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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Suite 800 Denver, CO 80203	
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	**▲COURT USE ONLY▲**
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BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF PETITIONERS-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 those rules. Specifically, the undersigned certifies that:

The brief contains 7,511 words.

C.A.R. 28(k) does not apply to *amicus curiae* briefs.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 32.

/s/ Elizabeth L. Harris
Elizabeth L. Harris

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INTRODUCTION

The Colorado legislature has concluded that public accommodations that do business in the state—but not entities that are "principally used for religious purposes," Colo. Rev. Stat. § 24-34-601(1) (2014)—must serve all customers in a nondiscriminatory way. Nothing in the federal Constitution calls for disturbing that legislative judgment. Allowing commercial businesses to pick and choose their customers without regard to the public accommodations law not only would frustrate the Colorado legislature's judgment, but also would subject lesbians and gay men to considerable uncertainty about which commercial establishments are open to them.

ARGUMENT

I. Excusing Allegedly "Artistic" Commercial Businesses from Complying with Antidiscrimination Laws Would Thwart the Colorado Legislature's Policy Judgment.

The appellants in this case—Masterpiece Cakeshop and its owner, Jack Phillips—argue that the First Amendment allows them to rely on their "sincerely held religious beliefs" to refuse to make wedding cakes for gay customers because cakemaking is an expressive art form. Appellants' Br. at 2, 12–14, 16–17. They argue that the bakery's ability to discriminate is justified because its employees

exercise "creativity and artistic skill" and sell "elaborate and symbolic" cakes. *Id.* at 12, 16. But the bakery is not unique in this respect. If this argument were sufficient to excuse a bakery from complying with Colorado's antidiscrimination statute, a host of other businesses could similarly exempt themselves and the state's goal of protecting equal access by its gay and lesbian residents to the commercial marketplace would be severely undermined.

An array of businesses have raised the "artistry" defense in support of their decisions to discriminate against gay and lesbian customers. For example, a commercial photographer in New Mexico argued that because her business involved "an expressive art form," her free-speech and free-exercise rights entitled her to refuse to photograph a lesbian couple's wedding. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 63 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). Similarly, a florist in Washington cites her religious views in asserting free-speech and free-exercise rights to refuse to "use her professional skill to make an arrangement of flowers and other materials for use at a same-sex wedding." *See* Mem. Decision and Order at 5, *State v. Arlene's Flowers*, No. 13-2-00871-5 (Wash. Super. Ct. Jan. 7, 2015), *available at* http://bit.ly/1CsAIQd.[1] The owners of

[1] All websites cited in this brief were last visited on February 11, 2015.

an art gallery in Iowa argued that being required to provide a wedding venue and planning services for gay couples would violate their rights to freedom of speech, freedom of religious exercise, and freedom of association because they "seek to consistently manifest both their artistic views and religious beliefs through the Gallery." Verified Pet. at ¶ 49, *Odgaard v. Iowa Civil Rights Comm'n*, No. CVCV046451 (Iowa Dist. Ct. Oct. 7, 2013), *available at* http://bit.ly/1ECYBFp. A wedding venue in Idaho similarly claims that it "expresses public messages that promote aspects of its owners' Christian religion" and thus cannot be required to serve gay and lesbian couples. Verified Compl. at ¶ 115, *Knapp v. City of Coeur D'Alene*, No. 2:14-cv-00441 (D. Idaho Oct. 17, 2014), *available at* http://bit.ly/1Ai9JoG. Even a promotional printing company has argued that it has a First Amendment right not to print "Pride Festival" t-shirts for a gay and lesbian organization because its "work is expressive and artistic." *See* Compl. and Notice of Appeal at ¶ 12, *Hands On Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm'n*, No. 14-CI-4474 (Ky. Circuit Ct. Dec. 8, 2014), *available at* http://bit.ly/1vq4W4u. The company explains that "[e]ven when the customer provides already-produced art or designs, [the printing shop's] graphic design artists need to finalize the art [to] print it." *Id*.

Under Masterpiece Cakeshop's reasoning, each of these businesses would be entitled to ignore a public accommodations law. Indeed, "[a]nyone who makes goods might be thought to engage in an artistic endeavor," and "a vast array of individuals providing services" could also be seen as engaging in "artistic or expressive" tasks. Mark Strasser, *Speech, Association, Conscience, and the First Amendment's Orientation*, 91 Denv. U. L. Rev. 495, 525 (2014). Restaurants, hotels, hairdressers, clothing vendors, and other businesses whose proprietors object to deploying their "artistic" services to facilitate a same-sex wedding would be entitled to the same exemption. *See id.* at 529–30; Robin Fretwell Wilson & Jana Singer, *Same-Sex Marriage and Conscience Exemptions*, Engage: J. Federalist Soc'y Prac. Groups, Sept. 2011, at 12, 15–16.

In short, accepting Masterpiece Cakeshop's argument would allow nearly any business alleging similar concerns to discriminate as it pleased. Lesbians and gay men (as well as others protected by antidiscrimination statutes) would not know which businesses were open to them, and could not expect the law to consistently protect their rights to access public accommodations on the same terms as other citizens. Indeed, in some communities, lesbians and gay men planning their weddings "might be forced to pick their merchants carefully, like

black families driving across the South half a century ago." Wilson & Singer, *supra*, at 16–17 (internal quotation marks omitted).

II. The First Amendment Does Not Permit Businesses to Excuse Themselves from Complying with Antidiscrimination Laws.

Given the policy implications discussed above, it should come as no surprise that public accommodations that have sought a First Amendment right to disregard antidiscrimination statutes have met with little legal success. *See Elane Photography*, 309 P.3d at 63 (commercial photography company); Interim Order at 38, 50, *In the Matter of Klein*, Nos. 44-14 & 45-14 (Or. Bureau of Labor and Indus. Jan. 29, 2015), *available at* http://bit.ly/1uYSHWJ (bakery); Order Granting Summ. J. at 16, *Baker v. Hands On Originals, Inc.*, No. 03-12-3135 (Lexington-Fayette Urban Cnty. Human Rights Comm'n Oct. 6, 2014), *available at* http://bit.ly/1EZCcCi (promotional printing company); *N. Coast Women's Care Med. Grp. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959, 967–68 (Cal. 2008) (medical doctors); Findings, Determination, and Order at 11, *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 6145-09 (N.J. Div. On Civil Rights Oct. 22, 2012), *available at* http://bit.ly/1AUGgCu (rented wedding venue); *see also* Grant Rogers, *Grimes' Gortz Haus to Stop All Weddings in Wake of Discrimination Complaint*, Des Moines Register, Jan. 28, 2015, *available at*

http://dmreg.co/1zFij28 (reporting that gallery owners settled Iowa Civil Rights Commission complaint by agreeing not to host only straight couples' weddings). Rightly so. The purposes of the First Amendment are "to preserve an uninhibited marketplace of ideas," *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969), and to reserve from official control "the sphere of intellect and spirit" of the American people, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Requiring a secular commercial establishment—one that does not define itself as a purveyor of any particular message—to serve all individuals does nothing to impede these First Amendment goals. On this point, the various components of the First Amendment speak with one voice: A secular commercial business that provides services to the public has no free-speech, free-exercise, or free-association right that would exempt it from a statute's requirement that it treat customers of all sexual orientations equally.

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

Colorado's antidiscrimination law does not violate the First Amendment by interfering with businesses' symbolic speech about same-sex marriage or by compelling businesses to engage in speech.

1. Antidiscrimination laws do not unconstitutionally restrict symbolic speech.

Antidiscrimination statutes like Colorado's do not burden or restrain business owners' symbolic speech. Neither the act of accepting or turning away customers, nor furnishing baked goods and other similar products to customers, is the kind of activity deemed worthy of symbolic-speech protection under existing First Amendment doctrine.

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

Whatever Masterpiece Cakeshop's motives may be for refusing to sell wedding cakes to gay and lesbian couples, the United States Supreme Court's

decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) [hereinafter *FAIR*], makes it clear that the *act* of selling cakes only to straight couples would not itself be considered symbolic speech. In *FAIR*, a coalition of law schools wished to exclude military recruiters from their on-campus employment fairs to express their disapproval of the military's discriminatory policies against openly gay or lesbian job candidates. *Id.* at 66. The Supreme Court rejected the schools' argument that their actions warranted the First Amendment protection afforded to symbolic speech. The Court reasoned that "[u]nlike flag burning," the law schools' conduct in "treating military recruiters differently from other recruiters" was "not inherently expressive." *Id.* Instead, the "actions were expressive only because the law schools accompanied their conduct with speech explaining it"; without that accompanying speech, "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.* Even a legislator's act of voting for or against a proposed statute falls short of qualifying as symbolic speech. Although the vote "*discloses* … that the legislator wishes (for whatever

reason)" that a measure be adopted, the act of voting itself "symbolizes nothing" and is not "an act of communication" that conveys the legislator's reasons for the vote. *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011).

Likewise, someone who observes that a commercial bakery created a wedding cake for a straight couple or that it did not create one for a gay couple would have no way of knowing whether the bakery's conduct took place because of the bakery owner's views about same-sex marriage, because the bakery lacked the supplies or time to complete both cake orders on time, or because one of the potential customers instead decided to order their cake from a different vendor with a product or price he or she preferred. Therefore, contrary to Masterpiece Cakeshop's contention, the act of "creating wedding cakes *only* for one-man-one-woman" couples does not "powerfully communicate[]" anything, much less the business owner's belief that "marriage is a union between one man and one woman ordained by God, exemplified by Christ's relationship with His Church." Appelants' Br. at 21. Only the bakery's accompanying speech can communicate this sentiment, and "[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien.*" *FAIR*, 547 U.S. at 66. "[T]he fact that a

nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech." *Nevada Comm'n on Ethics*, 131 S. Ct. at 2350.

Masterpiece Cakeshop's assertions that wedding cakes are "the most elaborate and symbolic cakes available," and that they "undoubtedly communicate something about marriage," do not change this analysis or transform the bakery's discriminatory conduct into protected symbolic speech. Appellants' Br. at 12–13. Indeed, even the American flag, which undisputedly has powerful symbolic meanings, is not itself so expressive that a court would "automatically conclude[] … that any action taken with respect to our flag is expressive." *Texas v. Johnson*, 491 U.S. 397, 405 (1989). To the contrary, in determining whether an action is itself symbolic speech, the Supreme Court "consider[s] the context in which [the action] occurs." *Id.* In *Texas v. Johnson*, for example, the Court concluded that Johnson's conduct in "burn[ing] an American flag as part—indeed as the culmination—of a political demonstration that coincided with the convening of the Republican Party" constituted symbolic speech because, given the context, "[t]he expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." *Id.* at 406. By contrast, merely wearing a uniform that,

like many organizations' uniforms, includes a patch of the United States flag, is not symbolic speech if there is "no evidence that observers would likely understand the patch or the wearer to be *telling* them anything about the wearer's beliefs." *Troster v. Penn. State Dep't of Corrections*, 65 F.3d 1086, 1092 (3d Cir. 1995); *see also, e.g., Cotto v. United Tech. Corp.,* 738 A.2d 623, 633 (Conn. 1999) ("Even though the flag is a symbol of government, … [not] every work assignment involving the flag implicates an employee's constitutional rights of free speech.").

However symbolic a wedding cake may be to the couple who orders it or to their guests, Masterpiece Cakeshop's desired course of conduct—providing the cakes to straight customers but not to gay or lesbian ones—does not, as discussed above, actually communicate the bakery owner's personal philosophy of marriage. *See Elane Photography*, 309 P.3d at 68 ("While photography may be expressive, the operation of a photography business is not."). The context of that choice—a commercial establishment subject to a public accommodations law—is such that no observer would understand the bakery's provision of services to be "telling them anything about the [bakery's] beliefs." *Troster*, 65 F.3d at 1092 (emphasis omitted).

By requiring businesses serving the public to provide the same goods and services to gay and lesbian customers that they provide to straight ones, Colorado's antidiscrimination law does not prohibit or restrict any symbolic speech. Neither a business's motivation for noncompliance nor the fact that the business sells items with expressive value transforms discriminatory conduct into constitutionally protected speech.

2. Antidiscrimination laws do not unconstitutionally compel businesses' speech.

Viewing a statute like Colorado's antidiscrimination law through the lens of a compelled-speech claim yields the same result: The statute regulates businesses' conduct; it does not unconstitutionally compel businesses or their owners to speak.

Like the regulation at issue in *FAIR*, Colorado's law does not compel symbolic speech because there is no likelihood that an entity's compliance with the law would be viewed as expression of a message. An observer who sees a bakery furnishing wedding cakes to both gay and straight customers has no way of knowing, for example, whether the bakery does so because it wishes to increase its revenue by serving as many customers as possible, because it values same-sex marriages as much as straight couples' marriages, because it did not inquire about its customers' sexual orientations and does not consider that information relevant

to its business, or because it simply wishes to follow applicable state antidiscrimination laws. *See FAIR*, 547 U.S. at 66 (observer would not be able to determine law schools' motives or views). The only way an observer could discern a motive for these actions would be from the business's accompanying speech, and the statute preserves businesses' prerogative to notify customers that it serves people of all orientations on an equal basis because it is required to do so as a matter of law. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (no compelled speech where business owner "could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law"); *Elane Photography*, 309 P.3d at 69 (same).

Even absent any such express notification, the fact that the Colorado statute prohibits *all* public accommodations from discriminating against gay and lesbian customers makes it especially unlikely that the public would view a particular business's compliance as an expression of its owner's personal views. As the California Supreme Court explained in the context of a case enforcing that state's prohibition on sexual-orientation discrimination, "simple obedience to a law that does not require one to convey a verbal or symbolic message cannot reasonably be seen as a statement of support for the law or its purpose." *N. Coast Women's Care*

Med. Grp., 189 P.3d at 967 (internal quotation marks omitted). If obedience were deemed constitutionally protected speech, "[s]uch a rule would, in effect, permit each individual to choose which laws he would obey merely by declaring his agreement or opposition." *Id.*

Here, too, the constitutional result is not changed by Masterpiece Cakeshop's claim that wedding cakes involve "creativity and artistic skill." Appellants' Br. at 16. The fact that a photography company "sells its expressive services to the public" does not exempt it from antidiscrimination laws. *Elane Photography,* 309 P.3d at 66. The Oregon bakery that refused to make a lesbian couple a wedding cake was similarly unsuccessful in its argument that requiring it to provide the cake would compel it "to engage in expression of a message." Interim Order at 44, *In the Matter of Klein*, Nos. 44-14 & 45-14. The rationale for these results is simple: whether or not a business provides services with expressive elements, nothing in an antidiscrimination statute requires the business to demonstrate its support for same-sex marriage. *Id.* at 48–49; *Elane Photography*, 309 P.3d at 64, 66–67.

As those tribunals held, commercial establishments that seek to discriminate cannot take refuge in *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), in which the

Supreme Court held that a state could not require a resident to display the message "Live Free or Die" on his private vehicle's license plate. *See* Interim Order at 48–49, *In the Matter of Klein*, Nos. 44-14 & 45-14; *Elane Photography*, 309 P.3d at 64. That situation is distinguishable from this one in three salient ways.

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

Second, in *Wooley*, the government co-opted citizens' personal vehicles and in effect "use[d] their private property as a 'mobile billboard' for the State's ideological message." *Wooley*, 430 U.S. at 715. The antidiscrimination statute, however, applies only in the context of enterprises that open their doors to the general public. It governs business transactions conducted in the public sphere, not the use of an individual's private, personal property.

Third, the antidiscrimination statute does not specify any message for dissemination, let alone require one. Nothing about compliance with Colorado's Act requires a bakery or other business to display any particular message about gay people or marriage on its owner's personal belongings or on the company' s websites, signs, or promotional materials. *See* Interim Order at 49, *In the Matter of Klein*, Nos. 44-14 & 45-14 (statute "does not require Respondents to recite or display any message"); *Elane Photography*, 309 P.3d at 68 ("The NMHRA does not require Elane Photography to either include photographs of same-sex couples in its advertisements or display them in its studio."). In contrast, in *Wooley*, the state required a personal vehicle "readily associated with its operator" to advertise a specific message selected by the state. 430 U.S. at 717 n.15. While *Wooley* involved a singular message, the Colorado statute at issue here requires public accommodations to serve a myriad of customers. *Cf. Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981) (by creating a forum in which "many views are advocated," a university "does not thereby endorse or promote any of the particular ideas aired there"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (where school facilities "had repeatedly been used by a wide variety of

private organizations," there is "no realistic danger that the community would think that the [school] was endorsing religion" by allowing religious event).

While a couple might request a particular cake because they find meaning in its design or inscription, Masterpiece Cakeshop offers no evidence that customers and their wedding guests will understand the cake to express the *baker's* views rather than the views of the marrying couple who commissioned the cake. Customers purchase a wedding cake for their own enjoyment and use, not because they want to assist the bakery in expressing itself. *Cf. Elane Photography*, 309 P.3d at 69 ("It is well known to the public that wedding photographers are hired by paying customers and ... may not share the happy couple's views."). A Massachusetts court made this distinction clear in rejecting a family-law attorney's arguments that her right to free speech enabled her to serve only women as clients. The court explained that "the public accommodation at issue here is the client's access to legal rights and remedies, rather than use of [the attorney's] speech and her law office as a vehicle for [the attorney's] own expression." *Nathanson v. Commonwealth of Mass. Comm'n Against Discrimination*, 16 Mass. L. Rptr. 761, at *6 (Mass. Super. Ct. 2003).

Wedding attendees are fully capable of understanding the difference between messages that a bakery promulgates on its own and customers' messages it accommodates because it is legally required to do so; the Supreme Court has held that even "high school students can appreciate the difference between speech a school sponsors and speech the school permits … pursuant to an equal access policy." *FAIR*, 547 U.S. at 65 (citing *Bd. of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens,* 496 U.S. 226, 250 (1990) (plurality opinion); *id.* at 268 (Marshall, J., concurring in judgment); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 841 (1995) (attribution concern "not a plausible fear")); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994) ("Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."); *Nathanson*, 16 Mass. L. Rptr. 761, at *6 ("A private attorney, when representing a client, operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself."). Contrary to the situation in cases like the one before this court, instances in which speech is unconstitutionally compelled "involve direct government

interference with the speaker's own message, as opposed to a message-for-hire." *Elane Photography*, 309 P.3d at 66.

Because antidiscrimination laws like Colorado's neither restrain symbolic speech by commercial businesses nor unconstitutionally compel them to engage in speech, businesses cannot find safe harbor against antidiscrimination statutes in the Free Speech Clause of the First Amendment.

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

A commercial business's discriminatory conduct—even when it is religiously motivated—is not protected by the First Amendment's Free Exercise Clause.

In the early days of the Supreme Court's free-exercise jurisprudence, the stringent standard of *Sherbert v. Verner*, 374 U.S. 398 (1963), prevailed. Under that regime, laws substantially burdening religious exercise were subject to strict scrutiny, even if the laws were equally applicable to non-religious conduct. *Id*. at 403–04, 406. Despite the rigorous *Sherbert* inquiry, courts universally rejected arguments like those advanced by Masterpiece Cakeshop to justify noncompliance with antidiscrimination laws. Thus, in *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court held that the Free Exercise Clause does not

protect a university's discriminatory admissions practices despite the institution's claim that "the challenged practices . . . were based on a genuine belief that the Bible forbids interracial dating and marriage." *Id.* at 602 n.28. Similarly, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the Court characterized a restaurant owner's argument that requiring it to serve African-American patrons "constitutes an interference with the 'free exercise of the Defendant's religion'" as "patently frivolous." *Id.* at 403 n.5 (citation omitted). *See also Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1397–98 (4th Cir. 1990) (rejecting free-exercise argument that defendant was not required to pay male and female employees alike due to belief that "the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family"); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620–21 (9th Cir. 1988) (upholding application of Title VII's prohibition on religious discrimination to company despite owners' free-exercise defense that the practice was required by "the Bible and their covenant with God").

The Supreme Court abandoned *Sherbert*'s strict standard in *Employment Division v. Smith*, 494 U.S. 872 (1990), holding that religiously neutral, generally applicable laws do not implicate the protections of the Free Exercise Clause. *Id.* at

878–79. Under *Smith*, a law that does not target religious exercise "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). There can be little doubt that antidiscrimination laws like Colorado's are neutral and generally applicable, and so pass muster under *Smith*'s relaxed test.[2]

A law lacks religious neutrality if its "object . . . is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. The "object" of proscribing discrimination on the basis of sexual orientation, as with race or gender, is generally understood to be the advancement of a value "embodied in our Bill of Rights—the respect for individual dignity in a diverse population." *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 32 (D.C. 1987); *cf. Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) ("fundamental object of" antidiscrimination law "was to

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[2] Congress restored the *Sherbert* standard as applied to federal law by enacting the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Because Masterpiece Cakeshop's arguments relate to state law, they can draw no support from this more favorable standard. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding RFRA unconstitutional as applied to state and local laws).

vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'"). This goal is a religiously neutral one. Appellants do not suggest, nor is there any evidence to indicate, that the legislature extended Colorado's antidiscrimination law to encompass sexual orientation with the object of burdening religious exercise; indeed, the preamble to the bill itself disavows any such intent. *See* S. 08-200 § 1 (Colo. 2008), *available at* http://bit.ly/1CLEp09.

The requirement of religious neutrality is "interrelated" with *Smith*'s second requirement: that the law apply generally. *Lukumi*, 508 U.S. at 531. Colorado's antidiscrimination law is religiously neutral and applies generally: it forbids all sexual-orientation discrimination, whether motivated by religion, tradition, customers' views, or personal discomfort. And it includes only one exemption: "church[es], synagogue[s], mosque[s], or other place[s] . . . principally used for religious purposes" are excepted from the definition of "public accommodation." Colo. Rev. Stat. § 24-34-601(1) (2014). This exception to the law's otherwise universal application is rooted in the First Amendment's longstanding "special solicitude to the rights of religious organizations" and concern for the autonomy of churches. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.

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

Colorado's antidiscrimination statute is not unique in this respect; because antidiscrimination laws generally share the characteristics described above, courts have overwhelmingly concluded that such laws are neutral and generally applicable and thus not subject to free-exercise challenges. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 697 n.27 (2010) (holding that school policy forbidding discrimination based on sexual orientation was "of general application" and only "incidentally burden[ed] religious conduct," and so Christian student group could not "moor its request for accommodation to the Free Exercise Clause"); *Christian*

Legal Soc'y v. Eck, 625 F. Supp. 2d 1026, 1051 (D. Mont. 2009) (similar); *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 538–39 (W.D. Ky. 2001) (upholding ordinance forbidding employment discrimination based on sexual orientation against Free Exercise challenge), *vacated on standing grounds*, 53 F. App'x 740 (6th Cir. 2002); *Elane Photography*, 309 P.3d at 75 (rejecting wedding photographer's free-exercise challenge to application of antidiscrimination law); *N. Coast Women's Care Med. Grp.*, 189 P.3d at 967 (rejecting free-exercise claim of doctors required by antidiscrimination law to provide insemination treatment to lesbian patient); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279 (Alaska 1994) (upholding enforcement of antidiscrimination law against free-exercise claim of landlord required to rent to couple regardless of marital status); *Smith v. Fair Emp't & Hous. Com.*, 913 P.2d 909, 919 (Cal. 1996) (same); *See also* Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 Nw. J. L. & Soc. Pol'y 274, 287–88 (2010) ("Because protections for same-sex couples do not specifically target religious conduct or motives, the Free Exercise Clause offers no support for exemption claims.").[3]

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[3] Courts' reluctance to accept the Free Exercise Clause as a justification for discriminatory actions extends well beyond the commercial context. *See, e.g.*, *King v. Governor of N.J.*, 767 F.3d 216, 241–43 (3d Cir. 2014) (upholding ban on purportedly therapeutic efforts to change the sexual orientation of gay minors as

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

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

Id. at 706.

A bakery may not justify refusing service to same-sex couples on the same basis; plainly, no comparable religious-exercise values are at stake with a commercial establishment, as opposed to a church or associated religious institution, and where customers rather than ministers are concerned. *See id*. As the

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applied to religiously motivated counselors); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 879–80 (11th Cir. 2011) (upholding requirement that graduate student with religious objection comply with professional ethics rules regarding treatment of lesbians and gay men); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1188 (9th Cir. 2006) (upholding school policy forbidding student to wear shirt displaying messages denigrating gay people despite student's religious motivation), *vacated as moot*, 549 U.S. 1262 (2007).

Supreme Court has recognized, "a labor union, or a social club" ought not to receive the same free-exercise protections as "the Lutheran Church." *Id.* A commercial establishment like Masterpiece Cakeshop has even less of a claim to a cohesive ideological identity than a labor union or social club. The bakery's claim is too far afield from the Free Exercise Clause's core concern of "interference with . . . internal church decision[s]"; the claim instead pertains "only [to] outward physical acts." *Id.* at 707.

With respect to such outward physical acts, as the Supreme Court observed in *Smith*, "'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,'" and thus "cannot afford the luxury" of permitting religious objectors to shrug off "civic obligations" whenever they conflict with religious beliefs. *Smith*, 494 U.S. at 888 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)). The responsibility of business owners to accord "individual dignity," *Gay Rights Coal. of Georgetown Univ. Law Ctr.,* 536 A.2d at 32, to all comers is not, and never has been, contingent upon consistency with the owners' religious beliefs.

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

Even if Masterpiece Cakeshop had framed its objection to the antidiscrimiation law as a violation of its right to freedom of association—as many other businesses in similar situations have—the Constitution still would not permit it to discriminate against gay and lesbian customers. Art gallery owners in Iowa, for example, claimed that the Iowa Civil Rights Act would infringe their freedom of association by requiring the gallery to host gay couples' weddings as well as those of straight couples. *See* Verified Pet. at ¶¶ 171–76, *Odgaard v. Iowa Civil Rights Comm'n*, No. CVCV046451. An organization in New Jersey has similarly argued that requiring it to rent its pavilion for gay couples' commitment ceremonies on the same bases as it does for straight couples' weddings would violate its right to freedom of association. *See Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo*, 339 F. App'x 232, 235 (3d Cir. 2009).

These arguments, like appeals to freedom of speech or free exercise of religion, do not excuse a business's noncompliance with antidiscrimination laws. Freedom-of-association doctrine holds firm to the notion that an entity's right to discriminate diminishes when inclusion would neither invade an association of the

most intimate and exclusive variety nor compromise the entity's ability to propound a message.

Supreme Court precedent "afford[s] constitutional protection to freedom of association in two distinct senses." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). First, "the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Id.* Second, it protects freedom of expressive association—"the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities." *Id.* Neither variety of protected association is infringed when a state prohibits commercial enterprises from discriminating against gay and lesbian customers.

1. Antidiscrimination statutes do not burden intimate association rights.

The Supreme Court "has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The interactions between a business and its customers, however, lie far afield from the intimate, personal relationships afforded this protection.

The paradigmatic instance of an intimate association is found in relationships attending the creation and sustenance of a family—including that between spouses or the relationship between a parent and a child—which inherently "involve deep attachments and commitments to the necessarily few other individuals with whom one shares … distinctively personal aspects of one's life." *Id.* at 619–20. In determining whether the right of intimate association will be extended beyond the context of family, courts "consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Rotary Int'l*, 481 U.S. at 546. Thus, protected associations are distinguished by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Roberts*, 468 U.S. at 620. Under this analysis, some courts have found close personal friendships or unmarried couples' romantic relationships to constitute intimate associations worthy of protection. *See, e.g., Matusick v. Erie Cnty. Water Auth.*, 757 F.3d 31, 58–59 (2d Cir. 2014) (couple engaged to marry); *Anderson v. City of LaVergne*, 371 F.3d 879, 882 (6th Cir. 2004) (unmarried couple living together in romantically and sexually monogamous relationship);

Akers v. McGinnis, 352 F.3d 1030, 1039–40 (6th Cir. 2003) (close personal friendship).

In contrast, “an association lacking these [insular] qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection.” *Roberts*, 468 U.S. at 620. Indeed, the Supreme Court considers it “clear beyond cavil” that patrons of a commercial dance hall, for example, are not afforded the Constitution’s protection of intimate human relationships. *Stanglin*, 490 U.S. at 24. Even the relationships between coworkers, coaches and sports team members, and psychoanalysts and their patients fall short of intimate association. *See Roberts*, 468 U.S. at 620; *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1051–52 (5th Cir. 1996); *Nat’l Ass’n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000). Given this case law, the interactions between Masterpiece Cakeshop and its customers simply cannot be characterized as involving intimate associations.

2. Antidiscrimination statutes do not unconstitutionally burden freedom of expressive association.

Although the Constitution does not expressly declare a right to associate for expressive purposes, the Supreme Court has extended First Amendment protection to this activity based on its recognition that “[t]he right to speak is often exercised

most effectively by combining one's voice with the voices of others." *FAIR*, 547 U.S. at 68. Without this protection, "the government [would be] free to restrict individuals' ability to join together and speak, [and] it could essentially silence views that the First Amendment is intended to protect." *Id.* Because the right to expressive association is intended to safeguard the underlying right to speak, an organization asserting a violation of its expressive association rights must first demonstrate that it engages in expressive activity through its interactions, and then must also show that the alleged violation significantly impacts the organization's ability to advocate its viewpoints. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648, 650 (2000). Businesses like Masterpiece Cakeshop can meet neither of these requirements.

First, to come within the ambit of a constitutional right to expressive association, "a group must engage in some form of expression." *Id.* at 648. While political advocacy groups clearly satisfy this standard, *see, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), "the right of expressive association [also] extends to groups organized to engage in speech that does not pertain directly to politics." *Stanglin*, 490 U.S. at 25. The Boy Scouts of America, for example, engage in expressive activity by seeking to transmit a particular

system of values to young people, both expressly and by example. *Boy Scouts of Am.*, 530 U.S. at 649–50. Groups like the Jaycees are likewise organized to "engage in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment." *Roberts*, 468 U.S. at 626–27.

Enterprises like Masterpiece Cakeshop, however, are in the business of producing goods and services in exchange for payment, not of bringing people together to promote the businesses' viewpoints or messages. While a bakery's interactions with customers "might be described as 'associational' in common parlance … they simply do not involve the sort of expressive association that the First Amendment has been held to protect." *Stanglin*, 490 U.S. at 24. Like the guests of the commercial dance hall at issue in *Stanglin*, a retail bakery's customers are mostly strangers to one another and "are not members of any organized association; they are patrons of the same business establishment." *Id.*

Second, even if a business could show that its customers affiliate with it to express a shared message, the right to expressive association would only be implicated by an associational requirement that imposed "serious burdens" on the group's "collective effort on behalf of its shared goals." *Roberts*, 468 U.S. at 622,

626. A majority of the Supreme Court held, for example, that requiring the Boy Scouts—an organization that exists to instill values in youths and has official policies declaring homosexuality immoral—to appoint openly gay adults as troop leaders would "significantly burden" the Boy Scouts' ability to convey its preferred messages to the organization's younger members. *Boy Scouts of America*, 530 U.S. at 653. Requiring a parade organizer to include a contingent marching under a banner with which the organizer disagrees likewise infringes the organizer's decision not to propound a particular view. *Id.* at 653–54 (discussing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557 (1995)).

But where such a substantial burden does not exist, an entity cannot "erect a shield against laws requiring access simply by asserting that mere association would impair its message." *FAIR*, 547 U.S. at 69 (internal quotation marks omitted). The Supreme Court has held that even groups like the Rotary Club—a non-profit organization with a longstanding policy of allowing full membership only to men—have no free-association right to refuse female members if they cannot "demonstrate that admitting women … will affect in any significant way the existing members' ability to carry out their various purposes." *Rotary Int'l*, 481 U.S. at 548; *see also Roberts*, 468 U.S. at 627 (finding "no basis in the record for

concluding that admission of women … will impede the organization's ability to engage in … protected activities or to disseminate its preferred views"); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (law firm did not show how its protected activity "would be inhibited by a requirement that it consider [a woman lawyer] for partnership on her merits").

A requirement that commercial enterprises serve gay and lesbian customers on the same terms as straight ones does not create relationships that impede the businesses' ability to engage in any of their own constitutionally protected activities. As explained above, a retail business's interactions with its customers are so limited in scope and duration that observers are not likely to confuse the views or messages of a customer for those of the business. Here, too, *Rumsfeld v. FAIR* is instructive. In *FAIR*, the Supreme Court held that the expressive association rights of law schools receiving federal funds were not infringed by a requirement that the schools allow military recruiters the same access to their campuses as other recruiters. 547 U.S. at 70. The Court reasoned that although the schools "'associate' with military recruiters in the sense that they interact with them[,] … recruiters are not part of the school." *Id.* at 69. They are, instead,

"outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." *Id.* A retail bakery and its customers likewise interact, but the customers are not part of the bakery. Members of the public become bakery customers for the limited purpose of obtaining baked goods—not because they wish to ally themselves with the bakery's ideological identity.

Thus, it is no surprise that courts have routinely rejected freedom-of-association challenges to laws that require individuals or establishments to engage in arm's-length business transactions. *See, e.g., Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 269–70 (D.C. Cir. 2014) ("interacting with coverage providers that must make contraceptive coverage available … does not make those providers part of the organization's expressive association or otherwise impair its ability to express its message"); *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010) (requiring groups to coordinate with City officials to arrange for use of space inside City Hall does not significantly burden right of association); *cf. Fields v. City of Tulsa*, 753 F.3d 1000, 1012 (10th Cir.) (police officer's freedom of association not infringed by order regarding attendance at Islamic Society event because officer "was never required to be anything more

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

Ultimately, the Colorado statute at issue here requires the bakery to engage in nothing more than arm’s-length business transactions with gay and straight customers alike. That transaction is neither intimate nor sufficiently expressive to warrant free-association protections.

CONCLUSION

Colorado and other states have enacted antidiscrimination laws to ensure that when gay and lesbian residents visit commercial businesses, they will not endure “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” *Heart of Atlanta Motel*, 379 U.S. at 250 (internal quotation marks omitted). The First Amendment does not grant a business like Masterpiece Cakeshop license to thwart that objective by picking and choosing which customers it will serve.

Respectfully submitted,

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I certify that on this 13th day of February, 2015, a true and correct copy of the foregoing Brief of *Amici Curiae* was filed with the Colorado Court of Appeals via ICCES and served via ICCES, on the Colorado Civil Rights Commission and the parties and/or their counsel of record as follows:

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