No. 16-111

In the

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,
Petitioners
V.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,
Respondents

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF FOR AMICI CURIAE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, PUBLIC INTEREST LAW CENTER, CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS, AND MISSISSIPPI CENTER FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

This case is not about speech, it is about equal access to public accommodations. It implicates civil rights law beyond Colorado's public accommodation statute and directly impacts the mission and ability of the undersigned *amici curiae* to combat unlawful discrimination in their respective jurisdictions.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs, the Public Interest Law Center, Chicago Lawyers' Committee for Civil Rights, and the Mississippi Center for Justice are four of eight independently funded and governed Lawyers' Committees. Through partnerships with the private bar and collaboration with grass roots organizations and other advocacy groups, they work to implement community-based solutions to advance civil rights—including through securing meaningful enforcement of local public accommodations laws similar to Colorado's Anti-Discrimination Act.

The Washington Lawyers' Committee was established in 1968 in response to findings in the Report of National Advisory Commission on Civil Disorders that racial discrimination and poverty

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[1] Petitioners and Respondent Colorado Civil Rights Commission have filed blanket consents with the Supreme Court; their consents are on file with the Clerk. Counsel for the individual Respondents Crag and Mullins granted consent to the filing of this brief; their consent accompanies this brief. No counsel for a party authored this brief in whole or in part, and no persons other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

were root causes of the riots that erupted in cities across the country following the assassination of the Reverend Dr. Martin Luther King, Jr. For almost 50 years, the Washington Lawyers' Committee has advocated public policy changes on behalf of individuals and groups in areas including fair housing, equal employment opportunity, and public accommodations. As a pioneer against consumer racism, the Washington Lawyers' Committee has secured legal victories for victims of discrimination that have changed the way hotels, restaurants, retail stores, sports clubs, and other companies do business. The Washington Lawyers' Committee attributes much of its success to the thousands of lawyers from more than 100 Washington, D.C., law firms who have made significant pro bono hour and financial contributions.

The Public Interest Law Center was founded in 1969 in Philadelphia, as part of the same focus on racial discrimination and poverty in northern cities that spurred the founding of the Washington Lawyers Committee. Throughout its 48 years, the Public Interest Law Center has used its tools of litigation, advocacy, organizing and community education to advance the civil, social, and economic rights of communities in the Philadelphia region facing discrimination, inequality, and poverty. It has secured significant improvements in public education, housing, employment, access to health care, environmental justice and voting.

Chicago Lawyers' Committee for Civil Rights was also founded in 1969. As Chicago's preeminent non-profit, civil rights legal organization, Chicago Lawyers' Committee works to secure racial equity

and economic opportunity for all. Its practice areas include housing opportunity, education equity, freedom from hate crime, voting rights, and equitable community development. Across these areas, Chicago Lawyers' Committee advocates to increase opportunity and to eliminate disparities based on race and other aspects of identity.

The Mississippi Center for Justice is the Deep South Affiliate of the Lawyers' Committee for Civil Rights Under Law. It was established in 2003 to promote racial and economic justice in Mississippi and to replace the civil rights legal capacity that left the state in the late 1970's. With three offices in the state, the Center advocates for social change in the areas of housing, education, health care access, fair credit and disaster response. In 2016, the Center challenged Mississippi's HB 1523, the most expansive "religious freedom" bill in the country, which allows individuals and organizations to deny services to LGBT individuals and couples based on strongly held religious beliefs or moral convictions concerning the definition of marriage.

SUMMARY OF ARGUMENT

This Court is no stranger to challenges against anti-discrimination statutes rooted in the First Amendment or other individual liberties. For most of the past century, it has rightly and repeatedly refused to afford Constitutional protection to "invidious private discrimination." But we cannot ignore this country's relationship with private and state-sanctioned discrimination, lest we dare to repeat it. Nor can we fool ourselves into thinking such discrimination is relegated to the past.

Fortunately, this case does not present a true First Amendment question, as there is no "speech" at issue. The undisputed fact is that Mr. Phillips refused to serve Mr. Craig and Mr. Mullins before there was any talk of design or message. Mr. Phillips did not refuse to convey a specific message—he refused to serve specific people, based on their membership in a specific, protected class. The theory that providing service to members of a protected class constitutes a compelled endorsement of those individuals or of the class as a whole stretches this Court's First Amendment precedent past its breaking point.

While Petitioners themselves may draw the line at selling wedding cakes to same-sex couples based on Phillips's religious beliefs, Petitioners' proposed interpretation of the law is unbounded by any limiting principle. Nor would the impact of Petitioners' requested relief be limited to Colorado. Forty-five states and the District of Columbia have public accommodations statutes prohibiting discrimination based on race, gender, ancestry, and religion. Twenty of these states join Colorado and the District of Columbia in expressly prohibiting discrimination based on sexual orientation. These statutes and the state and local judicial and administrative remedies they afford have been, and continue to be, essential in advancing states' compelling interests in eradicating private discrimination and securing for their citizens equal access to public accommodations.

A victory for Petitioners on the facts of this case would therefore have far reaching consequences, undermine decades of civil rights progress, and

eviscerate public accommodation statutes across the country. The First and Fourteenth Amendments cannot logically permit, let alone mandate, such a result. *Amici* respectfully urge the Court to affirm the decision of the Colorado Court of Appeals.

ARGUMENT

I. Enactment and enforcement of civil rights and public accommodation laws have been fundamental to bending the arc of history toward justice.

"The nature of injustice is that we may not always see it in our own times." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). Indeed, a brief review of this country's record on civil rights demonstrates how public opinion of race-based discrimination has substantially evolved over decades—once state-sanctioned and widely embraced (often on religious grounds), such discrimination is almost universally viewed from our present vantage point as contrary to "deeply and widely accepted views of elementary justice." *See* U.S. Br. 32 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 592, 604 (1983) (denying tax-exempt status to private schools that prescribed and enforced racially discriminatory admission standards on the basis of religious doctrine)).

But progress was not made overnight. Almost immediately after the Civil War and passage of the Thirteenth Amendment, Congress passed the first federal public accommodation law, Section 1 of the Civil Rights Act of 1875. The Act, which resembles current public accommodation laws, was enacted on

the basis of the Thirteenth and Fourteenth Amendments. It provided that:

> all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Civil Rights Act of 1875, 18 Stat. 335.

In the years leading up to its passage, the bill was hotly contested in Congress. Opponents branded it an "unconstitutional attempt to legislate social equality" that would "vex white men, North and South" and "expose the black man to more persecution." John Hope Franklin, *The Enforcement of the Civil Rights Act of 1875*, 6 Prologue: J. Nat'l Archives 225, 226 (1974); *see also* Cong. Rec. 982 (1875) (statement of Sen. Chittenden). Once signed into law, the U.S. Justice Department essentially ignored and refused to enforce it. *Franklin*, at 228. Providing insight to a majority of white public opinion at the time, the *New York Times* argued that

> white southerners . . . would close their businesses rather than comply with the provisions of the act. There would be little trouble in the North, the paper predicted, largely because the blacks are so great a minority that "they will hardly deem it

> prudent to force themselves into first-class hotels or restaurants . . . . As a rule, the negroes in this part of the country are quiet, inoffensive people who live for and to themselves, and have no desire to intrude where they are not welcome. In the South, however, there are many colored men and women who delight in 'scenes' and cheap notoriety."

Id. at 226 (quoting *Can the Civil Rights Law be Enforced?*, N.Y. Times, Mar. 06, 1875).[2] A mere eight years after enactment, Congress's attempt to prohibit racial discrimination in places of public accommodation was held to be unconstitutional. *Civil Rights Cases*, 109 U.S. 3 (1883) (holding that such discrimination was not a "badge of slavery" under the Thirteenth Amendment, and that it amounted to private, rather than state-sanctioned, discrimination and thus fell outside the purview of the Fourteenth Amendment). Race relations in the country continued to be plagued by states' segregationist "Jim Crow" laws and "separate but equal" treatment of white and black Americans in public schools, public places, and public transportation for much of the following century. *See, e.g.*, *Plessy v. Fergusson*, 163 U.S. 537 (1896),

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[2] The NY Times article also quoted former Chief Justice Lochrane, of Georgia, "who is regarded as one of the most liberal men in the South," as stating: "We would ride in wagons or walk, live in boarding-houses or starve, live without a laugh or public entertainment, rather than be dictated to, and forced to mingle with an element inferior, ill-bred, ignorant, and forced by law upon us."

overruled by Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

Following the *Civil Rights Cases*, many other states adopted their own public accommodations statutes. But it took decades of civil rights protests and legal challenges to undermine the Jim Crow system and turn a majority of public opinion against segregation. This Court played a key role, with cases such as *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that participation in primary elections cannot be denied on the basis of race); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that courts cannot enforce racial covenants on real estate); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that a state law school could not deny admission to black applicants on the basis of race where such education was not available in a separate law school offered by the state); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (holding that black graduate student was entitled to same treatment by state school as students of other races); *Boynton v. Virginia*, 364 U.S. 454 (1960) (upholding right of black interstate traveler to be served without discrimination by restaurant at bus terminal); and, of course, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (holding that race-based segregation in public schools violates the Equal Protection Clause).

Momentum for racial equality as a social, political, economic, and moral issue continued to gain in the 1950s and 1960s, aided by the protests, sit-ins, and Freedom Rides of the Civil Rights Movement. Nearly a century after enactment of the previous federal public accommodations statute, President Kennedy called for a new Civil Rights Act, which

President Johnson signed into law in 1964. Title II of that Act establishes the right of "[a]ll persons . . . to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a. To protect it from suffering the same fate as the 1875 Act, Congress enacted the 1964 Act on the basis of its Commerce Clause powers, rather than pursuant to the Thirteenth or Fourteenth Amendments.

Even as the Act invalidated *de jure* segregation, business owners immediately sought cover under the Constitution to continue private race-based discrimination, challenging Congress's authority to "compel them to use their privately owned businesses to serve customers whom they did not want to serve." *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964) (upholding application of Title II to motel that refused lodging to black people); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding application of Title II to restaurant that served food to black customers for takeout but did not permit black customers to dine at the restaurant.).

Over the years, the Civil Rights Act of 1964 and similar statutes have also survived challenges alleging that anti-discrimination statutes represent an invasion of individual liberties; namely of the First Amendment rights to free speech, association, and exercise of religion. *See, e.g.*, *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966) ("This Court refuses to lend credence or

support to [defendant's] position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs."), *rev'd on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) ("Indeed, this is not even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable, ... [including] defendants' contention that the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'");[3] *see also* Section IV, *infra*.

II. Similar to race-based discrimination, discrimination based on sexual orientation has posed "unique historical, constitutional, and institutional concerns."

Amicus U.S. Department of Justice ("DOJ") acknowledges that states have a "fundamental, overriding interest in eliminating private racial discrimination." U.S. Br. 32 (quoting *Bob Jones Univ.*, 461 U.S. at 604). It contends, however, that "[t]he same cannot be said for opposition to same-sex marriage" because "opposition to same-sex marriage 'long has been held—and continues to be held—in

[3] While the district court concluded that the defendant's drive-in restaurants did not fall within the Act's definition of "places of public accommodation," the Fourth Circuit reversed and instructed the district court to award attorneys' fees that would compensate plaintiffs for expenses needlessly incurred by defendant's frivolous Free Exercise claims. *Newman*, 377 F.2d at 438, *aff'd*, 390 U.S. 400.

good faith by reasonable and sincere people.'" *Id.* (citing *Obergefell*, 135 S. Ct. at 2594, 2602). DOJ also suggests that, unlike racial discrimination, sexual orientation discrimination is not a "'familiar and recurring evil' that poses 'unique historical, constitutional, and institutional concerns.'" *Id.* (citing *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017)).

But discrimination based on race and sexual orientation have followed remarkably similar paths. Just as Petitioners base their opposition to same-sex marriage on their deeply held religious and moral beliefs, so too did people who, at a different time, were likely viewed by the society around them as "reasonable and sincere people" oppose racial integration. Indeed, the same year that the Civil Rights Act of 1964 was signed into law, the Circuit Court of Caroline County, Virginia, affirmed criminal sentences against Mildred and Richard Loving for violating Virginia's ban on interracial marriages, writing:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Loving v. Virginia, 388 U.S. 1, 3 (1967) (citing opinion of Circuit Court of Caroline County); *see also Bob Jones Univ.*, 461 U.S. at 582 (holding that IRS's revocation of tax exempt status for school with religiously-based policy against interracial dating did

not violate the Free Exercise and Establishment Clauses of the First Amendment.); *Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144 (4th Cir. 1980) (private school opposed interracial dating, purportedly on religious grounds).

And this Court recently summarized the historical, constitutional, and institutional harms of sexual orientation-based discrimination in *Obergefell v. Hodges*:

> Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.
>
> For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.

135 S. Ct. at 2596 (citations omitted); *see also Bowers v. Hardwick*, 478 U.S. 186 (1986) (affirming the constitutionality of Georgia law criminalizing same-sex intimacy); *Paddock Bar, Inc. v. Div. of Alcoholic Beverage Control*, 46 N.J. Super. 405, 408 (App. Div. 1957) ("Assuredly, it is inimical to the

preservation of our social and moral welfare to permit public taverns to be converted into recreational fraternity houses for homosexuals or prostitutes."). States have a compelling interest in eliminating "this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments," whether based on race, sexual orientation, or any other protected trait. S. Rep. No. 88-872, at 15-16 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370.

III. Meaningful and enforceable state public accommodations laws have been and continue to be necessary in securing equal access.

In spite of the disgraceful history of Jim Crow laws and other efforts by some states to preserve and advance institutionalized discrimination, many states have been leaders in the fight for civil rights. The District of Columbia, Kansas, Massachusetts, and New York all enacted laws prohibiting discrimination in public accommodations even before this Court held the Civil Rights Act of 1875 unconstitutional. After the *Civil Rights Cases*, many more states stepped up to fill the void left by federal law.

By the time Congress enacted the Civil Rights Act of 1964, 31 states and the District of Columbia had statutes prohibiting racial discrimination in places of public accommodation. *See* Wallace F. Caldwell, *State Public Accommodations Laws, Fundamental Liberties and Enforcement Programs*, 40 Wash. L. Rev. 841, 843 (1965) (listing states with public accommodation statutes and dates of

enactment). Today, all but five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—have public accommodations laws prohibiting discrimination based on race, gender, ancestry, and religion.

State public accommodations statutes offer potent remedies tailored to their communities' values, and they are frequently much broader than federal law with respect to the classes protected and the entities covered. The D.C. Human Rights Act of 1977, for example, prohibits discrimination in public accommodations based on 18 protected traits, including sexual orientation.[4] Twenty other states join Colorado and D.C. in expressly prohibiting discrimination in places of public accommodation on the basis of sexual orientation.[5] And, similar to

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[4] D.C. Code §2-1402.31 (prohibiting discrimination on the basis of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business).

[5] California (Cal. Civ. Code § 51); Connecticut (Conn. Gen. Stat. §§46a-64, 81d); Delaware (Del. Code tit. 6, §4504); Hawaii (Hawaii Rev. Stat. §489-3); Illinois (Ill. Comp. Stat. Ch. 775, §5/1-102); Iowa (Iowa Code §216.7); Maine (Me. Rev. Stat. tit. 5, §§4552, 4591); Maryland (Md. Code, State Gov't §20-304); Massachusetts (Mass. Gen. Laws Ch. 272, §98); Minnesota (Minn. Stat. §363A.11); Nevada (Nev. Rev. Stat. §651.070); New Hampshire (N.H. Rev. Stat. §354-A:17); New Jersey (N.J. Stat. §10:5-12); New Mexico (N.M. Stat. §28-1-7(f)); New York (N.Y. Civil Rights Law §40-c); Oregon (Or. Rev. Stat. §659A.403); Rhode Island (R.I. Gen. Laws §11-24-2); Vermont (Vt. Stat. tit. 9, §4502); Washington (Wash. Rev. Code §49.60.215); Wisconsin (Wis. Stat. §106.52). Where state anti-discrimination laws do

Colorado's Anti-Discrimination Act, Colo. Rev. Stat. §24-34-301 *et seq*., ("CADA"), the D.C. Human Rights Act broadly defines "place of public accommodation" to include "wholesale and retail stores, and establishments dealing with goods or services of any kind." D.C. Code § 2-1401.02(24).

Remedies under state statutes also tend to be more widely accessible to victims of discrimination, as claims can typically be brought before local administrative tribunals. For example, in this case, Mr. Craig and Mr. Mullins filed charges of discrimination under CADA with the Colorado Civil Rights Division. Following the Division's finding of probable cause, the Colorado Civil Rights Commission filed a formal complaint with Colorado's Office of Administrative Courts, and Mr. Craig and Mr. Mullins intervened. The District of Columbia and other jurisdictions similarly have administrative offices and remedies that are often more accessible, faster, less expensive, and less burdensome than proceedings in federal court.

Preservation of the remedies and accessibility afforded by state statutes are essential to combatting unlawful discrimination in public accommodations,

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not expressly cover sexual orientation, there are often city ordinances that fill the void. *See, e.g.*, Philadelphia Commission on Human Relations, The Philadelphia Fair Practices Ordinance: Prohibitions Against Unlawful Discrimination, Chapter 9-1100 of the Philadelphia Code, *available at* http://bit.ly/2xsUHyN. Since 2015, the Philadelphia Commission on Human Relations has received 36 complaints of sexual orientation based discrimination in employment, housing, and public accommodations.

employment, housing, education, and other areas. Despite progress that has been made over the last 50 years, *amici* continue to represent victims of wrongful discrimination in public accommodation cases against restaurants, hotels, health clubs and spas, rental car franchises, and taxicab companies. *Amici* and civil rights organizations like them depend on meaningful enforcement of anti-discrimination statutes like CADA to achieve for their clients non-discriminatory access to public accommodations.

A 2016 study found that, for each year between 2008 and 2014, "on average, 93 complaints of sexual orientation or gender identity public accommodations discrimination were filed nationally, across all 16 states that provided data." The Williams Institute, *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity*, 1 (Feb. 2016), available at http://bit.ly/2yLMSFz. Aggregating all available state-level data, the study also found that public accommodation laws "are used by LGBT people at rates similar to the use of non-discrimination laws by people of color[.]" *Id.* Consistent with these findings, the D.C. Office of Human Rights reports that it docketed 45 cases in 2016 involving discrimination in places of public accommodation within the District, seven of which involved race-based discrimination, and another four of which involved sexual-orientation discrimination. Office of Human Rights, District of Columbia, *Highlights of Fiscal Year 2016*, at 8 *available at* http://bit.ly/2y7eTpb.

Despite this reality, Petitioners contend that application of CADA is not necessary to advance

Colorado's interest in ensuring "goods and services . . . are available to all of the state's citizens" and point to a law review article that found "[t]here is no evidence of widespread denials of service to gay customers." Pet. Br. at 50 (citing Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 Ind. L.J. 693, 721 (2017)). This not only ignores historical and widespread social and institutional discrimination against gays and lesbians, it also fails to acknowledge that any current lack of widespread denials might prove, rather than disprove, the success and value of anti-discrimination laws. It also ignores the same article's acknowledgment that the lack of evidence might result from "gays and lesbians . . . avoid[ing] situations where they are refused service by cloaking their sexual identity or consciously avoiding businesses that discriminate." Oman at 721. Forcing people to hide their identity or avoid businesses that discriminate is precisely what CADA and similar anti-discrimination laws aim to address.

Petitioners also attempt to minimize the state's interest in eliminating sexual orientation discrimination by pointing to the fact that Mr. Craig and Mr. Mullins were ultimately able to acquire a wedding cake from another baker after Mr. Phillips refused to serve them. This not only smacks of "separate but equal," it is beside the point. As this Court has rightly recognized, "[d]iscrimination 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. . . ."

Heart of Atlanta Motel, 379 U.S. at 292 (Goldberg, J., concurring) (citing S. Rep. No. 88-872, at 16).

Petitioners try to appropriate the dignitary harm in this instance in their own favor, but they mischaracterize the facts at hand: The Commission did not "brand as discriminatory Phillips's core religious beliefs, compel him to stop creating his wedding designs, and ostracize him has a member of the community." Pet. Br. at 55. Mr. Phillips has the right to hold his religious beliefs—indeed CADA even protects him from discrimination on the basis of those beliefs. But Mr. Phillips's company does not have the right to refuse service to others based on their identity.

Petitioners assert that the business's refusal to sell wedding cakes to same-sex couples does not amount to "your kind isn't welcome here" discrimination, because Mr. Phillips offered to sell Mr. Craig and Mr. Mullins anything else in his shop. Pet. Br. at 51. But this Court rejected that argument fifty years ago. *Katzenbach v. McClung*, 379 U.S. 294 (restaurant that refused to allow black customers to dine in but offered food for take-out violated public accommodation provision of Civil Rights Act). Other courts have similarly dismissed this argument. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013) ("Elane Photography's willingness to offer some services to Willock does not cure its refusal to provide other services that it offered to the general public.").

IV. The First Amendment does not affirmatively protect "invidious private discrimination."

Amici acknowledge the value of protecting what may be an "unpopular" message, and the importance of accommodating religious beliefs, for "[t]he Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 444–45 (1963). Indeed, *amici* and the attorneys supporting them have represented many people who have faced discrimination based on their exercise of their right of free expression, particularly including expression of religious beliefs.

But "[i]nvidious private discrimination . . . has never been" and should not now be "accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973). This Court has recognized, for example, that "parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable," but that "it does not follow that the *practice of excluding* racial minorities from such institutions is also protected by the same principle." *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (emphasis added); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that application of Title VII to prohibit law firm from excluding women from partnership did not infringe constitutional rights of expression or association.).

In any event, this case does not require the Court to choose between anti-discrimination laws and the First Amendment. Petitioners' conduct does not implicate "free speech." Tellingly, there was no discussion of any design or message before Mr. Phillips refused to serve Mr. Craig and Mr. Mullins based solely on their identity as gay customers. His refusal to serve them was no more an act of "free speech" than would be refusal to serve a customer or hire an employee based on race, sex, religion, national origin, disability, veteran's status, or any other subject matter that could in theory be the subject of some expression.

This case is therefore easily distinguished from the examples in Petitioners' brief, each of which involved a refusal to create a product conveying an express message that the service provider did not wish to convey, rather than refusal to serve a customer that the service provider did not wish to serve. *See, e.g.*, *Jack v. Azucar Bakery*, Charge No. P20140069X (Colo. Civil Rights Div. Mar. 25, 2015); *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015); *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015). In those cases, the bakeries declined to create bible-shaped cakes *inscribed* with derogatory *messages* about homosexuality. Notably, two of the bakeries offered to make the bible-shaped cakes without the objectionable message, and the third simply declined to make the cake "as envisioned" by the patron.

With respect to any inherent "celebratory" message of wedding cakes in general, nobody is asking Mr. Phillips personally to celebrate anybody's

wedding. Reasonable people understand that he is not a part of the wedding, and that he sells wedding cakes to people for profit so that they may celebrate their event.

Petitioners' strained efforts to analogize this case to the Court's "compelled speech" precedent misunderstand those narrow holdings. The government is not forcing Petitioners to allocate space on their cakes to accommodate a non-customer's third party message. *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 9-21 (1986) (plurality opinion); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974). "The compelled-speech violation in each of [these] prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006).

Nor is Colorado forcing Petitioners to speak the government's message. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977). Colorado neither requires Phillips to bake wedding cakes nor prohibits him from baking wedding cakes. Nor does it dictate any aspect of the design of his cakes, other than that he must make cakes for same-sex couples that are "similar" to the cakes he makes for heterosexual couples. Colorado reasonably requires that anyone who chooses to operate his business "for purposes of commercial gain by offering goods or services to the public must stick to his bargain." *Heart of Atlanta Motel*, 379 U.S. at 284 (Douglas, J., concurring). If Petitioners wish to profit economically from their

cake-baking business, it is fair for the state to require that they not cut others out of economic participation based solely on their identity.

V. Contorting First Amendment precedent to bake into public accommodation laws a broad right to discriminate would undermine enforcement of state and federal civil rights laws.

A victory for Petitioners here would severely undermine public accommodations statutes prohibiting discrimination on the basis of race, gender, sexual orientation, or any other protected status. Petitioners in this case may decide to draw the line at selling wedding cakes to same-sex couples, but this limitation is not compelled by their interpretation of the First and Fourteenth Amendments.

Petitioners' theory is not limited to wedding cakes. Any number of businesses that sell goods or services related to weddings could claim that their involvement conveys a message against their will that they personally endorse and celebrate each wedding—such as the photographer who captures images of the wedding and uses artistic judgment to edit and select photographs; the florist, who creates arrangements to beautify the ceremony and reception; the D.J., band, or wedding singer, who create playlists and perform celebratory and romantic music for the wedding; the custom lighting service, which may display the couple's monogrammed initials; the caterer, who customizes a menu and prepares food for the couple's first married meal; or the limo rental company, which symbolically

carries the couple away after the wedding, often adorned with the message "Just Married!" Each of these professionals' goods or services contributes as much to a couple's celebration of its wedding as a cake maker, and their goods or services can involve as much "expression" as a wedding cake.

Amici for Petitioners themselves demonstrate the expansive application of Petitioners' requested interpretation of law: For example, DOJ would extend a license to discriminate to jewelers that make wedding rings. U.S. Br. 27. Other *amici* observe that "[t]he owner of a chartered bus service—plainly not engaging in speech—may be asked to transport guests to a same sex wedding. He is, in our view, similar to the creator of ceremonial cakes, to an artistic florist, or to any artist commissioned by a same-sex couple." Br. of the National Jewish Commission on Law and Public Affairs ("COLPA") Filed on Behalf of Orthodox Jewish Organizations as *Amicus Curiae* in Supp. of Pet'rs at 3; *see also* Br. of Agudath Israel of America as *Amicus Curiae* in Supp. of Pet'rs at 3 (noting that because Jewish law prohibits homosexual practices and aiding and abetting forbidden practices, it is "quite likely that an Orthodox Jewish baker would refuse to design and bake a cake for an event celebrating a marriage of two men, and it is likely that an Orthodox Jewish caterer would refuse to prepare food for it, and that Orthodox Jewish photographers, musicians, printers, florists, etc. would refuse to provide their services.").

Petitioners assume that "few cake artists (or other expressive professionals, for that matter) will decline to celebrate same-sex marriages because anyone who follows that path must be willing to

endure steep market costs and the hostile opposition that people like Phillips have experienced." Pet. Br. at 54-55. Setting aside the fact that Phillips was not asked to "celebrate" Craig and Mullin's marriage, Petitioners have no basis to speculate as to what other professionals would do absent enforceable anti-discrimination laws. And, in fact, a number of professionals—including some of Petitioners' *amici*—have either refused to offer their goods or services to same-sex couples despite state anti-discrimination laws or strongly support such refusal. *See, e.g.*, Br. of 479 Creative Professionals as *Amici Curiae* in Supp. of Pet'rs; *see also* Br. of Aaron and Melissa Klein as *Amici Curiae* in Supp. of Pet'rs (bakery owners that refused to make a cake for a same-sex wedding); [6] Br. of Christian Business Owners Supporting Religious Freedom as Amici Curiae in Supp. of Pet'rs (noting that *amici* Dick and Betty Odgaard refused to rent a wedding venue to a same-sex couple);[7] *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (refusal to photograph a same-sex commitment ceremony); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (refusal to provide floral arrangements to same-sex wedding).

Indeed, Petitioners' theory is not even limited to services that involve some creative or artistic element. Petitioners themselves demonstrate this by arguing not only that Mr. Phillips's creation of the

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[6] *See also Klein v. Or. Bureau of Labor & Indus.*, No. CA A15899 (Or. Ct. App. argued Mar. 2, 2017).

[7] *Odgaard, et al. v. Iowa Civil Rights Comm'n, et al.*, Case No 14-0738, Op. (Iowa Sup. Ct. Jan. 14, 2015).

cake is expressive conduct, but that his *delivery* of the cake is also expressive conduct. Pet. Br. at 24. By this logic, any business could refuse to provide any product or service to a couple planning a same-sex wedding, on the theory that the mere delivery of the product or service could be understood as an endorsement of the couple or the wedding.

Likewise, Petitioners' Free Exercise theory threatens to transform any state public accommodations statute into a non-neutral law that "exclude[s] people with a specific religious belief from a specific vocation." Pet. Br. at 44. For example, the Washington Lawyers' Committee recently helped facilitate a settlement and accessibility initiative to address denial of taxicab services to blind individuals with guide dogs in violation of the D.C. Human Rights Act. Among the reasons cited by drivers for refusing service were religiously-based objections to contact with certain animals. Under Petitioners' theory, application of D.C.'s public accommodations statute in such a case would amount to "target[ing] . . . professionals who have a religious objection" to dogs. Pet. Br. at 45. Such an interpretation would drastically undermine state efforts to eliminate disability-based discrimination.

Just as Petitioners' theory is not limited to weddings or to service of same-sex couples, it is also not limited to sincerely held religious beliefs. Petitioners offer no limiting principle at all. By Petitioners' theory, any provider of goods or services to the public would have an equal First Amendment right to refuse to serve any customer based on a subjective belief that serving a customer implicitly constitutes endorsement of that person's protected

class. The implications of Petitioners' theory are thus alarmingly broad and would harm wide swaths of the public.

People hold a wide range of religious, political, or other private beliefs on issues of race, sex, religion, national origin, and other protected classes. Some hotel owners may sincerely believe that people of different races should not marry. Could they refuse to rent a hotel room to an inter-racial couple? Some auto shop owners may sincerely believe that women should not drive. Could they refuse to service a woman's car? Some restaurant owners may sincerely believe that immigration laws should be more restrictive. Could they refuse to allow immigrants to eat at their restaurants? Some employers sincerely believe that war is evil. Could they refuse to hire a veteran who served honorably in time of war?

People have a right to hold every one of these beliefs and to express them freely, regardless of whether others may disagree or find them offensive. Indeed, a sincerely held belief is not even an element, because there is even a free speech right to express things that one does not believe. Even a baker who sincerely believes that all people should be treated equally could have the right to refuse service on the theory that he should not be compelled to express his belief that all people should be treated equally.

But anti-discrimination laws would become meaningless and useless if this Court were to recognize a First Amendment right to discriminate based on the theory that merely serving a member of a protected class may imply expression of a

particular point of view regarding that class of people. Petitioners' free speech argument is limitless, unmanageable, and wrong.

CONCLUSION

The Colorado Court of Appeals' decision should be affirmed.

Respectfully submitted,

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