-sex couples by renting out their property for the weddings solemnizing those marriages, that the farm is not a public accommodation for purposes of wedding

ceremonies, and that the policy did not violate Article 15 because it was based on objections to same-sex marriage instead of sexual orientation. But if Article 15's prohibition on sexual-orientation discrimination is to have any teeth, the Court must not credit these arguments.

In fact, if Appellants were correct that they cannot be forced to treat same-sex couples on equal terms with opposite-sex couples because they have the right to control the message sent by their commercial associations, all public-accommodation law would be a nullity. For if Appellants' reasoning were correct, one party venue could refuse to rent to mixed-race couples to express beliefs about the sin of miscegenation. Another could refuse to host birthday parties for children of unwed mothers to express views about the sin of premarital sex. Still another could refuse to host Bar Mitzvahs to express anti-Semitic sentiments. It is precisely this sort of status-based refusal of service that Article 15 bars. And properly so.

Nothing in Article 15 prevents New York businesses from contributing to the marketplace of ideas. Businesses and their owners with strongly held views are generally free to express those views. They can generally brand themselves in whatever manner they like. Far from compelling businesses to speak the government's anti-discriminatory message, Article 15 *removes* any possible presumption that the mere act of selling a good or service on equal terms to all comers is by itself the communication of any idea whatever about any customer.

When a New York business offers its property to the public for events to generate profit, the business is a place of public accommodation, a status that comes with certain obligations. In New York, for more than a decade, places of public accommodation have been obliged to contract with gay, lesbian, or bisexual patrons on the same terms as similarly situated heterosexual patrons. This obligation cannot be brushed aside with the excuse that a denied good or service was denied because of an objection to "same-sex marriage" rather than because of sexual-orientation discrimination.

The administrative law judge here appropriately concluded that Appellants violated Article 15 by refusing to host the McCarthys' same-sex wedding ceremony; and the New York Human Rights Commission properly adopted the ALJ's decision. This Court should affirm.

INTEREST OF THE *AMICI CURIAE*

The Main Street Alliance (the "Alliance") is a national network of state-based small-business coalitions that provide members with a platform to express views on issues affecting their businesses and local economies. The Alliance has affiliates in ten states, including New York, and represents the interests of more than 25,000 small business owners nationwide. Initially formed in 2008 by the Alliance for a Just Society to provide a voice for small businesses in the healthcare-reform debate, the Alliance has since expanded its work to encompass a

broad range of important issues affecting the business community, including matters relating to civil rights and the lawful and fair treatment of customers and patrons.

Small Business United is the Alliance's New York affiliate. It is a small business owner membership program of Make the Road New York, a community organization of more than 15,000 members that serves the State's poor and working class communities. Small Business United consists of 200 small business owners in Brooklyn, Queens, and Staten Island that together provide a diverse array of goods and services to the people of this State.

As organizations intimately familiar with the concerns of small businesses serving the public, the Alliance and Make the Road understand that the broad, uniform application of Article 15 and other antidiscrimination laws is good for the people and the economy of this State. When same-sex couples have reason to worry that some businesses lining Main Street may reject their patronage, the entire business community suffers. The Alliance, Make the Road, and their members strongly believe that consistent and reliable enforcement of antidiscrimination principles is essential to the vitality of New York's business districts and its public spaces in general. Accordingly, *amici* have a strong interest in urging this Court to affirm the decision below.

ARGUMENT

For over a century, New York has been a leader in working to ensure equal treatment of all people by stamping out discrimination in places of public accommodation. The trend toward ever-expanding protections against invidious discrimination has been good for this State, its people, and the businesses that serve them. These long-standing efforts by the Legislature, courts, and citizens of New York should not be undermined by the creation of unwarranted exceptions to the State's straightforward public-accommodations requirements. Neither law nor public policy supports Appellants' bid to create such an exception here.

I. THE BROAD, UNIFORM APPLICATION OF ARTICLE 15 IS CRUCIAL TO THE WELL-BEING OF THIS STATE, ITS CITIZENRY, AND ITS ECONOMY.

A. Article 15's History Reflects The State's Long-Standing Commitment To Preventing Discrimination By Places of Public Accommodation.

New York's leadership in eradicating discrimination is well demonstrated by the evolution of its public-accommodation laws. In 1895, the Legislature enacted New York's first prohibition on discrimination in places of public accommodation, which provided that "[a]ll persons within . . . this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of . . . all . . . places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens." Laws of 1895, ch. 1042, § 1. In keeping with that vision, the Legislature has continually

strengthened and expanded protections against discrimination in places of public accommodation ever since.

In 1913, for example, the law was amended to "give greater efficacy to the policy of the original statute, to forbid the accomplishment of the discrimination barred by the statute, not only by a direct exclusion, but also by . . . indirect means." *Woollcott v. Shubert*, 217 N.Y. 212, 220 (1916); *see* N.Y. CIV. RIGHTS LAW § 40 (McKinney 1916). The amendment specifically targeted "the practice of proprietors . . . to advertise or notify the public and individuals that the advantages and privileges of those places would be refused to persons on account of race or creed." *Woollcott*, 217 N.Y. at 222. Accordingly, the Legislature prohibited public accommodations from "directly *or indirectly* refus[ing], withhold[ing] from or deny[ing] to any person any of [its] accommodations, advantages or privileges . . . on account of race, creed or color." Laws of 1913, ch. 265, § 1 (emphasis added).

In 1945, the Legislature passed the Ives-Quinn Act, which "created in the executive department a commission vested with power 'to eliminate and prevent discrimination because of race, creed, color or national origin either by employers, labor organizations, employment agencies or other persons.'" Terry Lichtash, *Ives-Quinn Act: The Law Against Discrimination*, 19 ST. JOHN'S L. REV. 170, 170 (1945). Though initially geared toward employment discrimination, that legislation was amended in 1952 to cover discrimination in places of public accommodation.

See N.Y. STATE DIV. OF HUMAN RIGHTS, ANNUAL REPORT FY2010-2011, at 2 ("NYSDHR REP.");[1] Lawrence S. Wittner, *Before the U.S. Civil Rights Laws: Anti-Discrimination in New York State*, HUFFPOST (May 25, 2010).[2] And in the years since, New York has continued extending protections to commercial activities in spheres such as housing and credit, and to classifications such as sex and physical disability. *See* NYSDHR REP. 2.

Most relevant here, in 2002, the Legislature added sexual orientation to the list of protected classes covered by the law. *See* Laws of 2002, ch. 1. It recognized that "[t]he opportunity to obtain . . . the use of places of public accommodation . . . without discrimination because of . . . sexual orientation . . . is . . . a civil right." N.Y. EXEC. Law § 291 (McKinney 2010). Article 15 now provides that "[i]t shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of . . . sexual orientation . . ., directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof." *Id.* § 296(2)(a).

---

[1] Available at http://www.dhr.ny.gov/sites/default/files/pdf/AnnualReport2010-2011FINAL.pdf.

[2] Available at http://www.huffingtonpost.com/lawrence-wittner/before-the-us-civil-right_b_585283.html.

B. Uniform Application Of Article 15 Is Good For New York And For The Economic Health Of Its Business Community.

1. Article 15's purpose of providing nondiscriminatory access to public accommodations has served the people and economy of this State well. In part, that is because a state's commitment to and reputation for inclusivity and equal treatment in access to public accommodations creates a positive climate not only for the state's residents but also for the businesses that serve them. The inverse is also true: "[D]iscriminatory situations caus[e] wide unrest and hav[e] a depressant effect on general business conditions in . . . communities." *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (describing congressional debates leading to passage of the Civil Rights Act of 1964). Simply put, broad, uniform enforcement of Article 15 makes New York a more desirable place to live, work, visit, shop, and dine. Thus, enforcement of Article 15 is good not just for the consumers whom it protects but also for the economy more broadly, because it helps create a hospitable environment for businesses, both large and small. *Cf., e.g.*, Mark Berman, *How Apple, the NFL and other big businesses helped kill the Arizona bill*, WASH. POST, Feb. 27, 2014 (explaining how and why businesses advocated against an Arizona law that would have let businesses deny service to LGBT customers).[3]

[3] Available at http://www.washingtonpost.com/news/post-nation/wp/2014/02/27/how-apple-the-nfl-and-other-big-businesses-helped-kill-the-arizona-bill/.

2. Such a hospitable environment is especially important because the growth of minority buying power is greatly outpacing that of the whole market. *See* Alison Kenny Paul et al., *Diversity as an Engine of Innovation*, 8 DELOITTE REV. 108, 110 (2011).[4] Thus, "[i]ncreasingly, retailers and consumer goods companies must embrace diversity as a market force." *Id.* What is more, when public accommodations operate on a nondiscriminatory basis, as New York law requires, it creates a public space in which different people meet, mingle, and exchange ideas. These interactions not only promote a well-informed citizenry, but also help encourage the innovation that New York needs to remain a vibrant economic competitor and to continue to develop as a leader in the high-tech sector and other growth sectors in the national economy.[5]

3. Recently, the State has done comparatively well in emerging from recession and getting on the road to economic recovery and growth. *See* J.P. MORGAN CHASE, COMMERCIAL BANKING GRP., REGIONAL PERSPECTIVES: NEW YORK ECONOMIC OUTLOOK 2 (June 2, 2014) ("JPM REP.") ("New York has

---

[4] Available at http://dupress.com/articles/diversity-as-an-engine-of-innovation/.

[5] *Cf.* Max Nathan & Neil Lee, *Does Cultural Diversity Help Innovation in Cities? Evidence from London Firms*, SERC Discussion Paper No. 69 (Feb. 2011) (finding "small but robust positive effects of management diversity on the development of new products and processes"); Huasheng Gao & Wei Zhang, *Does Workplace Discrimination Impede Innovation?* (June. 2015), *available at* http://www.cicfconf.org/sites/default/files/paper_70.pdf (finding "a negative causal effect of workplace discrimination on corporate innovation").

recovered as well as any state . . . and its job market has fully recovered the losses from the recession.").[6] Key drivers of that success include the finance industry's rebound, *see* JPM REP. 21, and the boom in New York City's high-tech industry, *see* OFFICE OF THE STATE COMPTROLLER, NEW YORK CITY'S GROWING HIGH-TECH INDUSTRY 1 (Apr. 2014) (finding that high-tech job growth during the current economic recovery "has been four times faster than the rate in the rest of the City's economy").[7] These industries and the people whom they employ are vital to this State's continuing economic prosperity. And for many, Article 15 and the inclusive culture that its protections foster are part of what makes New York attractive.

4. The Legislature's extension of Article 15's protections to cover sexual orientation is an appropriate measure for achieving these important ends. As historic bias against lesbian, gay, bisexual, and transgender members of our families and communities continues to wane, the tremendous size of the market for serving LGBT clientele has become more apparent. Nationally, this market is projected to reach $830 *billion* in 2015. Advertising Week, *2015 Should Be the*

---

[6] Available at https://www.chase.com/content/dam/chasecom/en/commercial-bank/documents/newyork-economy.pdf; *see also* WELLS FARGO SEC., ECON. GRP., NORTHEASTERN STATES: 2015 ECONOMIC OUTLOOK 8 (Apr. 14, 2015), *available at* https://www08.wellsfargomedia.com/downloads/pdf/com/insights/economics/regional-reports/Northeastern_Economic_Outlook_04142015.pdf.

[7] Available at http://www.osc.state.ny.us/osdc/rpt2-2015.pdf.

Year of LGBT Marketing, Jan. 19, 2015.[8] Reaching and serving this market is thus critical to New York from a business and economic-development standpoint. And that will become only more true in the future. *Diversity as an Engine of Innovation*, *supra*, at 116 (discussing recent studies regarding the LGBT market's buying power, and noting that "industry analysts [] anticipate that this group's spending may increase, despite the country's slow progress in regaining its financial health"). Moreover, many people will eschew businesses and communities that discriminate even if they themselves are not members of the disfavored class. Thus, there were and still are strong economic reasons—not to mention ethical ones—for New York to expand its public-accommodations law to encompass sexual orientation.[9]

---

[8] Available at http://www.theawsc.com/2015/01/19/2015-should-be-the-year-of-lgbt-marketing/. Recognition of the right of same-sex couples to marry can itself have a significant positive effect on a state's economy. A 2009 *Forbes* article estimated that nationwide legalization of same-sex marriage would result in $9.5 billion in additional wedding-related revenues alone. Miriam Marcus, *The $9.5 Billion Gay Marriage Windfall*, FORBES, June 16, 2009, *available at* http://www.forbes.com/2009/06/15/same-sex-marriage-entrepreneurs-finance-windfall.html. New York's experience confirms the profound economic impact of legalizing same-sex marriage: Legalization boosted New York City's economy by $259 million in just the first year. Blake Ellis, *Gay marriage boosts NYC's economy by $259 million in first year*, CNN MONEY, July 24, 2012, http://money.cnn.com/2012/07/24/pf/gay-marriage-economic-impact.

[9] The serious negative economic effects of excluding LGBT individuals from antidiscrimination laws are now equally clear. *See, e.g.*, MICH. DEP'T OF CIVIL RIGHTS, REPORT ON LGBT INCLUSION UNDER MICHIGAN LAW WITH RECOMMENDATIONS FOR ACTION (Jan. 28, 2013), *available at* http://www.michigan.gov/documents/mdcr/MDCR_Report_on_LGBT_Inclusion_

5. In the absence of a broad law requiring inclusiveness in the commercial sphere, a subset of businesses may seek to profit through exclusionary practices. It is unfortunately still the case that some members of the public would prefer to patronize establishments that exclude members of protected classes.

The economic incentive to discriminate in order to cultivate a customer base among persons with discriminatory animus has played an outsize role in the history of overt discrimination and segregation in this country. As Gavin Wright, a scholar of American economic history, has explained: "The starting point for understanding conflict over public accommodations is the proposition that racial segregation [in the American South] was fundamentally a calculated business policy by profit-seeking firms. . . . The business motivation for segregation was relatively straightforward: [Businesses] feared that serving blacks, particularly in socially sensitive activities such as eating and sleeping, would result in the loss of white customers." Gavin Wright, *Southern Business and Public Accommodations: An Economic-Historical Paradox*, at 4-5 (2008).[10]

Given this history, one can readily imagine businesses that provide wedding-related goods and services dividing into two groups—one serving same-sex

---

409727_7.pdf (studying anti-LGBT discrimination's negative economic effect and recommending expansion of public-accommodations law to cover sexual orientation).

[10] Available at http://web.stanford.edu/~write/papers/ParadoxR.pdf.

couples and one excluding them—with each group catering to separate clientele. Such a division might benefit the discriminatory enterprises, but this balkanization would invariably diminish the overall vitality and diversity of the market.[11]

In *amici*'s experience, communities with state and local governments that allow this form of discrimination to flourish gain a deservedly bad reputation. They become less desirable places for all types of people to live, work, and visit. The businesses that adhere to the nondiscrimination principle in those environments inevitably suffer too: Community members shop and dine out less often for fear that they will face discrimination; tourism is depressed as travelers understandably avoid destinations where they may be made to feel unwelcome; and it becomes harder to recruit and retain talented employees, who may be members of some disfavored class or may simply be unwilling to live and raise their children in an environment that tolerates open and invidious discrimination.[12] If that is not bad

---

[11] In describing these economic incentives to discriminate, we do not question the sincerity of Appellants' objection to same-sex marriage or doubt the genuineness of Appellants' professed motivation for discriminating against same-sex couples. Our point is just that, as a law of general applicability that ensures fair access to public accommodations, Article 15 removes the strong economic incentives that may otherwise encourage some businesses to discriminate.

[12] *See Veto follows business backlash over Arizona anti-gay bill*, CNN Money, Feb. 26, 2014, http://money.cnn.com/2014/02/25/news/economy/arizona-anti-gay-bill (noting that many national corporations "urg[ed] [Arizona Governor Jan] Brewer to veto [a] bill" that would have allowed businesses to refuse to serve LGBT customers, "saying the law would be bad for the state's reputation and bad for business—repelling tourists, potential employees and current workers who live in the state").

enough, when some businesses trade on a reputation for discrimination, making it a selling point, they put competitive pressure on others to discriminate as well. At best, the result is economic balkanization; at worst, communities fragment and resegregate as businesses are driven to serve only their own "kind" to survive.

These ills are precisely what antidiscrimination laws like Article 15 were designed to forestall. *See, e.g.*, RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES 167 (2001) (describing legislative testimony supporting the Civil Rights Act of 1964, including testimony that "racial discrimination by one restaurant in a city encouraged the practice throughout the area because of the other proprietors' fear of the competitive advantage gained by the segregated restaurant in increased white trade"); *see also* Wright, *supra*, at 20 (contending that "Southern businessmen were locked into a low-level equilibrium, in which their own perception of prejudice on the part of white customers was a crucial factor").

6. Some individual firms will always profit from discrimination when it is permitted (and others may be driven to engage in similar or complementary discrimination to compete). But whatever these actors may gain at the expense of protected classes is vastly outweighed by the broader harms. The incentives to backslide into invidious discrimination thus present a classic case for regulation: When economic actors are able to reap benefits from an activity without absorbing

all the costs—that is, when they stand to profit from imposing so-called negative externalities on others, especially vulnerable or disfavored populations—regulation is appropriate to realign the incentive structure and thereby reduce the public harm. That is what New York has wisely chosen to do in passing, expanding, and consistently enforcing its public-accommodations law.

7. Appellants argue that hosting the McCarthys' same-sex wedding would have somehow communicated Appellants' support for extending the institution of marriage to same-sex couples. This position is not only constitutionally unsound (as Respondents and other *amici* have amply explained), but runs headlong into what makes Article 15 effective. This case has nothing to do with symbolic speech[13] or forcing private actors to voice the government's message on gay rights, any more than prohibitions against "Whites Only" lunch

[13] If Appellants' logic sufficed to transform commerce into protected speech, it would justify any other refusal of service: serving a customer who is a member of a disfavored group would always communicate a similar message of approbation. Declining to sell a loaf of bread to a customer who is gay could be defended as expression of disagreement with "the homosexual lifestyle." Excluding people of color from one's store could be justified as a statement about how blacks and whites should not be allowed to interact. Refraining from providing handicap access could be defended as a statement about how people should not be allowed to "flaunt" their disabilities in public. And hiring only male employees could be justified as making a statement about how women should not be permitted to work outside the home. The point is not, of course, that commercial activity can never involve expressive content. Rather, it is that the *bare act* of engaging in commerce is not symbolic speech. As the U.S. Supreme Court explained decades ago, it "c[ould] not accept the view that an apparently limitless variety of conduct can be labeled '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).

counters compel restaurateurs to espouse the government's message on racial equality. Like all anti-discrimination laws, Article 15 *eliminates* any possible presumption that the mere act of engaging with members of protected classes on equal terms communicates a message of approbation. It should be apparent to observers that a venue obeying a legal requirement not to discriminate says nothing whatsoever about whether the venue's owners support the event or its participants.

To be sure, proprietors of small businesses may have strong views on social issues and may wish to engage in public debate on those issues. This *amici* brief itself belies any suggestion to the contrary. But *amici* represent a diverse array of political and social views, and each one of its members serves customers with whom it disagrees, perhaps vehemently.[14]

Our experience is that patrons normally do not view our member businesses as engaging in expressive activity in the ordinary course of providing goods or services for sale; and patrons do not normally draw any conclusions about those businesses' political, social, religious, or philosophical perspectives from the bare fact that they comply with the antidiscrimination laws to which all our member businesses are subject. A wedding venue like the one at issue here, in other words,

[14] Moreover, if the Appellants' argument were correct, as a practical matter there would be no way to differentiate between improper status-based refusals to sell and refusals based on a merchant's desire to express and communicate a message of disdain for a protected status or the people who bear that status. Article 15 would be riddled with loopholes and businesses would be entirely without guidance about what the law actually requires or how to comply with it.

is normally presumed by its customers to be acting as a wedding venue, not as a political speaker, unless it goes out of its way to present itself as a speaker. To suggest otherwise is simply to mischaracterize how businesses—even small businesses—operate, and how customers perceive them.

* * *

A reputation for discrimination in places of public accommodation could quickly curtail or even reverse the strides that New York has made, driving people to flee to more hospitable, inclusive environments. In the long run, this State will not benefit from a legal regime that permits economic rewards to go to those who discriminate while imposing the costs of that discrimination on disfavored classes and the individuals and businesses who would remain true to antidiscrimination laws. Only through the application of broad, uniform nondiscrimination principles can New York's place in the national economy be preserved.

II. APPELLANTS' ATTEMPTS TO EXEMPT THEMSELVES FROM ARTICLE 15 ARE LEGALLY AND FACTUALLY INDEFENSIBLE.

A. Liberty Ridge is a place of public accommodation.

Appellants seek to exempt themselves from Article 15 by arguing that Liberty Ridge is not a place of public accommodation when they contract to host wedding ceremonies on part of the property—even though other parts are regularly open to the public for the purchase of goods and services. Br. 15-19. Appellants'

attempt to slice and dice their commercial activity to allow them to discriminate when they want is contrary to Article 15's intent and to the factual record.

1. "[T]he Legislature intended that the definition of place of [public] accommodation should be interpreted *broadly*." *Matter of U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y.2d 401, 410 (1983) (emphasis added); *see also* N.Y. EXEC. LAW § 300 (McKinney 2000) ("The provisions of . . . [A]rticle [15] shall be construed liberally for the accomplishment of the purposes thereof."). This alone counsels against permitting establishments to pick and choose the aspects of their for-profit businesses that are subject to Article 15. Appellants contend that "[w]hen determining if an entity is a public accommodation, the analysis focuses on the particular service or request at issue, rather than other activities or the full range of services provided by an entity." Br. 16. But such an approach is inconsistent with the intended breadth of the term "place of public accommodation" and would render Article 15 toothless, permitting businesses that are otherwise open to the public to exempt themselves from Article 15 simply by pointing to the very exclusionary practices the law prohibits.

Appellants do just this: They seek to exempt their provision of marriage-ceremony services from Article 15 on the basis that such services are not available to everyone, and that the specific area of their land in question is not open to the public. This is akin to a movie theater having a whites-only auditorium: the

decision to discriminate does not create an exception to the laws prohibiting discrimination. *See Johnson v. Auburn & Syracuse Elec. R.R. Co.*, 222 N.Y. 443, 448-49 (1918) (holding that a particular part of a business's property was a place of public accommodation where it was "not maintained as an independent business, but as an auxiliary to" part of the business that was clearly a public accommodation; the property at issue could "[ ]not be separated [ ]from [the rest of the business] and held to be an independent and private enterprise").[15]

2. That couples must contract with Appellants to hold a wedding ceremony on—or otherwise make use of—the relevant part of Appellants' property is not a license to discriminate. Appellants place heavy reliance on this fact, arguing that it means that the barn where wedding ceremonies are held is not open to the public and therefore not a place of public accommodation. *See* Br. 17-19. But unfettered public access is not a necessary condition for an establishment to constitute a place of public accommodation. This is well demonstrated by the illustrative examples chosen by the Legislature, which include establishments that

[15] The one New York case Appellants rely upon for their approach provides none. In *Ness v. Pan American World Airways*, 142 A.D.2d 233 (2d Dep't 1988), the "rewards program" to which Appellants refer (at Br. 16) was a separate entity that had been sued for discrimination. Thus, the court did not consider a situation analogous to the one here. The rewards program defendant did not claim to constitute a place of public accommodation with respect to some services but not others, as Appellants claim about Liberty Ridge. By holding that the rewards program was not a place of public accommodation because it did not provide *any* of its services to the general public, *see* 142 A.D.2d at 240-41, the Second Department did not endorse the service-by-service approach Appellants advance.

members of the public cannot access at will without entering into some kind of contractual relationship. *See* N.Y. EXEC. LAW § 292 (McKinney 1951) (including hotels, theatres, and music halls as examples of places of public accommodations). If the requirement that patrons enter into an agreement before accessing the property overcame the obligation not to discriminate, the public accommodation law's scope would shrink beyond recognition. *See, e.g.*, *Batavia Lodge No. 196 v. N.Y. State Div. of Human Rights*, 43 A.D.2d 807, 808 (4th Dep't 1973) (finding a club to be a public accommodation where "[t]ickets . . .were sold to the general public without restriction"), *rev'd in part on other grounds*, 35 N.Y.2d 143 (1974).

3. What is crucial here is not that Appellants require customers to contract for wedding ceremonies, but rather that they hold their property and services—including wedding ceremonies—out to the public for purchase. The barn in which they hold wedding ceremonies was advertised to the public as available "year-round for parties, business meetings, holiday gatherings, retreats, and weddings." Notice and Final Order ¶ 30 (quoting Complainants' Exhibit 7 C). Fenced-in or not, the barn thus fits within the "phrase place of public accommodation in the broad sense of providing conveniences and services to the public." *Cahill v. Rosa*, 89 N.Y.2d 14, 21-22 (1996) ("Dentists' offices come within this definition of public accommodation because they provide services to the public. Though they may be conducted on private premises and by appointment,

such places are generally open to all comers. Patients may be drawn to the office by an advertisement or telephone book listing, upon referral by other health care providers, or . . . by a sign displayed on the premises.").

Courts have consistently found commercial invitations of the sort that Appellants have extended to the public to be significant in concluding that an establishment constitutes a place of public accommodation. *See id.*; *Power Squadrons*, 59 N.Y.2d at 410-11 ("These widespread public activities to promote the Power Squadrons' goals and to solicit public interest and participation in its courses are . . . the equivalent of systematically offering a service or accommodation to the public and bringing petitioners within the statutory definition."); *McKaine v. Drake Bus. Sch., Inc.*, 107 Misc. 241, 243 (1st Dep't 1919) (stating that "it would seem difficult to hold . . . that a school which concededly advertises for students upon billboards and elevated and subway stations throughout the city of New York" was not a public accommodation). Rightly so: An establishment that generates business by holding its services out to the public as available for purchase with little or no restrictions accepts an obligation to abide by laws that protect members of the public who belong to protected categories—like the McCarthys—from discrimination.

B. Appellants denied services because of sexual orientation.

There can be no serious doubt that Appellants refused services to the McCarthys "because of the[ir] . . . sexual orientation" in contravention of Article 15. N.Y. Exec. Law § 296(2)(a). Appellants contend that their "religious belief about marriage . . . motivated" the refusal to host a ceremony for the couple. Br. 21. But to the extent Appellants' arguments imply that it matters that their refusal was based on the couple's intended conduct—*i.e.*, entering into marriage with a same-sex partner—rather than their status—*i.e.*, being gay—the Court must reject that sort of artificial line-drawing if Article 15 is to serve its goal of preventing discrimination in public accommodations and creating the uniformly welcoming business community that the Legislature envisioned.

1. Conduct cannot be divorced from status when the people engaging in the conduct bear the status and the fact of the status relates to their engaging in the conduct. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."). The

U.S. Supreme Court, therefore, "ha[s] declined to distinguish between status and conduct in this context." *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 689 (2010).[16] So should this Court.

The New Mexico Supreme Court reached the same conclusion in a similar case. In rejecting the proffered status-conduct distinction and denying a wedding photographer's claim of a constitutional right not to photograph same-sex weddings, the court held that permitting "discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of" New Mexico's antidiscrimination law. *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 61 (N.M. 2013). The same goes for Article 15.

2. Appellants' insistence "that no evidence in the record demonstrates that [they] have any bias based on sexual orientation" (Br. 20) is neither here nor there. Article 15 does not require that conduct be motivated by any sort of animus or bias to be unlawful. To the contrary: it just requires that the conduct be based on, *i.e.*, "because of," a protected characteristic—the characteristic itself has to be the motivating factor, not animus or bias toward that characteristic. Importing a

[16] In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Supreme Court also recognized that sometimes conduct is so closely related to a class of persons that disfavor of that conduct is necessarily discrimination against the class: "Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." *Id.* at 270. So, too, an attack on same-sex weddings is an attack on same-sex couples.

heightened state-of-mind requirement would be contrary to Article 15's breadth and purpose, and the liberal construction courts are to afford it. New York's courts have upheld determinations that conduct violated Article 15 where it was intended to "promote diversity" but nevertheless had a "discriminatory impact." *See, e.g.*, *Mill River Club, Inc. v. N.Y. State Div. of Human Rights*, 59 A.D.3d 549, 555 (2d Dep't 2009). Though it does not share a similarly benign purpose, Appellants' policy surely has a similarly discriminatory impact.

Moreover, since 1913, Article 15 has prohibited places of public accommodation from discriminating either "directly or indirectly" on the basis of protected characteristics. N.Y. EXEC. LAW § 296 (McKinney 2010). While *amic*i believe that Appellants' refusal to host same-sex wedding ceremonies constitutes direct discrimination, even on Appellants' own view the refusal to host wedding ceremonies of same-sex couples must be regarded as indirect discrimination at the very least: The weddings of same-sex couples function as a proxy for the couples themselves. Article 15 "prohibits public accommodations from making *any* distinction in the services they offer to customers on the basis of protected classifications. . . . [and] does not permit businesses to offer a 'limited menu' of goods or services to customers on the basis of a status that fits within one of the protected categories." *Elane Photography*, 309 P.3d at 62 (emphasis added).

Refusing to host wedding ceremonies of same-sex couples is no different than refusing to host wedding ceremonies of couples in which the bride and groom are of difference races or religions. Protestations in those circumstances that a wedding venue was not unlawfully discriminating against blacks or Jews because it was declining to serve only those blacks who marry whites or those Jews who marry Christians would ring hollow. So too must Appellants' argument here.

* * *

If this Court were to sanction Appellants' discriminatory policy, it would not only override the Legislature's considered judgment that public accommodations should be open equally to all people regardless of race, sex, national origin, sexual orientation, and other immutable characteristics. It would also send the message that New York is a place where overt discrimination is tolerated and people of diverse backgrounds, faiths, and orientations are not. That message would harm this State, its citizens, and its economy. Allowing New York to continue to enforce its antidiscrimination laws, on the other hand, will help to preserve the State's reputation as a place where people want to live, work, invest, and play – and marry.

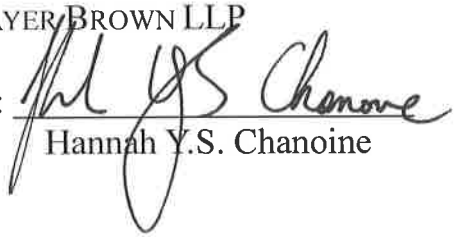
CONCLUSION

The judgment of the New York State Division of Human Rights should be affirmed.

Respectfully submitted,

Dated: August 6, 2015

MAYER BROWN LLP

By: 
Hannah Y.S. Chanoine

Of Counsel:

Alex O. Kardon*
Rory K. Schneider
MAYER BROWN LLP
1221Avenue of the Americas
New York, NY 10020
(212) 506-2500
hchanoine@mayerbrown.com

**not admitted in New York*

Counsel for amici curiae