EXHIBIT 26

Scardina Law

Autumn Scardina, Esq.
autumn@scardinalaw.com

November 6, 2017

SENT VIA FACSIMILE AND USPS

COLORADO DIVISION
NOV 07 2017
OF CIVIL RIGHTS

Ms. Aubrey Elenis
Colorado Civil Rights Division
1560 Broadway Street, Suite 1050
Denver, CO 80202
FAX: 303-894-7830

RE: Case Number CP2018011310

Dear Ms. Elenis:

Thank you for affording my client the opportunity to rebut to the Response to Request for Information letter dated September 19, 2017 from Alliance Defending Freedom on behalf of Masterpiece Cakeshop, Ltd. (hereinafter "Masterpiece").

1. Rebuttal to Written Position Statement in Response to the Charge of Discrimination:

Ms. Scardina does not dispute the nature of Masterpieces business. She takes no issue with his religious beliefs nor does she dispute that the business serves a noble and useful purpose to the community in providing a "safe place at the cake shop for drug and alcohol abusers to share a cup of coffee". Rather, she agrees that the business provides valuable and beneficial services to the community and merely wishes to be able to access those services to the same degree and scope as the general public without regard to her gender identity.

While Mr. Phillips alleges that he "welcomes people from all walks of life, including individuals of all races, faiths, gender identities, and sexual orientations", the facts surrounding this case demonstrate that is simply not true. Specifically, Mr. Phillips refused to offer his services to create a custom birthday cake for Ms. Scardina upon learning that she transitioned genders from male-to-female.

In *Tesmer v. Colorado High School Activities Association*, 140 P.3d 249, 254 (Colo. App. 2006), the Colorado Court of Appeals concluded that to prevail on a discrimination claim under CADA, plaintiffs must prove that, "but for" their membership in an enumerated class, they would not have been denied the full privileges of a place of public accommodation. The division explained that plaintiffs need **not** establish that their membership in the enumerated class was the "sole" cause of the denial of services. *Id.* Rather, it is sufficient that they show that the discriminatory action was based in whole or in part on their membership in the protected class. *Id*; *Craig v. Masterpiece Cakeshop Inc.* 2015 COA 115.

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The facts at issue demonstrate that but for Ms. Scardina's gender identity, she would not have been denied the full privileges of the place of public accommodation. Importantly, as the attached supporting affidavits explain, Ms. Scardina did not request that Masterpiece make any statements regarding "sex-changes or gender transitions". She merely requested that Masterpiece help her celebrate her birthday by preparing a custom cake, a task that Masterpiece admittedly performs. At no time did Ms. Scardina request that Masterpiece make any representation or statement concerning her gender or "sex-changes". Rather, she merely requested that they prepare a birthday cake using a blue colored cake and pink frosting. It was not until, and only because of Ms. Scardina's gender identity, that Masterpiece refused to provide her services. Such a decision is aberrant to Colorado law and discriminatory in purpose, intent, and effect.

While Masterpiece is free to decline to create cakes for any number of reasons, it is prohibited by Colorado Law from discriminating against individuals on the basis of gender identity. C.R.S. 1973 24-34-301, et seq. Masterpiece routinely provides custom cakes that celebrate birthdays. Masterpiece's website has an entire section dedicated to "Birthday" cakes[1] and at least two of the pictures of cakes provided by Masterpiece appear to be cakes prepared to celebrate birthdays. Furthermore, Masterpiece's website boasts that "custom designs are his specialty; if you can think it up, Jack can make it into a cake!"[2]

When Ms. Scardina requested a custom birthday cake, Masterpiece appeared happy to comply and began working with Ms. Scardina to complete the order. Ms. Scardina inquired about Masterpiece's ability to create a cake using different colors for the outside and inside of the cake and Masterpiece agreed they could accommodate that request. Ms. Scardina then requested that the cake have blue frosting with pink cake, to which Masterpiece had no objection. It was not until and only upon Ms. Scardina's disclosure that she is a transgender woman that Masterpiece refused to provide services to Ms. Scardina. Such conduct is the very definition of discriminatory conduct.

Masterpiece is willing to prepare and create birthday cakes for cisgender individuals and boasts that they are able to create custom cakes. Masterpiece does not deny that they provide custom birthday cakes to the general public and boasts that they can create any cake it's customer's can think of. Masterpiece did not object to the design of pink frosting with blue cake nor did they object to the cakes message until Ms. Scardina disclosed her gender identity. There is nothing inherently offensive or inappropriate about a cake with pink frosting and blue cake. Masterpiece admits that there is no company policy or general term of service that prohibits preparing cakes with pink frosting and blue cake to customers.[3] Masterpiece does not appear to

[1] http //masterpiececakes com/birthday/
[2] http.//masterpiececakes com/
[3] Nor does Masterpiece appear to allege that cakes with pink frosting and blue cake are offensive to his religious beliefs While Masterpiece claims to be a "man of deep faith" and a "Christian', he provides no evidence to suggest that such a faith prohibits him from preparing cakes with pink frosting and blue cake. Ms Scardina performed an

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take issue with or decline to sell cakes with pink frosting and blue cakes in general. Rather, Masterpiece's objection and unwillingness to provide services to Ms. Scardina rests entirely on her gender identity, and is therefore discriminatory on the basis of her gender identity.

Ms. Scardina did not request that Masterpiece make any statement regarding her transition nor did she request that the cake celebrate a "sex change from male to female". Rather, she requested a custom birthday cake to celebrate her birth with friends and family. Mastrerpiece was willing to provide such a service and only objected upon learning of Ms. Scardina's gender identity. There is no viewpoint or statement inherent in a cake with blue interior and pink exterior independent of Ms. Scardina's gender identity and Masterpiece does not generally prohibit the same.

Masterpiece's reliance on the Divisions decision in *Jack v. Le Bakery Sensual, Inc.*[4] is inapposite because the requested cake could not be considered objectionable absent Ms. Scardina's gender identity. In *Le Bakery Sensual*, the Division found that a baker did not discriminate against a Christian patron on the basis of his creed when it refused his requests to create two bible-shaped cakes inscribed with derogatory messages about gays, including "Homosexuality is a detestable sin. Leviticus 18:2." The Division found that the bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message. Importantly, there was no evidence that the bakeries based their decisions on the patron's religion, and evidence had established that all three regularly created cakes with Christian themes. Conversely, Masterpiece admits that its decision to Ms. Scardina's requested birthday cake was because of its opposition to her gender identity, which is tantamount to discrimination on the basis of sexual orientation. Unlike the request in *Le Bakery Sensual, Inc.*, there is nothing inherently offensive about the cake Ms. Scardina requested. Furthermore, Masterpiece expressed a willingness and ability to prepare a cake with blue exterior and pink interior and did not object to the request until Ms. Scardina indicated her gender identity.

The Constitution does not protect Masterpiece's discriminatory conduct. Simply put, discrimination by a commercial entity is entitled to no constitutional protection. *Roberts v. United States Jaycees* (1984) 468 U.S. 609. The Anti-Discrimination Act as applied in this context deals with commercial conduct not speech. While Masterpiece argues that baking pastries and cakes is "speech" or "expressive conduct" and therefore protected by the First Amendment of the United States Constitution, commercial entities like Masterpiece are not entitled to special exemptions from anti-discrimination laws merely because they characterize their business ventures as expression or speech. *Citizen Publ'g Co v. United States*, (1969) 394 U.S. 131, 139-40

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exhaustive search of all versions of the New Testament but was not able to find any biblical passages that pertain to the creation of cakes with pink frosting and blue cake

[4] Jack v. Azucar Bakery, Charge No. P20140069X, at 2 (Colo Civil Rights Div. Mar 25, 2015), available at http //perma cc/5K6D-VV8U

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(holding that although media organizations are entitled to the highest levels of First Amendment protection, they are subject to restraints on certain business or commercial practices in their sales policies.); *Arcara v. Cloud books, Inc.* (1986) 478 U.S. 697.

As the United States Supreme Court held in *Sorrell v. IMS Health Inc.*[5] "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." The Constitution does not guarantee a right to choose customers without restraint from the State. A shopkeeper has no Constitutional right to deal only with persons of his or her choosing. *Roberts v. United States Jaycees* (1996) 468 U.S. 609; *Hearths of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241.

Masterpiece does not have a Constitution's right to discriminate based on religious belief. In fact, similar arguments have been dismissed by the United States Supreme Court as "patently frivolous". *Newman v. Piggie Park Enters*, 390 U.S. 400, 402 (1968); *Bob Jones Univ. v. United States* 461 U.S. 226 (1990)(holding that the right to free exercise of religion does not require exceptions to laws aimed at eradicating racial discrimination.); *Norwood v. Harrison* 413 U.S. 455 (1973).

In short, despite the denials of the same, the evidence clearly shows that Masterpiece and its agents treated Ms. Scardina differently from how it treats other customers. While other customers are allowed to purchase custom made birthday cakes, Ms. Scardina was denied such services based entirely on her gender identity. While Masterpiece boasts that "if you can think it up; Jack can make it a cake," it refused to make the cake Ms. Scardina thought of because of her gender identity. While Masterpiece has no general policies prohibiting the use of pink frosting and blue cake and was willing to prepare such a cake for Ms. Scardina until she disclosed her gender identity, it refuses to provide such a cake to her specifically because of her gender identity. This key distinction appears to be missed by Masterpiece in its response to the charge.

Sincerely,

/s/ Autumn Scardina
Autumn Scardina, Esq.
SCARDINA LAW

[5] 564 U.S. 552, 567 (2011)

ATTACHMENT A – WITNESS STATEMENTS

WITNESS 1:

Todd Scardina

301 S. Ogden Street, Denver, CO 80209

(720) 838-3717

I, Todd Scardina, hereby submit the following statement in support of the Rebuttal Statement in Case Number CP2017011310, Scardina V. Masterpiece Cakeshop:

1. I am the younger brother to the claimant in this matter, Autumn Scardina.
2. My sister and I are both attorneys in Colorado and partners at the law firm named Scardina Law, LLC.
3. On June 26, 2017, the following events occurred:
    a. In the afternoon, I was driving my car with Ms. Scardina in the front passenger seat. My sister reminded me that her birthday was coming up on July 6, 2017 and indicated that she would like to celebrate her birthday with a custom cake.
    b. She indicated she would like Masterpiece Cakeshop to prepare the cake and I observed her google their information from her smartphone.
    c. At first, I could only overhear Ms. Scardina's portion of the telephone call as the phone was not on speakerphone. The initial conversation was as follows:
        i. Ms. Scardina inquired about whether Masterpiece Cakeshop prepared custom birthday cakes.
        ii. Ms. Scardina explained that her birthday was coming up on July 6, 2017 and asked if they could prepare it on time.
        iii. Ms. Scardina indicated that she would need a cake that would serve approximately 6-8 people.
        iv. Ms. Scardina began to discuss the design for the cake and requested that the cake have pink interior and blue exterior.
        v. Ms. Scardina then explained the design was to celebrate her birthday which coincided with the day she came out as transgender.
        vi. Up through this point in the conversation, my sister's demeaner was calm, friendly, and polite.
        vii. At this point in the conversation, I observed my sister's demeanor change. She appeared not to believe what was being said on the phone and indicated to me and the person on the phone that she would put the phone on speaker for me to hear. She then put the call on her phone's speakerphone.
    d. The following portions of the conversation were on speakerphone and observed directly by me:
        i. Ms. Scardina asked for the person at Masterpiece Cakeshop to confirm that she was refusing to make the cake as requested. The individual from Masterpiece

Cakeshop responded by indicating that "they do not make cakes to celebrate sex-changes".

ii. Ms. Scardina responded by explaining it is not a cake to celebrate sex-changes but a custom birthday cake that would celebrate both the date of her birth and the date she came out as transgender.

iii. Masterpiece Cakeshop said "we don't make cakes for that" and the phone went dead.

e. I then observed Ms. Scardina call Masterpiece Cakeshop immediately thereafter. This call was placed on speakerphone and I witnessed the following conversation:

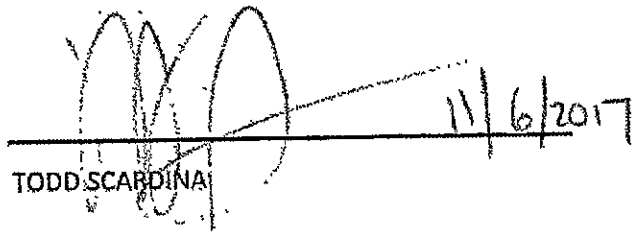
i. Ms. Scardina indicated that she had called and the phone was disconnected.

ii. Ms. Scardina requested the individuals name, as she appeared upset that she had been disconnected previously. The individual refused to provide her name.

iii. Ms. Scardina explained again that she was calling to order a birthday cake and that she wanted it to be blue on the outside and pink on the inside because her birthday was the same day as she came out as transgender.

iv. Masterpiece Cakeshop again declined to take the order stating that it would violate their religious beliefs. Ms. Scardina asked how a blue cake with pink interior would offend anyone's religion, and the call was terminated by Masterpiece Cakeshop.

f. My sister was very upset with the interaction. She was emotionally distraught and frustrated with the lacking respect and service from Masterpiece Cakeshop.



TODD SCARDINA

WITNESS 2:

Autumn Scardina

7779 Everett Way, Arvada, CO 80005

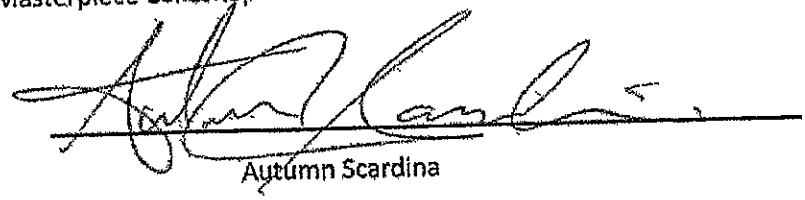
(818) 205-5560

(720) 838-3717

I, Autumn Scardina, hereby submit the following statement in support of the Rebuttal Statement in Case Number CP2017011310, Scardina V. Masterpiece Cakeshop:

1. I am the claimant in this matter.
2. My birthday is July 6, 1978.
3. On July 6, 2010, I came out as transgender.
4. On June 26, 2017, the following events occurred:
    a. In the afternoon, I was a passenger in my brother's car.
    b. I had wanted to celebrate my birthday with a custom cake.
    c. I had heard about Masterpiece Cakeshop and wanted to see if they would make a custom cake for my birthday.
    d. I googled Masterpiece Cakeshop's information from my smartphone and called to inquire about a custom birthday cake.
    e. The individual identified herself as someone associated with Masterpiece Cakeshop and asked how she could help me.
    f. I began by asking if they made custom birthday cakes. The individual responded that they did prepare custom birthday cakes.
    g. They asked me when my birthday was, and I explained it was on July 6, 2017 and I inquired if that would give them enough time. They indicated that would be fine.
    h. They then asked how big of a cake I would need.
    i. I explained that it would probably need to serve 6-8 people.
    j. I then explained that I wanted a cake with blue exterior and pink interior. I asked if they could prepare a cake with blue frosting and pink cake.
    k. They indicated that they could prepare such a cake.
    l. I thanked them and explained that the design was a reflection of the fact that I transitioned from male-to-female and that I had come out as transgender on my birthday.
    m. At this point, Masterpiece indicated they would not be able to prepare my cake. The person indicated that they did not prepare such cakes and I believe she mentioned her religious beliefs.
    n. I started to become upset and indicated I would put the phone on speakerphone so my brother, Todd Scardina, could hear her portion of the conversation.
    o. I then asked her to confirm that she was refusing to prepare the cake for me.
    p. She indicated they do not prepare cakes for "sex changes." I explained it was for my birthday, not a sex change, and she stated that Masterpiece Cakeshop said "we don't make cakes for that" and the phone went dead.
    q. I call Masterpiece Cakeshop immediately thereafter.

r. This call was placed on speakerphone.
s. I indicated that I had just called and the phone was disconnected.
t. I requested the individuals name. The individual refused to provide her name.
u. I explained again that I was calling to order a birthday cake and that I wanted it to be blue on the outside and pink on the inside because my birthday was the same day as the day I came out as transgender.
v. Masterpiece Cakeshop again declined to take my order, stating that it would violate their religious beliefs.
w. I asked how a blue cake with pink interior would offend anyone's religion, and the call was terminated by Masterpiece Cakeshop.



Autumn Scardina

FAX COVER SHEET

TO	Wesley Fry
COMPANY	
FAX NUMBER	13038947830
FROM	Scardina Law
DATE	2017-11-07 00:04:10 GMT
RE	Case Number: CP2017011310, Scardina v. Masterpiece Cakeshop

COVER MESSAGE

Please see attached. Original to foolow

Scardina Law

Autumn Scardina, Esq.
autumn@scardinalaw.com

November 6, 2017

SENT VIA FACSIMILE AND USPS

Ms. Aubrey Elenis
Colorado Civil Rights Division
1560 Broadway Street, Suite 1050
Denver, CO 80202
FAX: 303-894-7830

RE: Case Number CP2018011310

Dear Ms. Elenis:

Thank you for affording my client the opportunity to rebut to the Response to Request for Information letter dated September 19, 2017 from Alliance Defending Freedom on behalf of Masterpiece Cakeshop, Ltd. (hereinafter "Masterpiece").

1. Rebuttal to Written Position Statement in Response to the Charge of Discrimination:

Ms. Scardina does not dispute the nature of Masterpieces business. She takes no issue with his religious beliefs nor does she dispute that the business serves a noble and useful purpose to the community in providing a "safe place at the cake shop for drug and alcohol abusers to share a cup of coffee". Rather, she agrees that the business provides valuable and beneficial services to the community and merely wishes to be able to access those services to the same degree and scope as the general public without regard to her gender identity.

While Mr. Phillips alleges that he "welcomes people from all walks of life, including individuals of all races, faiths, gender identities, and sexual orientations", the facts surrounding this case demonstrate that is simply not true. Specifically, Mr. Phillips refused to offer his services to create a custom birthday cake for Ms. Scardina upon learning that she transitioned genders from male-to-female.

In *Tesmer v. Colorado High School Activities Association*, 140 P.3d 249, 254 (Colo. App. 2006), the Colorado Court of Appeals concluded that to prevail on a discrimination claim under CADA, plaintiffs must prove that, "but for" their membership in an enumerated class, they would not have been denied the full privileges of a place of public accommodation. The division explained that plaintiffs need **not** establish that their membership in the enumerated class was the "sole" cause of the denial of services. *Id.* Rather, it is sufficient that they show that the discriminatory action was based in whole or in part on their membership in the protected class. *Id*; *Craig v. Masterpiece Cakeshop Inc.* 2015 COA 115.

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The facts at issue demonstrate that but for Ms. Scardina's gender identity, she would not have been denied the full privileges of the place of public accommodation. Importantly, as the attached supporting affidavits explain, Ms. Scardina did not request that Masterpiece make any statements regarding "sex-changes or gender transitions". She merely requested that Masterpiece help her celebrate her birthday by preparing a custom cake, a task that Masterpiece admittedly performs. At no time did Ms. Scardina request that Masterpiece make any representation or statement concerning her gender or "sex-changes". Rather, she merely requested that they prepare a birthday cake using a blue colored cake and pink frosting. It was not until, and only because of Ms. Scardina's gender identity, that Masterpiece refused to provide her services. Such a decision is aberrant to Colorado law and discriminatory in purpose, intent, and effect.

While Masterpiece is free to decline to create cakes for any number of reasons, it is prohibited by Colorado Law from discriminating against individuals on the basis of gender identity. C.R.S. 1973 24-34-301, et seq. Masterpiece routinely provides custom cakes that celebrate birthdays. Masterpiece's website has an entire section dedicated to "Birthday" cakes[1] and at least two of the pictures of cakes provided by Masterpiece appear to be cakes prepared to celebrate birthdays. Furthermore, Masterpiece's website boasts that "custom designs are his specialty; if you can think it up, Jack can make it into a cake!"[2]

When Ms. Scardina requested a custom birthday cake, Masterpiece appeared happy to comply and began working with Ms. Scardina to complete the order. Ms. Scardina inquired about Masterpiece's ability to create a cake using different colors for the outside and inside of the cake and Masterpiece agreed they could accommodate that request. Ms. Scardina then requested that the cake have blue frosting with pink cake, to which Masterpiece had no objection. It was not until and only upon Ms. Scardina's disclosure that she is a transgender woman that Masterpiece refused to provide services to Ms. Scardina. Such conduct is the very definition of discriminatory conduct.

Masterpiece is willing to prepare and create birthday cakes for cisgender individuals and boasts that they are able to create custom cakes. Masterpiece does not deny that they provide custom birthday cakes to the general public and boasts that they can create any cake it's customer's can think of. Masterpiece did not object to the design of pink frosting with blue cake nor did they object to the cakes message until Ms. Scardina disclosed her gender identity. There is nothing inherently offensive or inappropriate about a cake with pink frosting and blue cake. Masterpiece admits that there is no company policy or general term of service that prohibits preparing cakes with pink frosting and blue cake to customers.[3] Masterpiece does not appear to

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Ms. Scardina did not request that Masterpiece make any statement regarding her transition nor did she request that the cake celebrate a "sex change from male to female". Rather, she requested a custom birthday cake to celebrate her birth with friends and family. Mastrerpiece was willing to provide such a service and only objected upon learning of Ms. Scardina's gender identity. There is no viewpoint or statement inherent in a cake with blue interior and pink exterior independent of Ms. Scardina's gender identity and Masterpiece does not generally prohibit the same.

Masterpiece's reliance on the Divisions decision in *Jack v. Le Bakery Sensual, Inc.*[4] is inapposite because the requested cake could not be considered objectionable absent Ms. Scardina's gender identity. In *Le Bakery Sensual*, the Division found that a baker did not discriminate against a Christian patron on the basis of his creed when it refused his requests to create two bible-shaped cakes inscribed with derogatory messages about gays, including "Homosexuality is a detestable sin. Leviticus 18:2." The Division found that the bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message. Importantly, there was no evidence that the bakeries based their decisions on the patron's religion, and evidence had established that all three regularly created cakes with Christian themes. Conversely, Masterpiece admits that its decision to Ms. Scardina's requested birthday cake was because of its opposition to her gender identity, which is tantamount to discrimination on the basis of sexual orientation. Unlike the request in *Le Bakery Sensual, Inc.*, there is nothing inherently offensive about the cake Ms. Scardina requested. Furthermore, Masterpiece expressed a willingness and ability to prepare a cake with blue exterior and pink interior and did not object to the request until Ms. Scardina indicated her gender identity.

The Constitution does not protect Masterpiece's discriminatory conduct. Simply put, discrimination by a commercial entity is entitled to no constitutional protection. *Roberts v. United States Jaycees* (1984) 468 U.S. 609. The Anti-Discrimination Act as applied in this context deals with commercial conduct not speech. While Masterpiece argues that baking pastries and cakes is "speech" or "expressive conduct" and therefore protected by the First Amendment of the United States Constitution, commercial entities like Masterpiece are not entitled to special exemptions from anti-discrimination laws merely because they characterize their business ventures as expression or speech. *Citizen Publ'g Co v. United States*, (1969) 394 U.S. 131, 139-40

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exhaustive search of all versions of the New Testament but was not able to find any biblical passages that pertain to the creation of cakes with pink frosting and blue cake.

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(holding that although media organizations are entitled to the highest levels of First Amendment protection, they are subject to restraints on certain business or commercial practices in their sales policies.); *Arcara v. Cloud books, Inc.* (1986) 478 U.S. 697.

As the United States Supreme Court held in *Sorrell v. IMS Health Inc.*[5] "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." The Constitution does not guarantee a right to choose customers without restraint from the State. A shopkeeper has no Constitutional right to deal only with persons of his or her choosing. *Roberts v. United States Jaycees* (1996) 468 U.S. 609; *Hearths of Atlanta Motel, Inc. v. United States* (1964) 379 U.S. 241.

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In short, despite the denials of the same, the evidence clearly shows that Masterpiece and its agents treated Ms. Scardina differently from how it treats other customers. While other customers are allowed to purchase custom made birthday cakes, Ms. Scardina was denied such services based entirely on her gender identity. While Masterpiece boasts that "if you can think it up; Jack can make it a cake," it refused to make the cake Ms. Scardina thought of because of her gender identity. While Masterpiece has no general policies prohibiting the use of pink frosting and blue cake and was willing to prepare such a cake for Ms. Scardina until she disclosed her gender identity, it refuses to provide such a cake to her specifically because of her gender identity. This key distinction appears to be missed by Masterpiece in its response to the charge.

Sincerely,

/s/ Autumn Scardina
Autumn Scardina, Esq.
SCARDINA LAW

[5] 564 U.S 552, 567 (2011)

EXHIBIT 27

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 825
Denver, CO 80202

Charge No. CP2018011310

Autumn Scardina
7779 Everett Way
Arvada, CO 80005 Complainant

Masterpiece Cakeshop Incorporated
3355 S. Wadsworth Blvd
Lakewood, CO 80227 Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is sufficient evidence to support the Complainant's claim of discrimination. As such, a **Probable Cause** determination is hereby issued.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Complainant alleges that on or about June 26, 2017, she was denied full and equal enjoyment of a place of public accommodation based on her sex (female) and/or transgender status (gender identify).

The Respondent denies the allegation of discrimination and contends that it will not design custom cakes that express ideas or celebrate events at odds with its owner and staff's religious beliefs.

The legal framework under which civil rights matters are examined is as follows: The Charging Party bears the burden of proving that discrimination has occurred. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the burden of explaining, with

sufficient clarity, a non-discriminatory justification for the action taken. This is in response to the specifically alleged action named in the charge. In addition, the Respondent has the burden to produce documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a non-discriminatory reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate reason is merely a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means treatment that is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through a preponderance of the evidence in the record, adequately shows that the Respondent's reason is pretext (i.e., is not to be believed), and that the Charging Party's protected status was the main reason for the adverse action taken. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. See Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997); Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery that provides cakes and baked goods to the public, and operates within the state of Colorado.

On or about June 26, 2017, the Complainant contacted the Respondent to order a cake and spoke with Debi Phillips ("D. Phillips") (female), Co-Owner. The Complainant contends that she requested a custom birthday cake. D. Phillips acknowledges that the Complainant called and requested a custom cake, but asserts that based on their conversation, it was not clear that she was requesting a birthday cake. D. Phillips states that she solicited details about the Complainant's wishes for the cake, including the date it was needed, the size, and desired flavors. The Complainant responded that she would need the cake by July 6, 2017, needed it to serve 6-8 people, and wanted the cake to have a blue exterior and a pink interior. The Complainant asserts that she "explained that the design was a reflection of the fact that [she] transitioned from male-to-female and that [she] had come out as transgender on [her] birthday." D. Phillips states that after the Complainant informed her that the cake was "to celebrate a sex-change from male to female," she instructed the Complainant that the Respondent would not make the requested cake. At this point, the phone call ended.

Shortly thereafter, the Complainant called the Respondent again and spoke with Lisa Eldfrick ("Eldfrick") (female), Service Representative. The Complainant states that she told the person who answered, Eldfrick, that she had just called and was disconnected. She asserts that she told Eldfrick that she "was calling to order a birthday cake and that [she] wanted it to be blue on the outside and pink on the inside because [her] birthday was the same day as the day [she] came out as transgender." Eldfrick asserts that she informed the Complainant that the Respondent would not fulfill this request. The evidence indicates that the Complainant questioned the Respondent's policies and that Eldfrick ended the phone call without responding to the Complainant's inquiries.

Jack Phillips (male), Owner, who admittedly makes all final business decisions for the Respondent, affirms this position, contending that the Respondent will not create custom cakes that address the topic of sex-changes or gender transitions. He contends that he will not support a message that "promote[s] the idea that a person's sex is anything other than an immutable God-given biological reality."

The Respondent asserts that it declines to make more than two to five custom cakes per week, due to time constraints. The Respondent also states that it refuses to make custom cakes for other expressions that it deems to be objectionable.

Denial of Full and Equal Enjoyment of a Place of Public Accommodation/Sex/ Transgender Status:

To prevail on a claim of discriminatory denial of full and equal enjoyment of goods, services, benefits or privileges of a place of public accommodation, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought goods or services from the Respondent; (3) the Charging Party was otherwise a qualified recipient of the services of the Respondent; 4) the Respondent denied the Charging Party the full and equal enjoyment of its services; and 5) the circumstances give rise to an inference of unlawful discrimination based on a protected class.

The Complainant is a member of protected classed based on her sex (female) and transgender status (gender identity). On or about June 26, 2017, the Complainant sought goods and service from the Respondent by requesting a custom cake. The Complainant was a qualified recipient of the services by the Respondent. An employee of the Respondent initially indicated that she was willing to assist the Complainant with this request, however, when the Complainant requested a blue exterior and a pink interior, explaining that the design reflected the Complainant's gender transition from male to female, the Respondent refused to provide the requested service to the Complainant. The Respondent asserts that it will not provide the service of creating cakes that "promote the idea that a person's sex is anything other than an immutable God-given biological reality." The evidence thus

demonstrates that the refusal to provide service to the Complainant was based on the Complainant's transgender status. A claim of discriminatory denial of full and equal enjoyment of a place of public accommodation has been established. As asserted by the Supreme Court, "It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions are offered to other members of the public." Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. ___ (2018).

Based on the evidence contained above, I determine that the Respondents have violated C.R.S. 24-34-602, as re-enacted, in respect to the Complainant's claim that the Respondents denied her equal enjoyment of a place of public accommodation.

In accordance with C.R.S. 24-34-306(2)(b)(II), as re-enacted, the Parties hereby are ordered by the Director to proceed to attempt amicable resolution of these charges by compulsory mediation. The Parties will be contacted by the agency to schedule this process.

On Behalf of the Colorado Civil Rights Division

Aubrey Elenis, Director
Or Authorized Designee

6·28·2018
Date

Certificate of Mailing

This is to certify that on July 2, 2018 a true and exact copy of the Closing Action of the above-referenced charge was deposited in the U.S. mail, postage prepaid, addressed to the parties and or representatives listed below:

CCRD Case number CP2018011310

Autumn Scardina
7779 Everett Way
Arvada, CO 80005

Todd Scardina, Esq.
Scardina Law
1245 E. Colfax Ave., Suite 302
Denver, CO 80218

Masterpiece Cakeshop, Incorporated
3355 S. Wadsworth Blvd. H-117
Lakewood, CO 80227

Jacob Warner, Esq.
Alliance for Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260

Jon Wilson
Colorado Department of Regulatory Agencies
Colorado Civil Rights Division
1560 Broadway, Suite 825
Denver, CO 80202

EXHIBIT 28

STATE OF COLORADO COLORADO CIVIL RIGHTS COMMISSION	
AUTUMN SCARDINA, Complainant, v. MASTERPIECE CAKESHOP INCORPORATED and JACK PHILLIPS, Respondents.	▲ COURT USE ONLY ▲ Charge No. CP2018011310 Case Number: CR 2018_____

NOTICE OF HEARING AND FORMAL COMPLAINT

YOU ARE HEREBY NOTIFIED pursuant to § 24-34-306(4) C.R.S., that a hearing will be held before an Administrative Law Judge at 9:00 a.m. on **Monday February 4, 2019** on the fourth floor at the Office of Administrative Courts, 1525 Sherman Street, Denver, Colorado 80203, to determine whether Respondents violated § 24-34-601 *et seq.*, C.R.S. (2018) by denying Complainant Autumn Scardina (Scardina) the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations at its place of public accommodation because of Scardina's sexual orientation (transgender status).

Pursuant to the authority set forth in §§ 24-34-305(1)(d) and 24-34-306(4), C.R.S. (2018), the Colorado Civil Rights Commission (Commission), having determined that the circumstances warrant a hearing, hereby charges and alleges as follows:

1. Respondent, Masterpiece Cakeshop Incorporated (Masterpiece or "the bakery"), is a bakery that engages in sales of goods and services to the public. Masterpiece is a place of public accommodation as defined by § 24-34-601(1), C.R.S., and is therefore subject to the jurisdiction of the Commission.

2. Respondent, Jack Phillips (Phillips) is the owner and operator of Masterpiece, and is a person as defined by §24-34-301(5)(a), C.R.S. As Masterpiece's owner, Phillips is responsible for providing the full and equal enjoyment of its goods and services to the public regardless of protected class, and is therefore subject to the jurisdiction of the Commission.

3. Timeliness and all other jurisdictional and procedural requirements of title 24, article 34, parts 3 and 4 have been satisfied.

4. Upon information and belief, on June 26, 2017, Scardina contacted Masterpiece by telephone to order a cake to celebrate her birthday. Scardina asked if the bakery sold made-to-order birthday cakes. The individual on the phone answered in the affirmative and asked for the date of her birthday. Scardina responded that it was on July 6th and asked if that would be enough time to make the cake. Masterpiece's representative indicated that that the bakery could accommodate that timing.

5. Upon information and belief, Scardina requested a cake with a blue exterior and a pink interior, and indicated that she would need a cake big enough to serve 6-8 people.

6. Upon information and belief, Masterpiece's representative stated that the bakery would make the cake as requested by Scardina. Scardina then mentioned that the design was a reflection of the fact that she had transitioned from male to female and that she had come out as transgender on her birthday. Masterpiece's representative then stated that the bakery would not make the cake as requested by Scardina because it does not make cakes to celebrate a sex-change and terminated the call.

7. Upon information and belief, Scardina called Masterpiece back and spoke to a different individual about the exchange that took place during her initial call and confirmed that the cake she had ordered was to celebrate her birthday. Masterpiece's representative responded that the bakery would not make a cake for Scardina and terminated the call.

8. On July 20, 2017, Scardina filed a charge of discrimination with the Colorado Civil Rights Division alleging that Respondents discriminated against her in a place of public accommodation based on her sex (female) and/or sexual orientation (transgender status).

9. During the Colorado Civil Rights Division's investigation of the charge, Phillips affirmed his employees' decision to not fulfill Scardina's order, and cited his religious beliefs as the reason why the bakery would not do so.

10. Upon information and belief, the bakery sells made-to-order birthday cakes to non-transgendered individuals.

11. On June 28, 2018, following the investigation, the Division Director's authorized designee found probable cause for crediting the allegations of the charge

that Masterpiece discriminated against Scardina in a place of public accommodation based on her sexual orientation (transgender status).

12. As required by § 24-34-306)(2)(b)(II), C.R.S. (2018), the Division Director's authorized designee ordered the parties to attempt amicable resolution of the charge by compulsory mediation.

13. Upon information and belief, efforts to resolve the matter amicably through the ordered mediation have been unsuccessful.

14. On October 2, 2018, the Commission voted to notice this matter for a hearing and to file this formal complaint.

15. The Commission alleges that Masterpiece denied service to Scardina based on her sexual orientation (transgender status), as defined by § 24-34-301(7), C.R.S. (2018), in a violation of § 24-34-601(2)(a), C.R.S. (2018).

16. The Commission further alleges that Masterpiece is not a place that is principally used for religious purposes, as contemplated by § 24-34-601(1), C.R.S. (2018).

The Commission seeks the following relief:

1. That Masterpiece and Phillips be ordered to allow Scardina and all customers that seek goods and services from the bakery, the full use and enjoyment of the goods, services, facilities, privileges, advantages, and/or accommodations of this place of public accommodation, regardless of their sexual orientation.

2. That Masterpiece and Phillips be ordered to cease and desist their practices of discriminating against persons based on their sexual orientation and to immediately discontinue their policy and practice of refusing to provide goods and services to persons due to their sexual orientation.

3. That Masterpiece and Phillips be ordered to adopt a corrective policy which will allow Scardina and other similarly situated persons the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations provided by the bakery regardless of their sexual orientation.

4. That Masterpiece and Phillips be ordered to report to the Commission all remedial action taken to eliminate the discriminatory practices until such time as it has been established that all discriminatory practices have ceased.

5. That Masterpiece and Phillips be ordered not to retaliate against Scardina in any way.

6. That Masterpiece and Phillips be ordered to provide any other relief which may be available to Scardina by virtue of operation of law and any other relief the Commission deems just and proper.

Masterpiece and Phillips may file a verified answer prior to the date of the hearing. The hearing will be conducted pursuant to sections 24-34-306 and 24-4-105, C.R.S. (2018). Failure to answer the complaint at hearing may result in entry of default judgment against Masterpiece and Phillips.

Dated this 9th day of October, 2018.

BY THE COMMISSION:

COMMISSIONER

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **NOTICE OF HEARING AND FORMAL COMPLAINT** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 9 day of October, 2018 addressed as follows:

Autumn Scardina
7779 Everett Way
Arvada, CO 80005

John McHugh
Reilly Pozner LLP
1700 Lincoln Street, Suite 3400
Denver, CO 80203

Masterpiece Cakeshop, Incorporated
3355 S. Wadsworth Blvd., H-117
Lakewood, CO 80227

Jacob Warner, Esq.
Alliance Defending Freedom
15100 N. 90th St.
Scottsdale, AZ 85260

By interdepartmental mailing services, copies were sent to:

Matthew Azer
Director/Chief ALJ
Office of Administrative Courts
1525 Sherman St, 4th Floor
Denver, CO 80203

Michelle Brissette Miller
First Assistant Attorney General
Employment/Personnel & Civil Rights Unit
Civil Litigation & Employment Law Section
1300 Broadway, 10th Floor
Denver, CO 80203

By Hand Delivery for filing on October 9, 2018:

Office of Administrative Courts
1525 Sherman St, 4th Floor
Denver, CO 80203

Adriana Carmona

EXHIBIT 29

Colorado Civil Rights Commission

Colorado Civil Rights Division

2017 ANNUAL REPORT

Hon. John W. Hickenlooper, Governor

Marguerite Salazar, Executive Director, Department of Regulatory Agencies

Aubrey Elenis, Director, Colorado Civil Rights Division

CONTENTS

LETTER FROM THE DIRECTOR

Aubrey Elenis, Esq.

Dear Coloradans,

As Director of the Colorado Civil Rights Division, I am excited to share this report with you which highlights the work of Division and the Commission during the 2016-2017 fiscal year.

This year, the Division launched a new online filing and case management system, CaseConnect, which allows parties to file intake information and submit evidence. Parties are able to communicate with staff through this system and can check on the status of their case throughout the investigative process. The Division is pleased to be able to offer parties an additional method of communication, and provide updates in a more efficient and expeditious manner. Over half of the discrimination complaints that the Division receives are now submitted through CaseConnect.

The Division has also seen an increase in the number of discrimination complaints filed this fiscal year. In order to address discrimination complaints in a more timely manner, the Division made available additional staff for the Division's Alternative Dispute Resolution (ADR) program. Through the ADR program, the Division provides parties the option to utilize its neutral professional mediators to facilitate discussions and negotiations as they attempt to resolve the charge and dispute before the investigation process commences. Parties can save time, resources, and unwanted stress by participating in good faith to reach a mutually acceptable solution through the ADR process.

The Division is dedicated to serving all Coloradoans, and I encourage you to learn more about the Division and the Commission in this annual report, and by visiting our website: https://www.colorado.gov/dora/civil-rights

Regards,

Aubrey Elenis, Director

LETTER FROM THE COMMISSION

Dear Coloradans,

We are pleased to present this annual report outlining the work and accomplishments of the Commission and the Civil Rights Division during the 2016-2017 state fiscal year. In this report for fiscal year 2016-17, you will find information regarding the powers and duties of the Commission, the Division's intake, investigation and Alternative Dispute Resolution (ADR) processes, as well as highlights and statistics regarding cases investigated, types of allegations filed, and case outcomes.

The Colorado Civil Rights Commission is a seven member volunteer board appointed by the Governor and confirmed by the Colorado State Senate. The Commission is tasked with eliminating unfair or discriminatory practices through education and outreach and partnering with other agencies and organizations to plan and provide education programs on anti-discrimination laws. The Commission also reviews appeals submitted by Complainants in which a No Probable Cause determination has been issued in their case. In addition, the Commission decides whether or not a case should be set for hearing before an Administrative Law Judge when a Probable Cause decision is issued, and the parties are unable to resolve the case through conciliation, which is a process offered through the Division's Alternative Dispute Resolution program.

We are committed to partnering with communities across Colorado to proactively advance equal rights in the most cost effective manner and least disruptive to the regulated community. We encourage you to attend our monthly meetings held in Denver and around the state so that you can hear about the current activities of the Commission and the Division and participate in discussions regarding the civil rights issues in your local communities. We also encourage you to visit our website, https://www.colorado.gov/dora/civil-rights, to learn more about the Colorado Anti-Discrimination Act, it's enforcement, and as well as current news and events.

We are privileged to serve on the Commission and we are committed to enforcing the state's anti-discrimination laws in the areas of employment, housing, and places of public accommodation with support from the Colorado Civil Rights Division, the Department of Regulatory Agencies, and the Attorney General's office. Thank you for the opportunity to engage in this important work.

Respectfully,

The Colorado Civil Rights Commission

MEET THE COMMISSION

Anthony Aragon

Democrat, Representing State or Local Government Entities, Denver

Term expires: 3/16/19

Ulysses J. Chaney

Republican, Representing state/local government entities, Colorado Springs

Resigned: 2/1/17

Dr. Miquel Elias

Republican, Representing Community at Large, Pueblo

Term expires: 3/13/20

Carol Fabrizio

Unaffiliated, Representing Business, Denver

Term expires: 3/16/19

Heidi Hess

Democrat, Representing Community at Large, Clifton

Resigned: 1/9/18

Rita Lewis

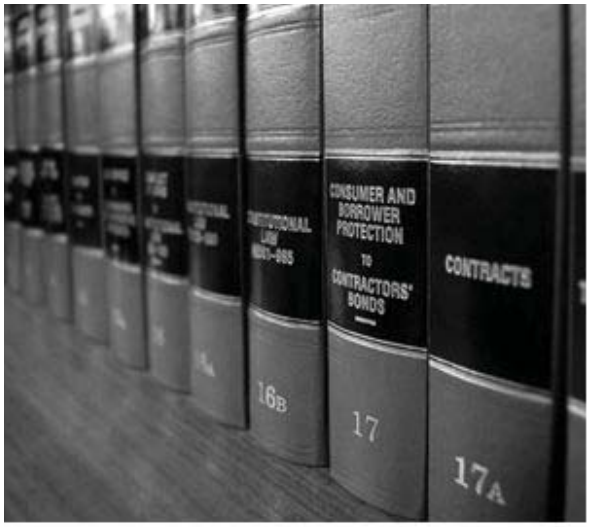
Democrat, Representing Small Business, Denver

Term expires: 3/16/19

Jessica Pocock

Unaffiliated, Representing Community at Large, Colorado Springs

Term expires: 3/13/20



CCRC & CCRD

OVERVIEW

Civil Rights **Commission**

The **Colorado Civil Rights Commission** (Commission) -- is a seven-member, bipartisan panel appointed by the Governor of Colorado pursuant to the Colorado Anti-Discrimination Act.

It has members representing various political parties, the community at large, as well as businesses, and groups that have been historically discriminated against. The members come from all regions of the State of Colorado.

Functions of the Civil Rights Commission

The mission of the Commission is to review appeals of cases investigated and dismissed by the Civil Rights Division; reach out to various communities to provide awareness of civil rights issues and protections; conduct hearings involving illegal discriminatory practices; initiate investigations regarding discrimination issues with broad public policy implications; advise the Governor and General Assembly regarding policies and legislation that address discrimination; and adopt and amend rules and regulations that provide standards and guidelines regarding the State statutes prohibiting discrimination.

Civil Rights **Division**

The **Colorado Civil Rights Division** (Division) is a neutral, fact-finding, administrative agency that provides civil rights education to the community, provides mediation and alternative dispute resolution services to resolve civil rights claims, and conducts investigations of charges of discrimination alleging violations of the Colorado Anti-Discrimination Act in the areas of employment, housing, and in places of public accommodation.

Civil Rights Division's Investigative Process

After a complaint is filed, an investigation is initiated. The investigation involves the collection of documentary evidence, witness interviews, and any other evidence relevant to resolving the complaint.

Once the investigation is completed, the Division Director or her designee issues a decision as to whether sufficient evidence exists to support the allegations of discrimination. If the decision is that no discrimination occurred, a Complainant may appeal the decision to the Commission.

If the Division finds that discrimination occurred, the statute requires that the Division attempt to settle the matter with the parties through a mandatory mediation conference. If mediation is unsuccessful, the Commission determines whether to set the case for an adjudicatory administrative hearing.

Civil Rights Division's Mediation Process

In order to resolve matters at the earliest possible stage in a case, the Division offers an Alternative Dispute Resolution (mediation) program early in an investigation, which can identify viable options for the early constructive resolution of cases.

Civil Rights Division's Training/Legal Advice Offerings

Because the Division is a neutral agency, it cannot provide legal advice or provide an opinion on a claim that may be brought before the Division. However, the Division and Commission engage in outreach and education to inform Coloradans of issues in civil rights and discrimination law.

The Division offers training programs to businesses and housing providers to help them ensure that they comply with the Colorado Anti-Discrimination Act (CADA). The Division also partners with other organizations and through independent outreach efforts to better serve the communities of Colorado.

The Division is increasingly providing internet-based access to all educational materials and has reached thousands of individuals and numerous communities to provide awareness of the anti-discrimination laws in Colorado. As statutory revisions are made affecting pertinent civil rights laws, updates are made to the brochures, teaching programs, and the Division's website that reflect those changes.

How does the CCRD & CCRC Help Serve Coloradans?

The mission of the Division and Commission is to promote equal treatment of all people in Colorado and foster a more open and receptive environment in which to conduct business, live, and work.

We are dedicated to promoting fair and inclusive communities through the enforcement of the civil rights laws, mediation, education, and outreach.

ENFORCEMENT

Case Processing

The primary mission of the Colorado Civil Rights Division (CCRD) is to enforce the anti-discrimination laws in the areas of employment, housing, and public accommodations under Title 24, Article 34, Parts 3-7, of the Colorado Revised Statutes. The Division investigates matters that come to its attention from Complainants in the public or which the Commission files with the Division on its own motion. The Division also works in conjunction with, and maintains work-share agreements with its federal counterparts, the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Housing and Urban Development (HUD). To avoid duplication of effort and provide more efficient customer service to the public, the Division investigates matters that are filed with both EEOC and HUD ("dual filing"), as well as cases that have jurisdiction exclusive to Colorado law. The staff of the Division strives to provide the best customer service to the public, as well as to all parties in a case, by the fairest and most transparent methods possible.

Charges Filed with CCRD

Cases are filed with the Division by Complainants alleging discrimination based on a protected class. A "protected class" is a characteristic of a person which cannot be targeted for discrimination. The specific Colorado Anti-Discrimination law falls under Title 24 of the Colorado Revised Statutes. As shown on the next page, discrimination charges based on retaliation, disability, and sex continue to be the highest in Fiscal Year 2016-2017, followed by race, age and national origin. Retaliation is an adverse action taken against someone who has opposed discrimination or participated in the investigation of a discrimination complaint or has engaged in other protected activity, such as requesting a reasonable accommodation for a disability.

Fiscal Year	Employment	Housing	Public Accommodation	Total Charges Filed
FY14-15	766	112	85	963
FY15-16	737	154	98	989
FY16-17	903	159	76	1138

PROTECTED CLASSES IN COLORADO

Housing, Employment, and Public Accommodations (PA)

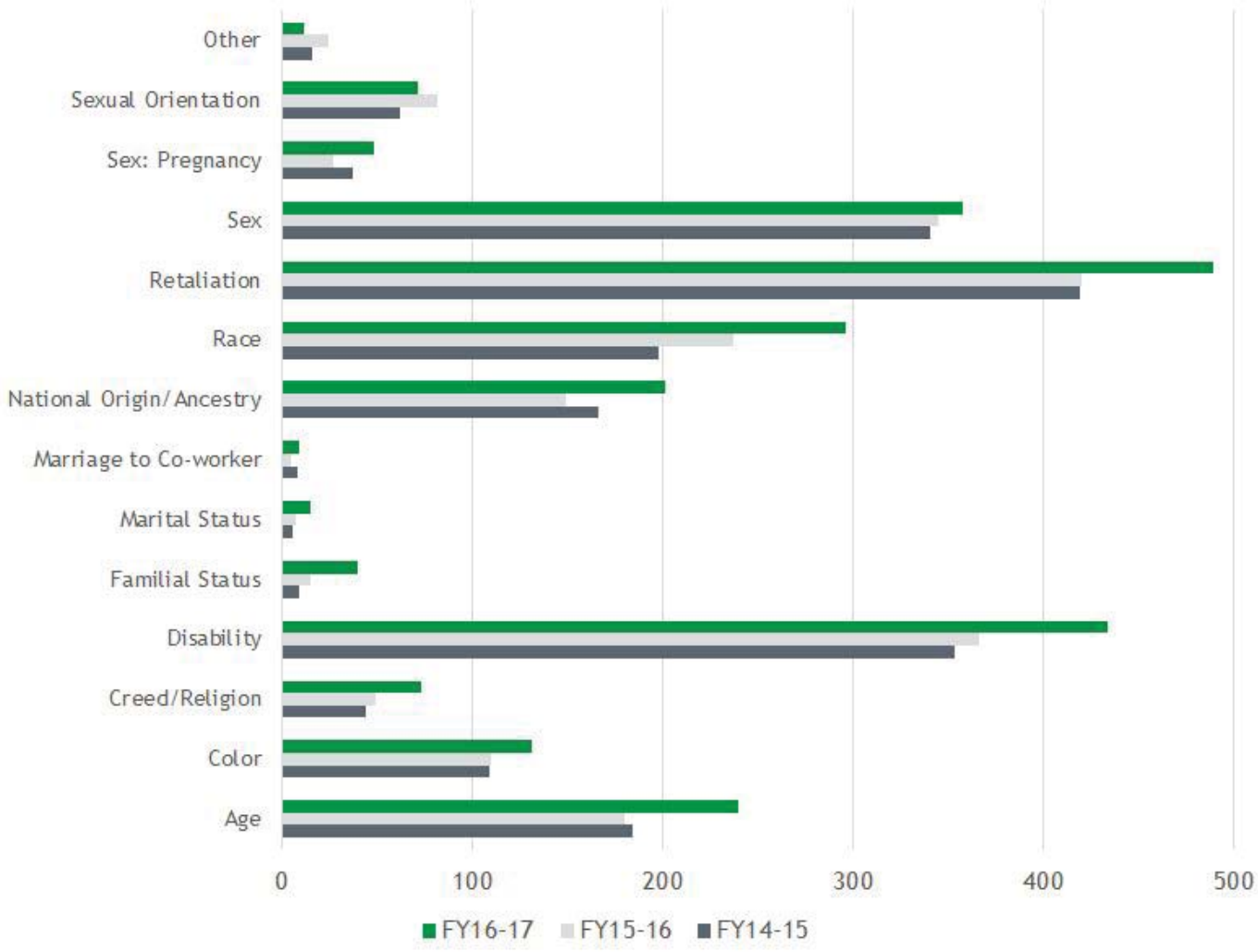
- Age (employment only)
- Color
- Creed
- Disability
- Familial status (housing only)
- Marital status (housing and PA only)
- Marriage to Co-worker (employment only)
- National Origin/Ancestry
- Race
- Religion (employment and housing only)
- Retaliation (for engaging in protected activity)
- Sex
- Sexual Orientation/Transgender

Basis of Charges Filed FY15-FY17

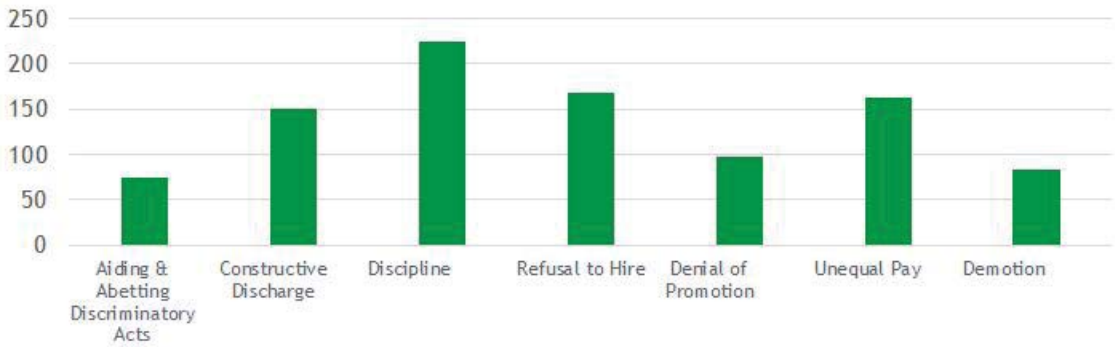
Basis*	FY14-15	FY15-16	FY16-17
Age	184	180	240
Color	109	110	131
Creed/Religion	44	49	73
Disability	353	366	433
Familial Status	9	15	40
Marital Status	6	7	15
Marriage to Co-worker	8	5	9
National Origin/Ancestry	166	149	201
Race	198	237	296
Retaliation	419	420	489
Sex	340	345	357
Sex: Pregnancy	37	27	48
Sexual Orientation	62	82	71
Other	16	24	12

* May be more than one basis per case

Charges Filed by Major Protected Class



Charges Filed by Allegation Type



Charges Filed by County FY16-17

[Consider including 1-2 sentences introducing the chart here.]

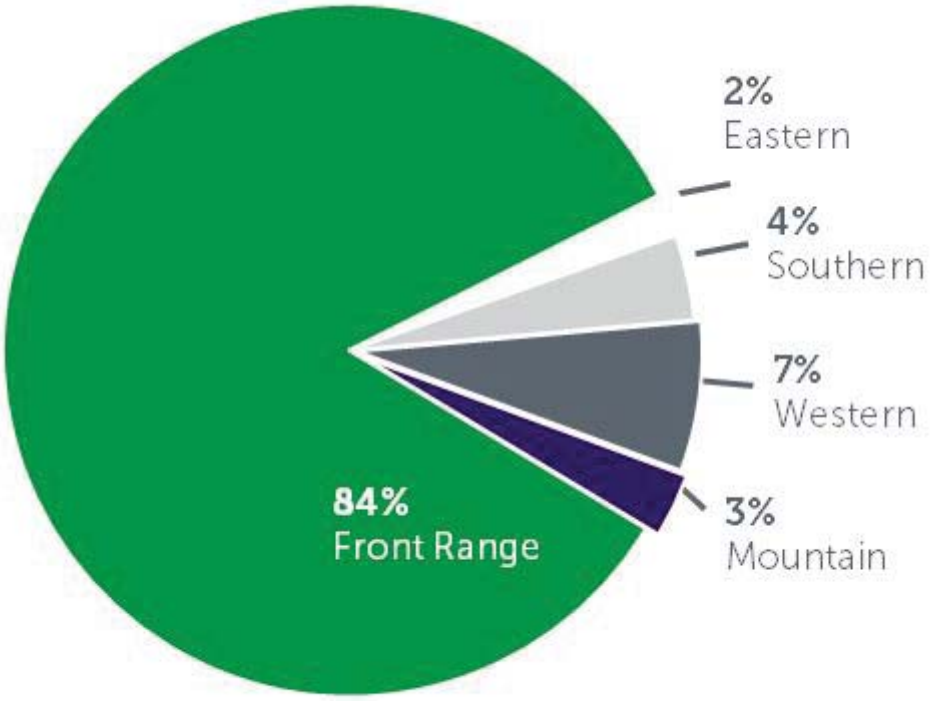
County	Employment	Housing	Public Accommodations	Total
Adams	73	6	1	80
Alamosa	2	0	2	4
Arapahoe	151	12	21	184
Archuleta	2	0	1	3
Baca	0	0	0	0
Bent	0	0	0	0
Boulder	59	4	7	70
Broomfield	12	2	2	16
Chaffee	2	0	0	2
Cheyenne	1	0	0	1
Clear Creek	0	0	0	0
Costilla	0	0	0	0
Conejos	0	0	0	0
Crowley	1	0	0	1
Custer	3	0	0	3
Delta	5	0	1	6
Denver	193	29	38	261
Douglas	35	3	5	43
Eagle	2	0	0	2
Elbert	1	0	0	1
El Paso	49	19	9	77
Fremont	8	0	0	8
Garfield	17	0	0	17
Gilpin	1	0	2	3
Grand	1	0	0	0
Gunnison	3	1	1	5
Hinsdale	0	0	0	0

Huerfano	1	0	0	1
Jackson	2	0	0	0
Jefferson	75	7	10	92
Kiowa	0	0	0	0
Kit Carson	1	0	0	1
La Plata	5	1	0	5
Lake	0	0	0	0
Larimer	45	7	2	54
Las Animas	3	0	1	4
Lincoln	0	0	0	0
Logan	11	1	2	14
Mesa	22	1	1	24
Mineral	0	0	0	0
Moffat	2	0	0	2
Montezuma	2	0	0	2
Montrose	8	0	1	9
Morgan	7	0	0	7
Otero	3	0	0	3
Ouray	1	1	0	2
Park	0	2	0	2
Phillips	0	0	0	0
Pitkin	1	0	0	1
Prowers	2	0	0	2
Pueblo	21	0	5	26
Rio Blanco	0	0	0	0
Rio Grande	4	0	0	4
Routt	3	0	0	3
Saguache	0	0	0	0
San Miguel	2	0	1	3
Sedgwick	0	0	0	0
Summit	4	0	0	4
Teller	5	0	0	5
Washington	0	0	0	0

Weld	34	2	1	37
Yuma	2	0	0	2

*some county data missing from online filings

Charges Filed by Region



INVESTIGATIONS & FINDINGS

When a formal complaint is filed alleging discrimination, the Division's investigative staff conducts a neutral investigation. Evidence is gathered from both parties in the case, witnesses are interviewed, and documents and records are requested. The investigation under Colorado law provides a transparent process to allow the parties the opportunity to provide information and evidence that corroborates their allegations and which refutes the allegations of the opposing party.

After the investigation, the Division Director or her designee makes a determination as to whether there is sufficient evidence to support a finding of "probable cause" that discrimination has occurred. If the Director finds probable cause, the parties are required to attempt to resolve the matter through a mandatory mediation process (also called "Conciliation"). If the Director finds that there is "no probable cause" to believe that discrimination has occurred, the Complainant has the right to appeal that determination to the Commission. In employment cases, if the case is dismissed, the Complainant may file a legal complaint in civil court; however, in housing cases, the Complainant may file in civil court at any time without needing to exhaust administrative remedies prior to filing in court. If the Director finds probable cause in an employment case and the case is not settled in conciliation, the Commission then decides whether the matter will be noticed for hearing before an Administrative Law Judge. In housing cases, if the Director finds probable cause and the case is not settled in conciliation, the statute requires that the case be set for hearing.

The below chart provides statistics concerning the number of "Probable Cause" and "No Probable Cause" determinations issued by the Director in the past three years.

Findings of CCRD

Area of Jurisdiction	FY14-15		FY15-16		FY16-17	
	Probable Cause	No Probable Cause	Probable Cause	No Probable Cause	Probable Cause	No Probable Cause
Employment	18	449	16	271	16	383
Housing	3	93	15	81	14	121
Public Accommodation	1	55	2	55	2	66

Appeals

As explained, when the Director finds no probable cause in a case, the Complainant may appeal the decision to the Commission within ten days. The Commission will review the matter taking into consideration the argument and evidence that proves existing evidence was misinterpreted or new evidence presented that was not available during the investigation process. The following are the number of appeals filed with the Commission in the past three fiscal years.

Fiscal Year	Employment	Housing	Public Accommodation	Total
FY14-15	51	14	13	78
FY15-16	47	16	25	88
FY16-17	63	23	16	102

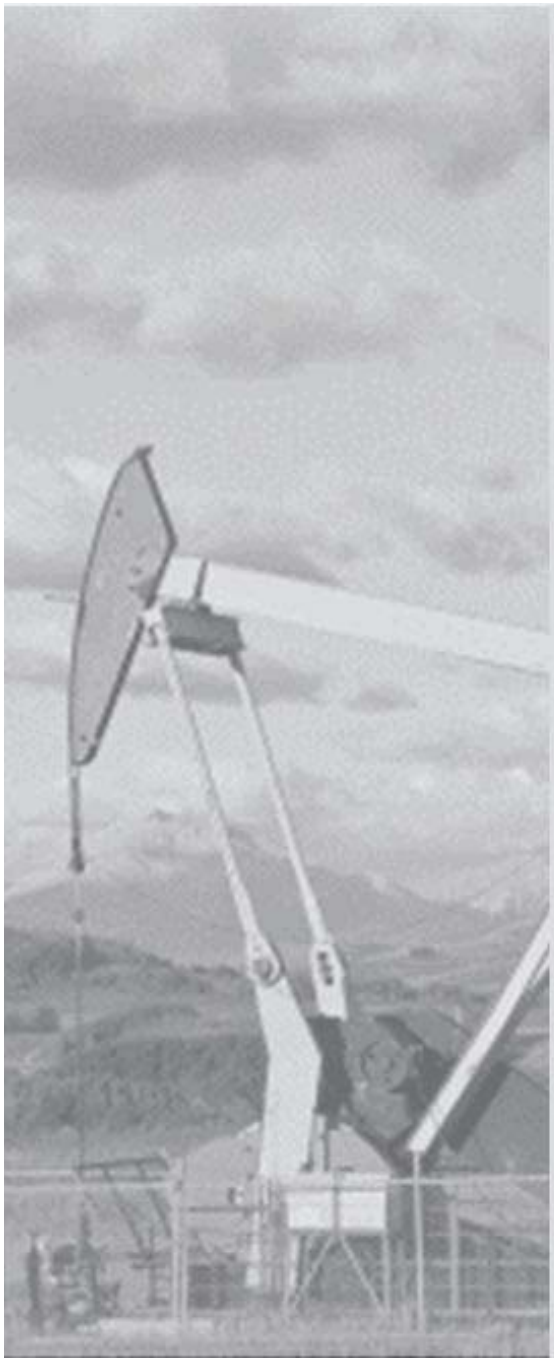
Cases Completed

Cases are closed under a number of circumstances, including: probable cause/no probable cause finding, successful mediation, closed after hearing, lack of jurisdiction, right to sue issued, and withdrawal or administrative closure. The Division strives to address as many cases as quickly as possible so that the parties are served by the process and matters can be resolved. The following chart demonstrates the number of cases that the Division closed in the past three fiscal years.

Fiscal Year	Employment	Housing	Public Accommodation	Total
FY14-15	644	122	67	833
FY15-16	563	118	62	743
FY16-17	751	183	91	1025

EMPLOYMENT CASES

Below are summaries of cases in which allegations of retaliation and discrimination based on age were made and in which the Division's examination of evidence supported the allegations asserted. Retaliation occurs when someone is subject to adverse action by a Respondent for engaging in protected civil rights related activity, for example, complaining of discriminatory conduct, participating in a civil rights related investigation, or requesting a reasonable accommodation for a disability.



Significant Employment Cases

The Division found Probable Cause that the Complainant, a derrick hand for a drilling contractor, was retaliated against when he complained of discrimination. The Complainant alleged that a co-worker pointed a BB gun at him and called him "bitch" and "nigger." The evidence demonstrates that the Complainant reported the allegations of discrimination to his supervisor. The evidence shows that Complainant was discharged within a few days of reporting the allegations of discrimination to his supervisor. The Respondent asserted that it offered to re-assign the Complainant to another work site, however, the Complainant refused, and because he did not want to be reassigned to another work site, was discharged. The evidence demonstrated that the Respondent's assertions were pre-textual and that the Complainant was discharged based on retaliation because he complained that he was being discriminated against based on his race.

The Complainant, age 61, was employed by the Respondent, a construction company, as a laborer. He worked for the Respondent for approximately one year when he was assigned to a new work crew and a new manager. The Complainant alleged that on a daily basis, the new manager would "yell" at workers and tell them they were not working fast enough, and would disparage older workers, suggesting that "they weren't good for anything." The Respondent conceded that it had received several complaints about this manager for allegedly telling older employees that they were "pieces of dirt, lazy, and not worth a shit," wanted to fire them, and planned on hiring younger employees to replace them. Interviews conducted with other employees confirmed the Complainant's allegations of harassment based on his age. While the Respondent removed the manager from this particular work crew, remedial action by an employer does not negate a claim of harassment when the harasser is a supervisor or manager.

HOUSING CASES

Allegations of discrimination based on familial status and race were supported by evidence obtained in two cases filed with the Division during the 2016-2017 fiscal year. Familial status is a protected class specifically in housing. Familial status refers to having a child or children under the age of 18 in the household. It also includes individuals in the process of adopting or obtaining custody of children under the age of 18, as well as pregnant women.

Significant Housing Cases

The Complainant rented an apartment from the Respondent landlords and signed another lease after living at the property for a year. Prior to her lease expiring, she expressed interest in renewing the lease for another year, and the landlords agreed to renew it without a rent increase. The Complainant alleges that she later informed her landlords that she was pregnant. The Respondent landlords agree that they told the Complainant that they had concerns about the Complainant living in the apartment with an infant, as they were concerned the infant would cry, which could lead to noise complaints from her neighbors. The landlords then informed the Complainant they would be raising her rent when her lease expired, and even though the Complainant agreed to pay the increase, the Respondents refused to renew her lease, stating that they planned to renovate the unit and possibly move into the unit themselves. The evidence demonstrated that the landlords did not move into the unit or renovate it, and instead, posted the unit for rent approximately 2 weeks after the Complainant moved out. The evidence demonstrated that none of the other tenants' leases were non-renewed, and none of the other tenants experienced rent increases as did the Complainant. The evidence obtained found that the landlords' reasoning for the non-renewal of the Complainant's lease was pretextual. The Division issued a Probable Cause determination that the Complainant was denied housing based on her familial status.

The Complainant filed a charge of discrimination with the Division alleging that she was denied housing based on her race/color (African American/Black). She rented an apartment from the Respondent owner for over a year without incident. The Respondent owner retained the services of a new property management company, who threatened the Complainant with eviction for allegedly smoking marijuana on the property and for damage to the property allegedly made by her children. The Complainant asserted that she does not smoke marijuana. Neighbors of the Complainant who are not African American/Black were interviewed, who confirmed that they did smoke marijuana. The evidence obtained during the investigation demonstrated that the Respondent property management company did not take steps to determine where the marijuana smoke was coming from, and assumed that it came from the Complainant's unit. The Respondent reported that the Complainant's lease was not renewed for several incidents involving the Complainant's children, such as breaking windows and throwing rocks at residents. The Respondent maintained that local law enforcement was called to address these incidents. The Division contacted the local law enforcement agency and records from the agency revealed that the reports involving broken windows at the property and rocks thrown at residents did not involve the Complainant or her children, but the children of other residents at the property not of the Complainant's protected class.
The evidence demonstrated that these residents did not receive Demands for Compliance or Possession, and that their leases were renewed upon request. The Complainant's lease was not renewed, despite her request to do so. The evidence obtained during the investigation demonstrated that the Complainant was denied housing based on her race/color (African American/Black).

PUBLIC ACCOMMODATION CASES

Colorado's laws also protect against discrimination in places of Public Accommodation, such as a library or a theatre. The law prohibits the denial of full and equal enjoyment of goods, services, facilities, privileges, and advantages in a place of public accommodation to any person of a protected class. A "place of public accommodation" is any place of business engaged in sales to the public and any place offering services to the public. Other examples include stores, restaurants, hotels, hospitals, parks, museums, sporting or recreational facilities, campsites, hospitals, and educational institutions (does not include churches, synagogues, mosques, or other places that are principally used for religious purposes).

NO place of public accommodation may post a sign which states or implies, "We reserve the right to refuse service to anyone."

Significant Public Accommodation Cases

The Complainant asserted that he was denied services due to his disability (hearing impairment). The evidence demonstrated that he attempted to obtain services from a company that provides services and technologies related to vehicle operation. The Complainant requested that a sign language interpreter be present to relay how to operate the technology that was being installed in his vehicle. The Respondent refused to provide an interpreter, forcing the Complainant to communicate in writing, even though American Sign Language is his first language, not English. The evidence demonstrated that communicating through writing was not effective for the Complainant, and that the Respondent had the resources to provide an interpreter, but refused to do so. The Division issued a Probable Cause finding in the case.

The Complainant filed a charge with the Division alleging that she was harassed based on her sex, female. The Complainant was a guest at the Respondent hotel. The Complainant asserted that a male valet carried her luggage to her room. The Complainant reported that the valet led her to a condominium instead of her room, and asked her if she would like to "hang out" and noted that the walls of the condominium were "soundproof." The Complainant states that she declined the invitation and was able to escape the situation when another person walked by. The Complainant avers that later in the evening the valet called her room and asked her if he could come up to her room and drink with her. She declined. She states that she later saw the valet standing outside of her door, waiting for her to come out of her room. The Complainant contends that she felt unsafe and immediately checked out of the hotel. She went to the front desk and asked for a refund, which was provided. The front desk staff asked her why she was not satisfied with her stay, and she reported her concerns about the valet's behavior. The evidence shows that the Respondent immediately conducted its own investigation into the Complainant's allegations, and promptly terminated the employment of the valet. The Division determined that the Respondent had not discriminated against the Complainant based on her sex, as the Respondent took reasonable care to prevent and promptly correct any adverse treatment based on the Complainant's sex.

ALTERNATIVE DISPUTE RESOLUTION

In order to encourage parties in a case to consider potential resolutions of matters under investigation, the Division offers Alternative Dispute Resolution (ADR) as a time and cost savings alternative to investigation and litigation. This mediation program is provided at no cost to the parties. The process benefits the parties in that it allows open discussion and resolution of a matter at its lowest possible level. Prior to the initiation of an investigation, the Division provides the parties the opportunity to participate in voluntary mediation. This is a formal meeting held between the parties where a Division mediator acts as a neutral intermediary to assist the parties in reaching a compromise. As previously discussed, the ADR unit also conducts compulsory mediation as required by statute after probable cause is found in a case.

Fiscal Year	Mediations			Conciliations			Total		
	Number of Mediations Held	Mediations Resulting in Settlements	Value of Mediated Settlements	Number of Conciliations Held	Conciliations Resulting in Settlements	Value of Conciliated Settlements	Total Held	Total Resulting in Settlements	Total Value
FY14-15	92	44	$ 542,685	22	10	$256,250	114	54	$798,935
FY15-16	114	69	$949,029	28	17	$169,021	142	86	$1,118,050
FY16-17	128	50	$2,663,406	39	11	$206,850	167	61	$ 2,870,256

The Division makes it a priority to provide parties with the opportunity to settle cases as often as possible. In many cases it proves to be a beneficial resolution. The parties are able to be heard as well as feel empowered to address a situation or improve relationships. Above are some statistics that demonstrate the work and outcomes of the program.

To improve customer service, reduce resources expended, and increase benefit to the parties in a case, the Division strives to decrease the time it takes to conduct mediations and conciliations. In this fiscal year, the Division was able to conduct 88% of its formal mediations within 45 days or less of the date the request for mediation was made.

OUTREACH & EDUCATION

Public education is a key part of the Commission's and Division's mission. Through the outreach and education program, we can raise public awareness of civil rights issues and knowledge of the laws prohibiting discrimination in employment, housing and places of public accommodations in Colorado.

In addition to the monthly educational training in Anti-Discrimination in Employment and Fair Housing provided in the main office in Denver, outreach members of the staff travel around the state providing educational presentations to businesses and individuals. In Fiscal Year 2016-2017, in addition to its regular training classes offered in Denver, the Division conducted training and outreach events in Longmont, Greeley, Fort Collins, Cortez, Colorado Springs, Grand Junction, Cañon City, Black Hawk, Aurora, Pueblo, Durango, Gunnison, Montrose, Boulder and Westminster.

The Division partners with other organizations to provide outreach, and leverages valuable resources by working with various organizations including city councils, academic institutions, non-profit organizations, and other government agencies thereby providing a greater ability to educate the public regarding anti-discrimination laws.

The Division also maintains a website at https://www.colorado.gov/dora/civil-rights where the public can learn about the Division and Commission, enroll in upcoming trainings, obtain information about anti-discrimination laws and rules, and download forms to file a complaint of discrimination. Members of the public are always encouraged to let us know how the website is assisting them with their needs.

Training & Outreach Events

Fiscal Year	Number of Trainings	No. of Trainings as Part of a Settlement	Number of Outreach Events	Total Trainings and Outreach
FY14-15	47	2	21	68
FY15-16	47	5	19	66
FY16-17	45	5	26	71

BUDGET

The Civil Rights Division is funded by the State of Colorado's General Fund. The Division's work is also supported by contractual agreements with the U.S. Department of Housing and Urban Development and the U.S. Equal Employment Opportunity Commission. Under the agreements, when Colorado and the federal government share jurisdiction, the Division conducts investigations on behalf of the federal government, avoiding duplicative effort and allowing for a more effective use of resources.

Budget FY 2016-2017 for FTEs

Source	Amount	Full-Time Employees
State General Funds	**$1,804,280**	**21.2**
Grant Funds	**$672,138**	**6**
Total	**$ 2,476,418**	**27.2**

HISTORY OF CIVIL RIGHTS IN COLORADO

1876	The Colorado Constitution was ratified after 100 Black men demanded and were given the right to vote.
1885	The Colorado General Assembly passed the Public Accommodations Act prohibiting discrimination on the basis of race or color.
1893	Colorado expanded its laws and granted women the right to vote.
1917	Discriminatory advertising was added to the prohibitions contained in the 1895 Public Accommodations Act.
1951	The General Assembly passed the Colorado Anti-Discrimination Act creating the Fair Employment Practices Division, attached to the state's Industrial Commission, forerunner of the Colorado Department of Labor and Employment. The Division's mission was to research and provide education regarding employment discrimination and conduct hearings regarding job discrimination cases involving public employers; However, the fledgling agency was given no compliance or enforcement powers.
1955	Lawmakers gave the agency independence when they renamed it the Colorado Anti-Discrimination Commission, detached it from the Industrial Commission, and gave it enforcement authority over public agencies.
1957	The General Assembly repealed an existing statute that prohibited interracial marriage and made the Commission a full-fledged agency when they added private employers with six or more employees to its jurisdiction, and charged the Commission with enforcing the 1895 Public Accommodations Act.
1959	Colorado passed the nation's first state fair housing law to cover both publicly assisted and privately financed housing and added it to the Commission's jurisdiction.
1965	The Colorado legislature renamed the agency the Colorado Civil Rights Commission.
1969	Sex was added as a protected status under Colorado's fair housing law.
1973	Marital status was added as a protected status under Colorado's fair housing law.
1977	Physical disability was added as a protected status under Colorado's anti-discrimination laws.

1979	The Colorado Civil Rights Commission passed its first Sunset Review and was place under the Department of Regulatory Agencies. The legislature also consolidated all of the state's civil rights laws into a single set of statutes and imposed a time limit (180 days) on the agency's jurisdiction.
1986	The General Assembly amended the state's fair employment statutes to include age (40-69 years) as a protected status.
1989	A second Sunset Review left the Commission and the Division stronger when legislators amended the statutes as follows: • granted the Director subpoena power in the investigation of housing cases, • granted Commission power to award back pay in employment cases and actual costs to obtain comparable housing in housing cases, • added mental disability and marriage to a co-worker as protected classes in employment, • required complainants to exhaust administrative remedies before filing a civil action in employment cases, • made retaliation for testifying in a discrimination charge illegal, and • made mediation mandatory after a finding of probable cause.
1990	Legislators amended Colorado's fair housing statutes to meet the federal requirement for "substantial equivalency," as follows: • prohibited discrimination based on familial status (families with children under age 18), • required builders of new multi-family dwellings to meet seven specific accessibility standards, • required landlords to make "reasonable modifications" for persons with disabilities, including permitting disabled tenants to make structural changes at their own expense, • gave parties to housing discrimination cases the option of having their case decided in a civil action rather than a hearing before an administrative law judge, • gave courts or the Commission power to assess fines and award actual and compensatory damages in housing cases, • gave title companies, attorneys, and title insurance agents power to remove illegal covenants based on race or religion, • added mental disability as a protected status under Colorado's fair housing law. • In employment cases, the legislature prohibited any lawful off-premises activity as a condition of employment illegal, with sole recourse through civil suits (dubbed the "smoker's rights" bill).
1991	The legislature gave the Director subpoena power in employment cases.
1992	Legislators fine-tuned the State's fair housing law to meet certain federal equivalency requirements as follows: • prohibited "blockbusting" and discriminating in the terms and conditions of real estate loans, and • excluded persons currently involved in illegal use of or addiction to a controlled substance from the definition of mental disability.
1993	The time limit for processing charges was extended from 180 days to 270 days, with the provision of a 180-day right-to-sue request.
1999	Colorado Civil Rights Division's third legislative Sunset Review left the agency with two new statutory mandates: • gave jurisdiction to the agency for workplace harassment cases without economic loss, • authorization to intervene in intergroup conflicts and offer voluntary dispute resolution services.

2000	The U.S. Courts of Appeals for the 10th Circuit in Barzanji v. Sealy Mattress Co, issued an opinion in a case that was initially filed with the Division, which placed additional limitations on the concept of "continuing violations" and reaffirmed that the date of notification of adverse employment action is the correct date of record for purposes of measuring jurisdictional filing deadlines.
2007	The legislature added sexual orientation, including transgender status, as a protected class in employment cases.
2008	The legislature added sexual orientation, including transgender status, as a protected class in housing and public accommodation cases, but exclude churches and other religious organizations from jurisdiction under the public accommodation statute.
2009	The Colorado Civil Rights Division's fourth legislative Sunset Review left the agency in place with three new statutory mandates: • gave jurisdiction to the agency for claims involving terms and conditions of employment; • allowed the Civil Rights Commission to initiate complaints; and • extended the Division's subpoena authority.
2013	The state legislature passed the Colorado Job Protection and Civil Rights Enforcement Act of 2013 which was signed by the Governor on May 6, 2013. Effective January 1, 2015, the Act expands the remedies a plaintiff may claim in a lawsuit in which intentional employment discrimination is proven to include attorneys' fees, compensatory and punitive damages, and front pay. Additionally, effective January 1, 2015 the Act permits age claims to be made by employees whose age is 40 years and over, with no ceiling as to the maximum age an individual may be in order to bring a claim of age discrimination.
2016	The state legislature passed the Pregnancy Workers Fairness Act of 2016, which was signed by the Governor on June 1, 2016 and went into effect August 10, 2016. This Act requires employers to provide reasonable accommodations to pregnant workers and applicants, as well as conditions related to pregnancy, such as recovery from childbirth. If an employee/applicant requests an accommodation related to pregnancy/childbirth, the employer must engage in an interactive process with the employee/applicant and provide reasonable accommodations to perform the essential functions of the position unless the accommodation would pose an undue hardship on the employer's business.

EXHIBIT 30

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

Charge No. P20140069X

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104 — Charging Party

Azucar Bakery
1886 S. Broadway
Denver, CO 80210 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is insufficient evidence to support the Charging Party's claims of unequal treatment and denial of goods or services based on creed. As such, a **No Probable Cause** determination hereby is issued.

The Division finds that the Respondent did not discriminate based on the Charging Party's creed. Instead, the evidence reflects that the Respondent declined to make the Charging Party's cakes, as he had envisioned them, because he requested the cakes include derogatory language and imagery. The evidence demonstrates that the Respondent would deny such requests to any customer, regardless of creed.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about March 13, 2014, he was treated unequally and denied goods or services in a place of public accommodation based on his creed, Christianity. The Respondent denies the allegations of discrimination and avers that the requested cake by the Charging Party was denied solely on the basis that the writing and imagery were " hateful and offensive".

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof,

then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery operating within the State of Colorado.

The Charging Party visited the Respondent's store on or about March 13, 2014, and was met by Pastry Chef Lindsay Jones ("Jones") (Christian). The Charging Party asked Jones for a price quote on two cakes made in the shape of open Bibles. The Charging Party requested that one of the cakes include an image of two groomsmen, holding hands in front of a cross, with a red "X" over the image. The Charging Party also requested that each cake be decorated with Biblical verses. On one of the cakes, he requested that one side read "God hates sin. Psalm 45:7" and on the opposite side of the cake "Homosexuality is a detestable sin. Leviticus 18:2." On the second cake, which he requested include the image of the two groomsmen with a red "X" over them, the Charging Party requested that it read: "God loves sinners," and on the other side "While we were yet sinners Christ died for us. Romans 5:8." The Charging Party did not state that the cakes were intended for a specific purpose or event.

After receiving the Charging Party's order, Jones excused herself from the counter and discussed the order with Owner Marjorie Silva ("Silva") (Catholic) and Manager Michael Bordo ("Bordo") (Catholic). Silva came to the counter to speak with the Charging Party. Silva asked the Charging Party about his general cake request and the Charging Party explained that he wanted two cakes made to look like Bibles. The Charging Party then explained to Silva that he wanted the verses as referenced above to appear on the cakes.

Silva states that she does not recall the specific verses that the Charging Party requested, but recalls the words "detestable," "homosexuality," and "sinners." The parties dispute what occurred next. The Charging Party alleges that Silva told him that she would have to consult with an attorney to determine the legality of decorating a cake with words that she felt were discriminatory. Silva denies that she told the Charging Party that she needed to consult with

an attorney, and states that she informed the Charging Party that she would make him cakes in the shape of Bibles, but would not decorate them with the message that he requested. Silva states that she declined to decorate the cakes with the verses or image of the groomsmen and offered instead provide him with icing and a pastry bag so he could write or draw whatever message he wished on the cakes himself. Silva also avers that she told the Charging Party that her bakery "does not discriminate" and "accept[s] all humans."

Later that day, the Charging Party returned to the bakery to inquire if Silva was still declining to make the cakes as requested. Bordo states that he reiterated the bakery would bake the cakes, but would not decorate them with the requested Biblical verses or groomsmen. The Charging Party asked Bordo if "he consider[ed] not baking [his] cake discrimination against [him] as a Christian," to which Bordo responded "no." The Charging Party then left the bakery.

The Charging Party maintains that he did not ask the Respondent or its employees to agree with or endorse the message of his envisioned cakes.

The Respondent avers that the Charging Party's request was not accommodated because it deemed the design and verses as discriminatory to the gay, lesbian, bisexual, and transgender community. The Respondent further states that "in the same manner [it] would not accept [an order from] anyone wanting to make a discriminatory cake against Christians, [it] will not make one that discriminates against gays." The Respondent states that it welcomes all customers, including the Charging Party, regardless of their protected class.

The evidence demonstrates that the Respondent specializes in cakes for various occasions, including weddings, birthdays, holidays, and other celebrations. On the Respondent's website, there are images of cakes created for customers in the past. There are numerous cakes decorated with Christian symbols and writing. Specifically, in the category of "Baby Shower and Christening Cakes" there are images of three cakes depicting the Christian cross, two of which include the words "God Bless" and one inscribed with "Mi Bautizo" (Spanish for "my baptism"). There is also an image of a wedding cake created by the Respondent depicting an opposite sex couple embracing in front of a Christian cross. The Respondent's website also provides that the bakery will make cakes "for every season of the year," including the Christian holidays of Easter and Christmas.

The Respondent states that it has previously denied cake requests due to business constraints, such as inability to meet customer deadlines due to high demand, but maintains that it would deny any requests deemed "offensive" or "hateful."

Comparative data reflects that the Respondent employs six persons, of whom three are Catholic and three are non-Catholic Christian. The record reflects that, in an average year, the Respondent produces between 60 and 80 cakes with Christian themes and/or symbolism.

Unequal Treatment

To prevail on a claim of discriminatory denial of equal treatment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified

recipient of the goods and services of the Respondent; and (4) the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Charging Party alleges that the Respondent treated him differently than persons of non-Christian creed by "demeaning his beliefs." There is insufficient evidence to demonstrate the Respondent treated the Charging Party differently than customers outside of his protected class.

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class (2) the Charging Party sought services or goods from the Respondent; (3) the Charging party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Respondent was a qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Respondent denied the Charging Party's request to make cakes that included the Biblical verses and an image of groomsmen with a red "X" over them. The circumstances do not give rise to an inference that the Respondent denied the Charging Party goods or services based on his creed. Indeed, the evidence demonstrates that the Respondent would have made a cake for the Charging Party for any event, celebration, or occasion regardless of his creed. Instead, the Respondent's denial was based on the explicit message that the Charging Party wished to include on the cakes, which the Respondent deemed as discriminatory. Additionally, the evidence demonstrates that the Respondent regularly creates cakes with Christian themes and/or symbolism, which are presumably ordered by Christian customers. Finally, the Respondent avers that it would similarly deny a request from a customer who requested a cake that it deemed discriminatory towards Christians.

Based on the evidence contained above, I determine that the Respondent has not violated C.R.S. 24-34-601(2), as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(I)(A) and Rule 10.6(A)(1) of the Commission's Rules of Practice and Procedure, the Charging Party may appeal the dismissal of this case to the Commission within ten (10) days, as set forth in the enclosed form.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or

b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(l)].

On Behalf of the Colorado Civil Rights Division

Jennifer McPherson, Interim Director
Or Authorized Designee

3/24/2015
Date

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

Charge No. P20140070X

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104 — Charging Party

Le Bakery Sensual, Inc.
300 E. 6th Ave.
Denver, CO 80203 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is insufficient evidence to support the Charging Party's claims of unequal treatment and denial of goods or service based on creed. As such, a **No Probable Cause** determination hereby is issued.

The Division finds that the Respondent did not discriminate based on the Charging Party's creed, but instead refused to create cakes for anyone, regardless of creed, where a customer requests derogatory language or imagery.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about March 13, 2014, he was denied equal treatment and access to goods or services in a place of public accommodation based on his creed, Christianity. The Respondent denies the allegations of discrimination and avers that the cake requested by the Charging Party was denied solely on the basis that the writing and imagery were "hateful."

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in

the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery operating within the State of Colorado.

The Charging Party visited the Respondent's store on or about March 13, 2014, and was met by Owner John Spotz ("Spotz") (no religious affiliation). The Charging Party asked Spotz for a price quote on two cakes. The Charging Party requested that two sheet cakes be made to resemble open Bibles. Spotz informed the Charging Party that he "had done open Bibles and books many times and that they look amazing." The Charging Party then elaborated that on one cake, he wanted an image of two groomsmen, appearing before a cross, with a red "X" over the image. The Charging Party described the image as "a Ghostbusters symbol over the illustration to indicate that same-sex unions are un-Biblical and inappropriate." The Charging Party wanted Biblical verses on both cakes. The Charging Party showed Spotz the verses, which he had written down on a sheet of paper, and read them aloud. The verses were: "God hates sin. Psalm 45:7" "Homosexuality is a detestable sin. Leviticus 18:2" and on the cake with the image of groomsmen before a cross with a red "X", the verses: "God loves sinners" and "While we were yet sinners Christ died for us. Romans 5:8."

After the Charging Party made the request for the image of the groomsmen with the "X" over them, Spotz asked if the Charging Party was "kidding him." The Charging Party responded that his request was serious. Spotz then informed the Charging Party that he would have to decline the order as envisioned by the Charging Party because he deemed the requested cake "hateful." The Charging Party did not state to Spotz or the Division whether the cakes were intended for a specific purpose or event. The Charging Party then left the bakery, after Spotz declined to create the cakes as the Charging Party had requested.

The Charging Party maintains that he did not ask the Respondent, or its employees, to agree with or endorse the message of his envisioned cakes.

The Respondent avers that everyone, including the Charging Party, is welcome at its bakery, regardless of creed, race, sex, sexual orientation or disability. The Respondent states that its refusal to create the specific cake requested by the Charging Party was based on its policy "not [to] make a cake that is purposefully hateful and is intended to discriminate against any person's creed, race, sex, sexual orientation, disability, etc." The Respondent avers that the Charging Party's request was intended to "denigrate individuals of a specific sexual orientation."

The record reflects that the Respondent specializes in making unique and intricate cakes for various occasions. The Respondent's website provides "[it] can design cakes that look like people, cars, motorcycles, houses, magazines, and just about anything you can imagine." The Respondent's website also includes images of cakes it has created for customers in the past, including cakes made to look like books and magazines. The Respondent also makes wedding cakes for both opposite sex and same sex couples, as well cakes for the Christian holidays of Christmas and Easter.

The Respondent denies that it has ever denied services or goods to customers based on their creed and/or religion.

It is the Respondent's position that production of the cake requested by the Charging Party would run afoul of C.R.S. § 24-34-701, which provides that a place of public accommodation may not "publish . . . or display in any way manner, or shape by any means or method . . . any communication . . . of any kind, nature or description that is intended or calculated to discriminate or actually discriminates against any . . . sexual orientation . . . ."

Spotz states that the only time he recalls denying a cake request was when he received a phone call in which the caller asked if he could decorate a cake with "a sexy little school girl."

Comparative data reflects that the Respondent employs four persons, of whom one is Catholic, one is Jewish, and two have no religious affiliation. The record reflects that the Respondent creates at least one Christian themed cake per month, increasing to three or four Christian themed cakes in the month of December.

Unequal Treatment

To prevail on a claim of discriminatory denial of equal treatment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; and (4) the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Charging Party alleges that the Respondent treated him differently than persons of non-Christian creed by "demeaning his beliefs." There is insufficient evidence to demonstrate the Respondent treated the Charging Party differently than other customers because of his creed.

The Charging Party's request was denied because he requested the cakes include language and images the Respondent deemed hateful.

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class (2) the Charging Party sought services or goods from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is "un-Biblical and inappropriate." The Respondent denied the Charging Party's request to make cakes that included the requested Biblical verses and an image of groomsmen with a red "X" over them. The circumstances do not give rise to an inference that the Respondent denied the Charging Party goods or services based on his creed. Instead, the evidence demonstrates that the Respondent was prepared to create the cakes as described by the Charging Party, until he requested the specific imagery of the two groomsmen with a red "x" placed over image and the "hateful" Biblical verses. Additionally, the record reflects that the Respondent has produced cakes featuring Christian symbolism in the past, which were presumably ordered by Christian customers.

Based on the evidence contained above, I determine that the Respondent has not violated C.R.S. 24-34-601 (2), as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(I)(A) and Rule 10.6(A)(1) of the Commission's Rules of Practice and Procedure, the Charging Party may appeal the dismissal of this case to the Commission within ten (10) days, as set forth in the enclosed form.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or

b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(I)].

On Behalf of the Colorado Civil Rights Division

Jennifer McPherson, Interim Director
Or Authorized Designee

3/24/2015
Date

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

Charge No. P20140071X

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104 — Charging Party

Gateaux, Ltd.
1160 N. Speer Blvd.
Denver, CO 80204 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is insufficient evidence to support the Charging Party's claims of unequal treatment and denial of goods or services based on creed. As such, a **No Probable Cause** determination hereby is issued.

The Division finds that the Respondent did not discriminate based on the Charging Party's creed, but instead refused to create cakes for anyone, regardless of creed, where a customer requests derogatory language or imagery.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about March 13, 2014, he was denied equal treatment and access to goods or services in a place of public accommodation based on his creed, Christianity. The Respondent denies the allegations of discrimination and avers that the cake order requested by the Charging Party was denied because the cakes included what was deemed to contain "offensive" or "derogatory" messages and imagery. In addition, the Respondent was uncertain whether it could technically create the cakes as described by the Charging Party.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof,

then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery operating within the State of Colorado.

The Charging Party visited the Respondent's store on or about March 13, 2014, and was met by Manager Michelle Karmona ("Karmona"). The Charging Party asked Karmona for a price quote on two cakes. The Charging Party requested that two sheet cakes be made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. The Charging Party requested that one of the cakes include an image of two groomsmen, holding hands, with a red "X" over the image. On one cake, he requested that one side read "God hates sin. Psalm 45:7" and on the opposite side of the cake "Homosexuality is a detestable sin. Leviticus 18:2." On the second cake, with the image of the two groomsmen covered by a red "X," the Charging Party requested that it read: "God loves sinners" and on the other side "While we were yet sinners Christ died for us. Romans 5:8." The Charging Party did not state to the Respondent or the Division whether the cake was intended for a specific purpose or event.

The parties dispute the events that occurred next. The Charging Party alleges that Karmona initially indicated that the Respondent would be able to make the Bible shaped cakes, but once she read the Biblical verses, she excused herself from the counter. The Charging Party further alleges that Karmona returned a short time later, informing him that she had spoken with the Respondent's Owner, Kathleen Davia ("Davia") (Catholic). The Charging Party claims that at this time Karmona informed him that the Respondent would bake the cakes, but would not include such a "strong message." The Respondent denies that this occurred, claiming instead that the Charging Party had indicated that he wanted the groomsmen to be three-dimensional figurines with a "Ghostbusters X" over the figures. Karmona felt the Respondent would be unable to accommodate the request as described by the Charging Party, based on "technical capabilities." The Respondent claims that the Charging Party was told that the

Bible-shaped cakes, with the Biblical verses, *sans* the groomsmen figurines and "Ghostbusters X," could be made.

The Respondent avers that, as with all customers, the Charging Party was asked to elaborate as to the purpose of the cakes, how he wished to present it, and how he would use it. The Charging Party would not provide an explanation to the Respondent. The Respondent alleges that it was the Charging Party's refusal to elaborate that left it with the impression that it would not be able to produce the cakes as requested by the Charging Party. The Respondent avers that it consistently requests that customers provide an image for them to replicate when it is something the Respondent does not "stock." For example, the Respondent avers that a customer requesting a cake with the image of a popular cartoon character can easily be created; however, when a customer requests a specific image without a photo reference or elaboration of the image, the Respondent will decline the request. Karmona then referred the Charging Party to another bakery with the belief that that bakery would be better suited to create the cakes as envisioned by the Charging Party.

The Respondent does not have a specific policy regarding the declination of a customer request, but states that the employee who receives the order also decorates the cake. It is the Respondent's position that, based on its individual employees' pastry knowledge, experience, and qualifications, they are best able to determine whether they have the ability to create the cake that a customer requests. Therefore, in the case of the Charging Party's request, Karmona determined that she would be unable to create the cakes as the Charging Party described.

The Respondent states that it has previously denied customer requests based on technical requirements, including inability to create the requested image, and requests for buttercream iced cakes where the Respondent maintained a fondant decorated cake would be preferable. Additionally, the Respondent states that it has denied customer requests for cakes that included crude language such as "eat me" or "ya old bitch" or "naughty images," on the basis that the imagery and messages were not what the Respondent wished to represent in its products. The Respondent's other reasons for declining customers' request include: availability of the product, insufficient time to create the cake requested, and scheduling conflicts.

The Charging Party avers that he did not ask the Respondent, or any of its employees, to agree with or endorse the message of his envisioned cakes.

Comparative data indicates that the Respondent employs six persons, of whom two are non-Catholic Christian, two are Agnostic, one is Catholic, and one is Atheist. The record reflects that the Respondent regularly creates Christian themed cakes and pastries, including items for several Catholic and non-Catholic Christian church events. Additionally, the evidence demonstrates that they have produced a number of cakes with Christian imagery and symbolism during the relevant time period.

The Respondent states that the Charging Party is welcome to return to the bakery.

Unequal Treatment

To prevail on a claim of discriminatory denial of equal treatment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; and (4) the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party visited the Respondent and sought two cakes bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Charging Party alleges that the Respondent treated him differently than persons outside of his protected class by "demeaning his beliefs." The evidence demonstrates that the Respondent attempted to engage the Charging Party in a dialogue regarding the cakes in more detail, which the Charging Party declined. There is insufficient evidence to demonstrate that the Respondent treated the Charging Party differently based on his creed. The evidence demonstrates that the Respondent would not create cakes with wording and images it deemed derogatory. The Respondent has denied other customers request for derogatory language without regard to the customer's creed.

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class (2) the Charging Party sought services or goods from the Respondent; (3) the Charging arty is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party visited the Respondent and sought two cakes bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Respondent denied the Charging Party's request to make cakes that included the Biblical verses and an image of groomsmen with a red "X" over them. The circumstances do not give rise to an inference that the Respondent denied the Charging Party goods or services based on his creed. Instead, the evidence suggests that based on the Respondent's understanding of the Charging Party's request, it would be unable to create the cake that he envisioned. The record reflects that the Respondent has denied customer requests for similar reasons. Additionally, the evidence demonstrates that the Respondent regularly produces cakes and other baked goods with Christian symbolism and messages, and continues to welcome the Charging Party in its bakery.

Based on the evidence contained above, I determine that the Respondent has not violated C.R.S. 24-34-601(2), as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(I)(A) and Rule 10.6(A)(1) of the Commission's Rules of Practice and Procedure, the Charging Party may appeal the dismissal of this case to the Commission within ten (10) days, as set forth in the enclosed form.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or

b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(l)].

On Behalf of the Colorado Civil Rights Division

Jennifer McPherson

Jennifer McPherson, Interim Director
Or Authorized Designee

3/24/2015
Date

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

June 30, 2015

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104

Charge Number: P20140070X; William Jack vs. Le Bakery Sensual, Inc.

Dear Mr. Jack:

This letter is to inform you that the Colorado Civil Rights Commission has reviewed your appeal. The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director's decision of no probable cause.

If you wish to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, you need to file within 90 days of the date of this mailing pursuant to CRS 24-34-306(2)(b)(I)(B & C).

Pursuant to CRS 24-34-306 (2) (b) (I) if you as the Charging Party do not file such an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action.

On behalf of the Commission

Rufina Hernández,
Director

cc: Le Bakery Sensual, Inc.
Jack Robinson

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

June 30, 2015

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104

Charge Number: P20140071X; William Jack vs. Gateaux, Ltd.

Dear Mr. Jack:

This letter is to inform you that the Colorado Civil Rights Commission has reviewed your appeal. The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director's decision of no probable cause.

If you wish to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, you need to file within 90 days of the date of this mailing pursuant to CRS 24-34-306(2)(b)(I)(B & C).

Pursuant to CRS 24-34-306 (2) (b) (I) if you as the Charging Party do not file such an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action.

On behalf of the Commission

Rufina Hernández,
Director

cc: Gateaux, Ltd.
Kathleen Davia

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

June 30, 2015

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104

Charge Number: P20140069X; William Jack vs. Azucar Sweet Shop and Bakery.

Dear Mr. Jack:

This letter is to inform you that the Colorado Civil Rights Commission has reviewed your appeal. The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director's decision of no probable cause.

If you wish to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, you need to file within 90 days of the date of this mailing pursuant to CRS 24-34-306(2)(b)(I)(B & C).

Pursuant to CRS 24-34-306 (2) (b) (I) if you as the Charging Party do not file such an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action.

On behalf of the Commission

Rufina Hernández,
Director

cc: Azucar Sweet Shop and Bakery
David Goldberg

EXHIBIT 31

No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.,
AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS,
Respondents.

On Writ of Certiorari
to the Colorado Court of Appeals

BRIEF FOR RESPONDENT COLORADO CIVIL RIGHTS COMMISSION

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Counsel for Respondent
Colorado Civil Rights Commission

October 23, 2017

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Colorado's Anti-Discrimination Act forbids businesses engaged in sales to the public from denying service because of a customer's sexual orientation. The question presented is whether the First Amendment grants a retail bakery the right to violate this equal-service requirement by refusing to sell a wedding cake of any kind to any same-sex couple.

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BRIEF FOR RESPONDENT

Respondent Colorado Civil Rights Commission respectfully requests that the Court affirm the judgment of the Colorado Court of Appeals.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The provision of the Colorado Anti-Discrimination Act that prohibits discriminatory sales by businesses open to the public provides:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges,

> advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.

COLO. REV. STAT. § 24-34-601(2)(a).

INTRODUCTION

When members of the public walk into retail stores in Colorado, they bring with them a basic expectation: they will not be turned away because of their protected characteristics—including race, sex, religion, or sexual orientation.

This case arose because a gay couple was referred to a retail bakery, where the couple hoped to buy a wedding cake. Within moments, however, the couple was denied service. The bakery would sell them neither a custom-designed cake nor a cake identical to one the bakery had sold to its other customers. In the past, the bakery had even refused to sell cupcakes to a lesbian couple for a family commitment ceremony. These denials of service are based on the claim that the bakery's wedding cakes are "speech," and selling them to gay couples would infringe the First Amendment rights of the bakery's owner, who objects to the marriages of same-sex couples on religious grounds.

Everyone agrees that the government cannot force people or entities to "speak." School children cannot be punished for refusing to say the pledge of allegiance. A newspaper cannot be compelled to print a politician's editorial. But those scenarios are nothing like the circumstances here, in which a state law has merely prohibited discriminatory denials of service by businesses open to the public. If a retail bakery will offer a white, three-tiered cake to one customer, it has no constitutional right to refuse to sell the same cake to the next customer because he happens to be African-American, Jewish, or gay.

Creating an exemption from this basic principle for "expressive" businesses would dramatically weaken anti-discrimination laws. If forbidding discrimination by these businesses is constitutionally equivalent to the forced transmission of a government-favored message, a wide range of commercial entities would have a license to discriminate, whether motivated by religious belief or raw animosity. Under this unprecedented interpretation of the First Amendment, a racist baker could refuse to sell "Happy Birthday" cakes to African-American customers, a screen printer could refuse to sell a banner announcing a Muslim family's reunion, and a tailor could refuse to sell a gay man a custom suit for a charity gala.

This case has nothing to do with the artistic merits of wedding cakes. It is instead about the integrity of a 150-year-old principle: when a business opens its doors to the general public, it may not reject customers because of who they are.

STATEMENT

I. Legal Background

A. For over 150 years, States like Colorado have prohibited discrimination in the commercial marketplace.

After the Civil War, many States enacted laws to protect "the civil rights of historically disadvantaged groups." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984). Many of these laws protected the right to purchase goods and services from "public accommodations," a right rooted in common-law principles predating the Reconstruction Amendments. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964). As time went on, the States expanded the common law rule to secure more than a room at the inn. They "progressively broadened the scope of [their] public accommodations law[s] …, both with respect to the number and type of covered facilities and with respect to the groups against whom discrimination is forbidden." *Roberts*, 468 U.S. at 624. At their core, however, these laws focused on a basic principle: businesses that sell to the public cannot deny goods or services because of a customer's protected characteristics.

One purpose of public accommodations laws was utilitarian: to ensure that discrimination would not deny citizens food, transportation, and lodging. But that was never their only aim. The central purpose of public accommodations laws is to "protect[ ] the State's citizenry from a number of serious social and personal harms." *Roberts*, 468 U.S. at 625. Title II of the federal Civil Rights Act illustrates the point. While Title II is

narrow—applying only to hotels, restaurants, gas stations, and places of entertainment, 42 U.S.C. § 2000a(b)—it was enacted over 50 years ago for reasons beyond economic access:

> The primary purpose … is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.

Heart of Atlanta Motel, 379 U.S. at 291–92 (Goldberg, J., concurring) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16); *see also id.* at 250 (majority opinion) (explaining that "the fundamental object" of Title II is to serve personal dignity).

During the civil rights era, proponents of segregation argued that businesses have a right to discriminate in selling goods and services. Those arguments never took hold. For example, some argued that public accommodations laws interfere with a business owner's free exercise of religion. That argument was deemed "patently frivolous." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968). Thus, "in a long line of cases" the Court rejected the notion that public accommodations laws "interfere[ ] with personal liberty." *Heart of Atlanta Motel*, 379 U.S. at 260.

B. Colorado was among the first States that adopted public accommodations statutes.

Colorado adopted its first public accommodations statute more than 130 years ago. In 1885—two years after this Court invalidated the federal Civil Rights Act of 1875 and invited state legislation on the subject—Colorado's General Assembly passed "An Act to Protect All Citizens in Their Civil Rights." 1885 COLO. SESS. LAWS at 132–33; *see Civil Rights Cases*, 109 U.S. 3 (1883). The 1885 law guaranteed "all citizens … regardless of race, color or previous condition of servitude … full and equal enjoyment" of specified public facilities. *Id*. Ten years later, the General Assembly updated the law, removing "churches" from its coverage and expanding it to include "all other places of public accommodation." *Compare* 1895 COLO. SESS. LAWS, ch. 61, at 139, *with* 1885 COLO. SESS. LAWS at 132–33.

Colorado's efforts to combat discrimination have evolved over the past 120 years. The Colorado Anti-Discrimination Act now establishes a comprehensive regulatory system, similar to the one established by the federal Civil Rights Act, to combat discrimination in housing, employment, and public accommodations. COLO. REV. STAT. §§ 24-34-301–804. The Civil Rights Division and Civil Rights Commission jointly oversee and enforce that system. COLO. REV. STAT. §§ 24-34-302–306.

The Division investigates charges of discrimination made by members of the public and determines whether a charge is supported by probable cause. COLO. REV. STAT. § 24-34-306(2). Upon a finding of

probable cause, the Commission decides whether to initiate a formal hearing. COLO. REV. STAT. § 24-34-306(4). If the evidence at that hearing establishes a legal violation, the Commission may order a business to cease and desist its discriminatory practices and impose remedial measures. COLO. REV. STAT. §§ 24-4-105(14), 24-34-306(9), 602(1)(a). The Commission cannot impose damages or fines in public accommodations cases. COLO. REV. STAT. §§ 24-34-306(9), 24-34-605.[1]

The current version of the Act defines "public accommodation" as a "place of business engaged in any sales to the public and any place offering services … to the public." COLO. REV. STAT. § 24-34-601(1). The definition excludes "a church, synagogue, mosque, or other place that is principally used for religious purposes." *Id.* Places of public accommodation are prohibited from denying "the full and equal enjoyment of … goods, services, facilities, privileges, advantages, or accommodations" "because of" a customer's protected characteristics. COLO. REV. STAT. § 24-34-601(2)(a).

[1] If a complainant wishes to seek a monetary judgment, a lawsuit must be filed, and the most that may be recovered is $500. COLO. REV. STAT. § 24-34-602. Higher amounts may be recovered in disability cases. COLO. REV. STAT. § 24-34-802(2).

C. In light of pervasive discrimination against gay people, Colorado amended its Anti-Discrimination Act to prohibit discrimination based on sexual orientation.

In 2007 and 2008, the Colorado legislature amended the Anti-Discrimination Act to add "sexual orientation" as a protected characteristic. It did so in light of a long history of discrimination against gay people, both nationwide and in Colorado specifically, and in recognition of the fact that sexual-orientation discrimination remains a serious problem. *See* Br. of *Amici Curiae* Colo. Orgs. & Individuals § I.

This Court has recognized the extent of that discrimination. "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 v. Hodges*, 135 S. Ct. 2584, 2596 (2015). Colorado shares this history. In 1992, a ballot initiative prohibited government entities within the State from "adopt[ing] or enforc[ing]" any policy granting gay people "protected status." *Romer v. Evans*, 517 U.S. 620, 624 (1996). That is, the initiative "bar[red] homosexuals from securing protection against the injuries that … public-accommodations laws address." *Id*. at 629. This Court struck down the initiative, concluding that this "broad and undifferentiated disability" reflected animus toward gay people, in violation of the Fourteenth Amendment. *Id*. at 632, 635–36.

Over time, the State reversed course and began equalizing the legal rights of gay people with those of

other citizens. In 2009, for example, Colorado granted same-sex partners the right to become beneficiaries of insurance, to receive inheritances, and to visit their partners in the hospital. 2009 COLO. SESS. LAWS, ch. 107, at 428. In 2013, the State established civil unions. 2013 COLO. SESS. LAWS, ch. 49, at 147.

But before granting those broader rights, Colorado amended the Act to provide the narrower protections at issue here. The goal of these 2007 and 2008 amendments was to extend the same protections that apply to race, sex, and other characteristics—*e.g.*, against discrimination in housing, employment, and public accommodations—to sexual orientation. *See* 2008 COLO. SESS. LAWS, ch. 341, at 1593; 2007 COLO. SESS. LAWS, ch. 295, at 1254.

Today, public accommodations laws similar to Colorado's have been enacted in all but five States. Br. of *Amici Curiae* Public Accommodation Law Scholars § I. Hundreds of jurisdictions, including 21 States and the District of Columbia, expressly prohibit businesses from refusing to sell goods and services based on a customer's sexual orientation. *See id*.

II. Facts and Procedural History

A. The Denial of Service.

In 2012, a gay couple, Charlie Craig and David Mullins, visited Masterpiece Cakeshop to order a wedding cake. J.A. 111. Masterpiece is a Colorado corporation that sells pre-made and made-to-order baked goods to the public. J.A. 105, 110. At the time, Colorado did not recognize the marriages of gay people, and the State's civil-unions law had not yet been enacted, so the couple planned to marry in

Massachusetts and celebrate with friends and family back home in Colorado. J.A. 110–11. They had not shopped at Masterpiece before; the event planner for their reception site referred them there. J.A. 183–84.

At the shop, the couple, along with Craig's mother, browsed pictures of wedding cakes that Masterpiece had sold to other customers. J.A. 59. They were then met by Jack Phillips, the proprietor. Within moments, they learned that the bakery would not serve them. J.A. 59, 111, 169.

Phillips said that it was his business practice not to sell wedding cakes to same-sex couples. J.A. 60, 111, 152. He said he would sell the couple "birthday cakes, shower cakes, … cookies and brownies, I just don't make cakes for same sex weddings." J.A. 152. The couple had no opportunity to discuss the cake they wanted, such as its design or whether it would include particular features or messages. J.A. 111, 152. They immediately left the store when it became clear they were being denied service. J.A. 111, 152.

The next day, Craig's mother called the shop to ask Phillips why he had turned her son away. Phillips responded that he would not make any wedding cake for any same-sex couple because of his religious beliefs. J.A. 152–53. He also said he objected to making a cake for what he described as an "unlawful" or "illegal" event. J.A. 39, 153, 159.

B. The Division's Investigation.

Craig and Mullins filed a charge of discrimination with the Colorado Civil Rights Division. J.A. 31. They alleged that they were denied full and equal service at a retail store because of their sexual orientation. J.A. 34–36.

The Division initiated an investigation, during which it learned that Phillips had denied service to other same-sex couples. J.A. 76. On one occasion, he refused to sell a lesbian couple "cupcakes for their family commitment ceremony," citing a policy "of not selling baked goods to same-sex couples for this type of event." J.A. 73. Phillips did not dispute this policy, nor did he dispute that his bakery is a public accommodation. J.A. 59–63, 72. Based on this record, the Division found probable cause that the Act had been violated, and it referred the matter to the Commission. J.A. 69.

C. Administrative Proceedings and Appeal.

1. The Civil Rights Commission determined that the charge of discrimination warranted a hearing. J.A. 87. The Commission filed formal complaints before an Administrative Law Judge, and Craig and Mullins intervened. J.A. 87, 102.

After discovery and motions practice, the parties moved for summary judgment, agreeing that there was no dispute as to the material facts. *See* J.A. 110–12, 148–53, 194–95. Phillips admitted that his shop "is a place of business that engages in the sale of bakery goods to the public." J.A. 105. He also admitted that he refused to serve Craig and Mullins and had refused to serve other same-sex couples "on approximately five or

six other occasions." J.A. 107–09. Phillips nonetheless argued that the First Amendment requires an exception to the Anti-Discrimination Act for "expressive" businesses. He asserted that complying with the Act's equal-service requirement would compel him to speak (in the form of a wedding cake) and would infringe the free exercise of his religion.

The Administrative Law Judge rejected those arguments. The judge concluded that Phillips violated the Act because he refused to serve same-sex couples on the same terms as other customers, observing that "for well over 100 years, Colorado has prohibited discrimination by businesses that offer goods and services to the public." Pet. App. 68a.

The judge next addressed whether the Act's prohibition against discriminatory sales amounts to compelled speech. The judge acknowledged that "decorating a wedding cake involves considerable skill and artistry." Pet. App. 75a. But no speech was compelled here because Phillips "categorically refused" to accept any wedding cake order from Craig and Mullins, even for "a nondescript cake that would have been suitable for consumption at any wedding." Pet. App. 75a. The judge explained that, even if the Act might be viewed as affecting a bakery's expression, "such impact is plainly incidental to the state's legitimate regulation of discriminatory conduct." Pet. App. 76a.

The judge distinguished scenarios in which a bakery might refuse to sell a cake featuring a "white-supremacist message" or a message "denigrating the Koran." Pet. App. 78a. The judge acknowledged that bakeries may apply general terms of service to all

customers. *Id*. Here, however, Phillips refused to sell any wedding cake to Craig and Mullins, "regardless of what was written on it or what it looked like." *Id*.

Turning to the free exercise claim, the judge concluded that the Act is "neutral and of general applicability because it is not aimed at restricting the activities of any particular group of individuals or businesses, nor is it aimed at restricting any religious practice." Pet. App. 84a. Consequently, Phillips was "not free to ignore its restrictions." *Id*.

2. The Commission unanimously adopted the administrative law judge's decision. Pet. App. 57a–58a. It ordered Phillips to "cease and desist from discriminating against … same-sex couples by refusing to sell them wedding cakes or any product [Masterpiece] would sell to heterosexual couples." *Id*. As is commonplace in civil rights cases, the Commission required Phillips to train his staff to ensure compliance with the Colorado Anti-Discrimination Act and to submit compliance reports. *Id*. The Commission ordered no monetary penalty or damages, nor was it authorized to. *Id*.

3. The Colorado Court of Appeals unanimously affirmed. Rejecting Phillips's First Amendment arguments, it emphasized that Phillips refused to make Craig and Mullins a cake "before any discussion of the cake's design." Pet. App. 28a; *see also* Pet. App. 4a, 29a, 35a. Thus, the only "compelled conduct" at issue was "basing [the] decision to serve a potential client, at least in part, on the client's sexual orientation." Pet. App. 29a. Prohibiting this discriminatory denial of service, the court held, does not violate free speech or free exercise protections. Pet. App. 22a–36a, 42a–45a.

The Colorado Supreme Court denied review. Pet. App. 54a–55a.

SUMMARY OF ARGUMENT

I.A. The Colorado Anti-Discrimination Act, as applied to a retail bakery that refuses to offer a line of goods and services to customers because of their protected characteristics, fully comports with the First Amendment. The discriminatory sale of goods and services is commercial conduct, not protected expression, *e.g.*, *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995), and discrimination is entitled to "no constitutional protection," even if engaged in by an entity whose business implicates the First Amendment, *e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *see N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 12–13 (1988).

Here, whether or not a wedding cake can be characterized as "pure speech" or "expressive conduct," the Act did not regulate the creative or expressive aspects of Phillips's retail bakery business. It prohibited only his discriminatory policy of refusing to sell any wedding cake of any kind to any gay couple. If a retail bakery will sell a cake of a particular design to some customers, it has no constitutional right to withhold that same cake from others because of their race, sex, faith, or sexual orientation. A prohibition against discriminatory sales does not infringe the freedom of speech.

B. In only two cases, both decided outside the commercial context, did the Court hold that a particular application of a public accommodations law

violated the First Amendment. In the first, *Hurley*, 515 U.S. 557, a private parade was forced to admit a group of marchers seeking to express its own distinct message. In the second, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), a private expressive association was forced to alter its membership ranks. Neither case called into question the application of public accommodations laws to businesses when they make sales to the public. To the contrary, both *Hurley* and *Dale* reaffirmed that States may prohibit the commercial, non-expressive act of refusing service because of a customer's protected characteristics.

C. The compelled speech doctrine does not grant businesses a license to discriminate in making sales. The doctrine applies either when a State selects a message and requires people or entities to deliver it, *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), or when a State grants a favored speaker access to a private forum, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). The Colorado Anti-Discrimination Act does neither.

Treating the nondiscriminatory sale of wedding cakes as "compelled speech"—as both Phillips and the United States urge—would depart from established First Amendment principles and severely undermine anti-discrimination laws. Any "expressive" business could discriminate, regardless of motive. And many businesses can characterize themselves as "expressive." For example, a family portrait studio could enforce a "No Mexicans" policy. A banquet hall could refuse to host events for Jewish people. A hair salon could turn away a lesbian woman who wants a new hair style because she will be attending a special event. Phillips

and the United States each present a different conception of the compelled speech doctrine, but neither suggests an analytical framework that comports with constitutional principles. The First Amendment does not privilege the expressive rights of some businesses above the expressive rights of others when it comes to selling goods and services to the public.

D. Even assuming the Act affects the expressive aspects of running a retail bakery, the effect is incidental to the Act's goal of eliminating discriminatory sales by businesses open to the public. Consequently, the most stringent form of scrutiny that may apply in this case is the deferential four-part test from *United States v. O'Brien*, 391 U.S. 367 (1968). Each prong of that test is satisfied here, and neither Phillips nor the United States argues otherwise. Instead, Phillips attempts to avoid the test altogether by labeling the Act content- and viewpoint- based. That argument contravenes a long line of this Court's decisions. *E.g.*, *Hurley*, 515 U.S. at 572.

To support his claim that the Commission's enforcement of the Act is viewpoint-based, Phillips cites circumstances in which Colorado bakeries refused to sell cakes with anti-gay inscriptions and were found not to violate the Act. But businesses do not violate public accommodations laws when, relying upon general terms of service, they decline to sell products with particular designs to all of their customers. Businesses trigger those laws only when they refuse to sell a product to customers because of their protected characteristics, despite selling the same product to others.

II. The Free Exercise Clause does not grant exemptions from public accommodations laws, which are neutral and generally applicable under *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 878 (1990). Public accommodations laws apply broadly and do not distinguish between secular and religiously motivated business practices. Phillips has not carried his burden to show that the Act was applied here to target religious conduct.

The Court should decline to apply the "hybrid rights" theory for the first time. Phillips did not seek certiorari on that issue and, in any event, he has no viable "hybrid" claim.

III. Finally, strict scrutiny does not apply. But even if it did, it would be satisfied. As this Court has acknowledged, public accommodations laws both serve compelling interests and are precisely tailored to address the harms of discrimination by commercial entities. *Roberts*, 468 U.S. at 626.

Phillips argues that, when applied to protect lesbian women and gay men from discrimination, public accommodations laws do not serve compelling interests. He also claims that States, in seeking to prevent sexual-orientation discrimination, may not apply standard prohibitions against discriminatory sales. He is mistaken.

ARGUMENT

I. The Free Speech Clause does not prohibit Colorado from banning discrimination by commercial entities when they sell goods and services to the general public.

This Court has never questioned a State's authority to apply a public accommodations law to a business's sale of goods and services. Only in two non-commercial settings—when public accommodations laws were applied either to edit the messages of a private parade or to alter a private organization's membership decisions—did the Court sustain First Amendment challenges to such laws.

Phillips seeks a far broader, and indeed unprecedented, exemption for his bakery. Although he has repeatedly conceded that his business is a public accommodation, he claims that he has the right to deny service to customers with protected characteristics because the products he wishes to withhold can be characterized as "creative" or "expressive." This logic finds no support in the First Amendment. A business's decision of whom to serve is not "speech," and discrimination has never been granted constitutional protection.

No one disputes that Phillips is "a man of deep religious faith whose beliefs guide his work," Pet. Br. 1, or that the Free Speech Clause protects his right to give voice to those beliefs. But when a business opens its doors to the public, a State may require that it serve customers on equal terms, regardless of their race, sex, faith, or sexual orientation.

A. The Anti-Discrimination Act was applied here to regulate commercial conduct, not speech.

1. Phillips devotes much of his brief to arguing that wedding cakes amount to either "pure speech" or "expressive conduct" and are therefore eligible for First Amendment protection. Pet. Br. 17–25. That argument sidesteps the critical inquiry. Nearly anything, including a cake, can be expressive. "It is possible to find some kernel of expression in almost every activity a person undertakes …." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). But whatever may be said about the expressiveness of wedding cakes, this case arose because of an illegal business practice: a discriminatory denial of service. Phillips violated the Act because he refused to sell any wedding cake of any design to an entire category of customers.

Commercial entities like Phillips's bakery are not entitled to special exemptions from generally applicable business regulations, including anti-discrimination laws, because the goods and services they sell, or the commercial activities they engage in, can be characterized as expressive. This Court has repeated that principle again and again, in various contexts.

For example, the Court has held that although "news gathering" and "news dissemination" receive the highest levels of First Amendment protection, even media entities are subject to "restraints on certain business or commercial practices," including their sales policies. *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139–40 (1969); *Associated Press v. United States*, 326 U.S. 1, 7 (1945) (holding that a publisher with a monopolistic sales policy is not entitled to a "peculiar

constitutional sanctuary" from "laws regulating his business practices"). Likewise, although bookselling is "protected activit[y]," "the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which [a business] happen[s] to sell books." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705, 707 (1986) (upholding the closure of an adult bookstore under a public health statute due to illegal "nonexpressive activity," including prostitution). In the public accommodations context, even if "a considerable amount" of protected First Amendment activity occurs at a place of public accommodation, this "does not afford the entity as a whole any constitutional immunity to practice discrimination." *N.Y. State Club Ass'n*, 487 U.S. at 12–13; *cf. Hishon*, 467 U.S. at 78 (recognizing that although law firms engage in protected speech, they have no constitutional right to discriminate in partnership decisions).

In short, "it has never been deemed an abridgement of freedom of speech … to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of [speech]." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ("*FAIR*"), 547 U.S. 47, 62 (2006) (quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949)). Thus, the critical inquiry in a case like this one is to identify what "is being regulated." *Citizen Publ'g Co.*, 394 U.S. at 139. The First Amendment "has no application when what is restricted is not protected speech." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 121 (2011). Put more broadly, "restrictions on protected expression are distinct from restrictions on economic activity or, more

generally, on nonexpressive conduct." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

If a state law targeted the expressive aspects of wedding cakes, it would trigger the First Amendment. For example, if Colorado enacted a statute requiring all wedding cakes to be white, with the purpose of promoting whatever messages a white wedding cake sends, the statute would implicate the freedom of speech. So would a statute banning cakes with certain messages—for example, messages criticizing state elected officials.

But if what "is being regulated" is a "business or commercial practice[ ]," the freedom of speech is not infringed—even if the business of the regulated party implicates the First Amendment. *Citizen Publ'g Co.*, 394 U.S. at 139; *Arcara*, 478 U.S. at 707. Here, then, the key question is whether the Anti-Discrimination Act, as applied to forbid discrimination in the sale of goods and services by a retail bakery, is a law that targets expression or is instead a generally applicable regulation of commercial conduct.

2. This Court has repeatedly recognized that a business's refusal to sell goods or services based on a customer's identity is commercial conduct subject to prohibition. "The Constitution does not guarantee a right to choose customers … without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex." *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment); *Heart of Atlanta Motel*, 379 U.S. at 259 ("[A]ppellant has no 'right' to select its guests as it sees fit, free from governmental regulation.").

The Constitution draws a line between *protected expression*, on the one hand, and "the *act of discriminating* against individuals in the provision of publicly available goods, privileges, and services," on the other. *Hurley*, 515 U.S. at 572 (emphasis added). Discrimination by commercial entities "cause[s] unique evils that government has a compelling interest to prevent." *Roberts*, 468 U.S. at 628. "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *FAIR*, 547 U.S. at 62. Thus, the rule under the First Amendment is straightforward. Discrimination by a commercial entity is "entitled to *no constitutional protection*." *Roberts*, 468 U.S. at 628 (emphasis added); *see also Hishon*, 467 U.S. at 78 ("[D]iscrimination … has never been accorded affirmative constitutional protections." (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973))).

The Colorado Anti-Discrimination Act falls within this straightforward rule. It applies to all Colorado businesses that open their doors to the public, whether they sell arguably "expressive" goods or utilitarian items like office supplies. It regulates what businesses "must *do*—afford equal access [to customers]—not what they may or may not *say*." *FAIR*, 547 U.S. at 60. It neither constrains speech nor compels speech; it neither "limits what [Phillips] may say nor requires [him] to say anything." *Id.* The Act is aimed not at speech or messages at all but at conduct unprotected by the First Amendment: a business's refusal to sell the

same goods and services to one person that it would sell to another.

3. Here, the Anti-Discrimination Act was applied to a retail bakery's refusal to sell a product to a couple because of their sexual orientation. No statutory provision, regulation, or order directed Phillips how to create wedding cakes, what embellishments or text to put on them, or what they must look like. The Act does not require Phillips to provide wedding cakes or other baked goods for any wedding or any other potentially expressive event. It prohibits only "refus[ing], withhold[ing] from, or deny[ing] to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods [and] services" that Phillips provides. COLO. REV. STAT. § 24-34-601(2)(a).

That basic requirement of equal service is precisely what the Commission ordered: Phillips "shall cease and desist from discriminating against … same-sex couples by refusing to sell them wedding cakes or any product [he] would sell to heterosexual couples." Pet. App. 57a. The Act itself and its application here simply required that if customers of Phillips's bakery "accept[ ] the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference." *Hurley*, 515 U.S. at 578.

If Phillips will sell a white, three-tiered wedding cake to an opposite-sex couple, he must sell the same cake to a gay couple. J.A. 170, 174 (providing examples of white three-tiered cakes Phillips has sold to other customers). If he will add congratulatory text at the request of one customer, he may not deny that request

to another because of the customer's sex or skin color. By the same token, however, if Phillips would not sell a wedding cake with a particular artistic theme to any customer, regardless of that customer's protected characteristics, he need not sell one to a same-sex couple. Pet. Br. 22 (indicating that Phillips would object to selling a wedding cake featuring a symbol of gay pride).[2]

In Phillips's view, he satisfies the equal-service requirement because he will sell gay customers "any other items in his store," including a cake "for another occasion." Pet. Br. 52–53. But a business discriminates against a customer when it denies an otherwise available good or service, even if it will sell the customer other goods or services. *See Crosswaith v. Bergin*, 35 P.2d 848, 848–89 (Colo. 1934) (holding that, when a restaurant refused to seat three customers together and told one that he must "eat in the kitchen" because of his race, "there was undoubtedly the kind of discrimination against which the law is obviously aimed"); *cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (rejecting the argument that "it is not racially discriminatory" to "allow[ ] all races to enroll" at a school while enforcing "prohibitions of association between men and women of different races").

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[2] Phillips claims that the Commission, in its Brief in Opposition to certiorari, had "a change of heart" about the First Amendment principles governing this case. Pet. Br. 33–34. The Commission has not altered its position. Consistent with the First Amendment, a State may require a business to "offer the same services to its customers regardless of their sexual orientation." Pet. Br. 5a.

Phillips refused to sell Craig and Mullins not only an original, custom-made cake; he also refused to sell them a cake identical to those he previously designed and sold to other customers. He even refused to sell cupcakes to a lesbian couple for a family commitment ceremony. In his brief, Phillips confirms that he would refuse to sell any same-sex couple any wedding cake whatsoever, claiming that "[a]ll his wedding cakes are custom-designed" and equivalent to pure speech, regardless of their appearance or features. Pet. Br. 21.[3]

This case is not about speech; it is about the withdrawal of a line of goods and services from a subset of customers because of their identity. *Cf. Katzenbach v. McClung*, 379 U.S. 294, 296 (1964) (applying the Civil Rights Act to a restaurant that allowed white customers to dine in but provided only "take-out service for Negroes"); *Roberts*, 468 U.S. at 621 (explaining that, although women were allowed to "participate in selected projects," they were denied the ability to "vote, hold office, or receive certain awards"). The First Amendment does not restrict Colorado's legitimate power to prohibit this sort of discriminatory commercial conduct.

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[3] Phillips's claim that all his cakes are "custom designed" appears to contradict his website, where he invites customers to "select" a cake design "from one of our galleries." Masterpiece Cakeshop, *Welcome!* (last visited Oct. 20, 2017), www.masterpiececakes.com ("Select from one of our galleries or order a custom design. Call or come in. We look forward to serving you!"). As Phillips concedes, Craig and Mullins were "reviewing photographs" of his past cakes when he refused to serve them. Pet. Br. 21.

B. *Hurley* and *Dale*, which involved the application of public accommodations laws outside the commercial context, do not grant businesses the right to discriminate.

Although public accommodations laws do not contravene the First Amendment when applied to a commercial entity's refusal to sell goods or services, this does not mean they never raise free speech concerns. When applied outside the commercial setting, they may impinge on expressive and associational rights.

The arguments in Phillips's brief and the *amicus* brief of the United States rely on two such cases, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* and *Boy Scouts of America v. Dale*, the only decisions in which this Court invalidated the application of public accommodations laws on First Amendment grounds. Pet. Br. 15, 26–27, 29; U.S. Br. 14–16. But those cases were "peculiar." *Hurley*, 515 U.S. at 572; *see also Dale*, 530 U.S. at 656–57. Both were far removed from the paradigmatic public accommodations context that this case presents: discrimination by a retail store that sells goods and services to the public.

1. The question in *Hurley* was whether a private, non-commercial association, formed exclusively to organize a parade celebrating Boston's Irish heritage, could be forced to include within the parade another private, non-commercial association, itself formed "for the very purpose" of promoting its own distinct message. 515 U.S. at 560, 561, 570, 581. That separate expressive association, the Irish-American Gay,

Lesbian, and Bisexual Group of Boston, wished to "communicate its ideas as part of the existing parade, rather than staging one of its own"; it sought to be admitted "as its own parade unit carrying its own banner," communicating its message of "pride … as openly gay, lesbian, and bisexual individuals." *Id.* at 561, 570, 572–73. The lower courts held that Massachusetts's public accommodations law required the parade to include this separate expressive group. *Id.* at 561–65.

This Court concluded that the First Amendment does not allow the "expressive content of [a] parade" to be regulated in this way. *Id*. at 572–73. Parades are, by definition, "inherently expressive." *Id*. at 568. They are one of the most "basic," "pristine," "ancient," and "classic" forms of expression, comparable to "a speaker who takes to the street corner to express his views." *Id.* at 568–69, 579 (internal quotation marks omitted). As this Court observed in a later opinion, the expressive nature of parades was "central" to the holding in *Hurley*. *FAIR*, 547 U.S. at 63. And, given the "expressive character" of both the parade and the group which the parade organizers wished to exclude, the forced inclusion of that group "had the effect of declaring speech itself" to be a "public accommodation." *Hurley*, 515 U.S. at 572–73.

Forcing the Boston parade to include an unwanted contingent of marchers would have been akin to forcing a Ku Klux Klan rally to include representatives of the NAACP, forcing a "Black Lives Matter" march to include a contingent representing a local police union, or forcing a Gay Pride parade to host an organized group of anti-LGBT activists. *Cf. Invisible Empire of*

the Knights of the Ku Klux Klan v. Mayor of the Town of Thurmont, 700 F. Supp. 281, 289 (D. Md. 1988) ("The KKK has nothing to do with the distribution of goods and services …. Allowing blacks to march with the KKK would change the primary message which the KKK advocates."). No matter how virtuous its aim, a law cannot be applied to "require speakers to modify the content of their expression" in that manner. *Hurley*, 515 U.S. at 578.

But the Court emphasized that *Hurley* involved a "peculiar" application of public accommodations law. *Id.* at 572. The parade was far more like a "private membership organization" than a business engaged in sales to the public. *Dale*, 530 U.S. at 659 n.4. The Court described the parade, its organizers, and its speech as "private" at least seven times. *See Hurley*, 515 U.S. at 558, 569–70, 572, 573, 574, 576, 581. And, in a later case, the Court confirmed that *Hurley* involved not a "public" accommodation, but a "private parade." *FAIR*, 547 U.S. at 63.

The Court never called into question the "focal point" of public accommodations laws; instead, it explicitly approved their application to prohibit "discriminati[on] against individuals in the provision of publicly available goods, privileges, and services." *Hurley*, 515 U.S. at 572. In the commercial sphere, the Court confirmed, it remains true that when customers "accept[ ] the usual terms of service," state law may ensure that "they will not be turned away merely on the proprietor's exercise of personal preference." *Hurley*, 515 U.S. at 578. Rather than endorsing the expansive argument that the First Amendment

insulates a business's denial of service from anti-discrimination laws, Pet. Br. 25–35, *Hurley* rejected it.

2. *Dale* also involved the application of a public accommodations law outside the commercial setting. A membership organization, the Boy Scouts of America, wished to exclude a gay man but was forced by a New Jersey court to maintain him in a leadership role. *Dale* involved an expressive-association claim, a claim Phillips has never raised, and the circumstances in *Dale* make its holding inapplicable here.

As the Court explained, the Boy Scouts was "a private, nonprofit organization" whose "general mission" was "to instill values in young people." *Dale*, 530 U.S. at 649 (internal alterations and quotation marks omitted). It did so through "expressive activity"—group events, during which scout leaders would "inculcate [youth members] with the Boy Scouts' values." *Dale*, 530 U.S. at 649–50. The Boy Scouts was thus an "expressive association" entitled to First Amendment protection.

Only a single state court, during 19 years of litigation,[4] had ruled that the Boy Scouts qualified as a "place of public accommodation" under anti-discrimination laws. *Dale*, 530 U.S. at 657 n.3. Altering the Boy Scouts' leadership decisions was akin to editing the message of the parade in *Hurley*: "the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Dale*, 530 U.S. at

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[4] *See* Oral Argument, *Boy Scouts of Am. v. Dale*, at 59:43, *available at* https://www.oyez.org/cases/1999/99-699.

654. This forced inclusion "directly and immediately" restricted the Boy Scouts' expressive rights and was a "severe intrusion" on them. *Id*. at 659.

But intruding into an expressive association's leadership decisions is a far cry from requiring retail stores to sell goods and services regardless of a customer's race, sex, or sexual orientation. The Court did not call into question public accommodations laws as applied to "clearly commercial entities." *Dale*, 530 U.S. at 657.

3. Under *Hurley* and *Dale*, a public accommodations law may not be applied to a private, non-commercial, expressive association to edit its speech or select its leadership. This amounts to the direct regulation of speech or association. The same is not true when those laws prohibit the commercial act of refusing to sell goods or services because of a customer's protected characteristics.

Craig and Mullins are nothing like an expressive group "formed for the very purpose" of marching in someone else's parade. *Hurley*, 515 U.S. at 570. They visited Phillips's shop because they were referred there by an event planner and wanted to buy a wedding cake—a product Phillips has sold to many other customers. J.A. 59, 183. The bakery itself, which is concededly a public accommodation, cannot be compared to a private group that organizes a cultural event involving a quarter million spectators. *Hurley*, 515 U.S. at 561. As for *Dale*, Phillips has never asserted an expressive-association defense, and his admissions in this case foreclose one. J.A. 105 (admitting that Masterpiece "is a place of business that engages in the sale of bakery goods to the public"); *see*

N.Y. State Club Ass'n, 487 U.S. at 13 (holding that, to raise an expressive-association defense, a group must "show that it is organized for specific expressive purposes" and inclusion of unwanted members would impede those purposes). Neither case alters the First Amendment analysis that applies here.

C. This case does not implicate the compelled speech doctrine.

Because the Anti-Discrimination Act was applied here to regulate a commercial entity's refusal of service, rather than its expression, this case does not implicate the compelled speech doctrine. Phillips is seeking to "stretch" the doctrine "well beyond the sort of activities [it] protect[s]." *FAIR*, 547 U.S. at 70. Both Phillips and the United States ask the Court to convert the doctrine from "a right of self-determination in matters that touch individual opinion and personal attitude," *Barnette*, 319 U.S. at 630, into a license for commercial entities to refuse sales and service because of their customers' protected characteristics. The doctrine does not apply so indiscriminately, and expanding it to apply here would cause profound doctrinal and practical problems.

1. A public accommodations law does not compel speech when it requires a business to serve customers on equal terms.

This Court's compelled-speech jurisprudence prohibits the government from singling out speech for regulation in two ways. Both are far afield from this case.

First, the government may not select a factual or ideological message and force a person or entity to speak or host it. *FAIR*, 547 U.S. at 62; *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). For example, when a person is ordered to say the pledge of allegiance or is criminally punished for refusing to disseminate a government-approved ideological slogan, the State "invades the sphere of intellect and spirit" that is "reserve[d] from all official control." *Barnette*, 319 U.S. at 642; *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The government may not compel people or entities "to profess a specific belief." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2330 (2013); *see also Riley*, 487 U.S. at 795–96 (invalidating a law that required charitable fundraisers to deliver specific, government-favored factual information in the course of their "fully protected speech").

Second, the government violates the compelled speech doctrine when it requires a private forum, such as a newspaper or corporate newsletter, to include the messages of a favored speaker. *Tornillo*, 418 U.S. at 258 (opinion of Burger, C.J.). This exercise of "editorial control and judgment" implicates core free speech questions for both press entities and other businesses. *Id.*; *Pac. Gas & Elec. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8–9, 11 (1986) (comparing a corporate newsletter to a newspaper). The government may not force a medium that is not otherwise open for public participation to include the messages of favored individuals or entities.

But these two lines of cases do not suggest that a business open to the public may wield the compelled speech doctrine to justify a denial of service. In arguing

otherwise, Phillips "exaggerate[s] the reach of [this Court's] First Amendment precedents." *FAIR*, 547 U.S. at 70. Colorado's Anti-Discrimination Act regulates the sale of goods and services; it "does not dictate the content of … speech at all." *Id*. at 62. Phillips may say whatever he wants to the "public at large," *Pac. Gas & Elec.*, 475 U.S. at 14 n.10,[5] and he "remain[s] free to disassociate himself" from the views of any of his customers, *FAIR*, 547 U.S. at 65.[6]

The Act does contain one provision that expressly regulates speech, but it does so only narrowly: it prohibits advertisements equivalent to "We Don't Serve Blacks" or "Gays Are Not Welcome Here." *See* COLO.

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[5] Phillips has advocated his views through major media outlets. *See, e.g.*, Adam Liptak, *Cake Is His 'Art.' So Can He Deny One to a Gay Couple?*, N.Y. TIMES, Sept. 16, 2017, at A1 ("'Because of my faith, I believe the Bible teaches clearly that it's a man and a woman,' he said."); ABC, *'The View' Exclusive: Baker Jack Phillips on Religious Discrimination Case* (last visited Oct. 20, 2017), http://abc.tv/2hS6MKE. Those activities are not within the purview of the Act, nor could they be.

[6] Because wedding celebrations focus on the couple rather than their vendors, and because all retail businesses in Colorado are required to comply with the Act's equal-service requirement, there is "little likelihood" that the views of a married couple will be attributed to a bakery that sold them a wedding cake identical to one it would have sold to its other customers. *See FAIR*, 547 U.S. at 65; *see* Pet. App. 33a–34a. For example, selling a cake to a Muslim or Jewish couple does not demonstrate the bakery's endorsement of Islamic or Jewish beliefs about marriage. This Court has recognized that audiences, even high school students, routinely make such distinctions. *Cf. Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) ("The proposition that schools do not endorse everything they fail to censor is not complicated").

REV. STAT. § 24-34-306(2)(a); Colo. Civil Rights Comm'n Rule 20.4, J.A. 344. That sort of speech restriction is constitutional as part of a legal framework that prohibits discriminatory conduct, *FAIR*, 547 U.S. at 62, and Phillips does not challenge it here. But if his compelled-speech theory is correct, and he may refuse service to same-sex couples, he must likewise have the right to hang a sign on his bakery's door stating, "We Don't Sell Wedding Cakes to Gays."

Under the Act, Phillips is free to sell cakes with "anti-gay" designs or inscriptions. *See* Pet. Br. 15, 40. He is also free to *decline* to sell cakes with "pro-gay" designs or inscriptions. But regardless of what messages his products and services might convey, he is not constitutionally entitled to deny a product or service based on a customer's sexual orientation, when he will sell the same product or service to others.

2. Applying the compelled speech doctrine here would confuse First Amendment law and grant businesses the right to discriminate in making sales to the public.

The compelled-speech arguments in Phillips's Brief and the *amicus* brief of the United States misapply this Court's free speech jurisprudence, misconstrue public accommodations laws, and, if accepted, would create profound First Amendment problems.

1. If Phillips is correct that a public accommodations law compels speech when applied to a business's refusal to sell "expressive" goods, Pet. Br. 25, 29, any business claiming to sell creative or artistic products could assert a right to discriminate. And because the

moral content of a speaker's beliefs are irrelevant under the First Amendment, his proposed exception would apply regardless of whether a refusal of service was based on religious belief or raw animosity. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (holding that speech is protected even when it is "hurtful" and "its contribution to public discourse may be negligible"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (explaining that government may not "impose special prohibitions on those speakers who express views on disfavored subjects," even if they use "odious racial epithets").

So, under Phillips's theory, a bakery could refuse to sell a cake welcoming an adopted child to her new family because the baker has a sincere religious objection to adoption by same-sex couples. *See* J.A. 171 (displaying a rocking-horse-shaped cake featuring the message "Welcome ❤ Baby Cooper"). Another bakery could refuse to make a cake with the text "Happy 50th Birthday James" because James is black, the bakery's owner is racist, and he wishes not to participate in an expressive event celebrating a black person.

Beyond bakeries, a printing company could refuse to sell a banner announcing the Abassi family reunion ("Welcome to Denver, Abassi Family!"), because its owner objects to celebrating the bonds among a Muslim family. A family portrait studio could hang a sign on its door stating, "We don't photograph Mexican families" based on personal animus toward Mexican immigrants. A hair salon could refuse to style a lesbian woman's hair for a special occasion, rejecting the idea that gay people should be made to look attractive. A social media company such as Facebook, which is no doubt

"engaged in expression" when it conveys countless messages for billions of users, could decide that although most users may post messages and images concerning their weddings, interracial couples may not. *See* Pet. Br. 25–27 (arguing that the First Amendment allows "businesses" to "declin[e] to convey" the messages of their customers).

This kind of discriminatory commercial conduct has been prohibited since the early days of public accommodations statutes. *See Darius v. Apostolos*, 190 P. 510, 511 (Colo. 1919) (explaining that, under an 1895 statute, any "business … furnishing personal service" is subject to Colorado anti-discrimination laws). Those longstanding prohibitions do not, as Phillips asserts, "'exact[ ] a penalty on the basis of the content' of … speech." Pet. Br. 28 (quoting *Tornillo*, 418 U.S. at 256). Laws that prohibit businesses from discriminating in the sale of goods and services are content- and viewpoint-neutral. *See infra* at 46, 47–49. The United States agrees. U.S. Br. 13.

Accordingly, Phillips is mistaken when he claims that the remedial training and reporting requirements he was ordered to undertake "deepen[ed his] compelled-speech injury" by requiring him to "reeducate his staff" and inform them that his religious beliefs are "mistaken." Pet. Br. 28–29. Phillips was not required to change his or anyone else's beliefs. He was required only to ensure that his staff adheres to the Anti-Discrimination Act's mandate of equal service. In the civil rights context, similar training and reporting requirements are commonplace. *E.g.*, Consent Decree at 3–10, *United States v. Routh Guys, LLC*, No. 3:15-cv-02191 (N.D. Tex. June 30, 2015), ECF No. 5 (requiring

employees to "attend a program of educational training concerning the substantive provisions of Title II" and requiring a business to report the results of compliance testing).

Nor does the routine application of public accommodations laws "jeopardize the freedom of newspapers, publishing companies, media outlets, and internet corporations." Pet. Br. 31 n.5. That argument misunderstands both how public accommodations laws have long operated and their constitutional limits. They do not apply, and may not be applied, to exercise editorial control over a newspaper or publishing company, which do not offer the public at large an opportunity to publish an article, book, or other expressive work. That aspect of their business is not a public accommodation, nor is it subject to a "right of access." *Cf. Tornillo*, 418 U.S. at 257–58.[7]

2. The arguments of the United States are equally incompatible with the First Amendment. The United States urges the Court to adopt a novel, disruptive rule: commercial entities may discriminate so long as they sell "inherently communicative" products for "expressive event[s]." U.S. Br. 16. That rule is legally unsupported, impractical, and—as applied by the United States—singles out gay people for disparate treatment. The United States offers no persuasive

[7] A newspaper's sale of commercial advertisements is a different matter. Those sales may be subject to anti-discrimination laws because, in that setting, any restriction on speech is "incidental to a valid limitation on economic activity." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 387, 389 (1973).

justification for undermining the laws of 21 States and hundreds of other jurisdictions across the country that seek to end discrimination based on sexual orientation.

a. The United States' proposed rule is a doctrinal aberration. To adopt it, the Court would be required to disregard relevant First Amendment precedent and ignore salient features of *Hurley* and *Dale*.

The United States acknowledges that, under longstanding First Amendment doctrine, when a public accommodations law is applied in a commercial setting, it satisfies the Constitution. "[T]he discriminatory provision of goods or services," the United States says, is "an *act* that is *not itself protected* under the First Amendment's Free Speech Clause." U.S. Br. 13 (emphasis added). Thus, when public accommodations laws are applied in "ordinary circumstances"—that is, when they are applied to "prevent[ ] discriminatory conduct" by businesses—they "receive *no* First Amendment scrutiny." *Id*. at 12–13 (emphasis added).

Yet the United States ignores this basic principle when analyzing *Hurley* and *Dale*, the two cases it cites to justify its novel rule. U.S. Br. 14–16. The United States concedes that *Hurley* and *Dale* are difficult to generalize because they were decided in "peculiar" settings, do not represent "typical enforcement of a state public accommodations law," and did not announce any "comprehensive [legal] framework." *Id*. at 15–16. Despite these concessions, however, the United States fails to mention the key feature that distinguishes those cases from this one: neither *Hurley* nor *Dale* involved a business that made sales to the public.

Thus, the United States' proposed rule does not reconcile "two strands of doctrine interpreting the Free Speech Clause," *id*. at 7; it selectively misreads this Court's jurisprudence.

b. The United States' approach would also be impossible to implement in any principled fashion without severely undermining public accommodations laws. The purported aim of the United States' rule is to prevent businesses from being required to "create expression" and "participate in an expressive event." U.S. Br. 23. In the United States' view, banquet halls, hotels, and car services do not "engage in protected expression" and are therefore excluded from the proposed rule. *Id*. 21–22.

All of these businesses, however, can "perform[ ] an important expressive function" when they sell goods or services for an event such as a wedding, which is "religious or sacred" and "imbued with expression." U.S. Br. 19, 23, 26. This includes a business that might usually be characterized as utilitarian, like a car service. For example, at the close of a wedding reception, guests often gather together to cheer while throwing rice or holding sparklers, as the couple climbs into a limousine and drives away.[8] By facilitating this moment, a car service is instrumental in sending the same message that Phillips objects to sending for same-sex couples: "a wedding has occurred, a marriage has begun, and the couple should be celebrated." Pet. Br. 8 (quoting J.A. 162).

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[8] This sort of "leaving tradition" has been practiced since "ancient times." KRISTINA SELESHANKO, CARRY ME OVER THE THRESHOLD: A CHRISTIAN GUIDE TO WEDDING TRADITIONS 86–88 (2005).

Thus, it makes little sense to distinguish a retail bakery from other businesses that might provide services for "expressive events," such as businesses that host wedding ceremonies on their own property. As one such business argued, "wedding ceremonies are 'inherently expressive event[s]'" and "by hosting a same-sex ceremony on [a family] farm, [the owners] would effectively be communicating and endorsing messages about marriage that are antithetical to their religious views." *See Gifford v. McCarthy*, 137 A.D.3d 30, 41 (N.Y. App. Div. 2016).

Labeling a wedding cake a "sculptural centerpiece," U.S. Br. 24, does not elevate the expressive interests of bakeries above the expressive interests of other businesses. None of them are entitled to avoid "content-neutral laws" that "do not regulate the content of expression" and prohibit only "the discriminatory provision of goods or services." *Id*. at 13. The United States' proposed approach invites arbitrary line-drawing rather than offering a principled framework for vindicating the expressive rights it claims are "trenche[d] on" by public accommodations laws. *Id*. at 31. It appears instead that the United States' rule was reverse-engineered largely to coincide with the types of entities that are covered by Title II of the federal Civil Rights Act, which, as it happens, covers hotels and banquet halls. *See* 42 U.S.C. § 2000a(b) (covering "hotel[s]," "facilit[ies] principally engaged in selling food for consumption on the premises," and "place[s] of … entertainment"); *see also* U.S. Br. 22 (criticizing Colorado's law for "sweep[ing] … broadly").

Even assuming the United States' treatment of banquet halls, hotels, and limousine services would

hold up in some cases, it would raise serious problems in others. Could a hotel refuse to host wedding guests if it offered services that are more "inherently communicative" than the sale of lodging—such as displaying signs and banners or offering gift bags with notes that say "Let's Celebrate the Union of this Happy Couple"? Could a limousine company refuse service if a same-sex couple, like other customers, wished to decorate the vehicle with a "Just Married" sign?

Also problematic is the United States' treatment of "pre-made" products, which it claims are subject to anti-discrimination laws, unlike "custom-made" products. This raises at least two concerns. First, the distinction would embed in constitutional law a right to offer second-class service to customers based on their race, sex, or faith—custom-made products for favored customers, pre-made products for disfavored customers. Second, it would provide a roadmap for businesses to deny *all* service. Here, for example, Phillips refuses to sell even pre-designed wedding cakes to gay customers, asserting that "[a]ll his wedding cakes are custom-designed." Pet. Br. 21.

Because the United States' proposed rule rests on a shaky doctrinal foundation and could not be applied in a principled fashion, it would require courts to grant nearly any "expressive" vendor a license to discriminate. And weddings are not the only "expressive" events. Birthday parties, baby showers, anniversaries, family reunions, retirement parties, and countless other celebrations would, under the United States' rule, give businesses an excuse to deny equal service. *See* Br. for Cake Artists as *Amici Curiae* in Support of Neither Party 19–26 (depicting cakes sold

for events including retirements, a quinceañera, a birthday, a graduation, the end of a military deployment, an impending birth, and a christening). The United States' proposed approach is not a recipe for resolving the question presented in this case; it is an invitation for more businesses to litigate their ability to reject customers based on their race, sex, religion, nationality, or sexual orientation.

c. Finally, the United States seeks to distinguish between categories of discrimination, arguing that, in the context of "expressive" businesses, "laws targeting race-based discrimination may survive heightened First Amendment scrutiny" but laws seeking to end discrimination based on sexual orientation do not. U.S. Br. 32. This is because, the United States asserts, Colorado does not have "a sufficient state interest" in combating sexual-orientation discrimination. *Id*. at 33.

This argument rests on a dangerous misunderstanding of constitutional law. The United States posits that combatting discrimination is a "compelling interest" only when the class discriminated against would receive strict scrutiny under the Equal Protection Clause. *Id*. at 32. This conflates two different legal questions: one, whether the government is justified in itself making classifications for purposes of regulation and, two, whether a law serves compelling interests when it seeks to eradicate discrimination. As this Court has held, public accommodations laws serve "compelling interests of the highest order" even when applied to prohibit discrimination against categories of people that, under equal protection doctrine, receive less than strict scrutiny. *Compare Roberts*, 468 U.S. 623–24 (upholding a public accommodations law that

required a business group to admit women), *with United States v. Virginia*, 518 U.S. 515, 532 (1996) (declining to "equat[e] gender classifications, for all purposes, to classifications based on race").

The Court has never suggested that the government's compelling interest in creating an open, inclusive marketplace diminishes when a State adds sexual orientation as a protected characteristic. *Hurley*, 515 U.S. at 572 (explaining that public accommodations laws, even as applied to sexual orientation discrimination, "are well within the State's usual power to enact"). Singling out gay people for exclusion from legal protections is a constitutional violation, not a constitutional imperative. *Romer*, 517 U.S. at 635.

D. Even assuming the Act's equal-service requirement affects the creative aspects of operating a bakery, the effect is incidental and the Act satisfies *O'Brien*.

1. Any effect of the Act on the creative or expressive aspects of operating a retail bakery is incidental to the goal of non-discrimination. *See O'Brien*, 391 U.S. at 377; *United States v. Albertini*, 472 U.S. 675, 687 (1985) (holding that barring a protester from a military base because of his past acts of vandalism only "incidentally burdens speech"); *see also FAIR*, 547 U.S. at 61–62, 66 (holding that an equal-access requirement, like an anti-discrimination law, does not implicate expressive conduct). Thus, the most demanding First Amendment scrutiny that may apply here is the four-

part test from *United States v. O'Brien*. *See FAIR*, 547 U.S. at 67.[9]

Each prong of that test is satisfied here, as the United States concedes. U.S. Br. 13–14 ("[P]ublic accommodations laws either do not trigger any First Amendment scrutiny or survive *O'Brien*."). Phillips does not argue otherwise; he argues only that the *O'Brien* test does not apply because the Commission's enforcement of the Act is content- and viewpoint-based. Pet. Br. 35–37. That is incorrect.

a. Under *O'Brien*, the first question is whether a challenged law is "within the constitutional power of the Government." *O'Brien*, 391 U.S. at 377; *Clark, v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). This Court's decisions confirm that Colorado may forbid commercial entities from refusing to sell goods or services based on a customer's identity. *E.g.*, *Hurley*, 515 U.S. at 572; *Roberts*, 468 U.S. at 625.

b. The second question is whether the challenged law "furthers an important or substantial government interest." *O'Brien*, 391 U.S. at 377. Again, as this Court has held, when laws like the Act are applied to a discriminatory denial of service by a commercial entity, they further not just important or substantial interests, but "compelling interests of the highest order." *E.g.*,

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[9] As explained above, the Anti-Discrimination Act is "directed at imposing sanctions on nonexpressive activity," rather than expressive conduct. *Arcara*, 478 U.S. at 707. Thus, the *O'Brien* test should "ha[ve] no relevance" to this case. *Id.*; *see also FAIR*, 547 U.S. at 66 ("[T]he conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*."). Even so, *O'Brien* is easily satisfied.

Roberts, 468 U.S. at 624; *see also Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

c. Third, *O'Brien* asks whether "the government interest is unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. This Court has repeatedly held that a State's "commitment to eliminating discrimination and assuring … citizens equal access to publicly available goods and services … is unrelated to the suppression of expression." *Roberts*, 468 U.S. at 624. Thus, when public accommodations laws are applied to a commercial entity's sale of goods and services, they are both content- and viewpoint-neutral. *Hurley*, 515 U.S. at 572 (explaining that public accommodations laws do not regulate "on the basis of … content"); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (explaining that "federal and state antidiscrimination laws" are "permissible content-neutral regulation[s]"); *Rotary Club of Duarte*, 481 U.S. at 549 (explaining that public accommodations laws "make[ ] no distinctions on the basis of [an] organization's viewpoint"); *see also* U.S. Br. 12–14.

d. Finally, *O'Brien* requires a tailoring inquiry. *O'Brien*, 391 U.S. at 381–82. This fourth prong asks whether a law's objective would "be achieved less effectively absent the regulation." *FAIR*, 547 U.S. at 67 (quoting *Albertini*, 472 U.S. at 689). The question is not whether other means of pursuing the objective "might be adequate," only whether the law "add[s] to the effectiveness" of the government's goal. *Id.* at 67–68; *Clark*, 468 U.S. at 299; *Albertini*, 472 U.S. at 688.

Granting special exemptions for businesses like Phillips's, and allowing them to discriminate in selling

goods and services, would make the Act less effective. Indeed, it would single out lesbian women and gay men for *unfavorable* treatment, contravening the mission of the Anti-Discrimination Act. As applied here, the Act satisfies *O'Brien*.

2. Phillips seeks to avoid the *O'Brien* test by claiming that the Act was applied here in a content- and viewpoint-based manner. Pet. Br. 35–37. Neither is true.

a. Phillips asserts that he "triggered [the Act] only because he addressed the topic of marriage through his art (i.e., because he designed custom cakes for opposite-sex weddings)." Pet. Br. 35. This mischaracterizes how the Act operates. Phillips triggered the Act because he refused to serve same-sex couples on the same terms as others, not because he chose to sell wedding cakes.

The Act would have applied in the same way had this case involved birthday cakes, or, more broadly, any other good or service—for example, a room at a hotel or a meal at a lunch counter. It likewise would have applied equally had the basis for the denial of service been race, religion, or another protected characteristic. COLO. REV. STAT. § 24-34-601(2)(a). This case happens to involve the refusal to sell a wedding cake to a gay couple. That does not mean the Act is concerned only with the subject of marriage.

b. Claiming that "the Commission has engaged in viewpoint discrimination," Phillips asserts that its enforcement decisions "favor[ ] cake artists who support same-sex marriage over those like Phillips who do not." Pet. Br. 36. Phillips cites proceedings in which the Colorado Civil Rights Division found no probable

cause for a violation of the Act when three bakeries "refuse[d] a religious customer's request to create custom cakes with religious messages *criticizing* same-sex marriage." Pet. Br. 36. This, Phillips claims, amounts to "playing favorites on the issue of same-sex marriage." *Id*.

The "customer requests" Phillips refers to were made by one person, on the same day in 2014, shortly before the Commission was to hear Phillips's appeal in this case. J.A. 232, 242, 251. This person visited three Denver bakeries, asking for cakes featuring images of two groomsmen holding hands with a red "X" over them. One cake would have featured text stating that homosexuality is "detestable." J.A. 233, 243, 252.

The bakeries refused the orders, and the person requesting them filed a complaint under the Act. The Division investigated those refusals, interviewing the bakeries' owners as well as the complainant. J.A. 230–58. As explained in letters to the complainant, there was no evidence that the bakeries discriminated because the customer was Christian. The bakeries regularly sold cakes to people of faith, including "cakes with Christian imagery." J.A. 235, 244, 254. Shortly after the letters were issued, Phillips cited them as supplemental authority to the Colorado Court of Appeals.

These scenarios do not demonstrate viewpoint discrimination. They demonstrate how public accommodations laws operate. A business may refuse service for many reasons, including the specific design of a requested product. But it may not refuse service based on a customer's identity. The three bakeries targeted by this customer would have refused to sell a

cake with an anti-gay inscription to anyone—a Jewish person, a customer of a different race, or a heterosexual couple.[10]

Phillips likewise has the right to decline an order for a cake with an "anti-family," "hateful," "or "vulgar" message, a right he claims to have exercised in the past. Pet. Br. at 9. What Phillips may not do is make a cake of a particular design for anyone *but* same-sex couples (or African-Americans, Muslims, or women). If applying a public accommodations law in this unremarkable way amounts to viewpoint discrimination, no public accommodations law would be immune from constitutional challenge, and this Court's history of upholding them under the First Amendment would require reexamination.

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[10] The United States, in describing how public accommodations laws operate, makes the same error as Phillips. It claims that, under the Commission's interpretation of the Act, a graphic designer would have to create fliers for "neo-Nazi[s]" and the "Westboro Baptist Church." U.S. Br. 17. But even if those groups had protected characteristics, the graphic designer could refuse to sell fliers advertising their hateful messages and activities—so long as the designer would refuse to sell the same fliers to other customers.

II. The right to free exercise of religion does not exempt a commercial enterprise from anti-discrimination laws.

1. A business owner's religious beliefs do not entitle him to discriminate in choosing which customers to serve. *Newman*, 390 U.S. at 402 n.5 (describing a free-exercise objection to a public accommodations law as "patently frivolous"). The same holds true in other contexts. The right to free exercise of religion does not require exceptions to laws aimed at eradicating discrimination. *Bob Jones Univ.*, 461 U.S. at 604 (holding that the government's interest in eradicating racial discrimination overcomes "whatever burden" might be placed on religiously motivated conduct). "[T]he Constitution … places no value on discrimination as it does on the values inherent in the Free Exercise Clause." *Norwood*, 413 U.S. at 469–70 (emphasis added).

Phillips has never disputed that Colorado can, in general, prohibit businesses from refusing to serve gay people. But in his view, his "religious motivation" places him "beyond the reach" of the Act. *Smith*, 494 U.S. at 878. To accept that argument, the Court would be required to "reevaluate[ ]" its decision in *Smith*, as Phillips himself suggests. Pet. Br. 48 n.8.

Yet Phillips's Petition for Certiorari did not argue that the Court should overturn *Smith*. Footnote 8 in the merits brief is the first time he has given "notice of an intent to make so far-reaching an argument." *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999). And that footnote does not explain what special reasons justify "reevaluating" precedent that States and local governments rely upon to determine the

constitutionality of "civic obligations of almost every conceivable kind." *Smith*, 494 U.S. at 888–89. This Court should therefore apply the *Smith* framework in disposing of Phillips's free exercise claim.

2. Under *Smith*, the Free Exercise Clause does not inhibit a State from enforcing "regulations of general application that incidentally burden religious conduct." *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 697 n.27 (2010). Thus, to trigger strict scrutiny, Phillips must demonstrate that his religious conduct has been singled out for disparate treatment. *Smith*, 494 U.S. at 878–79. He must show that "the object of the [Anti-Discrimination Act] is to infringe upon or restrict practices because of their religious motivation" or that the Act selectively "burdens only … conduct motivated by religious belief." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 533, 543 (1993). Neither of these "interrelated" problems is present here. *Id*. at 531.

The public accommodations provisions of the Anti-Discrimination Act have been the law of Colorado, in one form or another, since 1885. 1885 COLO. SESS. LAWS, at 132–33. In all that time, Colorado has prohibited both secular and religiously motivated discrimination, and since 1895 that prohibition has applied to every "public accommodation" in the State. 1895 COLO. SESS. LAWS, ch. 61, at 139. As the court of appeals explained below, the Act "does not exempt secular conduct from its reach" and "does not impose burdens on religious conduct not imposed on secular conduct." Pet. App. 42a–45a. It merely "prohibits [businesses] from picking and choosing customers

based on their sexual orientation" and other protected characteristics. *Id*. at 45a.

By claiming "a private right to ignore" the Act, Phillips seeks "a constitutional anomaly." *Smith*, 494 U.S. at 886. He "seeks preferential, not equal treatment," *Christian Legal Soc'y*, 561 U.S. at 697 n.27, namely, a special right to refuse to sell a line of goods and services to customers because of their sexual orientation. Colorado cannot grant Phillips this preferential treatment without granting similar treatment to others, even if their beliefs would justify refusing to serve customers based on their race or sex. Under the Free Exercise Clause, there is "no way … to distinguish" one person's religious objections "from the religious objections [of] others." *Smith*, 494 U.S. at 880; *see also Lukumi*, 508 U.S. at 531.

3. Phillips attempts to show that the Act is neither neutral nor generally applicable through two basic arguments. Neither carries his burden under *Smith*. Alternatively, he argues that this Court should forgo the *Smith* framework in favor of a "hybrid rights" theory. It should reject that invitation.

a. In seeking to trigger strict scrutiny under *Smith*, Phillips first argues that because Colorado businesses may reject orders based on generally applicable "offensiveness" policies, the Act targets religion. Pet. Br. 39–46. This again misconstrues how public accommodations laws operate. *See supra* at 48–49. Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be "offensive." Phillips claims to have done precisely that in the past.

Pet. Br. 9. Thus, a Muslim baker is not required to create a cake denigrating the Koran. Pet. App. 78a.

But whatever terms of service a business adopts, those terms may not single out customers for discriminatory treatment. The problem with "Phillips's speech-based decision" to refuse to serve same-sex couples, Pet. Br. 40, is not that it was religiously motivated. The problem is that it applies only to same-sex couples. A discriminatory terms-of-service policy would violate the Act just as clearly if it were based on secular hostility.

Phillips is mistaken when he claims that the Commission has assumed the role of determining whether a particular cake is "offensive." Pet. Br. 43. It does no such thing. It instead determines whether a business denies goods and services, or a line of goods and services, to customers based on characteristics that are protected under the Act. Phillips admitted that he did just that. J.A. 62, 109.

Phillips's second argument in favor of applying strict scrutiny is that the Commission has "disdain for Phillips's religious views." Pet. Br. 42. He cites the statement of one Commissioner who, in rejecting a motion to stay the Commission's final order pending appeal, expressed the view that religion has in the past been used to justify discrimination and religious objections to legal requirements should not be used to justify harming others. Pet. App. 293a–94a. The Commissioner's statement does not demonstrate that Phillips was singled out because of his beliefs. Phillips claimed a right to deny service based on his faith; the Commission was required to consider that claim. The Commissioner's statement was intended to "reiterate

what [the Commission] said in the [appeal] hearing"—that religious objections are not a valid basis to defeat the Anti-Discrimination Act. Pet App. 293a; *see* J.A. 204–07 (explaining the Commission's conclusions on the free exercise claim).

b. Finally, in an attempt to entirely remove his free exercise defense from the *Smith* framework, Phillips asserts a "hybrid rights" claim.[11] In *Smith*, the Court noted in dicta that it had previously invalidated laws in "hybrid situation[s]," which "involved … the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881–82. Whether this announced a new species of constitutional claim is disputed. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006) (describing the hybrid-rights doctrine as "illogical" and "untenable" (internal citations omitted)). As Phillips acknowledges, the Court "has yet to specify the precise framework for analyzing those claims." Pet. Br. 47. That is, the Court has never in fact held that a special analysis applies to "hybrid situations." It should not do so here and, even if it does, Phillips would not prevail.

The hybrid-rights doctrine, as Phillips describes it, would allow two losing constitutional arguments to equal a winning one. Phillips claims that because he

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[11] As with his request to overturn *Smith*, Phillips did not raise the hybrid-rights question in the Petition. This Court has repeatedly declined to review the validity of hybrid-rights claims. *E.g.*, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), *cert. denied*, 555 U.S. 815 (2008); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006), *cert. denied*, 552 U.S. 816 (2007). It should decline to expand this case to review that issue. *S. Cent. Bell Tel. Co.*, 526 U.S. at 171.

asserts both a "strong free-speech interest" and a "robust free-exercise interest" against serving same-sex couples, this combination of arguments—even if not individually successful—requires application of strict scrutiny. Pet. Br. 47. Justice Scalia, the author of *Smith*, cautioned against this approach, explaining that it would "convert an invalid free-exercise claim … into a valid free-speech claim." *Watchtower Bible and Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150, 171 (2002) (Scalia, J., concurring in the judgment).

But even accepting Phillips's formulation of the hybrid-rights doctrine, the outcome here does not change. Each of Phillips's constitutional claims must, he concedes, be at least "colorable." Pet. Br. 47. As explained in this section and in Part I, *supra*, a business's refusal to serve customers because of their protected characteristics is not insulated from government regulation by the Free Speech Clause or the Free Exercise Clause.

III. Even assuming strict scrutiny applies, it is satisfied.

Phillips recognizes that, to prevail, he must convince this Court both to apply strict scrutiny and to hold that the Act does not satisfy that standard in this case. *See* Pet. Br. 37, 46, 47–48, 48. The United States agrees that the only path to reversal is the application of "heightened scrutiny." U.S. Br. 31. As explained above, strict or heightened scrutiny does not apply here.

But even assuming strict scrutiny applies, the Anti-Discrimination Act satisfies that standard when it prohibits public businesses, such as Phillips's bakery,

from refusing service on the basis of sexual orientation. As this Court has recognized, anti-discrimination laws serve compelling interests and are narrowly tailored to achieve them. *Roberts*, 468 U.S. at 626 (explaining that a public accommodations law "clearly furthers compelling state interests … through the least restrictive means"); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

1. *The State has a compelling interest in extending anti-discrimination protections to gay people*. Phillips offers a vanishingly narrow conception of the compelling interest at stake in this case. He claims "[t]he Commission must show that it has a compelling interest in forcing cake artists who otherwise serve LGBT customers to violate their consciences by creating custom wedding cakes." Pet. Br. 49. This argument "misconceives the nature of the State's interest." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978).

Colorado seeks to ensure that customers of businesses open to the public are not turned away because of their protected characteristics. The Court has acknowledged that this "goal … plainly serves compelling interests of the highest order," including "protect[ing] the State's citizenry from a number of serious social and personal harms," ensuring "individual dignity," and securing "wide participation in political, economic, and cultural life." *Roberts*, 468

U.S. at 624–25; *see also Rotary Club of Duarte*, 481 U.S. at 549 ("[T]he State's compelling interest in assuring equal access to women extends to the acquisition of … tangible goods and services."); *N.Y. State Club Ass'n*, 487 U.S. at 14 n.5.

Phillips does not dispute that these interests are compelling in other circumstances. Instead, he asserts that they are not compelling *as applied to lesbian women and gay men*. He claims that "dignitary interests" are not a "real concern" in the context of sexual-orientation discrimination and that refusing service to gay people is "neither invidious nor based on the slightest bit of animosity." Pet. Br. 52–53. In his view, "unless same-sex couples have problems accessing cake artists" or are subject to the sort of "your kind isn't welcome here" discrimination that existed in the pre-civil-rights South, a State need not be troubled by denials of service based on sexual orientation. *Id*. at 50–51. The United States puts it more directly, claiming that while combatting racial discrimination serves "compelling" interests, combatting discrimination against gay people does not. U.S. Br. 32.

Gay people have suffered—and still suffer—harms similar to those suffered by others who receive protection under public accommodations laws. Like women discriminated against based on their sex, gay people have been subject to "archaic and overbroad assumptions," "stereotypical notions," "stigmatizing injury," and the denial of "equal opportunities." *Roberts*, 468 U.S. at 625 (explaining the harms of sex discrimination); *see Obergefell*, 135 S. Ct. at 2596 (recognizing the indignities suffered by gay people); *see*

also, e.g., *Conaway v. Deane*, 932 A.2d 571, 609–11 (Md. App. 2007) ("Homosexual persons have been the object of societal prejudice by private actors as well as by the judicial and legislative branches of federal and state governments."). Indeed, gay people suffer discrimination in places of public accommodation at rates similar to women and racial minorities. *See The Williams Institute*, "Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity," Feb. 2016, *available at* http://bit.ly/2i060LH.

Phillips nonetheless assumes that because attitudes about gay people are changing, preventing discrimination based on sexual orientation is no longer a compelling government interest. Pet. Br. 54–55. The Court has never analyzed the question that way. For example, at the time the Court decided *Bob Jones University*, few colleges enforced a policy prohibiting "cultural or biological mixing of the races." 461 U.S. at 580, 583 n.6. Yet the Court still held that the government had a "compelling interest" in eradicating racial discrimination in higher education. *Id*. at 604. Similarly, in the 1980s, women were steadily being accepted as equals in professional circles. *See Rotary Club of Duarte*, 481 U.S. at 549 n.7 (noting that women made up "40.6 percent of the managerial and professional labor force"); *id*. at 549 n.8 (noting that women were often included in Rotary Club meetings); *Hishon*, 467 U.S. at 81 (Powell, J., concurring) (explaining that few businesses believed that a person's sex is relevant to hiring decisions). Yet the Court repeatedly recognized that States have a "compelling interest in eliminating discrimination against women."

Rotary Club of Duarte, 481 U.S. at 549; *Roberts*, 468 U.S. at 624.

There is no principled reason to treat the goal of eradicating sexual-orientation discrimination as anything less than compelling. The Anti-Discrimination Act, as applied to lesbian women and gay men who seek to buy goods and services from Colorado businesses, serves compelling interests.

2. *The Act is narrowly tailored*. The Act is also narrowly tailored to eradicate discrimination from the public commercial marketplace. The Act applies only to the discriminatory refusal to serve; nothing more, nothing less. COLO. REV. STAT. § 24-34-601(2)(a). And the Commission's enforcement powers are entirely remedial—the Commission may require only that discrimination cease and not recur. COLO. REV. STAT. §§ 26-34-306(9), 605. These provisions "respond[ ] precisely to the substantive problem which legitimately concerns the State and abridge[ ] no more speech … than is necessary to accomplish that purpose." *Roberts*, 468 U.S. at 628–29.

Phillips asserts that these provisions are "vastly underinclusive." Pet. Br. 56. He makes three basic arguments, all of which are meritless.

First, Phillips claims that, under the Commission's interpretation of the Act, retail bakeries can reject any cake with "written messages or specific designs." Pet. Br. 56. If the Act is applied in this way, Phillips argues, same-sex couples will be "forced to discuss the details of their desired custom cake[s]" before being denied service, leading to a "greater" dignitary harm than that

caused by blanket policies refusing service to all same-sex couples. Pet. Br. 56–57.

Under public accommodations laws like the Act, however, businesses cannot simply refuse service after "discussing the details" of an order. They must apply even-handed terms-of-service policies. The harms the Act addresses are those that flow from business policies that deny service to entire categories of customers. If a same-sex couple requests a cake similar to one a bakery has previously sold, the bakery must serve that couple.

Second, Phillips points to the Act's exemption for houses of worship and religious organizations. Pet. Br. 57. This exemption is similar to those found in many anti-discrimination laws. *See, e.g.*, *N.Y. State Club Ass'n*, 487 U.S. at 16 (discussing an exemption for benevolent orders and religious corporations, and explaining that "[f]or well over a century, the State has extended special treatment in the law to these associations"). Exemptions like these do not undermine the "undoubtedly important" goal of ending discrimination. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012). They honor the First Amendment by accommodating the rights of entities affiliated with places of worship. *See id.* at 706.

Finally, Phillips claims that because "the citizenry at large" is allowed to discuss religious objections to same-sex marriage, including through "hurtful speech," the Act cannot possibly be tailored to "dignity-based justifications." Pet. Br. 57–58. The point of public accommodations laws is not to prevent certain people from hearing certain messages. The point is to prevent

discriminatory denials of service. Colorado need not ban all speech critical of same-sex marriage to protect the dignity of gay people who wish to patronize public accommodations. *Cf. Burson v. Freeman*, 504 U.S. 191, 207 (1992) ("We do not … agree that the failure to regulate all speech renders the statute fatally underinclusive.").

3. *Phillips's suggested alternatives defeat the purposes of the Act.* Phillips posits that two "less restrictive alternatives are available to achieve the state's interest." Pet. Br. 58. Neither serves the purposes of the Act.

He first argues that the Commission should apply a two-tiered rule: businesses that sell "artistic" goods may be required to "sell premade items to the public" on equal terms, but those same businesses may discriminate when it comes to individualized orders. Pet. Br. 58. As explained above, this would give a wide range of businesses the right to discriminate by providing second-class service, whether driven by religious belief or merely bigotry, racism, or sexism. *See supra* at 42–43. Phillips does not cite any public accommodations law in the United States, over a more than 150-year history, that included an "expressive goods" or "customized orders" exception.

Phillips's second alternative is even more troubling. He suggests that Colorado create a state-sponsored website "apprising [gay] consumers" of wedding vendors who will serve them. Pet. Br. 61. To him, this system—a state declaration that one segment of society must be singled out from the rest—is a "ready alternative that protects the interests of all involved." *Id*.

It is doubtful that Phillips would have made this suggestion had Charlie Craig and David Mullins been denied service because they were an interracial couple rather than a gay couple. Before the civil rights era, African Americans were required to consult "special guidebook[s]" before seeking service at businesses open to the rest of society. *Heart of Atlanta Motel*, 379 U.S. at 253; Victor Hugo Green, THE NEGRO MOTORIST GREEN-BOOK (1949). The odiousness of that arrangement is easy to see.

Phillips demands respect for his religious beliefs, and that respect is secured by the Constitution. But under that same Constitution, a religious belief is no justification for a State—or a business open to the general public—to treat a class of people as inferior simply because of who they are.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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