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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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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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).

EXHIBIT 10

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

[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.

[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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October 23, 2017

EXHIBIT 10

2017 WL 5152969 (U.S.) (Appellate Brief)
Supreme Court of the United States.

MASTERPIECE CAKESHOP, LTD., et al., Petitioners,
v.
COLORADO CIVIL RIGHTS COMMISSION, et al., Respondents.

No. 16-111.
October 30, 2017.

On Writ of Certiorari to the Colorado Court of Appeals

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***1** INTEREST OF THE AMICI CURIAE

Amici include lesbian, gay, bisexual, or transgender (LGBT) individuals resident in the State of Colorado and LGBT membership organizations based in Colorado that rely on the protections of the Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. §§ 24-34-301 to -804, to ensure equal access to basic commercial services. Amici also include organizations and individuals that seek to address the discrimination that LGBT Coloradans have faced, and continue to face, on a daily basis.

Finally, amici include current and former Colorado lawmakers who have drafted or supported legislative initiatives pertaining to the rights of LGBT Coloradans, including CADA's provisions protecting LGBT Coloradans. These include former State Senator Jennifer Veiga and former State Representative Joel Judd, who sponsored the amendment to CADA that codified the protections challenged here. [1]

[1] Pursuant to Rule 37, this brief is filed with the written consent of Respondents Craig and Mullins. Respondent Colorado Civil Rights Commission and Petitioner have lodged blanket consents for the filing of amicus briefs with this Court. Counsel for a party did not author this brief in whole or in part, and such counsel or a party did not make a monetary contribution

EXHIBIT 11

intended to fund the preparation or submission of this brief. No person or entity, other than the amici, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

*2 SUMMARY OF ARGUMENT

CADA fulfills Colorado's compelling interest in protecting the rights of all its citizens, including LGBT Coloradans, to participate with equal dignity in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans,* 517 U.S. 620, 631 (1996). Prohibited at various points in Colorado's history from engaging in intimate conduct, from "securing protection against … injuries … [in] public-accommodations," and from marrying their partners of choice, LGBT Coloradans were for decades treated as "stranger[s] to [the] laws" of Colorado. *Id.* at 635. In the pitched, public, state-wide battles that heralded each act of stigmatization, LGBT Coloradans were accused of being immoral and of committing sexual offenses. These encounters left LGBT individuals vulnerable, subject to discrimination and public scorn.

Faced with this ongoing history of discrimination, Colorado legislators in 2008 sought to protect LGBT individuals' ability to fully participate in the state's commercial life. In so doing, they carefully limited CADA to avoid overburdening Coloradans' First Amendment interests by introducing exemptions from the law's reach.

CADA seeks to protect LGBT individuals from the identical injuries that this Court recognized in *Romer* as being "far reaching." *Id.* at 627. The range of transactions and activities in which LGBT Coloradans are now protected by CADA are almost identical to the "specific legal protections" that Amendment 2 "nullifie[d]," including housing, real *3 estate, and other business transactions. *Id.* at 629. Many of these services - including access to food and basic health care - are in short supply in remote, mountainous areas of the state. Further, there is evidence that LGBT Coloradans face unique barriers and continued discrimination in accessing these essential services. Access - and discrimination - in those circumstances does not simply determine dignity and social acceptance, but can mark the line between life and death. Under existing interpretations of federal law, LGBT Coloradans lack the explicit protections from most kinds of discrimination that many other groups enjoy. LGBT Coloradans are therefore completely reliant on CADA to ensure this access.

An expression- or religion-based exception to CADA would achieve at a retail level what Amendment 2 sought to accomplish wholesale - denying LGBT individuals equal social dignity. If the baking of a wedding cake - over whose design and message the couple would have the final say - could somehow be construed as the baker's First Amendment-protected activity, then, as Colorado's history shows, stemming the tide of discrimination against LGBT Coloradans would prove difficult. Other vendors who provide essential services, often through the written or spoken word, could seek similar exemptions. Employers, likewise, could seek to escape antidiscrimination strictures. Indeed, it is hard to see why a First Amendment exemption to discriminate against LGBT Coloradans would not extend to other groups that consistently invoke CADA for their protection.

*4 "[W]hen … sincere, personal opposition becomes … law … it creates an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell v. Hodges,* 135 S. Ct. 2584, 2608 (2015). While all Coloradans are free to express sincere opposition to any protected group, allowing them to embed this opposition into a legal right to exclude such minorities from commercial activities would undermine the balance the legislative process has struck, and would forever alter "the structure and operation of modern antidiscrimination laws." *Romer,* 517 U.S. at 628.

ARGUMENT

I. CADA FULFILLS THE STATE'S COMPELLING INTEREST IN PROTECTING THE RIGHTS OF ALL ITS CITIZENS, INCLUDING LGBT COLORADANS, TO EQUAL

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DIGNITY AND THE OPPORTUNITY TO PARTICIPATE IN THE PUBLIC SPHERE BY PROTECTING THEM AGAINST DISCRIMINATION IN PUBLIC ACCOMMODATIONS

A. LGBT Coloradans have faced a history of demeaning and discriminatory treatment

The quest for equal treatment of LGBT individuals in Colorado has been long-running and has faced persistent, often hostile, opposition. Over the past 25 years, Colorado has enacted not one, but two, citizen-initiated amendments to the Colorado ***5** Constitution specifically designed to declare gay men and lesbians "unequal to everyone else" and to "deem [them] a stranger to its laws." *Romer,* 517 U.S. at 635. The first, known as Amendment 2, worked a "[s]weeping and comprehensive" change in the status of lesbian, gay, and bisexual individuals that placed them, "by state decree … in a solitary class [.]" *Id.* at 627. The second, known as Amendment 43, denied Colorado's gay and lesbian citizens "equal dignity in the eyes of the law" by denying them the freedom to marry. *Obergefell,* 135 S. Ct. at 2608. While these two constitutional amendments garnered the most attention in Colorado's battle over the rights of LGBT people, they are just two chapters in a much longer story.

Until 1971, Colorado criminalized intimate conduct between individuals of the same sex. "Gays and lesbians lived hidden lives and in fear of exposure that could, and did, result in loss of a job and professional career - even eviction from one's home." Gerald A. Gerash, *On the Shoulders of the Gay Coalition of Denver, in* United We Stand: The Story of Unity and the Creation of The Center 3, 3 (Phil Nash ed., 2016). Police raided homes of openly gay men, imprisoned organizers of a prominent gay rights organization, and confiscated the group's mailing lists. *A Brief LGBT History of Colorado,* Out Front (Aug. 20, 2014).[2] Even after the repeal of Colorado's antisodomy laws, gay people faced ***6** significant hostility. When the Boulder, Colorado, city council voted to prohibit employment discrimination against gay men and lesbians in 1974, voters withdrew those protections by ballot initiative. *See* Lisa Keen & Suzanne B. Goldberg, Strangers to the Law: Gay People on Trial 6 (2000).

2 https://www.outfrontmagazine.com/news/colorado-lgbt-community/brief-lgbt-history-colorado/.

In subsequent decades, the rights of LGBT people rode "a political see-saw" in Colorado. *Id.* While Boulder reinstated its antidiscrimination provisions in 1987, and Denver adopted similar measures in 1990, other cities rejected them. In these battles, some opponents of equal rights for gay people compared homosexuality with necrophilia and bestiality, and argued that homosexuality would lead to increased child molestation. *See* Susan Berry Casey, Appealing for Justice: One Colorado Lawyer, Four Decades, and the Landmark Gay Rights Case: *Romer v. Evans* 196 (2016); Stephen Bransford, Gay Politics vs. Colorado: The Inside Story of Amendment 2, at 21 (1994). By the time Amendment 2 was proposed, gay men and lesbians felt "beaten up, stigmatized, and more isolated than ever." Casey, *supra,* at 201. And even when some communities decided to protect the rights of LGBT citizens to participate fully in civic life, opponents responded with animosity, leading the charge for passage of Amendment 2. *See Romer,* 517 U.S. at 623.

The Amendment 2 campaign sought to demean and humiliate LGBT Coloradans. Both in mainstream media outlets, such as Newsweek and National Public Radio, and through more targeted means, proponents falsely claimed that gay men had sex with minors, that many had more than 1,000 ***7** partners, and that they consumed fecal material. *See generally* Brief for *Amicus Curiae* National Bar Association in Support of Respondents at 6, *Romer,* 517 U.S. 620 (No. 94-1039) [hereinafter Nat'l Bar Ass'n Brief] (listing sources).

Throughout the campaign, LGBT Coloradans "were subjected to constant scrutiny, anger and vitriol, unfair accusations, and blatant distortions about their lives." Glenda M. Russell, Voted Out: The Psychological Consequences of Anti-Gay Politics 3 (2000). Such invective was backed up by physical aggression. Even as violence against gay people decreased across the nation, Colorado saw an uptick. Nat'l Bar Ass'n Brief at 7 (citation omitted). Amendment 2, which "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else," passed with a comfortable majority. *Romer,* 517 U.S. at 635.

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Romer struck down Amendment 2 as a violation of the Equal Protection Clause because it was born of "a bare … desire to harm a politically unpopular group." *Id.* at 634 (citations omitted). But even as *Romer* lay pending before the Court, prejudice against Colorado's LGBT community endured. In 1996, the Colorado legislature enacted a bill to prohibit marriage between individuals of the same sex. Governor Roy Romer vetoed the bill, but the legislature passed it again in 1997, only to have it vetoed once more. Governor Bill Owens signed yet a third version into law in 2000. *Governor Signs Gay-Marriage Ban Among Flock of Other Bills,* Colo. Springs Gazette, May 28, 2000, at 2.

***8** The following years saw additional challenges. In 2003 and 2004, legislators proposed a civil union bill to give same-sex couples a portion of the legal protections afforded their heterosexual counterparts. The bill faced harsh opposition and died in committee both years. Michael Brewer, *Colorado's Battle Over Domestic Partnerships and Marriage Equality in 2006,* 4:1 J. GLBT Family Stud. 117, 118 (2008). In 2005 and 2006, Governor Owens vetoed proposed employment discrimination protections for gay and lesbian Coloradans. *Id.* at 123. And in 2006, the organizations behind Amendment 2 launched a new initiative - this time to cement into the State's constitution the denial of same-sex couples' freedom to marry. *Id.* at 118-19. Amendment 43, which prevented the legislature from ending gay Coloradans' exclusion from marriage, passed by a wide margin. *Id.* at 123.

Recognizing that it would be hard to obtain their freedom to marry, gay rights advocates sought to create family protections through state-level domestic partnership status. Because the Governor had previously vetoed similar protections for same-sex couples, advocates placed a domestic partnership proposal on the ballot. *Id.* at 119. Even this limited measure lost handily. *Id.* at 123.

As this history suggests, legal protections for gay and lesbian Coloradans were sorely needed and hard won. In 2007, the Colorado legislature finally passed a law prohibiting discrimination on the basis of sexual orientation in employment. Colo. Rev. Stat. § 24-34-402. In 2008, as discussed further below, CADA was amended to prohibit discrimination based ***9** on sexual orientation in public accommodations and housing. In 2013, a civil union law provided some of the tangible protections and responsibilities of marriage, and, in 2014, following the Tenth Circuit's decision in *Kitchen v. Herbert,* 755 F.3d 1193 (10th Cir. 2014), same-sex couples in Colorado finally obtained equal freedom to marry.

B. The legislative record of CADA demonstrates that it was amended to address this history of discrimination

1. As this Court has recognized, "times can blind us to certain truths." *Lawrence v. Texas,* 539 U.S. 558, 579 (2003). The history of CADA provides an example of this reality.

Colorado has prohibited discrimination in public accommodations since 1885. *See generally* Resp't Colo. Civil Rights Comm'n Br. 7-8 (describing history). The law has been amended over time to add certain protected characteristics as society gained an understanding that discrimination on the basis of those characteristics was invidious, destructive, and without legitimate or rational purpose. But despite the long history of discrimination and stigma described above, sexual orientation was not included until the law had been in place for well over a century.

Colorado legislators sought for more than a decade to add protections for LGBT individuals in CADA, but their efforts were met with repeated failure. Compendium of Legis. Hist. of SB08-200 (2008 amendment to CADA) at 90-91 [hereinafter ***10** Leg. Record].[3] Finally, in 2008, following extensive evidentiary hearings and debate, the Colorado General Assembly made clear that sexual orientation discrimination, like other enumerated forms of exclusion and disadvantage, should be and was prohibited in public accommodations and housing.

3 http://scholar.law.colorado.edu/research-data/8/.

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The purpose of the 2008 amendment was simple: as Representative Joel Judd, its chief sponsor in the Colorado House, explained, by extending protections to LGBT people in "places of public accommodation … [that] range from … barbershops, to hotels, to hospitals, [to] … funeral homes," the law ensures that LGBT individuals will "live in dignity and will ultimately die in dignity." *Id.* at 112.

Many opponents refused to acknowledge that sexual orientation discrimination is a serious problem, however, let alone something to be prevented. One legislator who opposed the bill suggested, ostensibly in jest, that discrimination against short people was far more pervasive and serious than was discrimination against gay people. *Id.* at 76-78. Another suggested that discriminating against gay people in housing was the same as refusing to rent to a "party[ing] college freshman." *Id.* at 131. Legislators objected to analogizing discrimination based on race to that based on homosexuality - "the science is still out on that[,]" one claimed. *Id.* at 148. Opponents argued that the measure was about nothing more than putting the "feelings" of LGBT people above the rights of others ***11** to decide to whom they want to rent apartments. *Id.* at 214.

Supporters of the legislation countered that the legislation fulfilled CADA's longstanding central purpose: protecting all Coloradans' ability to engage in "transactions and endeavors that constitute ordinary civic life in a free society." *Romer,* 517 U.S. at 631. As Mark Ferrandino, Colorado's first openly gay male legislator, explained, this amendment was about the State's compelling interest in assuring all people the ability to find housing, to serve on a jury without discrimination, and to engage in the many other fundamentals of civic and commercial life. Leg. Record at 272-73. And, these legislators noted, Colorado had a compelling interest in enacting a law to end this discrimination, alongside others, because discrimination on the basis of sexual orientation was, and is, serious and ongoing.

In documenting the need for this protection, legislators relied in part on their own experiences in Colorado. Senator Chris Romer, the son of former Governor Roy Romer, described "how painful" it was for a former staffer of his father "to explain to people what it means to be afraid and to be gay" after Amendment 2 passed. *Id.* at 78-79. Another legislator explained how his son, a prosecutor, left Colorado for Oregon, because he found Colorado to be hostile to gay people. He concluded, "I don't have formal statistics, I just have one, and the one is my son. He was uncomfortable in Colorado." *Id.* at 88. Yet another representative explained that what motivated her was the need to ensure "basic human ***12** decency," to guarantee that the housing and health care needs of her sister, her partner, and their three children were properly satisfied. *Id.* at 222-23.

Witnesses also testified to the prevalence of discrimination on the basis of sexual orientation. A representative from the Anti-Defamation League said that its office received calls about individuals being denied housing because of their sexual orientation. *Id.* at 42. The director of the LGBT Center reported calls from people who had heard doctors in emergency rooms suggesting that they did not want to treat gay patients because of their sexual orientation. *Id.* at 52.

2. In deliberating on the addition of sexual orientation to CADA, legislators were careful to consider possible effects on speech and religion. The question presented by this case was debated in the hearings. One witness testified about his concern that religious people who run businesses would be required to serve gay people despite their "personal conscience." *Id.* at 25-27. In response, the law's supporters noted that, by prohibiting discrimination based on sex, race, or creed, CADA already considered and rejected demands by those who elect to run a business for unfettered license to discriminate. *Id.* at 155-56.

As legislators explained, CADA seeks to strike the right balance between the desire of some individuals to discriminate, whatever their reason, and "the need for individuals to be able to acquire acceptable housing … to raise a family," *id.* at 127, or to access and participate in the marketplace without injury or insult. That familiar balance, ***13** struck again and again over decades of civil rights legislation, one witness noted, separated "private organizations" that can "choose to exclude people based on their own creed and practices" from those in the commercial or "public sphere," such as "housing [and] education." *Id.* at 58. Accordingly, as one legislator observed, "[i]f you choose to go into the world of

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commerce and offer your services to the general public, then, at that point, you've given up the ability to draw a line on the basis of race, on the basis of religion, or on the basis of sexual preference." *Id.* at 197.

Even while defending the essential purposes that CADA served, legislators were eager to listen to, negotiate with, and accommodate religious interests. As Senator Jennifer Veiga, who sponsored the bill in the Senate, noted during the hearings, the proposal was amended to address the Catholic Church's one expressed concern: a provision concerning discrimination based on *religion* that the Church perceived as troublesome and duplicative. *Id.* at 40, 63-64, 71, 107. The legislature also amended the bill to allow restrictive covenants on cemetery plots to respect religious preferences. *Id.* at 62. And they expanded the exemption from CADA beyond just churches, synagogues, and mosques to include any "other place that is principally used for religious purposes," so that religious camps, among other entities, would not be subject to the law. *Id.* at 261-62.

Notably, the substantial majority of the testimony from religious organizations during the debate over amending CADA was supportive of ***14** adding protections against discrimination on the basis of sexual orientation. *E.g., id.* at 55-56, 176-79. As a Methodist minister, whose own congregation did not ordain gays and lesbians, explained, a "bill that protects gay and lesbian people from discrimination" in public accommodations helps Coloradans "rise to a higher standard from that of dehumanizing our fellow human beings." *Id.* at 56-57.

The amendment to CADA to include protections based on sexual orientation was the culmination of a "deliberative process" in which "people t[oo]k [ ] seriously questions that they may not have even regarded as questions before." *Obergefell,* 135 S. Ct. at 2625 (Roberts, C.J., dissenting). The result of the careful democratic balance thus achieved should not be overridden.

II. AN EXPRESSIVE OR RELIGIOUS EXCEPTION TO CADA WOULD SEVERELY UNDERMINE ANTIDISCRIMINATION PROTECTIONS AND SUBJECT LGBT AND, MOST LIKELY, OTHER COLORADANS TO WIDESPREAD DISCRIMINATION

A novel expressive or religious exception to CADA would swallow the rule against discrimination that the law embodies, and mark a departure from the respect courts have given such laws over decades. CADA's protections span a vast array of services, through which LGBT Coloradans access basic needs, such as food, shelter, and health care. Weakening these protections invites would-be discriminators to ***15** "inflict[ ] on them immediate, continuing, and real injuries." *Romer,* 517 U.S. at 635. Moreover, creating an exemption to permit discrimination on the basis of sexual orientation would either allow the same carve-out to discriminate on other bases (*e.g.*, gender, race, or even religion), or would impermissibly single out one class of citizens as "unequal to everyone else." *Id.* And although some assert that discrimination against LGBT citizens is not a "real concern," Pet'rs' Br. 52, Colorado's experience - and our nation's broader history - demonstrates that it is. LGBT people have been singled out for unequal treatment in critical contexts, from health care to housing to employment and, of course, to public accommodations.

A. CADA's protections reach across a wide array of public and commercial contexts

CADA's protections are nearly identical to the municipal protections that triggered the passage of Amendment 2. *See Romer,* 517 U.S. at 623-24. The list of "persons or entities subject to a duty not to discriminate … goes well beyond the entities covered by the common law." *Id.* at 628. The law prohibits "any place of business engaged in any sales to the public … [or] offering services, facilities, privileges, advantages, or accommodations to the public" from discriminating against protected classes of individuals. To be clear about the breadth of protection the legislature intended to provide, CADA non-exhaustively lists several such entities as examples:

> ***16** any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation

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> facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor.

Colo. Rev. Stat. § 24-34-601.

Fulfilling CADA's intent to eliminate invidious discrimination in commercial life, vulnerable groups have sought the protection of CADA for a wide variety of purposes. Children have sought access to recreational facilities to which they were allegedly denied access because of their race. *Creek Red Nation, LLC v. Jeffco Midget Football Ass'n,* 175 F. Supp. 3d 1290, 1292-93 (D. Colo. 2016). Women have sought access to local stores to purchase basic ***17** necessities. *Arnold v. Anton Co-op. Ass'n,* 293 P.3d 99, 102 (Colo. Ct. App. 2011). Disabled individuals have sought access to major restaurant and retail chains. *Lucas v. Kmart Corp.,* No. 99-cv-01923-JLK, 2005 WL 1648182, at *1 (D. Colo. July 13, 2005); *Colo. Cross-Disability Coal. v. Taco Bell Corp.,* 184 F.R.D. 354, 355-56 (D. Colo. 1999). Native Americans have used CADA to challenge school regulations that burdened their religious beliefs. *Sch. Dist. No. 11-J v. Howell,* 517 P.2d 422, 423 (Colo. Ct. App. 1973). Other plaintiffs have turned to CADA to combat discrimination in public transportation, *Reeves v. Queen City Transp.,* 10 F. Supp. 2d 1181, 1182-83 (D. Colo. 1998); in obtaining cellular telephones, *Lewis v. Strong,* No. 09-cv-02861-REB-KMT, 2010 WL 4318884, at *1, 5 (D. Colo. Aug. 19, 2010); and in obtaining access to essential medical care. *Colo. Cross-Disability Coal. v. Women's Health Care Assocs., P.C.,* No. 10-cv-01568-RPM, 2010 WL 4318845, at *1-2 (D. Colo. Oct. 25, 2010). In short, CADA is an essential tool to protect equal access to a vast array of public accommodations.

Access to these accommodations can be a matter of life and death for many Coloradans. Although most of Colorado's citizens live in or near the Denver metro area, the vast reaches of the State are rural, and citizens in those areas frequently lack choice as to where they can receive essential services. Of Colorado's 64 counties, 51 are wholly or partially designated as Primary Care Health Professional Shortage Areas by the federal government. Colorado Department of Public Health and Environment GIS, Primary Care Health Professional Shortage Areas ***18** (HPSAs) (2015).[4] Similarly, a report found that "[a]ccess to supermarkets is a problem in many Colorado neighborhoods but exceedingly so in lower-income, inner-city and rural communities where the incidence of diet-related disease is highest." Allison Karpyn & John Weidman, The Food Trust, Special Report: The Need for More Supermarkets in Colorado at 10 (2009).[5] CADA ensures access to stores that do exist in such areas. *Cf. Anton Co-op. Ass'n,* 293 P.3d at 102 (CADA case in which plaintiff noted that the Association's store "is the only place within 30 miles to purchase many necessities"). Colorado's geography makes seeking alternative services in the Rockies even harder. Any exception to CADA could transform a shortage into a complete deprivation of basic services for vulnerable minorities.

4 https://www.colorado.gov/pacific/sites/default/files/PCO_HPSA-primary-care-map.pdf.

5 http://www.coloradohealth.org/sites/default/files/documents/2017-01/Food_Trust_Rpt-Colorado-Special%20Report%C20the%C20Need%C20for%C20More%C20Supermarkets%C20in%20CO.pdf.

B. An expressive or religious exception would sweep broadly, harming LGBT individuals and perhaps members of other protected classes as well

The implications of a carve-out from CADA based on the kind of compelled speech or free exercise claim put forward in this case would be far-reaching. If a merchant could refuse service in defiance of a civil rights law simply by asserting that

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its ***19** expressive or religious beliefs are implicated by the identity of the customer or the customer's exercise of his or her rights, then nearly any merchant could claim an expressive or religious license to evade the law. There is no principled way to limit such an exemption to wedding cake bakers or florists, or to discrimination based only on sexual orientation. The First Amendment requires no such exemption from generally applicable, content neutral antidiscrimination laws.

1. Even assuming that cakes have an expressive function, they hardly embody the *merchant's* message. Historically and culturally, the message on the wedding cake is that of the married couple; the design and any text "are often closely identified in the public mind with the [couple]," rather than with the baker; and the customer can "maintain[ ] direct control" and "final approval authority" over the product. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,* 135 S. Ct. 2239, 2248-49 (2015) (quoting *Pleasant Grove City v. Summum,* 555 U.S. 460, 472, 473 (2009)) (identifying factors that determine to whom speech should be attributed). Similarly, no reasonable person imputes the message on a T-shirt to the weaver, the message on a wedding photograph to the photographer, or the billboard message or campaign ad to the advertising company. These messages are rightly imputed to the person with control over the message - the customer who paid for them. Indeed, why would a customer ***20** pay a merchant to spread the merchant's message? [6]

6 So understood, this case is distinct from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557 (1995), wherein the organizers of a privately arranged parade - an inherently politically expressive activity - were required by the state to include a group in the parade that would alter their message. *Id.* at 559. Importantly, it was *the parade organizer's* message that controlled, not the message from the outside group. *Id.* at 568-70. Here, the merchant is not being forced to alter his speech, but is simply facilitating that of yet another customer.

If a new carve-out were based on a business owner's purported expressive interest, then any vendor who characterizes his or her work as including an expressive component could assert a right to refuse service. If this kind of discrimination were permitted because of a carve-out to CADA, then LGBT individuals could be denied even essential services. For example, medical treatment frequently requires verbal interaction between doctor and patient. Medical professionals have been held to engage in "speech" for the purposes of the First Amendment even when providing treatment. *King v. Governor of the State of N.J.,* 767 F.3d 216, 225 (3d Cir. 2014). Funeral parlors might similarly decline to provide services for same-sex couples, on the grounds that funerals, like weddings, have expressive components.

Further, such exemptions would create challenges for the LGBT groups and organizations that have been essential for fostering community and mutual support for individuals who frequently face familial rejection. For example, amicus Denver Gay ***21** Men's Chorus, with nearly 150 members, might be denied access to the few venues that can hold a group its size if the owners of those venues claimed that the Chorus's pro-LGBT message would be attributed to them and thus excused their compliance with the law.

Without a principled limit, exemptions created to CADA could easily be asserted for other protections embodied in state law. Just as a vendor here seeks an exemption to laws that prohibit discrimination against customers, employers may seek exemptions from state laws that prohibit discrimination against employees, arguing that the employers' religious or expressive rights entitle them to distance themselves from members of the LGBT community.

2. A commercial carve-out in the name of religious beliefs would have similarly damaging effects. While this case involves a wedding vendor, it is not difficult to imagine the landlord who refuses to rent to a gay couple because their marriage or cohabitation is contrary to his religious beliefs. *Cf. Evans v. Romer,* 882 P.2d 1335, 1342 (Colo. 1994), *aff'd,*517 U.S. 620 (1996) (proponents of Amendment 2 relied on cases holding that laws prohibiting marital discrimination in rentals burdened free exercise, even though those cases upheld the validity of the regulations as neutral principles of general applicability).

The impact of a religious carve-out could also cause significant harm to the children or parents of same-sex couples. In 2010, a preschool student in Boulder, Colorado was denied enrollment for kindergarten because the school learned the

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child's ***22** parents were a lesbian couple. Sarah Netter, *Colorado Catholic School Boots Student with Lesbian Mothers,* ABC News (Mar. 9, 2010). [7] If teachers or principals in schools covered by CADA were permitted a religious exemption because of their personal beliefs, the line the law draws between religious institutions and those that do not serve a primarily religious purpose would be eviscerated. The potential harm to children, to parents seeking care in nursing homes, and to others associated with same-sex couples, in addition to the couples themselves, could be significant.

7 http://abcnews.go.com/WN/colorado-catholic-school-kicks-student-lesbian-mothers/story?id=10043528.

Indeed, a religious carve-out in the case now before the Court would raise additional concerns because courts are generally reluctant to question whether a particular asserted belief is consistent with a religion's other precepts or with the commonly known beliefs of a particular religion. *See, e.g., United States v. Seeger,* 380 U.S. 163, 185 (1965) (the threshold question of whether a belief is "truly held" is a question of fact). Thus, while some businesspeople seeking to discriminate may harbor a genuine religious objection to married same-sex couples, others who seek to engage in invidious discrimination may use the religious carve-out as an opportunity to do so regardless of their actual religious convictions.

3. Equally troubling, there is no principled way to allow an exception for sexual orientation but not ***23** for other characteristics protected under the same law. If commercial businesses can claim an expressive exception to CADA for participation in a wedding between two people of the same sex, a business that objected to a marriage between people of two different races, or two different religions, may also claim such an exception.

Even former Georgia Attorney General Michael Bowers - hardly a radical advocate of the equal rights of gay people, *see Bowers v. Hardwick,* 478 U.S. 186 (1986); *Shahar v. Bowers,* 114 F.3d 1097 (11th Cir. 1997) - has publicly declared that laws creating sweeping exceptions to non-discrimination statutes for those who do not want to comply in the name of religion are "unequivocally an excuse to discriminate." Letter from Michael J. Bowers to Jeff Graham, Executive Director, Georgia Equality, Inc. at 6 (Feb. 23, 2015). [8] If an exemption were allowed, Bowers asserted, "there is no limit to the discrimination and disruption that could be brought about in the name of religious freedom." *Id.* at 3.

8 https://drive.google.com/file/d/0B_KEK8-LWmzhUjdmMlRHZ0h2TEk/view.

Bowers, like many others, has recognized that "permitting citizens to opt out of laws because of a so-called burden on the exercise of religion in effect 'would permit every citizen to become a law unto himself.' " *Id.* at 6 (quoting *Jones v. City of Moultrie,* 27 S.E.2d 39, 42 (Ga. 1943)). "Allowing each person to become a law unto his or herself," in turn, "destroys uniformity to the law and creates mass ***24** uncertainty," a can of worms that would threaten our very democracy. *Id.* As Bowers concluded, "[t]his … is not about gay marriage, or contraception, or even so-called 'religious freedom.' It is more important than all of these, because it ultimately involves the rule of law." *Id.* at 7.

Accordingly, this Court has consistently rejected attempts to undermine neutrally applicable antidiscrimination laws based on the putative expressive or religious interests of those who seek to discriminate. For example, in *Hishon v. King & Spalding,* 467 U.S. 69 (1984), this Court rejected the argument that forcing a law firm to comply with Title VII's prohibition on gender discrimination infringed on the firm partnership's First Amendment freedom of association. *Id.* at 78-79. While recognizing that lawyers' work involves "a distinctive contribution … to the ideas and beliefs of our society," the Court concluded, as it had in other contexts, that "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.* at 78 (quoting *Norwood v. Harrison,* 413 U.S. 455, 470 (1973)).

Similarly, in *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968), owners of drive-in restaurants argued that they should be exempt from Title II of the Civil Rights Act of 1964 because, by mandating that they not discriminate against

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customers based on race, the law infringed on their free exercise of religion. *Id.* at 400. In awarding attorney's fees to the plaintiffs, the ***25** Supreme Court characterized the merchant's free exercise argument as "patently frivolous." *Id.* at 402 n.5; *see also Bob Jones Univ. v. United States,* 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971."); *Loving v. Virginia,* 388 U.S. 1, 3 (1967).

In its amicus brief, the federal government seeks to limit the damage to civil rights laws that a carve-out here could unleash by suggesting that, at least in the case of race, antidiscrimination laws "*may* survive heightened First Amendment scrutiny" because racial bias is " 'a familiar and recurring evil' that poses 'unique historical, constitutional, and institutional concerns.' " United States Br. at 32 (emphasis added). It argues that, by contrast, anti-gay discrimination is tolerable and that the Colorado legislature's considered decision to include a prohibition of anti-gay discrimination alongside other prohibited bases somehow does "not advance[ ] a sufficient state interest." *Id.* at 33. The government's position is belied by the long history of anti-gay discrimination, the deliberate inclusion of LGBT protections in CADA, and the importance of access to vital services, including participation in the marketplace, which all demonstrate that the Colorado legislature acted with a compelling and sufficient interest. The government's argument taken to its logical extreme would mark LGBT Coloradans as uniquely underselling of the protections that the legislature has deemed appropriate for similarly vulnerable groups. The ***26** damage that would flow from a license to discriminate here is a can of worms that should not be opened.

C. CADA is vital to protect LGBT Coloradans from ongoing discrimination in commercial settings

The compelling need for CADA's protections is not theoretical. It is real. LGBT Coloradans require access to the same services and opportunities as other Coloradans. CADA is an important measure for ensuring equal access. The need for CADA's protections is demonstrated by the sad reality that LGBT Coloradans still suffer discrimination that endangers access to these critical resources. A recent report on LGBT health care in Colorado revealed that 21% of health care providers refused to provide services to LGBT people. One Colorado Education Fund, Invisible: The State of LGBT Health in Colorado 9 (2012).[9] Among LGBT patients, 55% feared they would be treated differently if their provider found they were LGBT. *Id.* Another 28% reported that their sexual orientation stopped them from seeking health services. *Id.* Only 59% are very open about sexual orientation with their medical providers. *Id.* at 11.

9 http://www.one-colorado.org/wp-content/uploads/2012/01/OneColorado_HealthSurveyResults.pdf

Statistics from the Colorado Human Rights Commission tell a similar story. Since 2008, when ***27** the Commission began collecting data about discrimination based on sexual orientation, there has been a regular uptick in complaints, from 23 in 2007-08, to 82 in 2015-16. Colorado Civil Rights Commission, Colorado Civil Rights Division, 2016 Annual Report 9 (2016);[10] Colorado Civil Rights Commission, Colorado Civil Rights Division, Annual Report 2014 5 (2014).[11]

10 https://drive.google.com/file/d/0B1*o*MNUeCI8FYQ21SNjdwTjhRRzg/view.

11 https://drive.google.com/file/d/0Bz-k2zYFlBh6bUxwcmlvUGh3VzQ/view.

Those statistics find even greater meaning in the stories of LGBT people around Colorado who have faced recent discrimination:

• In 2015, Tonya Smith and her wife, Rachel, were looking for an apartment to rent after their landlord sold the home in which they were living. They had a difficult time finding something in their price range. When they found a promising unit, the potential landlord asked invasive questions and told the couple at the last minute that she would not rent to them because of their "unique relationship." *Smith v. Avanti,* 249 F. Supp. 3d 1194, 1197-98, 1201 (D. Colo. 2017). Tonya

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and Rachel ended up having to get rid of many of their belongings as they were unable to find another residence on short notice. *Id.* at 1198.

• In 2017, Cherry Creek Mortgage Company, Colorado's largest residential mortgage firm, was sued by a married lesbian couple because the firm declined to provide them with the same health care ***28** coverage that it provided to different-sex married couples. The company changed its policy to provide equal treatment to its gay employees only after facing litigation. Mark Harden, *Cherry Creek Mortgage Chairman Resigns as Company Changes Same-Sex Benefits Policy,* Denver Bus. J. (Aug. 26, 2017). [12]

12 https://www.bizjournals.com/denver/news/2017/08/26/cherry-creek-mortgage-chairman-resigns-as-company.html.

• In 2012, Coy Mathis, a 6-year-old first grade student who is a transgender girl, was denied use of the girls' restroom at her elementary school. The Colorado Civil Rights Commission found that the school had "forced her to disengage from her group of friends" and "tasked [the 6-year-old] with the burden of having to plan her restroom visits to ensure that she has sufficient time to get to one of the approved restrooms." Coy Mathis, Charge No. P20130034X, Colo. Div. of Civil Rights, 11 (2012) (determination). [13]

13 https://archive.org/details/716966-pdf-of-coy-mathis-ruling.

• In the fall of 2017, the Equal Employment Opportunity Commission found sufficient evidence that a Denver tire company refused to hire a transgender man to support a lawsuit against the company under Title VII, and thereafter filed suit. Complaint at 2-3, *EEOC v. A&E Tire, Inc.,* No. 1:17-cv-02362-STV (D. Colo. Sept. 29, 2017). The applicant allegedly had been told that he "had the job so long as he could pass all of the screening process. *Id.* at 33. When he acknowledged in paperwork that he had been born female, the manager hired someone else. *Id.* at 42-55.

***29** • In 2012, two different employees of the Colorado State Patrol received settlements from the agency as a result of their claims that they were discriminated against on the job because of their sexual orientation. Tak Landrock, *Colorado State Patrol Payouts Cost Taxpayers $2 Million in 2013,* KDVR (Dec. 27, 2013). [14]

14 http://kdvr.com/2013/12/27/colorado-state-patrols-payout-cost-taxpayers-2-million/.

Of course, experience teaches that, for every instance of discrimination such as the above, there are many more that go unreported.

Importantly, CADA and its analogous state protections in the employment context, Colo. Rev. Stat. § 24-34-402, currently provide the only reliable, robust, and explicit recourse for these and other LGBT Coloradans. For instance, federal protections are frequently interpreted not to include LGBT individuals. To take one example, Section 1557 of the Affordable Care Act, prohibits discrimination in health care settings based on race, sex, and other characteristics. But the federal government has stated that sexual orientation is not covered. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,390 (May 18, 2016) (codified at 45 C.F.R, pt. 92). And the Tenth Circuit Court of Appeals has refused to interpret Title VII to include protections for members of the LGBT community. *See Etsitty v. Utah Transit Auth.,* 502 F.3d 1215, 1222 (10th Cir. 2010) (Title VII does not protect transgender individuals); ***30** *Medina v. IncomeSupport Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections … do not extend to harassment due to a person's sexuality."). Granting would-be discriminators a license to discriminate in defiance of CADA risks undoing the protections Colorado has put in place to assure LGBT people, their families, and others, equal opportunity to participate in and contribute to the marketplace and other important areas of life.

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Colorado has a compelling interest in protecting the rights of all of its citizens. LGBT Coloradans have the same right to dignity and participation in the public sphere that CADA assures to all other citizens of the State. Creating a carve-out to permit discrimination against LGBT people would deny them that essential dignity, and threaten the civil rights laws themselves.

CONCLUSION

The decision of the Colorado Court of Appeals should be affirmed.

*1A APPENDIX: LIST OF AMICI CURIAE

Clemmie Engle is a retired attorney who formerly worked at the Colorado Attorney General's Office.

Daneya Esgar has served two terms in the Colorado House of Representatives. She works with the House leadership team as the Majority Caucus Chair. She is also the Chair of the Capital Development Committee and Vice-Chair of the House Health, Insurance, and Environment Committee. She sits on the House Agriculture, Livestock, and Natural Resource Committee, as well as the House Transportation and Energy Committee.

Mark Ferrandino is the Chief Financial Officer for the Denver Public Schools and, until January 2015, was speaker of the Colorado House of Representatives. Previously, he was a senior budget analyst for the Colorado Department of Health Care Policy and Financing under Governor Bill Owens; a program analyst for the United States Department of Justice, Office of the Inspector General; and a policy analyst for the White House Office of Management and Budget under Presidents Bill Clinton and George W. Bush.

Lucía Guzmán is the Minority Leader in the Colorado Senate. Appointed to the Colorado Senate in May 2010, she represents Senate District 34 in Denver.

***2a** Leslie Herod is a member of the Colorado House of Representatives representing District 8.

Joel Judd is an attorney who served in the Colorado State Legislature from 2003 to 2010, chairing the House Finance Committee from 2007 to 2010.

Dominick Moreno is the Assistant Majority Leader in the State Senate. He also serves on the Joint Budget Committee. He represented the 32nd District in the Colorado House of Representatives from 2012 to 2016, before being elected to the Colorado State Senate in 2016.

Paul Rosenthal is a community activist, teacher, and politician who was elected in 2012 to serve in the Colorado House of Representatives for House District 9.

Dr. Glenda Russell is a teacher and licensed psychologist in the state of Colorado. She has a Ph.D. degree in Clinical Psychology from the University of Colorado and an internship at the Neuropsychiatric Institute at UCLA Health Sciences Center.

Pat Steadman is an attorney, former legislator, and former lobbyist. He was appointed to the Colorado Senate in May 2009. He represented Senate District 31 from 2009 to 2017.

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***3a** Jessie Uliberri served four years in the Colorado Senate representing District 21 in Adams County. He is Vice President of Impact and External Affairs at Wellstone.

Jennifer Veiga is an attorney and a former Colorado legislator. First elected to the Colorado House of Representatives in 1996, Veiga was appointed to the Colorado Senate in 2003 and subsequently elected to full terms in 2004 and 2008. She represented Senate District 31.

Center for Health Progress creates opportunities and eliminates barriers to health equity for Coloradans.

Colorado Ethics Watch is a Colorado nonprofit corporation devoted to using legal tools to promote ethics and transparency in government.

The Colorado Health Foundation is the state's largest private foundation and is dedicated to grantmaking, advocacy, and private sector partnerships that advance the Foundation's mission of improving the health of Coloradans.

The Colorado Lesbian Gay Bisexual Transgender ("LGBT") Bar Association is a voluntary professional association of gay, lesbian, bisexual and transgender attorneys, judges, paralegals, law students, and allies who provide a LGBT presence within Colorado's legal community.

***4a** The Denver Gay & Lesbian Flag Football League fosters the community through sport and promotes positive social and athletic enjoyment of flag football among the gay, lesbian, bisexual, and transgender community, as well as our straight allies living in the greater Denver area.

EBS Support Services, LLC works to advance social equity by supporting nonprofit organizations and individuals that use technology and media to build an educated and engaged public.

Gender Identity Center of Colorado provides support to anyone gender variant in their gender identity and expression, with resources available to anyone, male/female/other, who can benefit from its services or resources, including spouses, significant others, parents, and siblings. It is also an informational and educational resource to the community at large.

The GLBT Community Center of Colorado engages, empowers, enriches, and advances the gay, lesbian, bisexual, and transgender community of Colorado by ensuring that every member of the community has access to the programs, services, and resources they need to live happy, healthy, and productive lives.

The Interfaith Alliance of Colorado brings people together from multiple faith traditions to drive social change.

***5a** NARAL Pro-Choice Colorado develops and sustains a constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive health choices, including preventing unintended pregnancies, bearing healthy children, and choosing legal abortion.

New Era Colorado reinvents politics for young people, mobilizing and empowering a new generation to participate in our democracy to make Colorado a better place for everyone.

Northern Colorado Equality seeks to enhance the well-being of the LGBT+ community through activities, programs, services, and education, thus empowering our members and allies.

One Colorado is the state's leading advocacy organization dedicated to advancing equality for lesbian, gay, bisexual, transgender, and queer (LGBTQ) Coloradans and their families.

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Padres & Jovenes Unidos is a multi-issue organization led by people of color who work for educational equity, racial justice, immigrant rights, and advocating for equal access to achieve a better quality of life.

***6a** PFLAG Boulder County is the extended family of the LGBTQ community, made up of LGBTQ individuals, family members, and allies. Because together it is stronger, PFLAG Boulder County provides support, education, and advocacy for the families, friends, and allies of lesbians, gays, bisexual, transgender, queer, and intersex (LBGTQI) people, as well as for the LGBTQI community itself.

PFLAG Greeley provides support, education, and advocacy for lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals, their families, friends, and allies in the Greeley community.

Planned Parenthood of the Rocky Mountains, which includes Planned Parenthood of Southern Nevada, Planned Parenthood of New Mexico, and Planned Parenthood of Wyoming, empowers individuals and families in the communities we serve to make informed choices about their sexual and reproductive health by providing high-quality health services, comprehensive sex education, and strategic advocacy.

ProgressNow Colorado Education works to improve the lives of all Coloradans by acting as the collective voice for the progressive movement in both traditional and new media.

***7a** Rocky Mountain Arts Association builds community through music performed by both the Denver Gay Men's Chorus and the Denver Women's chorus, providing educational, cultural, and social enrichment for our audiences and our members.

Southern Colorado Equality Alliance brings LGBTQ and ally communities together through education, advocacy, and empowerment for support and inclusion.

Trans* Youth Education and Support (TYES) empowers and supports families and caregivers of gender expansive youth by providing resources, education, outreach, and advocacy, in order to create supportive environments that allow youth to experience the joy of authenticity.

The Transformative Freedom Fund supports the authentic selves of transgender Coloradans by removing financial barriers to transition-related health care.

The Women's Lobby of Colorado has sought to provide better opportunities for women in our state since 1993 by ensuring that public policies reflect gender equity and justice.

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COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: February 17, 2015 9:18 AM
COLORADO CIVIL RIGHTS COMMISSION, DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202 Case No. 2013-0008	
RESPONDENTS-APPELLANTS: MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, v. PETITIONERS-APPELLEES: CHARLIE CRAIG and DAVID MULLINS.	
John M. McHugh, No. 45456, jmchugh@rplaw.com Anthony L. Giacomini, No. 26057, agiacomini@rplaw.com REILLY POZNER LLP 1900 16th Street, Suite1700 Denver, CO 80202 (303) 893-6100 Jennifer C. Pizer, *of counsel* Lambda Legal Defense and Education Fund, Inc. 4221 Wilshire Boulevard, Suite 280 Los Angeles, California 90010 (213) 382-7600 ext. 242 jpizer@lambdalegal.org	▲ COURT USE ONLY ▲ Court of Appeals Case No. 2014CA1351

BRIEF *AMICI CURIAE* OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., ONE COLORADO AND ONE COLORADO EDUCATIONAL FUND IN SUPPORT OF APPELLEES

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I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

❑It contains _____words.

☒It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

❑For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.___), not to an entire document, where the issue was raised and ruled on.

❑For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

☒I acknowledge that my brief may be stricken if it fails to comply with any of the requirements

of C.A.R. 28 and C.A.R. 32.

s/ John McHugh

John McHugh

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INTERESTS OF AMICI

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education and policy advocacy. *See, e.g., Lawrence v. Texas,* 539 U.S. 558 (2003) (Texas ban on same-sex adult intimacy was unconstitutional denial of liberty); *Taylor v. Rice*, 451 F.3d 898 (D.C. Cir. 2006) (allowing challenge to U.S. Foreign Service's blanket exclusion of HIV-positive applicants to proceed to trial).

Lambda Legal has represented lesbian and gay couples in many cases of sexual orientation discrimination involving assertions that neutral statutes, rules, or policies regulating businesses, professional services, and other public accommodations infringed religious freedom. *See, e.g., North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (rejecting claim that nondiscrimination statute protecting LGBT patients infringed physician's speech and religious exercise rights); *Cervelli v. Aloha Bed & Breakfast*, Hawaii Intermediate Court of Appeals Case No. CAAP-13-0000806 (in case concerning refusal of lodging to lesbian couple, appeal by proprietor of rejection of religious liberty defense), information available at

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http://www.lambdalegal.org/in-court/cases/cervelli-v-aloha-bed-and-breakfast; *McCrea and White v. Sun Taxi Assoc. et al.*, Illinois Dept. of Human Rights Charge No. 2014-CP-1093 (sexual orientation discrimination charge filed by gay couple after being ejected from taxicab), information available at http://www.lambdalegal.org/sites/default/files/mccrea_il_20131028_charge-of-discrimination.pdf; *Odgaard v. Iowa Civil Rights Comm'n*, Iowa Supreme Court Case No. No. 14-0738 (case filed by owners of art gallery and event space who refused rental to same-sex couple for wedding reception, seeking to bypass state civil rights agency's investigation of couple's discrimination complaint), information available at http://www.lambdalegal.org/in-court/cases/odgaard-v-iowa-civil-rights-commission.

Amicus Curiae One Colorado is a statewide advocacy organization dedicated to securing and protecting equality and opportunity for LGBT Coloradans and their families. It works toward that goal by advocating for LGBT Coloradans and their families and by lobbying the General Assembly, executive branch, and local governments on issues such as safe schools, recognition of LGBT people's family relationships, and LGBT health and human services. *Amicus Curiae* One Colorado Education Fund is a 501(c)(3) nonprofit organization that shares with One Colorado a mission to secure and protect equality and opportunity for LGBT

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Coloradans and their families. The One Colorado Education Fund provides educational programming on LGBT issues, conducts research to understand public opinions, mobilizes a community of LGBT people and straight allies, and develops campaigns to build public support for fairness and equality. Together, these organizations are working for a fair and just Colorado.

The legal issues before this Court on the instant appeal are similar to those addressed in cases arising in many other states. Because the Court's decision here is likely to affect thousands of LGBT people across Colorado, Lambda Legal, One Colorado and One Colorado Educational Fund share a particular interest in ensuring that the Court may consider the issues presented here with the additional context provided in this *amici* brief.

STATEMENT OF THE CASE

Amici Curiae join in the Statement of the Case presented by Appellees.

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns sexual orientation discrimination by a man who has chosen to earn his living by making and selling cakes—including wedding cakes—to the general public. Through his business, Appellant Masterpiece Cakeshop, Inc. ("Cakeshop"), Appellant Jack Phillips offers a variety of styles, colors and flavors

from which his customers may choose what suits their tastes and plans. While he decides the range of options that will comprise his offerings, he does not, of course, limit certain colors or flavors to persons of particular races or ethnicities. Likewise, and similarly in keeping with Colorado law, Cakeshop does not limit sales to those who share Mr. Phillips' religious beliefs. But unlike this routine willingness to serve those of faiths different from his, as well as atheists and interfaith couples, Cakeshop and Mr. Phillips claim a religious right to turn away lesbian and gay couples. [1] Regardless of what motivates Mr. Phillips personally, that is sexual orientation discrimination and it violates the Colorado Anti-Discrimination Act ("CADA"), COLO. REV. STAT. §§ 24-34-601–605 et seq.

Appellants contend that this Court should create an exception to CADA that allows them to turn away same-sex couples because they claim that the State's interest in enforcing the law with respect to this business is only "marginal," that

[1] Appellants Cakeshop and Phillips also claim a privilege to turn away same-sex couples based on constitutionally protected rights of expression and expressive association. *Amici Curiae* agree with the explanations submitted by Appellees David Mullins and Charlie Craig in their Responding Brief on the Merits, and by *Amicus Curiae* Americans United for Separation of Church and State, as to why those arguments are mistaken. This brief addresses only Appellants' claim that they may refuse to make and sell wedding cakes for same-sex couples notwithstanding Colorado's nondiscrimination law, as a matter of protected exercise of religion. This brief complements the *amicus* brief of the National Center for Lesbian Rights also addressing this claim.

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allowing this exception will not "swallow the nondiscrimination rule," and that, after all, Appellees Charlie Craig and David Mullins "easily" obtained a cake elsewhere after Cakeshop refused them because they are a gay couple. Appellants' Opening Brief ("AppBr") at 36, 35, 5.

Appellants miss the point. Fortunately, given our history, most Americans now do recognize that being told essentially, "we don't serve your kind here" is discrimination that inflicts dignitary harm on those rejected and stigmatizes the entire disparaged group. On this point, the United States Supreme Court has admonished firmly that nondiscrimination laws "serve interests of the highest order." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (requiring enforcement of California's public accommodations law). The Court has emphasized in particular that public accommodations nondiscrimination laws serve the essential social function of reducing the "moral and social wrong" of discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964). They "eliminate [the] evil" of businesses serving only those "as they see fit," which demeans both the individual and society as a whole. *Id.* at 259.

Religious motivations cannot mitigate this harm. To the contrary, from the Crusades and the Inquisition to current disputes in the Balkans, the Middle East, parts of Africa and elsewhere round the globe, too much of human history shows

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how religious sectarianism can exacerbate human strife when deployed to justify lesser treatment of those perceived as different. We have learned this lesson the hard way in America, too. Time and again, religion has been proffered to excuse invidious discrimination. Given the immense demographic diversity and religious pluralism of our Nation, the law must be crystal clear that each person's religious liberty ends where harm to another would begin.

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

The Colorado Civil Rights Commission considered and properly rejected Appellants' arguments for a religiously based exemption from CADA. *Amici Curiae* thus support Appellees' request for affirmance.

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II. ARGUMENT

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

In the United States, differing religious beliefs about family life and gender roles often have generated disputes not only in public accommodations, but also in education, employment, medical services and other arenas. Prominent among them, in particular, have been problems arising when religious convictions prompt some to believe that others have sinned or should be kept apart, leading to discrimination in commercial and other public settings. Although some forms of religiously motivated discrimination doubtless have receded, our history tells a recurring saga of successive generations asking anew whether our protections for religious liberty warrant exemptions from laws protecting others' liberty and right to participate equally in civic life. Our courts rightly and consistently have recognized that the answer to that question must remain the same: religious beliefs do not entitle any of us to exemptions from generally applicable laws protecting all of us.

Thus, for example, during the past century's struggles over racial integration, some Christian schools restricted admissions of African American applicants based on beliefs that "mixing of the races" would violate God's

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commands. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983). Some restaurant owners refused to serve African American customers citing religious objections to "integration of the races." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). Religious tenets also were used to justify laws and policies against interracial relationships and marriage. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (in decision invalidating state interracial marriage ban, quoting trial judge's admonition that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (firing of white clerk typist for friendship with black person was not protected exercise of religion despite church's religious objection to interracial friendships).

And as our society began coming to grips with the desire and need of women for equal treatment in the workplace, some who objected on religious grounds sought exemptions from employment non-discrimination laws as a free exercise right. Notwithstanding the longstanding religious traditions on which such claims often were premised, courts recognized that these religious views could not

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be accommodated in the workplace without vitiating the sex discrimination protections on which workers are entitled to depend. *See, e.g., EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (school violated antidiscrimination law by offering unequal health benefits to female employees); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (employer improperly refused to hire women bus drivers due to religious objection of Hasidic male student bus riders).

Similarly, after state and local governments enacted fair housing laws that included protections for unmarried couples, landlords unsuccessfully sought exemptions based on their belief that they would sin by providing residences in which tenants would commit the sin of fornication. *See, e.g., Smith v. Fair Emp. and Hous. Comm'n*, 913 P.2d 909, 925 (Cal. 1996) (rejecting religious exercise claim of landlord because housing law did not substantially burden religious exercise); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same).

Across generations, then, these questions have been asked and answered, echoing with reassuring consistency as courts have recognized the public's abiding interests in securing fair access and peaceful co-existence in the public marketplace. Today, these common interests are tested once again as LGBT people

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seek full participation in American life. There is growing understanding that sexual orientation and gender expression are personal characteristics bearing no relevance to one's ability to contribute to society, including one's ability to form a loving relationship and build a family together. *United States v. Windsor*, 133 S.Ct. 2675, 2694-96 (2013); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). And yet, there remain pervasive and fervent religious objections on the part of many people to interacting with LGBT people in commercial contexts, still inspiring widespread harassment and discrimination. *See, e.g.*, *Bodett v. Coxcom, Inc*., 366 F.3d 736 (9th Cir. 2004) (supervisor religiously harassing lesbian subordinate); *Peterson v. Hewlett-Packard Co*., 358 F.3d 599 (9th Cir. 2004) (anti-gay proselytizing intended to provoke coworkers); *Knight v. Conn. Dep't. of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (visiting nurse proselytizing to home-bound AIDS patient); *Erdmann v. Tranquility, Inc*., 155 F. Supp. 2d 1152 (N.D. Cal. 2001) (supervisor harassment of gay subordinate with warnings he would "go to hell" and pressure to join workplace prayer services); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 539–40 (W.D. Ky. 2001) (physician refusal to employ gay people), *vacated on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959, 967

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(Cal. 2008) (applying strict scrutiny and rejecting physicians' religious objections to treating lesbian patients).

As laws and company policies have begun to offer more protections against this discrimination, some who object on religious grounds are asking courts to change course and allow religious exemptions where they have not done so in past cases. For the most part, the past principle has held true and the needs of third parties have remained a constraint on religion-based conduct in commercial contexts. *See, e.g.*, *Bodett,* 366 F.3d at 736 (rejecting religious accommodation claim)*; Peterson,* 358 F.3d at 599 (same); *Knight,* 275 F.3d at 156 (same); *Erdmann*, 155 F. Supp.2d at 1152 (antigay harassment was unlawful discrimination); *Hyman*, 132 F.Supp.2d at 539-540 (rejecting physician's claim of religious exemption from nondiscrimination law); *North Coast Women's Care Med. Grp.*, 189 P.3d at 970 (same).

The exemption Cakeshop seeks here would mark a sea change – opening the door to similar denials of goods, access to services, and other equitable treatment for LGBT people, persons living with HIV, and anyone else whose family life or minority status is disfavored by a merchant's religious convictions. As the U.S. Supreme Court has recognized, our laws and traditions have "afford[ed] constitutional protection to personal decisions relating to marriage, procreation,

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contraception, family relationships, child rearing, and education." *Lawrence,* 539 U.S. at 574 (citation omitted). The Court's explanation of the "respect the Constitution demands for the autonomy of the person in making these choices," *id.*, makes clear that the "person" whose autonomy is protected is the individual himself or herself – not those offering goods or services to everyone in the marketplace. This must remain the rule. Religion must not be made into a shield for invidious deprivations of basic human rights.

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

According to the 2010 United States Census, approximately 12,500 same-sex couples make their home in Colorado, with nearly two thousand of those couples raising children. Gary J. Gates & Abigail M. Cooke, *Colorado: Census Snapshot: 2010, available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Colorado_v2.pdf. Treatment of same-sex couples, and of LGBT people generally, in Colorado has not always been kind. Researchers at the Williams Institute at UCLA School of Law have documented the history of discrimination against LGBT Coloradans, reporting substantial discrimination by government actors as well as the general public. Williams Institute, *Colorado – Sexual Orientation and Gender Identity Law and Documentation of Discrimination* (UCLA School of Law, Sept. 2009), *available at*

http://williamsinstitute.law.ucla.edu/wp-content/uploads/Colorado.pdf (documenting public sector employment discrimination based on sexual orientation and gender identity in Colorado, as part of 15-chapter study reporting widespread, persistent unconstitutional discrimination by state governments against LGBT people) ("*Documenting Discrimination*").

Documenting Discrimination reports that the State of Colorado surveyed the law on sexual orientation discrimination in Colorado as of 1992 for the purpose of informing voters in connection with that year's ballot measures, including Amendment 2 to the Colorado Constitution which proposed to prohibit the enactment or enforcement of nondiscrimination protections for gay, lesbian and bisexual Coloradans. *Id*. at 1. According to the State's survey, the cities of Aspen, Boulder and Denver had "determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations." *Id*. at 2 (citing *Colorado General Assembly, Legislative Counsel Report on Ballot Proposals, An Analysis of 1992 Ballot Proposals*, RESEARCH PUBL. NO. 369, 9-12 (1992)).

In 1992, Colorado voters famously passed Amendment 2, Colo. Const., Art. II, § 30b, intentionally thwarting the municipal ordinances Aspen, Boulder and Denver had adopted to ban such discrimination. Although the U.S. Supreme Court

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held Amendment 2 unconstitutional as a violation of Equal Protection and Due Process, *Romer v. Evans*, 517 U.S. 620 (1996), Colorado voters again changed their state constitution to deny lesbian, gay and bisexual Coloradans equality under state law, approving Amendment 43 in 2006 to exclude same-sex couples from the freedom to marry. Colo. Const. Art. II, Amend. 43; *see Brinkman et al. v. Long et al.*, No. 13-CV-32572 2014 WL 3408024, at *21 (Colo. Dist. Ct. July 9, 2014) (ruling Amendment 43 unconstitutional).

The legislature's subsequent addition of sexual orientation and gender identity protections to CADA was a significant improvement for LGBT Coloradans. But the events at issue in this case are part of a larger, persistent pattern of business proprietors in many states claiming religious rights to defy nondiscrimination laws, with refusal of wedding-related goods and services inflicting particular humiliation and reinforcing stigma for same-sex couples. For example:

- In Washington State, a florist refused to sell flowers for a gay couple's wedding. *See* Associated Press, *Ruling against florist who didn't want to do gay wedding*, KOMONEWS.com (Jan. 7, 2015), http://www.komonews.com/news/local/Ruling-against-florist-who-didnt-want-to-do-gay-wedding-287857051.html**;** Sara Schilling, *Judge:*

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Arlene's Flowers owner can be sued in her personal capacity, TRI-CITY HERALD (Jan. 7, 2015), http://www.tri-cityherald.com/2015/01/07/3346717_judge-denies-motion-to-toss-out.html?rh=1**;** *Ingersoll v Arlene's Flowers*, AM. CIVIL LIBERTIES UNION (Oct. 11, 2013), https://www.aclu.org/lgbt-rights/ingersoll-v-arlenes-flowers.

- An Oregon baker objected on religious grounds to selling a cake to a lesbian couple. Everton Bailey, Jr., *Same-sex couple files complaint against Gresham bakery that refused to make wedding cake*, THE OREGONIAN (Feb. 1, 2013), http://perma.cc/MJ5W-VJ5L; Molly Young, *Sweet Cakes by Melissa violated same-sex couple's civil rights when it refused to make wedding cake, state finds*, THE OREGONIAN (Jan. 17, 2014), http://perma.cc/66XH-5EYQ.
- And in Iowa, a couple who operates an event facility, bistro, and art gallery refused on religious grounds to rent the venue to a gay male couple for a reception after their wedding. Sharyn Jackson, *Gortz Haus owners file suit against Iowa Civil Rights Commission*, DES MOINES REGISTER (Oct. 8, 2013), http://perma.cc/B9MB-NRN2. *See also* Verified Petition, *Odgaard v. Iowa Civil Rights Comm'n*, NO. CVCV046451 (Polk Cty., Iowa, Dist. Ct. Oct. 7, 2013); Ruling on

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Defendants' Motion to Dismiss, *Odgaard v. Iowa Civil Rights Comm'n*, NO. CVCV046451 (Apr. 3, 2014) (dismissing petition); *see also* www.lambdalegal.org/in-court/cases/odgaard-v-iowa-civil-rights-commission.

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

- Diane Cervelli and Taeko Bufford were refused vacation lodging at the Aloha Bed & Breakfast, despite Hawaii's nondiscrimination law, due to the owner's religious objection to hosting lesbians. *See Cervelli v. Aloha Bed & Breakfast*, LAMBDA LEGAL, http://www.lambdalegal.org/in-court/cases/cervelli-v-aloha-bed-and-breakfast.
- In Illinois, a gay couple planning their civil union reception was turned down by two establishments that routinely host weddings; one not only refused the couple but berated them with religiously condemning emails. *See Mattoon couple challenge denial of services at two Illinois Bed and Breakfast Facilities*, ACLU-ILLINOIS (Nov. 2, 2011), http://www.aclu-

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il.org/mattoon-couple-challenge-denial-of-services-at-two-illinois-bed-and-breakfast-facilities/.

- In California, Lupita Benitez was refused a standard infertility treatment because her physicians objected on religious grounds to treating her the same as other patients because she was in a relationship with another woman. *North Coast Women's Care Med. Grp.*, 189 P.3d at 959.

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

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

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contraception, sterilization, and infertility care, and at innumerable other personal decisions about family life.

Amici sound alarm bells here because discriminatory refusals of goods or services exacerbates the stress from social exclusion and stigma that can lead to serious mental health problems, including depression, anxiety, substance use disorders, and suicide attempts. Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, Psychological Bulletin, Vol. 129, No. 5, 674-97 (2003); Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 19 Am. J. Pub. Health 1869-76 (2001).

Religious reinforcement of anti-LGBT bias and discrimination often increases the negative impact on mental health. *See* Ilan H. Meyer, Merilee Teylan & Sharon Schwartz, *The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals*, WILLIAMS INST. (2014) (research shows anti-gay messages from religious leaders/organizations increases severe mental health reactions), http://williamsinstitute.law.ucla.edu/research/health-and-hiv-aids/lgb-suicide-june-2014/; Edward J. Alessi, James I. Martin, Akua Gyamerah & Ilan H. Meyer, *Prejudice Events and Traumatic Stress among Heterosexuals and*

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Lesbians, Gay Men, and Bisexuals, WILLIAMS INST. (2013), available at http://www.tandfonline.com/doi/full/10.1080/10926771.2013.785455#abstract. *See also* Maurice N. Gattis, Michael R. Woodford & Yoonsun Han, *Discrimination and Depressive Symptoms Among Sexual Minority Youth: Is Gay-Affirming Religious Affiliation a Protective Factor?*, ARCH. SEX. BEHAV. 1589 (2014) (finding that harmful effects of discrimination among sexual minority youth affiliated with religious denominations that endorsed marriage equality were significantly less than those among peers affiliated with denominations opposing marriage equality).

The case before this Court concerns baked goods, but the "go elsewhere" approach Appellants defend is not necessarily confined to wedding-related services. The notion that the owner of a commercial business sins by engaging in a commercial transaction with a "sinful" customer could apply just as well to business transactions concerning any goods or services, medical care, housing or employment. Some might find this connection implausible. But for those hoping that nondiscrimination protections soon will reduce stigma, health disparities, wage disparities, job loss, and unequal employment benefits based on sexual orientation

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or gender identity,[2] Cakeshop's quest for a religious exemption for commercial activity poses a potentially devastating threat with distressing historical echoes. *See generally* David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. Rev. 1176, 1221 (1994) (desired exemptions "would undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.").

Accepting Cakeshop's arguments would eviscerate bedrock doctrine reaffirmed consistently over time. This settled approach permits and encourages a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation while ensuring equal opportunity for everyone in the public marketplace. The proposed alternative would transform that marketplace into segregated dominions within which each business owner with religious convictions "becomes a law unto himself," *Employment Division v. Smith*, 494 U.S. 872, 879

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

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(1990), and would force members of vulnerable minority groups to suffer the harms and indignities of being shunned and required to go from shop to shop searching for places where they will not be treated as pariahs.

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

III. CONCLUSION

For the foregoing reasons, Lambda Legal Defense and Education Fund, Inc., One Colorado and One Colorado Education Fund as *amici curiae* respectfully urge this Court to affirm the decision of the Colorado Civil Rights Commission.

Respectfully submitted this 13th day of February, 2015.

s/ John M. McHugh

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Anthony L. Giacomini
REILLY POZNER LLP
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Denver, CO 80202

Attorneys for Amici Curiae Lambda Legal Defense and Education Fund, Inc., One Colorado and One Colorado Education Fund

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2015, I electronically filed a true and correct copy of the foregoing: **AMICI CURIAE BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., ONE COLORADO AND ONE COLORADO EDUCATION FUND** through ICCES which will send notification of such filing to the following:

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John M. McHugh

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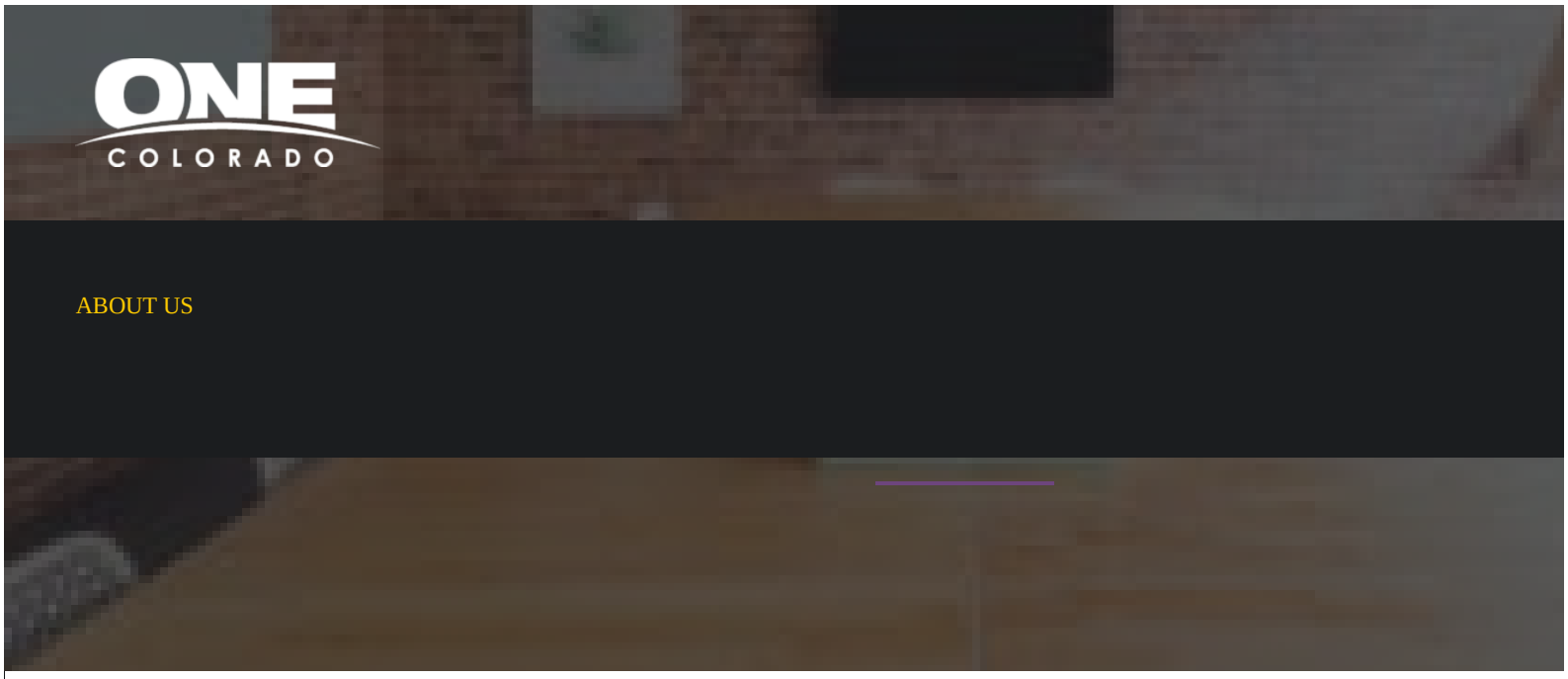

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One Colorado is led by an engaged, active Board of Directors. Prior to hiring staff, the Board oversa
research project, conducting a needs assessment survey of over 4,600 LGBTQ Coloradans and a p
Coloradans. This research was used to develop the organization's strategic goals and objectives, w
continues to implement.

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Will Singleton
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Erin Yourtz

EXHIBIT 13

- OUR TEAM

WHAT'S HAPPENING AT ONE COLORADO

- One Colorado Call Night!
- The 2018 Western Slope Ally Awards
- One Colorado Call Night
- One Colorado Reaction to Leaked Kavanaugh Emails
- 2018 Ally Awards

One Colorado is the state's leading advocacy organization dedicated to advancing equa
lesbian, gay, bisexual, transgender, and queer (LGBTQ) Coloradans and their families. W
working together for a fair and just Colorado.

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EXHIBIT 13

[redacted]

Western Slope Field Organizer

EXHIBIT 14

Heidi Jeanne Hess

Heidi Jeanne Hess is the Western Slope Field Organizer for One Colorado, coordinating the organization's grassroots efforts, developing diverse coalitions, and bridging gaps within LGBTQ communities in Grand Junction and along the Western Slope.

Heidi is relatively new to Colorado, having moved to the Western Slope in 2009 from North Dallas, Texas. Born and raised in Omaha, Nebraska, Heidi has been actively involved in LGBTQ rights and activism since 1982.

She has a Bachelor of Science in Journalism and a Master of Arts in Communication both from the University of Nebraska-Omaha. While at university, Heidi was President of the Gay Lesbian Student Organization, served as a long-time volunteer at Nebraska AIDS Project when it was first formed, and worked to establish the first-ever LGBTQ Pride Parade in Omaha.

In her spare time, Heidi enjoys reading, going on day trips with her partner, Dannie, and being involved with their church.

Contact Me

(214) 298-4446

Email

HEIDIH@ONE-COLORADO.ORG

EXHIBIT 14

★ MEET THE REST OF OUR STAFF

ONE COLORADO

One Colorado is the state's leading advocacy organization dedicated to advancing equality for lesbian, gay, bisexual, transgender, and queer (LGBTQ) Coloradans and their families. We are working together for a fair and just Colorado.

Getting in Touch

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Helpful Links

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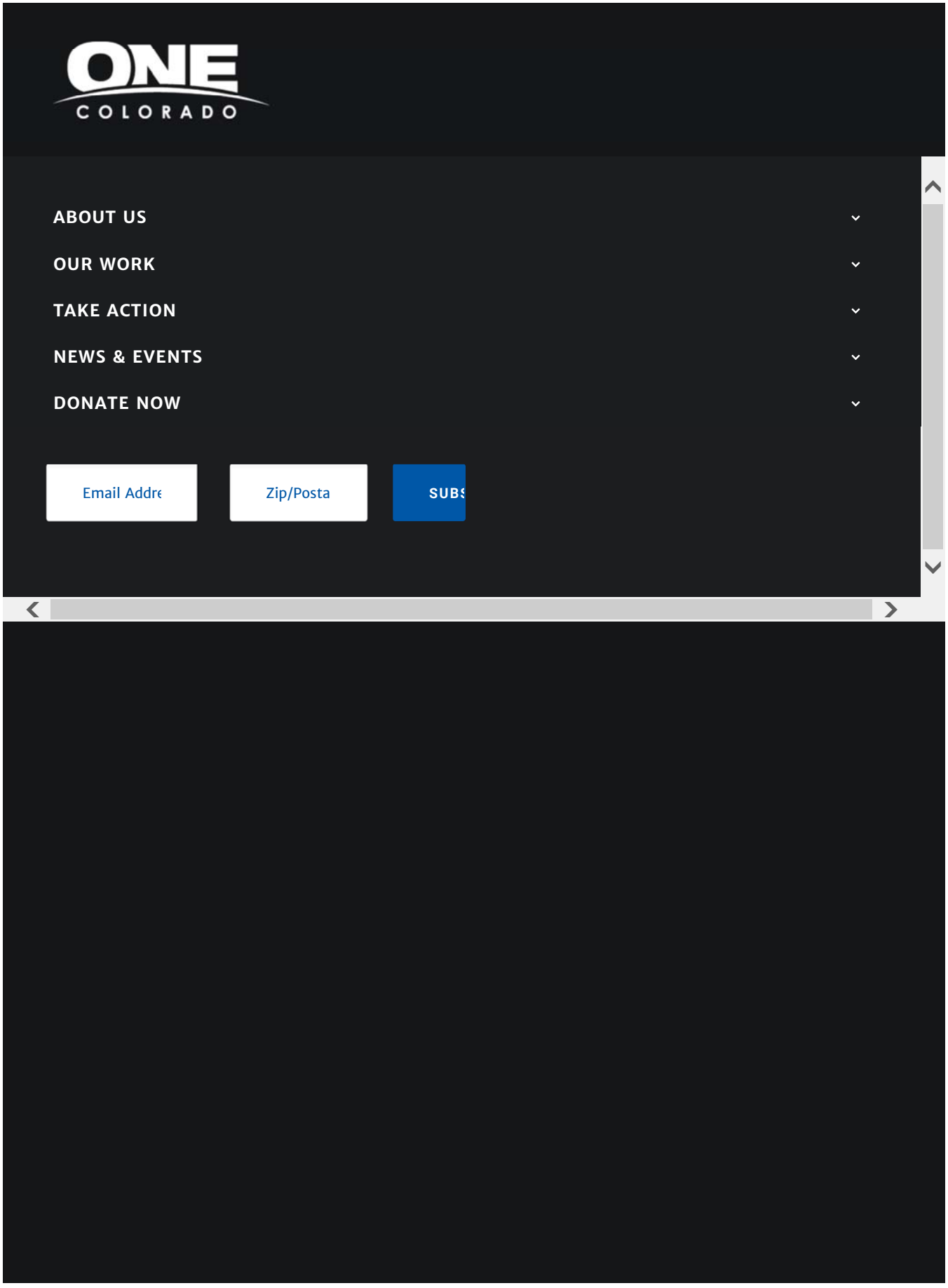
ONE
COLORADO
ABOUT US
OUR WORK
TAKE ACTION
NEWS & EVENTS
DONATE NOW
Email Addre
Zip/Posta
SUBS

EXHIBIT 14

Heidi J Hess @hjhess3 · 11 Mar 2013
RT @rxmaryjane: I'm really sick of the phrase "deeply held religious beliefs." #coleg #civilunions

Heidi J Hess @hjhess3 · 11 Mar 2013
So deeply held religious beleifs that disciminate is ok? #civilunions #coleg
1

Heidi J Hess @hjhess3 · 28 Feb 2013
RT @Sonrisa_Lucero: Cake writing, though a professional service, is apparently free speech. #civilunions

Heidi J Hess @hjhess3 · 28 Feb 2013
RT @jcobb5280: Dear bakers, if you want to stay in business, stop giving the gays more reasons to hate carbs. #coleg

EXHIBIT 15


Heidi J Hess @hjhess3 · 28 Feb 2013
RT @pinklaura: Apparently, making a gay wedding cake is the same as making a "happy birthday, hitler" cake #godwinslaw #coleg #civilunions
1
Heidi J Hess @hjhess3 · 28 Feb 2013
RT @alexcobell: I don't remember the last time I saw a wedding cake that said "Happy gay weeding" #tacky #coleg
1
Heidi J Hess @hjhess3 · 28 Feb 2013
RT @lynn_bartels So gay cakes and gay cookies are okay, but not gay wedding cakes. Gotcha. #coleg
Heidi J Hess @hjhess3 · 28 Feb 2013
Woot! The Cake Lawyer is up! #gaycake #civilunions #coleg
Heidi J Hess @hjhess3 · 28 Feb 2013
Freedom OF religion does NOT mean freedom FOR YOUR religion. #coleg #civilunions
1
Heidi J Hess @hjhess3 · 28 Feb 2013
RT @BigotedCake: Yes! My cakes are art for God! Not for the "gays" #coleg #civilunions
Heidi J Hess @hjhess3 · 28 Feb 2013
Opposition testimony starting. Focus today: supposed "religious protection" #civilunions #coleg

EXHIBIT 15


Heidi J Hess @hjhess3 · 28 Feb 2013
Pastor Connor: The bible has been quoted in favor of slavery and in favor of women's sufferage. #coleg #civilunions
Heidi J Hess @hjhess3 · 23 Jan 2013
Haha! My stepson: So when I buy a wedding cake I have to say it's a straight cake? #civilunions #coleg
Heidi J Hess @hjhess3 · 23 Jan 2013
Rainbow cake. RT @amwheeland: I need cake soon. Non-bigoted cake. #coleg #civilunions
Heidi J Hess @hjhess3 · 23 Jan 2013
RT @BigotedCake: Miniature figurines on top of cakes must be limited to ONE man and ONE woman. #coleg #focusonthecake
Heidi J Hess @hjhess3 · 23 Jan 2013
Hahahaha RT @BigotedCake: I'm trying to make big fluffy pink wedding cakes, not further the gay agenda, dammit! #coleg #civilunions
Heidi J Hess @hjhess3 · 23 Jan 2013
The side that brough cake as an argument says WE are intellectually dishonest? That's rich. #coleg #civilunions

EXHIBIT 15

Heidi J Hess @hjhess3 · 23 Jan 2013

Sen. Steve King wants to add an amendment to allow cake bakers to discriminate. Go Western Slope! #ugh #civilunions #coleg

1

Heidi J Hess @hjhess3 · 11 Mar 2013

RT @ZackFord: Nothing makes me roll my eyes quite like an old white man standing up for inequality. Sorry, Rep. Gardner. #COleg #civilunions

1

EXHIBIT 15

PUBLIC SESSION MINUTES

TENTH (2013-2014) MONTHLY MEETING
Of the
COLORADO CIVIL RIGHTS COMMISSION

Friday, May 30, 2014
Colorado State Capitol
200 E. Colfax Ave, Old Supreme Court Chambers
Denver, CO 80203

Convened: 10:05 a.m. Public Session

The tenth 2013-2014 Monthly Public Session of the Colorado Civil Rights Commission was held on Friday, May 30, 2014, at the Colorado State Capitol, 200 E. Colfax Ave, Old Supreme Court Chambers, Denver, CO 80203 and was convened at 10:05 a.m., Commissioner Katina Banks, Chair, presiding.

Commissioners present were: Katina Banks, Chair, Raju Jairam, Susie Velasquez, Marvin Adams, Diann Rice, Heidi Hess, and Dulce Saenz.

Present from the Civil Rights Division:
Steve Chavez, Director
Shayla Malone, Commission Coordinator

Present from the Colorado Office of the Attorney General:
Counsel for the Commission, Assistant Attorney General Charmaine Rose
Counsel for the Division, Assistant Attorney General Molly Moats

Members of the Public present:
Helen Bowman
Paula Greisen
Sara Neel
Dana Menzel
Billy Mac
Lisa Elderick
Jack Phillips
Natalie Decker
Nicolle Martin
Jeremy Tedesco
David Mullins
Charlie Craig
Stacy Worthington
Sarah Spears
James Gavin
Andrea Turner
Diana Black

EXHIBIT 16

Vikki Otrro
Dan Weiss
Rebecca Wallace
Stephen Meswarb
Rachel Pryor Lease
Leah Pryor Lease
Carolyn Tyler
Matt Stegeman
Kathy Mclroy
Austin Berstein
Scott Levin
Jon Wilson
Aubrey Elenis
Lindsay Huusko
Ashley Wheeland

CALL TO ORDER

Commissioner Banks called the meeting to order and asked the Commissioners present to read their names into the record for the purpose of establishing a *quorum*. Attorneys present from the Colorado Office of the Attorney General, staff of the Colorado Civil Rights Division, and members of the public also identified themselves for the record.

APPROVAL OF PUBLIC SESSION MINUTES

April 25, 2014

Commissioner Rice moved to approve the minutes of the Public Session of April 25, 2014, Commissioner Hess seconded, and the motion passed.

May 16, 2014

Commissioner Rice moved to approve the minutes of the Public Session of May 16, 2014 as amended, Commissioner Hess seconded, and the motion passed.

May 28, 2014

Commissioner Rice moved to approve the minutes of the Public Session of May 28, 2014 as amended, Commissioner Hess seconded, and the motion passed.

DIRECTOR'S REPORT

Commissioner Chavez advised the Commission that two new investigators have been hired.

Director Chavez also informed the Commission that he attended a roundtable discussion with Senator Udall in regards to sexual abuse with migrant workers.

ATTORNEY GENERAL'S REPORT

P20130008X; CR2013-0008; Charlie Craig & David Mullins v. Masterpiece Cakeshop, Inc.

Commissioner Jairam moved that the Commission direct Assistant Attorney General, counsel for the Commission, to draft an order that will adopt in full the Initial Decision of Administrative Law Judge Robert N. Spencer, Affirming the Order Granting Complainants Motion for Protective Order, and the Respondents Motion to Dismiss the Formal Complaint and Motion to Dismiss Jack C. Phillips. Ordering the Respondents to cease and desist from discriminating against Complainants and other same-sex couples by refusing to sell them wedding cakes or any product Respondents would sell to heterosexual couples, provide quarterly compliance reports to the Colorado Civil Rights Division for two years from the date of the order, to include number of patrons denied service by Mr. Phillips or Masterpiece Cakeshop, Inc. and the reason why the patrons were denied service. The motion was seconded by Commissioner Velasquez, and the motion passed.

AUDIENCE PARTICIPATION

Nicolle Martin raised questions about the record for Masterpiece Cake Inc., she was reminded by Assistant Attorney General Rose that she could address those concerns with her at a later date and time.

OTHER BUSINESS

None

EXECUTIVE SESSION

Commissioner Rice made the following motion, Commissioner Jairam seconded, and the motion passed:

I move that the Commission enter into Executive Session at this time in order to consider the following matters:

- To address the following cases on the May consent agenda, hearing worthy review cases, and settlements: E20140002, P20140013X, H20140051, E20140074, E20130796, P20140024X, H20140026, H20120119 , E20110085 which are required to be kept confidential pursuant to Sections 24-34-306(3), and 24-6-402(3)(a)(III), C.R.S.;

- For the purpose of receiving legal advice pursuant to Section 24-6-402(3) (a) (II), C.R.S.

Next Meeting – to be held in Denver, Colorado on June 18, 2014.

EXHIBIT 16

ADJOURNMENT
Commission Public Meeting adjourned

EXHIBIT 16

STATE OF COLORADO

CITY AND COUNTY OF DENVER

Colorado Civil Rights Commission Meeting

Held on May 30, 2014

Colorado State Capitol

200 East Colfax Avenue, Old Supreme Court Chambers

In re: CHARLIE CRAIG and DAVID MULLINS v.

MASTERPIECE CAKESHOP, INC.

Case No.: P20130008X, CR2013-0008

This transcript was taken from an audio recording by Teresa Hart, Registered Professional Reporter and Notary Public.

P R O C E E D I N G S

* * * * *

THE CHAIRWOMAN: Okay. Welcome to the old Supreme Court chambers, where because of the high level of interest of the matter that we will be discussing later in our meeting, Colorado Civil Rights Commission is honored to meet.

For those of you who have not attended one of our proceedings, we meet -- typically we meet monthly. The Commission is a seven-member bipartisan panel whose mission is to conduct hearings on the character, cause, and extent of illegal discriminatory practices throughout the state; advise the governor and the general assembly regarding policies and legislation that address illegal discrimination; review appeals of cases investigated and dismissed by the Colorado Civil Rights Division; and adopt and amend rules, regulations, et cetera, to be followed in the enforcement of the state's statute regarding discrimination.

Our first order of business is to make sure that we read our names into the record so that we can establish a forum. And so I'm going to ask each commissioner do that. And then I'll ask anyone who's representing the -- excuse me, from the attorney

general's office or the staff of the Colorado Civil Rights Division to also read their names into the record for purposes of these proceedings.

So Commissioner Saenz, would you begin?

COMMISSIONER SAENZ: Sure. Commissioner Saenz from Denver.

COMMISSIONER RICE: Commissioner Diane Rice from Loveland.

COMMISSIONER JAIRAM: Commissioner Raju Jairam from Fort Collins.

COMMISSIONER BANKS: Commissioner Katina Banks from Denver.

COMMISSIONER VELASQUEZ: Commissioner Susie Velasquez from Greeley.

COMMISSIONER ADAMS: Commissioner Marvin Adams from Colorado Springs.

COMMISSIONER HESS: Commissioner Heidi Hess from Grand Junction.

MS. ROSE: Charmaine Rose, counsel for the commission.

MS. MOATS: Molly Moats, counsel for the Divisions.

MR. CHAVEZ: Steve Chavez, Civil Rights Division director.

MS. MALONE: Shayla Malone, Colorado

Civil Rights Division.

THE CHAIRWOMAN: Great. Thank you.

Okay. At this time the next order on the agenda is for us to approve our public session meeting -- minutes, excuse me, for a few sessions that we've had. First is for April 25th, 2014.

UNIDENTIFIED SPEAKER: Madame Chair, I move approval of the minutes of the public meeting of April 25th, 2014.

UNIDENTIFIED SPEAKER: Second.

THE CHAIRWOMAN: All in favor?

(Responses were heard.)

HEARING OFFICER: Okay. May 16th, 2014, we had an emergency public session meeting.

UNIDENTIFIED SPEAKER: Madame Chair, I move approval of the minutes of the May 16th emergency meeting with the Colorado Civil Rights Commission.

UNIDENTIFIED SPEAKER: (Inaudible.)

THE CHAIRWOMAN: One question I had. I believe that it indicates on the minutes that only one commissioner was via phone conference. But my impression -- my recollection is that most of us were ...

UNIDENTIFIED SPEAKER: Yeah, I think it would help if we moved the item in parenthesis to the

front of the number of people that were on the forum.

THE CHAIRWOMAN: Yeah. Can we just make that edit to just be correct for the record?

Okay. If we're okay with that amendment, so moved and seconded. All in favor?

(Responses were heard.)

THE CHAIRWOMAN: And then finally, the approval of the public session meeting minutes for May 28th, 2014.

UNIDENTIFIED SPEAKER: Madame Chair, I move approval of the minutes of the May 28th, 2014, emergency meeting. Also noting that the phone conference be (inaudible) put to the beginning of the list.

THE CHAIRWOMAN: Okay. So as amended, is there a second?

UNIDENTIFIED SPEAKER: Second.

THE CHAIRWOMAN: All in favor?

(Responses were heard.)

THE CHAIRWOMAN: All right. Next on the agenda is the director's report.

MR. CHAVEZ: Good morning, Commissioner Banks, and good morning other commissioners. It's great to see all of you today. I'm going to keep my remarks brief because I know there's a lot on your

agenda.

And I'd only like to mention just a couple of things. Operationally the Division has hired two new investigators. And so that's great for -- we're happy to have them on board. Our budget for the coming year looks great.

And as far as human outreach events we conducted reasonably, I had the privilege of speaking to the parents and friends of lesbians and gays, people in Colorado Springs last week, and it was really well attended. You know, there were probably 70 or 80 people there. And there was a great deal of interest in the work that the Division does.

I was also invited by Senator Mark Udall's office to participate in a panel that he convened involving some nonprofit organizations in the United States, Equal Employment Opportunity Commission here in Denver, to have a discussion between community groups and various resource organizations regarding sexual assault in the workplace.

You know, as you know, that's an issue that's a great deal of interest to the Division, as well as the Commission, and it went very well. So unless anybody has any questions, that's all I have.

THE CHAIRWOMAN: Does anyone? Great.

Thank you very much, Director Chavez. We appreciate those updates. Those are all very interesting. And very encouraging to know that you got two new investigators to help with the workload so ...

Okay. The next item on the agenda is the attorney general's report, Case P20130008X, CR2013-0008, Charlie Craig and David Mullins versus Masterpiece Cakeshop, Inc.

And really the only matter for us to do now is to deliberate this case. As I indicated to the audience, the commission meets to formulate policies and to hear appeals in discrimination cases. And today we're going to be reviewing an initial decision rendered by an administrative law judge in this case.

The administrative law judge found that respondent's, Masterpiece Cakeshop and Jack Phillips, violated the public accommodations section of Colorado's antidiscrimination act.

Masterpiece Cakeshop and Mr. Phillips have now filed exceptions to the administrative law judge's initial decision, so today we're going to be deliberating, and we hope to make a determination soon.

We may decide to adopt the initial decision. Or if the facts or the law support it, the Commission may decide to overturn the initial decision

in whole or in part. The Commission may also decide to remand the case back to the administrative law judge for further consideration consistent with its directives.

We may make and issue a final order today or at a later date. And also, our decision will be -- may be appealed, I'd will -- may, but it probably will, may be appealed to the Colorado court of appeals.

Now, pursuant to the Commission Rule No. 10.13 (d), the commission's final order shall be made a part of a certified transcript of the record of the proceedings. And the entire record shall be filed at the Division's Denver office located on the 10th floor at 1560 Broadway in Denver.

Now, this final order will be available for examination by the parties during regular business hours. However, it will not be available on-line.

Now I want to just begin our discussion amongst the Commission about this case. I see three primary issues. There's a couple -- well, really there's two procedural issues and then of course the main issue, which is the respondent's exception to the administrative law judge's initial decision to grant the motion for summary judgment filed by the complainants.

Is there someone who would like to begin? No? Really?

UNIDENTIFIED SPEAKER: Well, I usually (inaudible).

THE CHAIRWOMAN: Yeah, I see that. Well, okay. Let's start with -- we can break it down. There's a few issues, right? The first one being -- the first point of interest is this motion to dismiss.

And the respondents are basically indicating that they believe the administrative law judge's denial of the motions to dismiss was erroneous. And they've made several arguments that have been briefed for us. The complainants have responded. We need to decide do we agree with the respondents or do we agree with the administrative law judge.

UNIDENTIFIED SPEAKER: Madame Chair, if I may.

THE CHAIRWOMAN: Sure.

UNIDENTIFIED SPEAKER: There were several, I think, issues raised by the respondent that really are technical issues.

THE CHAIRWOMAN: Uh-huh.

UNIDENTIFIED SPEAKER: And this is a case that, from my point of view, has some significance. And to dismiss the case based on a technicality would

not be serving either party well.

The fact that the wrong statute was cited has, I think from my point of view, been adequately addressed by the staff at the Division testifying under oath that it was just a typographical error.

So that's one for sure that -- and the other points that were technical issues, I think to me, should be considered moot because it's too significant to just determine on those grounds.

THE CHAIRWOMAN: I see. Okay.

COMMISSIONER VELASQUEZ: And I would agree with that, as well.

THE CHAIRWOMAN: Thank you, Commissioner Velasquez. Well, if there's not any other discussion --

COMMISSIONER JAIRAM: I have a question.

THE CHAIRWOMAN: Sure.

COMMISSIONER JAIRAM: So do we take each one of these by vote or do we just vote on the whole thing?

THE CHAIRWOMAN: I think we should just talk about them, each issue, and then we can make a final decision. I don't know that we need to -- unless there's a point of contention that we need to --

UNIDENTIFIED SPEAKER: Unless there's

some issue within that --

THE CHAIRWOMAN: Correct.

UNIDENTIFIED SPEAKER: Okay.

THE CHAIRWOMAN: So with respect to the motion to dismiss, what I'm hearing is that we think that the -- there's still ample notice despite the typographical error, and that also -- errors, I should say, and that still the respondents were on notice. They were on notice of what the charge was and who the charge was -- who the charge was against. Yes.

UNIDENTIFIED SPEAKER: (Inaudible.)

THE CHAIRWOMAN: Okay.

COMMISSIONER JAIRAM: And I agree with Commissioner Rice, that I think it is very well documented. The letter of determination was well phrased. And I don't think there's any question as to what the charge is.

THE CHAIRWOMAN: Okay.

COMMISSIONER JAIRAM: So trying to overturn it based on the wrong citation I think is ridiculous.

THE CHAIRWOMAN: Okay. Any other comments with respect to the motion to dismiss either in general or with respect to Respondent Jack Phillips? Okay.

The other -- the next point that the respondents make in their brief has to do with the fact that the administrative law judge granted the complainant's request or motion for a protective order in the time that they were doing discovery.

Specifically they're arguing that they feel like they were -- should have been entitled to seek discovery that the complainants argued was beyond the scope of the case and not germane to either the claim being made, which is, of course, discrimination under the public accommodation statute, or the defenses being raised by the respondent.

Who has thoughts that they'd like to start with on this particular issue? Anyone?

COMMISSIONER RICE: (Inaudible.)

THE CHAIRWOMAN: Okay. Thank you, Commissioner Rice.

COMMISSIONER RICE: You know, if -- I would be surprised if a judge would allow such interrogation. It's not -- from my point of view, the -- those issues were not germane to the facts of the case. It seems to me it is a delay tactic. And to drag this out any farther than we need to is inappropriate.

Plus, it might also infringe on the

complainant's right to privacy. I don't know for sure, but it seems like some of the issues were (inaudible) in nature and not necessary to the case.

THE CHAIRWOMAN: Well, I'm not necessarily sure about the privacy issue. But I do think that there is an issue with respect to relevancy, right, that we want to stay -- you know, with respect to -- to these questions we want to stay focused on what facts kind of deal with the case and with the claim.

And it seemed that many of the questions, at least in the record as we saw, were seen beyond that and not getting us -- moving us towards getting information that's helpful.

Anyone else or do we feel comfortable that we -- we're -- we can make a decision about that particular argument? You feel good?

UNIDENTIFIED SPEAKER: Yes, I do.

THE CHAIRWOMAN: Okay. So then the larger question at hand, well, the legal question at hand is this question of the fact that the administrative law judge granted the motion for summary judgment filed by the complainants and denied the respondent's motion for summary judgment. And we're being asked to reconsider that.

And there are a number of issues. I think there's sort of three central arguments: That the respondents did not discriminate because of sexual orientation; that forcing the respondents to provide their services to the complainants is compelled speech; and that also it -- that the administrative law judge violated the respondent's right to free exercise of religion.

Who would like to start on any of those issues?

COMMISSIONER JAIRAM: Should we take them one at a time?

THE CHAIRWOMAN: If that would -- if that pleases the commission, I'm okay with that.

UNIDENTIFIED SPEAKER: I didn't hear him.

THE CHAIRWOMAN: He said, should we take each issue one at a time?

UNIDENTIFIED SPEAKER: I think so.

UNIDENTIFIED SPEAKER: Can all the commissioners turn their microphones on?

UNIDENTIFIED SPEAKER: I think they're on.

UNIDENTIFIED SPEAKER: Thank you.

UNIDENTIFIED SPEAKER: Thank you.

COMMISSIONER JAIRAM: Okay. With respect

to the issue of where the respondent claims that they were not discriminating based on sexual orientation, but based on same sex marriage, to me I think they're tied together.

Obviously, people of the same sex are wanting to get married, so discriminating against same sex marriage is the same as, you know, discriminating against their sexual orientation. I mean, that's my (inaudible).

THE CHAIRWOMAN: I see nods. Any other comments on that point?

UNIDENTIFIED SPEAKER: Yes. I agree with Commissioner Jairam. And when I thought about this issue, I thought about (inaudible) back not very many decades ago where -- to when interracial marriage was -- was frowned upon, was not recognized, was actually illegal in some states. And I think that that is the same issue as same sex marriage.

And the courts have held that interracial -- discrimination based on interracial marriage is the same as race discrimination and that they can't be separated. So based on those things, I think -- and, you know, there have been many attempts to justify that kind of discrimination in the past. And I think it's time we recognized that it's

discrimination.

UNIDENTIFIED SPEAKER: Commissioner (inaudible), I had a similar thought. The terminology used was miscegenation. And that too was the law in several places for a number of years. And it took a long time for, I think, the courts and others to come to some realization that that didn't make much sense. So I had the similar thought in reviewing this case, you know.

The line has to be drawn somewhere. And we think we've come a long way, but we've still got a long way to go in that regard. So (inaudible) on that point.

THE CHAIRWOMAN: Okay. Anyone else want -- have anything else to add? I mean, ultimately, right, we're just deciding whether we think the administrative law judge's decision should be overturned on this point, and it sounds like we don't. We think that we are in agreement with the thinking there.

UNIDENTIFIED SPEAKER: I (inaudible).

THE CHAIRWOMAN: I'm sorry, say that again?

UNIDENTIFIED SPEAKER: I said, I don't have any different --

THE CHAIRWOMAN: Great. Right, I mean, this nexus, this connection between being opposed to same sex marriage and sexual orientation is the basis that they are --

COMMISSIONER JAIRAM: Yeah, I mean, seriously, let's look at this. I mean, isn't it kind of ridiculous to think that people of the opposite sex can be considered to be having same sex marriage? And so it speaks to the issue of, what is sexual orientation?

THE CHAIRWOMAN: Uh-huh.

COMMISSIONER JAIRAM: So I think it's very clear to me, that they are one and the same.

THE CHAIRWOMAN: Right. That they are connected. Okay. With respect to this question of compelled speech, again, our ultimate decision is to determine whether the administrative law judge's opinion here should be overturned in part or in whole on the question of whether requiring the respondent to provide his services is somehow compelled speech in violation of the First Amendment of the United States, as well as the Colorado's First Amendment in the -- excuse me, free speech under the Colorado Constitution.

So I think we have to determine -- one of the arguments is that making cake is an expression.

The counterargument is that this is being provided in the course of offering a business, offering services, and that the speech -- the speaker in that case is not the cake maker, but the customer. Yeah.

UNIDENTIFIED SPEAKER: I do believe that the reason that we have these laws also is because of the public accommodation. What we have here is public accommodation. And I think within -- you know, somebody within their own home and freedom of speech, wanted to bake a cake, and wouldn't allow that, that's completely different, that's private.

But what we have here is a business. And it's public accommodation so it should be -- it should be open to everyone regardless of whether it's a same sex marriage or not.

UNIDENTIFIED SPEAKER: Well, and even if it -- if someone wanted to bake a cake on a public parking lot and not charge -- not try to sell their product as an expression of speech, that would be a different -- in my mind, a different question than -- than the question before us. And there's a -- there's a -- there's a sale of the cake and the business at hand, so ...

UNIDENTIFIED SPEAKER: I think we've established -- I mean, we've talked about the issue

that same sex marriage is -- cannot be separated from sexual orientation, but that same sex marriage -- that the two are tied. So it seems to me that in a public accommodation, that it is the same -- the same rules apply regarding speech within that public accommodation.

If it were a -- a person came in and said -- and the cake shop had said, No, I don't bake cakes for Hispanics, it would be the -- it would be the same issue. And it would be still they don't have the right to do that under their freedom of speech either. So we could overturn every civil rights statute if we --

THE CHAIRWOMAN: Yeah, it sort of swallows it up whole, right, if you sort of let them -- let that be the standard.

Yes, Commissioner Raju.

COMMISSIONER JAIRAM: Yeah, I think any business that chooses to -- or any person that chooses to do business in the state of Colorado has to recognize that they have to conduct business in an ethical and law-abiding way.

And if the laws of the state say that you will not discriminate, that should be very clear. I mean, it's not an issue of free speech. I mean, I can

believe anything I want to believe.

But if I'm going to do business here, then I'd better not discriminate if I'm going to follow the laws of discrimination and be (inaudible). (Inaudible). And to refuse service to somebody is -- you know, it is discriminatory in my mind.

THE CHAIRWOMAN: I think it -- I think that's the gist of it, right, is this idea that -- you know, that's why the law is here, because discrimination is harmful, right? And our job is to try to eradicate that.

The purpose of the Colorado Antidiscrimination Act is to eradicate that so that people aren't being hurt and their dignity isn't harmed. The justification here seems to be, Well, you're making me say something I don't want to say, I don't know -- I don't know that that's entirely true.

I think that the cake shop owner could -- they can't say -- put up a sign that says, We refuse service, but they certainly could put up a sign that says, you know , we're opposed to, you know, same sex marriage. They could say that. I don't know that -- and I don't know that by making a cake that someone has ordered, that they're being forced to say something that they don't agree to with (sic).

I don't think that that's what's happening. I think they're just -- they're making a cake. Yes, it's creative. But there are lots of industries or businesses that require some creativity, some artistry.

And if we -- we start drawing these lines, I think that's where we get into trouble.

UNIDENTIFIED SPEAKER: It seems to me you could make the same argument whether you were building a website, almost anything that takes some -- some imagination or maybe -- maybe not (inaudible). But other than that, almost any profession takes -- and any business takes some creativity.

THE CHAIRWOMAN: Okay. Is there any other comments anyone has?

COMMISSIONER JAIRAM: Well, it's been over, what, 60, 70 years since -- there used to be signs in restaurants saying, We refuse service to certain segments of the population. And I'm glad -- hopefully we're progressing further to the point where we stop this kind of behavior.

THE CHAIRWOMAN: All right. So on this question of the -- the argument that there's a violation of respondent's free speech rights, our thought is that the administrative law judge got it

right in this?

UNIDENTIFIED SPEAKER: Yes.

COMMISSIONER JAIRAM: I think so. I mean, they don't even, you know, get to any discussions. He just refused them service, period.

THE CHAIRWOMAN: Okay. What's the next issue? I guess the last one is -- I real -- the reason that we're here in the first place, right, is that the respondents assert that the administrative law judge's decision violates their freedom to exercise their religion.

And there's a couple arguments within that, that are folded into that. One is that there should be -- the Colorado Antidiscrimination Act should be reviewed under strict scrutiny. And they're also basically saying that this is a violation, that this isn't -- that there -- because there are exceptions in our statute, that, you know, this isn't correct, this is unconstitutional. At least that's what I -- how I read it. Tell me if you're (inaudible).

COMMISSIONER RICE: I think that the Colorado Antidiscrimination Act is written in a very neutral manner. Some exceptions have been made for religious organizations or businesses or organizations that clearly serve a single sex. As noted, a women's

clinic or some other organization like that.

But those are very clear -- clearly delineated exceptions. If Masterpiece Cake were -- or Mr. Phillips were an ordained minister and he was only serving commissioners or congregates of his church, that might be a different situation. But he is -- does have a public business and is he serving the public.

So I -- you know, I don't think that this case falls within the exceptions.

THE CHAIRWOMAN: Uh-huh.

COMMISSIONER RICE: I think there is a very significant and important reason for the Antidiscrimination Act and a significant -- it is a significant benefit to this state to have this statute and to enforce it.

THE CHAIRWOMAN: Thank you, Commissioner Rice. I think that's well said. And you certainly speak for me. But does anyone else have anything they want to add? Okay. So.

COMMISSIONER JAIRAM: I don't think the act necessarily prevents Mr. Phillips from believing what he wants to believe. And -- but if he decides to do business in the state, he's got to follow (inaudible). And I don't think the Act is overreaching to the extent that it prevents him from exercising his

free speech.

THE CHAIRWOMAN: Well, free speech we already -- we talked about. But what do you think about his --

COMMISSIONER JAIRAM: His belief system, yes.

THE CHAIRWOMAN: Right, right, his religious beliefs.

COMMISSIONER JAIRAM: We all have our own belief systems.

THE CHAIRWOMAN: Yes.

COMMISSIONER JAIRAM: And, you know, as a businessman, I shouldn't allow my belief system to impact on how I treat people, bottom line.

THE CHAIRWOMAN: Okay. That is the bottom line, Commissioner Jairam, thank you.

Okay. So then my sense is, from what we're saying, I just want to make sure that I'm helping -- or I'm -- because we're going to have to draft up an order.

To make sure I'm understanding, we're saying that we think that the statute -- there are good reasons for the statute; that it is valid; and that it's neutral in general in its application simply -- just as the administrative law judge determined. Yes.

UNIDENTIFIED SPEAKER: (Inaudible.)

THE CHAIRWOMAN: Okay. I think one other argument made was simply that the recommendations made by the administrative law judge were overbroad. And I think that was briefed by -- by both sides. Does anyone have any thoughts or comments on that particular point? I don't --

I think I understand what the respondents are arguing. And I just think it's just not as narrow as they would have us -- have us want it to be. But I want to make sure (inaudible).

UNIDENTIFIED SPEAKER: (Inaudible.)

THE CHAIRWOMAN: No, I don't think it is.

UNIDENTIFIED SPEAKER: My sense is that the ALJ was appropriate in (inaudible) what he decided was not overbroad. He is not making the final decision. And it is up to the commission to issue that final order and to decide what the remedies are.

THE CHAIRWOMAN: Right.

UNIDENTIFIED SPEAKER: And I don't think it's appropriate for the ALJ to -- to do that. So I think it's what it should be.

THE CHAIRWOMAN: Right. And I certainly feel that -- I mean, we're within our rights and our purview of -- under the statute, right, to be -- to

have -- have a respondent take the steps necessary to ensure that there isn't continuing discrimination, right. So narrowing it to just the complainants doesn't make much sense.

UNIDENTIFIED SPEAKER: Madame Chair, I'd like to -- and I should have done this much earlier. Going back to the respondent's argument ...

THE CHAIRWOMAN: Okay.

UNIDENTIFIED SPEAKER: Way back.

THE CHAIRWOMAN: Okay.

UNIDENTIFIED SPEAKER: About separating Mr. Phillips from Masterpiece Cake, and the respondent that had some arguments about whether they are one and the same and personal liability. And I think we just need to make sure that we address that so that it's not left that we didn't consider it, I think.

THE CHAIRWOMAN: Okay. I thought we did. But what is it that you'd like to add?

UNIDENTIFIED SPEAKER: Oh, I thought we talked about --

THE CHAIRWOMAN: It's okay. What would you like to ...

UNIDENTIFIED SPEAKER: I just want to make sure that we all agree that Masterpiece Cake and Mr. Phillips are --

THE CHAIRWOMAN: Are both respondents?

UNIDENTIFIED SPEAKER: -- are both respondents.

THE CHAIRWOMAN: Right.

UNIDENTIFIED SPEAKER: One and the same.

THE CHAIRWOMAN: Yeah. I think that that's what we agreed, that the -- because there were two motions to dismiss. There was a motion to dismiss the case in general. And then there was also a motion to dismiss Respondent Jack Phillips.

In our discussion we talked about both and the idea that they were both -- there was notice, there was sufficient notice for both Jack Phillips and Masterpiece Cakeshop to be on notice about the charge.

UNIDENTIFIED SPEAKER: Okay. I'm fine. I just wanted to make sure.

THE CHAIRWOMAN: Is everyone else on the same page with that?

UNIDENTIFIED SPEAKER: Uh-huh.

UNIDENTIFIED SPEAKER: Yes.

THE CHAIRWOMAN: Is there anything else that we need to address? And actually I'm looking at the attorney to see ... Because she will be drafting our order. Since -- we would ask you to help draft our order. I just want to make sure there's not anything

else that you need to know or hear from us.

UNIDENTIFIED SPEAKER: Thank you, commissioner. I would just ask that the commission consider what remedies they want to order. The ALJ (inaudible) highlighted two things (inaudible) discretion.

But the first is the cease and desist from discriminating against the plaintiffs and other same sex couples by refusing to sell them wedding cakes or any other products that (inaudible) couples.

So if you decide -- it sounds like you're deciding to (inaudible). And then the other course of action (inaudible) appropriate by the commission. Under the statute there are some other penalties and remedies available. And that is under 24-34-602. You have some finding ability, but -- give me just one moment.

THE CHAIRWOMAN: Sure.

UNIDENTIFIED SPEAKER: I'm sorry. This is my inability to find it, so ... (Inaudible) but if there is anything else that you can think of that would be an actual remedy (inaudible) that on. But other than that, that's the extent of your jurisdiction and your discretion.

THE CHAIRWOMAN: Sure.

UNIDENTIFIED SPEAKER: So we can issue an order, a cease and desist. And also, can we not order -- report it to the commission?

THE CHAIRWOMAN: I definitely want that. We can. And I would want that if everyone's in agreement. We can decide on it as a group. I think that we should request a report back. I think that we -- we want a cease and desist and, you know, an amendment of this policy is the ideal situation.

Commissioner Jairam, you had some thoughts?

COMMISSIONER JAIRAM: Oh, I just had a comment. And that is, I want to put this one matter to rest, and that is: There was an argument by the respondent saying that they -- you know, that they -- he didn't offer to sell them a wedding cake, but he offered to sell them different products.

Yet, the evidence is there that there was another same sex couple that wanted cupcakes and he refused to serve them. So I think it's a speechless argument to try to say that, you know -- obviously he does not want to -- or he is -- (inaudible) discriminated against these people.

And I believe the -- it was best said by the judges in the New Mexico case, where the laws are

here just to protect individuals from humiliation and dignitary harm. And that should be very clear, that is, we do not want people to feel undignified when they walk into any place of business and do business that, you know, serves the public.

And I will also, you know, refer -- you know, I'm referring to the comments made by Justice (inaudible) in that case. And essentially he was saying that if a businessman wants to do business in the state and he's got an issue with the -- the law's impacting his personal belief system, he needs to look at being able to compromise. And I think it was very well said by that judge.

THE CHAIRWOMAN: Sure. Sure. Well, I think that's the challenge, right? It's, like, you can have your beliefs, but you can't hurt other people at the same time. So on this question of remedies, we're in line with the cease and desist not just with respect to the complainant's right, but with respect to any similar situated individuals; amendment of revision of the policy of reporting to the Commission.

Is there anything else? All remedial action that's been taken to eliminate discriminatory practices is what we'd want. Yes, Commissioner --

UNIDENTIFIED SPEAKER: Sorry, I just have

one question on the reporting requirements (inaudible). How long would you like the reporting to take place and on what frequency?

UNIDENTIFIED SPEAKER: I would like to see quarterly reports for the next three years.

UNIDENTIFIED SPEAKER: Thank you.

THE CHAIRWOMAN: Is everyone in agreement with that?

UNIDENTIFIED SPEAKER: (Inaudible.)

UNIDENTIFIED SPEAKER: What's the -- I think, what's the normal range? I was thinking about that (inaudible).

THE CHAIRWOMAN: Cases, it varies. You know, three is probably on the high end of what we've done before. And -- but it is typically quarterly, right? So if you think over the span of three years, that's 12 reports, right, so it's not a large number of reports, it's just a longer period of time.

So -- but it is not atypical for us to require reporting over a period of years. But I think three is on the high end of it. Yeah?

UNIDENTIFIED SPEAKER: What I'm hearing is that three is a little on the high side --

THE CHAIRWOMAN: Yeah.

UNIDENTIFIED SPEAKER: -- and that two is

probably typical --

THE CHAIRWOMAN: Is typical, right.

UNIDENTIFIED SPEAKER: And then I also wanted to know, what are the parameters of reporting? What is it that you want them to report?

UNIDENTIFIED SPEAKER: I agree with the two years. I'd like to see the reporting reflect who -- whether -- who cakes were baked for, or products were produced for, let's put it that way, celebration products and whether they were for the sexual orientation or the -- of those --

THE CHAIRWOMAN: Well, so -- can I rephrase? I think I know what you're getting at. As a point clarification, what I was asking for is a report on all remedial action that's been taken. You know, so what immediate remedial action has been taken to eliminate the discriminatory practice that's created this problem in the first place. You know, getting rid of the policy, training for the staff, whatever that happens to be, so a report of that.

And then I think what Commissioner Rice is looking for is something that sort of demonstrates that this isn't happening anymore. And so that to me looked like for a period of two years a quarterly report that gives us the number of individuals who came

in seeking a wedding cake for a same sex wedding.

UNIDENTIFIED SPEAKER: Or a reception or --

THE CHAIRWOMAN: Or a reception or what have you, but a same sex union of some sort. Just the number of those, right? Not every single ...

UNIDENTIFIED SPEAKER: Oh, that's -- (inaudible) a question about that, though. Are we then asking the employees at Masterpiece Cake at the bakery to inquire of everyone who comes in to order a cake of celebration to inquire about their sexual orientation?

THE CHAIRWOMAN: Right. I don't want that either. I think it's just the number of cakes made, right? Right?

UNIDENTIFIED SPEAKER: Perhaps if I may make a suggestion, that it may be a requirement to report just the number of people that they've turned away in any means possible of those individuals. Because I think that that really gets to the heart of what --

THE CHAIRWOMAN: Sure. I think it's the reverse of that. What I think Commissioner Rice is wanting to see is that over a period of time this isn't continuing to happen. I think that's the ultimate goal, so ...

UNIDENTIFIED SPEAKER: And so would a report of the number or the -- some information about patrons that they've turned away, would that suffice?

UNIDENTIFIED SPEAKER: I suppose, yeah. Yeah. I mean, there should be no report then. You're asking -- I mean --

UNIDENTIFIED SPEAKER: I think that's what you're looking for.

UNIDENTIFIED SPEAKER: Yes. And that should be -- so that should be very brief for them to file and not take -- I mean, it should be, you know, one sentence, we didn't turn anyone away.

UNIDENTIFIED SPEAKER: As far as the report, is that something that we have to decide now? Because I'm wondering if maybe we can get some help maybe from the attorney, if maybe we can get some assistance in coming up with the report, as well?

UNIDENTIFIED SPEAKER: Yeah. Commissioners, I think that for the purposes of if you wanted to finalize your order today, then yes. But in terms of the guidance that I have here that the -- that you want a report quarterly if any remedial action taken such as policies implemented and training for staff, as well as for example the number of individuals turned away who were refused service, that that gives a

little bit of leeway for the Division to carry out the order.

THE CHAIRWOMAN: Commissioner -- oh, sorry, Director?

MR. CHAVEZ: Thank you. Yeah, on behalf of the Division, I think this is relatively (inaudible). You know, the crux of what you want to know is, you know, whether or not people are continuing to be denied this service based on sexual orientation.

So if you would consider issuing an order that just includes the number of individuals turned away and why, you know, you can do that quarterly for a period of two years, including some training by staff, that's something the Division could certainly monitor and report back to the Commission.

COMMISSIONER JAIRAM: I like that.

THE CHAIRWOMAN: All right. I think that's -- I think that's what you're looking for. Thank you.

COMMISSIONER SAENZ: I have a question.

THE CHAIRWOMAN: Yes, Commissioner Saenz.

COMMISSIONER SAENZ: Director, is there also this -- in the past is there a way that we can keep the names (inaudible) investigators all up as to why?

MR. CHAVEZ: I'm not sure what your question is, Commissioner.

COMMISSIONER SAENZ: (Inaudible) in order to not ask about people's sexual orientation, just making sure that we understand why people were turned away as opposed to another reason.

MR. CHAVEZ: Sure. Sure. Right. And that would keep in more focus. That's a good point.

THE CHAIRWOMAN: Okay. So I think that we have what we need now to have a final order that we can draft up. But we could today decide that order. And I think that that would be in the best interest of everyone, is to make a decision, right, that we're going to issue a final order, right, basically.

UNIDENTIFIED SPEAKER: Do you need a motion then?

THE CHAIRWOMAN: Uh-huh.

UNIDENTIFIED SPEAKER: Madame Chair, I move that the commission accept the administrative law judge's order and initial decision.

THE CHAIRWOMAN: Okay.

UNIDENTIFIED SPEAKER: Second.

UNIDENTIFIED SPEAKER: Or should there be more?

THE CHAIRWOMAN: Is there any debate -- I

think there is more to it because we do have to address some of the other issues raised on appeal, right? So I think if we could amend it, that would be ideal, right?

We're wanting to adopt the administrative law judge's initial decision, as well as the order with respect to the protective order and the order with respect to the motions to dismiss.

UNIDENTIFIED SPEAKER: Madame Chair, so I'll offer (inaudible) amendment if I may, that the commission uphold the administrative law judge's decision on motions to dismiss and the administrative law judge's decision that Masterpiece Cake and Mr. Jack Phillips did, in fact, discriminate in violation of the Colorado Antidiscrimination Act; and issue an order to cease and desist; and to file quarterly reports for a period of two years showing remedial actions taken, including staff training, policy changes, and a report of all customers turned away for celebration cakes and the reason for that.

UNIDENTIFIED SPEAKER: Second.

THE CHAIRWOMAN: I think that we can only amend it, and also include that we would accept the administrative law judge's order granting the protective order.

UNIDENTIFIED SPEAKER: Oh. Thank you.

THE CHAIRWOMAN: Uh-huh. As amended? Yes, Commissioner (inaudible).

UNIDENTIFIED SPEAKER: I'd like to say (inaudible) amendment --

THE CHAIRWOMAN: An amendment to the amendment.

UNIDENTIFIED SPEAKER: -- an amendment to the amendment.

THE CHAIRWOMAN: Yes.

UNIDENTIFIED SPEAKER: I don't believe that we need to say (inaudible) -- for people -- (inaudible) reporting for people who have just been turned away and why for ...

THE CHAIRWOMAN: I'm trying to follow you.

UNIDENTIFIED SPEAKER: Well, I understood that we weren't limiting it to just celebration cakes or -- because we get into a, what if it's celebration cookies or ... I mean, so I (inaudible) that we were going to just say for people who have been turned away, that the report was going to include just people who have been turned away for (inaudible).

UNIDENTIFIED SPEAKER: That's agreeable.

THE CHAIRWOMAN: All right. Okay. So we're clear on the motion. Is there a second?

UNIDENTIFIED SPEAKER: Second.

THE CHAIRWOMAN: All in favor?

(Responses were heard.)

THE CHAIRWOMAN: Any opposed?

(No responses were heard.)

THE CHAIRWOMAN: And any abstentions?

(No responses were heard.)

THE CHAIRWOMAN: Okay. We're done with our deliberation then of the Craig/Mullins and David -- sorry. Craig and Mullins versus Masterpiece Cakeshop.

The next order of business on the agenda is audience participation. I believe that we had a sign-in sheet for anyone who was interested, who might be interested in making any comments to the commission, and there wasn't any. Okay.

UNIDENTIFIED SPEAKER: (Inaudible.)

THE CHAIRWOMAN: Okay. So it doesn't appear that anyone wants to speak. If I'm incorrect about that, please let me know. Anyone is welcome. We would need you to state your name for the record.

By the way, everyone who's here should have signed in for the record, so please do that.

UNIDENTIFIED SPEAKER: I'll speak.

THE CHAIRWOMAN: Okay. So there are a few guidelines with respect to audience participation.

Please identify -- come forward --

UNIDENTIFIED SPEAKER: (Inaudible.)

THE CHAIRWOMAN: Okay. Are you wanting to chat -- discuss this particular case or speak to us in general?

UNIDENTIFIED SPEAKER: Speak to you in general about (inaudible).

THE CHAIRWOMAN: That's what I suspected you might say, counsel.

UNIDENTIFIED SPEAKER: (Inaudible.)

THE CHAIRWOMAN: I'm sorry, I didn't hear that last part.

UNIDENTIFIED SPEAKER: We just have a couple of anomalies in the record. I spoke to Ms. Rose about that prior to the beginning of the proceedings.

I just want to make sure the respondents and the complainants are allowed the opportunity to fully vet the certified record. We noticed just recently again that some pages are missing. So I just wanted to make sure that that gets handled --

THE CHAIRWOMAN: Okay. For the record you can tell us what pages you think are missing or what information you think is missing, and -- but I don't know -- I mean, at this point we've now actually --

UNIDENTIFIED SPEAKER: Commissioner, when I spoke to Ms. Martin, I told her that I would work with her to make sure that the record is complete.

THE CHAIRWOMAN: Okay. Okay. So she'll make sure that it's complete. If you want to go ahead and tell us what those are -- those things are, that's fine, but --

UNIDENTIFIED SPEAKER: At this point (inaudible) record on the matter is closed, so I think that --

THE CHAIRWOMAN: It's just a matter of correcting then.

UNIDENTIFIED SPEAKER: That's right.

THE CHAIRWOMAN: Okay. Okay. So I will -- what I can tell you, then, Ms. Martin, is that I'll assure you that Ms. Rose will make the corrections that you've addressed with her.

UNIDENTIFIED SPEAKER: (Inaudible.)

THE CHAIRWOMAN: Thank you very much. I appreciate it. Anything else? So if there's no other audience participation, is there any other business? Commissioners?

UNIDENTIFIED SPEAKER: Nothing. No.

THE CHAIRWOMAN: I have one thing I want to add. Shayla Malone (phonetic) from the Division did

forward out to us information about our next commission meeting, which is going to be on -- I think it's June 18th. And it's going to be in Denver.

It's not going to be at our normal offices. And we're going to have a public forum. And so I would like to urge all of the commissioners, to the extent that you have networks here in Denver, to get that information out to people. I think that's really important.

That's my only other business I think. I'm looking forward to the public forum.

UNIDENTIFIED SPEAKER: Madame Chair?

THE CHAIRWOMAN: Yeah.

UNIDENTIFIED SPEAKER: I would offer a motion to move to executive session.

THE CHAIRWOMAN: Great.

UNIDENTIFIED SPEAKER: It's appropriate --

(Whereupon, the audio recording was concluded.)

CERTIFICATE

STATE OF COLORADO)
CITY AND COUNTY OF DENVER) ss.

I, TERESA HART, Registered Professional Reporter and Notary Public for the State of Colorado, do hereby certify that this transcript was taken in shorthand by me from an audio recording and was reduced to typewritten form by computer-aided transcription; that the speakers in this transcript were identified by me to the best of my ability and according to the introductions made; that the foregoing is a true transcript of the proceedings had; that I am not attorney, nor counsel, nor in any way connected with any attorney or counsel for any of the parties to said action or otherwise interested in its event.

IN WITNESS WHEREOF, I have hereunto affixed my hand and notarial seal this 20th day of June, 2014.

My commission expires: January 15, 2016.

TERESA HART
Registered Professional Reporter
and Notary Public
CALDERWOOD-MACKELPRANG, INC.

EXHIBIT 17

PUBLIC SESSION MINUTES

FIRST (2014-2015) MONTHLY MEETING
Of the
COLORADO CIVIL RIGHTS COMMISSION

Friday, July 25, 2014
Civic Center Plaza Building
1560 Broadway-Conference Room 110D
Denver, CO 80202

Convened: 10:10 a.m. Public Session

The first 2014-2015 Monthly Executive Session of the Colorado Civil Rights Commission was held on Friday, July 25, 2014, at the Civic Center Plaza Building, Conference Room 110D, 1560 Broadway, Denver, CO 80202 and was convened at 10:10 a.m., Commissioner Raju Jairam, Chair, presiding.

Commissioners present were: Raju Jairam, Chair, Susie Velasquez, Marvin Adams, Diann Rice, Heidi Hess, and Dulce Saenz.

Present from the Civil Rights Division:
Jennifer McPherson, Deputy Director
Shayla Malone, Commission Coordinator

Present from the Colorado Office of the Attorney General:
Counsel for the Commission, Assistant Attorney General Eric Maxfield
Counsel for the Division, Deputy Attorney General Vincent Morscher

Members of the Public present:
Nicolle Martin

CALL TO ORDER

Commissioner Jairam called the meeting to order and asked the Commissioners present to read their names into the record for the purpose of establishing a *quorum*. Attorneys present from the Colorado Office of the Attorney General, staff of the Colorado Civil Rights Division, and members of the public also identified themselves for the record.

APPROVAL OF PUBLIC SESSION MINUTES

June 18, 2014

EXHIBIT 18

Commissioner Rice moved to approve the minutes of the Public Session of June 18, 2014, Commissioner Adams seconded, and the motion passed.

June 25, 2014

Commissioner Rice moved to approve the minutes of the Public Session of June 25, 2014 as amended, Commissioner Hess seconded, and the motion passed.

July 15, 2014

Commissioner Rice moved to approve the minutes of the Public Session of July 15, 2014 as amended, Commissioner Velasquez seconded, and the motion passed.

DIRECTOR'S REPORT

Deputy Director McPherson advised the Commission that the Division staff is currently participating in a three day mediation training. The purpose of the training is to give investigators and supervisors training to resolve cases in the beginning stages.

Deputy Director McPherson advised the Commission that the Division has secured a location for the Pueblo office at 301 N. Main Street, Suite 305. John Quintana was selected and hired as a part time office assistant for the Pueblo office and the Division anticipates hiring a strategic partnership associate for a non-permanent nine month roll in which will be focused heavily on outreach in the community.

Deputy McPherson reported that the Division exceeded the 2014 fiscal year HUD contract.

ATTORNEY GENERAL'S REPORT

1. **P20130008X; CR2013-0008; Charlie Craig & David Mullins v. Masterpiece Cakeshop, Inc.**

   Commissioner Rice moved to deny the Motion for Stay, Commissioner Velasquez seconded, and the motion passed.

AUDIENCE PARTICIPATION

Deputy Director McPherson introduced DORA's PIO (Public Information Officer) Rebecca Laurie.

OTHER BUSINESS

None

EXECUTIVE SESSION

Commissioner Rice made the following motion, Commissioner Hess seconded, and the motion passed:

> I move that the Commission enter into Executive Session at this time in order to consider the following matters:
>
> - To address the following cases on the July consent agenda, hearing worthy review cases, and settlements: H20140044, E20140029, H20140071, H20140033, E20140133, E20140150, EE20140232, E20140143, H20140075, H20140087, E20140255, and E20130909 which are required to be kept confidential pursuant to Sections 24-34-306(3), and 24-6-402(3)(a)(III), C.R.S.;
>
> - For the purpose of receiving legal advice pursuant to Section 24-6-402(3) (a) (II), C.R.S.

Next Meeting – to be held in Denver, Colorado on August 21, 2014.

ADJOURNMENT
Commission Public Meeting adjourned

EXHIBIT 18

STATE OF COLORADO

CITY AND COUNTY OF DENVER

Colorado Civil Rights Commission Meeting

Held on July 25, 2014

Colorado State Capitol

200 East Colfax Avenue, Old Supreme Court Chambers

In re: CHARLIE CRAIG and DAVID MULLINS v. MASTERPIECE CAKESHOP, INC.

Case No: P20130008X, CR2013-0008

This transcript was taken from an audio recording by Katherine A. McNally, Certified Transcriber, CET**D-323.

ARIZONA REPORTING SERVICE, INC.
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Phoenix, Arizona 85004-1481

EXHIBIT 19

P R O C E E D I N G S

* * * * *

(Commencement of audio at 00:00.0.)

THE CHAIRMAN: Calling the meeting to order. This is the Friday, July 25th, 2014, meeting of the Colorado Civil Rights Commission.

Would all of those that are present please feed your name into the record?

COMMISSIONER VELASQUEZ: Susie Velasquez, Greeley, Colorado.

COMMISSIONER RICE: Diane Rice, Loveland, Colorado.

MS. McPHERSON: Jennifer McPherson, with the Division.

MS. MALONE: Shayla Malone, with the Division.

MR. MORTURE: Vince Morture (phonetic), Deputy Attorney General, counsel for the Division.

MR. MAXFIELD: Eric Maxfield, First Assistant AG, from the Division.

COMMISSIONER ADAMS: Commissioner Adams, Fountain, Colorado Springs, Colorado.

COMMISSIONER HESS: Commissioner Hess, from Grand Junction, Colorado.

COMMISSIONER SAENZ: Rosa Saenz, from Denver.

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COMMISSIONER JAIRAM: Raju Jairam, Fort Collins Colorado.

THE CHAIRMAN: And --

MS. MARTIN: Oh, I'm just observing.

THE CHAIRMAN: Yes, ma'am. But you need to tell us who you are, please.

MS. MARTIN: Oh, I'm Nicolle Martin.

THE CHAIRMAN: Okay. Nicolle Martin with --

MS. MARTIN: Counsel for complainants -- I'm sorry. Counsel for respondents and appellants --

THE CHAIRMAN: Oh. Okay, (indiscernible).

MS. MARTIN: -- (indiscernible) Masterpiece.

THE CHAIRMAN: Okay. Thank you.

And I guess we do have a quorum.

(Conclusion of audio at 01:13.8; commencement of audio at 08:40.0.)

THE CHAIRMAN: Okay. Eric.

MR. MAXFIELD: So there is a Motion to Stay final agency order filed by respondents in the Craig v. Masterpiece Cakeshop case. There is a complainant's response in option to the Motion for Stay that was filed, I think, yesterday. And (indiscernible) has to take a look at that.

Procedurally, the -- either party (indiscernible) a stay of the final agency order from

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the Commission. And then if that is granted, there'll be a stay in place. If it's denied, then they may also seek a stay from the Court of Appeals. The Court of Appeals could grant or deny the stay during the pendency of the appeal, which was also noticed by Masterpiece, Inc.

So if there are questions about the Commission's authority and the reasoning around the possible granting of the stay or denial, I can try to answer those. It is -- and then that's something that I can do here and now to you, you know, in open session, or if you would want to waive attorney/client privilege, or you could ask to go into -- make a motion to go into executive session, and we could have a closed session for attorney advice on the merits of the Motion to Stay.

THE CHAIRMAN: My question is, Do we need to respond to this or make a motion today or need a motion today?

MR. MAXFIELD: Yes. This -- this ought to receive action today, either a grant or denial of the stay.

THE CHAIRMAN: Okay.

MALE SPEAKER: I would like to have an opportunity to read this. I don't know about the others.

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FEMALE SPEAKER: And maybe we can sometime take a short break, and when we finish the public -- and at the beginning of our executive session and a few minutes to read this stuff, because we --

MALE SPEAKER: Yes.

FEMALE SPEAKER: -- I don't think we've seen it until now.

MALE SPEAKER: (Indiscernible) last night.

MR. MAXFIELD: One thing that I could offer is that the -- the legal standard identified by both parties in the general sense is the same. So I don't think that there's a contest about that. And so you'll see the elements -- four elements set out clearly by both parties, and for which I think there's agreement.

FEMALE SPEAKER: Okay.

MALE SPEAKER: And then if we need any advice, then we could go into closed session?

MR. MAXFIELD: Yes.

THE CHAIRMAN: Okay.

MR. MAXFIELD: Yeah.

THE CHAIRMAN: So it -- I guess we all finished through the public session, take maybe a 10-, 15-minute break, give everyone have a chance to read this --

MALE SPEAKER: Um-hmm.

THE CHAIRMAN: -- and then we'll discuss it.

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MALE SPEAKER: Okay.

THE CHAIRMAN: Does that work?

FEMALE SPEAKER: Um-hmm. And then if we -- before we break up executive session --

THE CHAIRMAN: Before -- yeah, if we need to go into executive session (indiscernible).

FEMALE SPEAKER: Okay. (Indiscernible) --

THE CHAIRMAN: (Indiscernible) merit.

FEMALE SPEAKER: -- if we have this on the agenda, we'll (indiscernible) --

THE CHAIRMAN: Yes.

FEMALE SPEAKER: -- have to go into executive session (indiscernible), okay?

THE CHAIRMAN: Is that acceptable?

FEMALE SPEAKER: Yes.

THE CHAIRMAN: All right. Any audience participation?

(Conclusion of audio at 11:48.4; commencement of audio at 17:35.1.)

THE CHAIRMAN: Okay. What we have here in front of us is -- anyway, we're here to discuss the Masterpiece Cakeshop, Case (indiscernible). Anyway, here's the agenda.

FEMALE SPEAKER: Oh, yeah.

THE CHAIRMAN: Oh, here it is. Okay. We're

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here to discuss Case P2013008X, CR2013-00H, Charlie Craig and David Mullins versus Masterpiece Cakeshop.

MALE SPEAKER: Um-hmm.

THE CHAIRMAN: There's a motion for a stay of the final Commission -- I mean, the Commission's final order, and then there's a response by the defendant in opposition. And then there's -- we've also been given a notice of appeal regarding a court, the appellate court, I guess.

So anyone want to lead off?

FEMALE SPEAKER: I'll lead.

Mr. Chair, I move that the Commission deny the Motion to Stay in -- for the Commission case.

FEMALE SPEAKER: Second.

THE CHAIRMAN: Okay. There's a motion on the floor and a second to deny the respondent's motion for a stay of the final order by this Commission.

MALE SPEAKER: Um-hmm.

THE CHAIRMAN: Okay. Are there any comments or discussions about this before I put it to a vote?

FEMALE SPEAKER: Yes, sir.

THE CHAIRMAN: Go ahead.

FEMALE SPEAKER: I'd like to make a couple comments.

First of all, I think for us to grant a stay

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would be to say that we disagree with our own order, final order. And of the arguments that are made, I think there is -- by virtue of our order, we determined that there is a public -- bless you --

FEMALE SPEAKER: Thank you.

FEMALE SPEAKER: -- there is a public interest in enforcing this, that clearly the public is hurt by actions such as those taken by Masterpiece Cake. Complying with the order is not harmful or irreparable to Masterpiece Cake. I don't see that any harm is done there.

I -- I further believe that if you're going to do business in Colorado, you have to follow the Colorado Antidiscrimination Act, and for us to give a stay in this case would be to say, oh, unless you don't want to. So anyway, I -- I believe that we have to live by our convictions and our orders (indiscernible) the respondent to do so.

THE CHAIRMAN: Susan?

FEMALE SPEAKER: I would just like to point out, and I agree with the documents of the plaintiffs that -- that the document that was in front of us from the -- the plaintiffs' response.

THE CHAIRMAN: Oh, okay.

FEMALE SPEAKER: -- that they have not

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demonstrated a likelihood of success, because they were rejected three times before. And as Diane pointed out, we made a decision then. And I don't believe that -- that they have a likelihood of success.

THE CHAIRMAN: Okay. Commissioner Saenz?

FEMALE SPEAKER: I --

THE CHAIRMAN: No comments?

FEMALE SPEAKER: No.

THE CHAIRMAN: Commissioner Hess?

COMMISSIONER HESS: I agree with what's been said.

THE CHAIRMAN: Commissioner Adams?

COMMISSIONER ADAMS: I would agree with Commissioner Rice's and (indiscernible) assessment of what has transpired.

FEMALE SPEAKER: I have one more comment.

THE CHAIRMAN: Go ahead.

FEMALE SPEAKER: In regard to the respondent's argument -- endless argument, this is that they -- this argument's been made before, and it -- it holds no water, as far as I'm concerned, whatsoever. You -- and we said this in the hearing, and we need to repeat this over and over, you cannot separate the fact that these men -- their -- their sexual orientation from the action of wanting to celebrate the marriage, anymore than you

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could a case between races in many years gone past.

And the U.S. Supreme Court has found over and over that you cannot discriminate on the basis of race, and sexual orientation is a status absolutely like race or -- so -- and you can't separate the fact that these gentlemen want to marry from the fact that they are homosexual.

THE CHAIRMAN: Okay. (Indiscernible.)

I have some comments, and that is, you know, Mr. Phillips says that he wants to be respected or his views and religious views to be respected, and I believe that the general public also needs to -- you know, their views need to be respected.

The -- the issue here is whether or not the couple that went in to get service were treated with dignity and respect, and the fact of the matter are they were not, and it's also clear that they were turned away. And those have all been established.

And I don't believe that the individual's right to practice his religion violates other people's rights to free access, especially when the business is open to the public and serving the public.

Now, what Mr. Phillips does in private is his own business. And I agree that, you know, we cannot separate same sex marriage and say that I'm not

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discriminating against gay couples, because I mean, by the very definition, when two people of the same sex want to get married, it tells me that they are of a certain sexual orientation. So that argument, again, fails.

Go ahead.

FEMALE SPEAKER: Well, I just want to point out that this -- this case is really not about same sex marriage. It's -- it's about a couple -- it's just about a gay couple that wanted a cake to celebrate a life event in their life.

FEMALE SPEAKER: Um-hmm.

FEMALE SPEAKER: That doesn't really -- it could have been a civil union. It could have been a -- you know, let's wrap, you know, ribbon around a tree and -- and -- and say that we hope, you know, the world gets to be a better place with us in it as a couple. So it's not -- I mean, I think there's some rhetoric that this is a case about same sex marriage. Well, it's really not. It's really about a case about denial of service.

FEMALE SPEAKER: You -- yeah, you're exactly right --

MALE SPEAKER: Um-hmm.

FEMALE SPEAKER: -- Commissioner Hess.

I would also like to reiterate what we said in

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the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be -- I mean, we -- we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to -- to use their religion to hurt others. So that's just my personal point of view.

THE CHAIRMAN: Okay. Any other comments?

Okay. So there's a motion on the floor to deny the respondent's Motion for Stay of our final order. And all those in favor, please signify by saying aye.

(A chorus of ayes.)

THE CHAIRMAN: Those opposed?

Any abstentions?

Therefore the Commission denies the respondent's motion for a stay of our final order.

(Conclusion of audio at 27:54.1.)

* * * * *

EXHIBIT 19

C E R T I F I C A T E

I, Katherine McNally, Certified Transcriptionist, do hereby certify that the foregoing pages 1 through 12 constitute a full, true, and accurate transcript, from electronic recording, of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

SIGNED and dated this 8th day of August 2014.

Katherine A. McNally

KATHERINE A. McNALLY
Certified Electronic Transcriber
CET**D323

EXHIBIT 19

Former Civil Rights Commissioner Diann Rice Speaks Out: 'I Don't Have Any Regrets'

BY CPR NEWS STAFF AND THE ASSOCIATED PRESS JUN 6, 2018

LISTEN Diann Rice Speaks With Ryan Warner

EXHIBIT 20

Mary Torres of Falls Church, Va., left, with her daughter Maria Torres, and Eugene Delgaudio, holds up a rolling pin in support of cake artist Jack Phillips, while outside of the Supreme Court, Tuesday, Dec. 5, 2017.

Jacquelyn Martin/AP

Diann Rice had a clue that something was happening with comments made during her tenure in the Colorado Civil Rights Commission years before they were argued in court. She had seen the legal team backing baker Jack Phillips post soundbites and videos online.

So when the Supreme Court's Monday ruling on the Masterpiece Cakeshop case cited her words?

"I wasn't completely surprised," Rice said.

The former Colorado civil rights commissioner, whose remarks on religion were the basis of a U.S. Supreme Court ruling for a baker who refused to make a wedding cake for a gay couple, insisted she has no religious bias and wouldn't have said anything if she'd known how her remarks would be used.

- **More:** GOP Seizes On SCOTUS' Masterpiece Rebuke Of Colorado Civil Rights Commission

EXHIBIT 20

Diann Rice acknowledged she made remarks cited by the high court when it ruled Monday in favor of Phillips, a suburban Denver baker. But she told the Associated Press in a telephone interview that she made the comments after Colorado's Civil Rights Commission already had ruled against Phillips and for Charlie Craig and Dave Mullins.

"The attorneys for Masterpiece used my comments to their advantage, obviously," Rice said. "It was used as it was used, and the ruling is what it is."

"I have no religious bias," said Rice, who said she was raised in Presbyterian and other Protestant faiths. "It wasn't that my comments had any influence on the (commission's) decision."

In a telephone interview with CPR News, Rice repeatedly stated that she has an appreciation for faith, but takes no excuses for discrimination.

"My point being that using any excuse — whether its faith or anything else — using any excuse as a justification or excuse for discrimination is not right," she said.

Rice said she is registered as an unaffiliated voter, not as a Democratic or a Republican. She added that she's "not always" a liberal, saying it depends on the issue and the person, and that she can "see both sides of many things."

"I'm not a NRA member, but I understand the people who are proponents of the Second Amendment," Rice said as an example.

The high court found that the commission failed to adequately consider Phillips' religious beliefs when it ruled against him for refusing to make the cake at his Masterpiece Cakeshop.

Justice Anthony Kennedy, who wrote the majority opinion, said anti-discrimination laws "must be applied in a manner that is neutral toward religion" and, while not citing Rice by name, said her remarks and others by the commission showed anti-religious bias as it considered the case.

- **More:** State Civil Rights Commission Feels GOP Heat As Funding Review Deadline Nears

The court didn't rule on whether people can avoid providing services to same-sex couples because of their religious beliefs.

EXHIBIT 20

Rice made the comment at a commission meeting on July 25, 2014, almost two months after the commission had ruled that Phillips had violated the Colorado Anti-Discrimination Act on May 30.

> *"Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be — I mean, we — we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others."*

Rice told CPR News she doesn't regret what she said, just that she caused the Civil Rights Commission "undue problems."

"That's my only regret, because I know during the legislative session they had some tough times with reauthorization, and that's too bad," she said. "I did not mean to cause them any trouble."

As for the negative attention the case has drawn to her, Rice isn't afraid to face it. The priority for her is that the case does not significantly roll back gay rights.

"If my comments allowed for the narrow ruling, that only affected one case and don't have precedent for all our LGBTQ rights in Colorado, I'm ok with that," she said. "I'm willing to take the heat if we aren't setting civil rights back."

Rice doesn't expect her infamy to last for long, saying, "Six months from now, nobody will even have an idea (who I am)."

The Alliance Defending Freedom, the conservative Christian law firm that represented Phillips, didn't immediately return a telephone message from the Associated Press seeking comment on Rice's comments Wednesday.

CPR News reporter Ryan Warner contributed to this story.

Masterpiece Cakeshop | Colorado Civil Rights Commission | discrimination | Religion | U.S. Supreme Court (SCOTUS)

EXHIBIT 20

2 Comments

Sort by Newest

Add a comment...

Charlotte Ruth Byrne

Really???!!! This guy is the opposite of a nazi! If he were a nazi, he would have gassed the gay couple, until they were dead! Instead, he simply said no, he wouldn't bake their cake. He has the legal right to act according to his conscience. Just like the gay couple has the legal right to take their business elsewhere!

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Gerry Santomassimo

It was a stupid thing to say at the time, and that hasn't changed. Commission members, no matter what their jurisdiction, need to be reminded that they have to be very careful how they word things and more importantly, leave their personal feelings out of it. Stick to the facts in front of you, you'll never go wrong.

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