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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Appeal from the Colorado Civil Rights Commission Department of Regulatory Agencies 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** ▲ Case No. 2014CA1351
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BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

CERTIFICATE OF COMPLIANCE

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

Specifically, the undersigned certifies that:

- The brief complies with C.A.R. 28(g). It contains 5,412 words and does not exceed 30 pages.
- I acknowledge that my brief may by stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Lauren E. Schmidt
Lauren E. Schmidt

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INTEREST OF THE AMICUS

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that, for nearly 75 years, has fought to enforce the guarantees of the United States Constitution against discrimination. *See*, *e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Since its inception, LDF has worked to eradicate barriers to the full and equal enjoyment of social and political rights, including those arising in the context of discrimination in places of public accommodation, *see, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968), and in the context of partner or spousal relationships, *see*, *e.g.*, *McLaughlin v. Florida*, 379 U.S. 184 (1964). Moreover, LDF has participated as *amicus curiae* in cases across the nation that affect the rights of gay people, including *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Bostic v. Schaefer*, No. 14-1167 (4th Cir. Apr. 18, 2014); *Jackson v. Abercrombie*, Nos. 12-16995, 12-16998, and *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Oct. 25, 2013); *Perry v.*

Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); and *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

Consistent with its opposition to all forms of discrimination, LDF has a strong interest in the fair application of the Colorado Anti-Discrimination Act (CADA), COLO. REV. STAT. § 24-34-601 (2015), and submits that its experience and knowledge will assist the Court in this case.

SUMMARY OF THE ARGUMENT AND INTRODUCTION

Prior to the passage of the Civil Rights Act of 1964, African Americans were relegated to second-class citizenship by a system of laws, ordinances, and customs that segregated white and African-American people in every possible area of life, including places of public accommodation. This system of segregation was designed to prevent African Americans from breaking the racial hierarchy established during slavery. The struggle to end racial discrimination in places of public accommodation was a core component of the Civil Rights Movement and culminated with the passage of Title II of the Civil Rights Act of 1964, which prohibits discrimination on the grounds of race, color, religion, or national origin in any place of public accommodation. *See* 42 U.S.C. § 2000a. When Title II became federal law, thirty-two states, including Colorado, also had laws prohibiting racial

discrimination in places of public accommodation. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 (1964). The fundamental objective of Title II, Colorado's Anti-Discrimination Act (CADA), and other laws prohibiting discrimination in places of public accommodation "was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Id.* at 250 (quoting S. Rep. No. 88-872, at 16-17 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370).

The harms emanating from discrimination in public accommodations are not limited to discrimination on the basis of race, as state legislatures have recognized around the country. CADA, by its express terms, prohibits sexual orientation discrimination in places of public accommodation. Similar to laws passed to remedy *de jure* and *de facto* racial segregation, CADA is a constitutionally-sound law meant to prevent and, if necessary, remedy discrimination against subordinated groups, including gay men and lesbians, in places of public accommodation. Here, CADA provides a remedy for Respondents-Appellants' discriminatory refusal to serve Petitioners-Appellees Charlie Craig and David Mullins based solely on their sexual orientation.

Further, the rationales advanced by Respondents-Appellants in support of their discriminatory actions—that their sincerely-held religious beliefs do not allow them to serve same-sex couples requesting a wedding cake—are reminiscent of religious arguments justifying slavery, defending Jim Crow segregation, implementing anti-miscegenation laws, and, of course, supporting laws and practices that denied African Americans the full and equal enjoyment of places of public accommodation. Proprietors unwilling to serve African-American customers relied on religious arguments that validated fears of racial integration, similar to Respondents-Appellants' religious arguments validating their fears of different sexual orientations. Those religious arguments failed then, and they should fail now. States have an interest in eliminating discrimination of all forms, no matter the motivation, in the enjoyment of places of public accommodation.

Given the similarities between the harms addressed by laws prohibiting racial discrimination and CADA's provision prohibiting sexual orientation discrimination—as well as the inherent flaws in religious arguments used to challenge anti-discrimination laws—this Court should affirm the Colorado Civil Rights Commission's Final Agency Order, dated May 30, 2014.

ARGUMENT

I. THE ELIMINATION OF DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION IS AN ESSENTIAL COMPONENT OF CIVIL RIGHTS HISTORY.

African Americans were systematically relegated to second-class citizenship in the post-Reconstruction South. This was accomplished through the enactment of a system of laws, ordinances, and customs that separated white and African-American people in every conceivable area of life. This code of segregation "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking," and "that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 7 (1955). Such racial segregation was not limited to the post-Civil War South. To the contrary, northern states maintained separate schools for white and African-American children, many northern states had laws against intermarriage, and the United States military remained segregated through the Civil War. John Hope Franklin, *History of Racial Segregation in the United States*, *in* IRA DE. A. REID, RACIAL DESEGREGATION AND INTEGRATION 5-6 (1956).

When the Civil Rights Act of 1875—which was Congress's attempt to prohibit discrimination on the basis of race in places of public accommodation—was struck down by the Supreme Court in 1883, *Civil Rights Cases*, 109 U.S. 3 (1883), Southern states introduced a steady onslaught of legislation to ensure that African Americans remained segregated from whites in nearly every aspect of society. Franklin, *supra*, at 6-9. "The supply of ideas for new ways to segregate whites and Negroes seemed inexhaustible," and "law was only one part of the mechanism keeping the races segregated." *Id.* at 8.

> Patriotic, labor, and business organizations kept alive the "lost cause" and all that it stood for, including the subordination of the Negro. Separate Bibles for oath taking in courts of law, separate doors for whites and Negroes, separate elevators and stairways, separate drinking fountains, and separate toilets existed even where the law did not require them.

Id.

These laws, policies, and customs were designed to dehumanize African Americans and maintain the racial hierarchy established during the time of slavery. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court held that laws requiring segregated railroad cars did not run afoul of the Constitution. Pointing to segregated schools and anti-miscegenation laws, the Court explained that "[a] statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must

always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races." *Id.* at 543. After the Civil War ended, "[t]he major assumptions of the slave regime, the cornerstone of which was the permanent inferiority of the Negro, were still so powerful as to be controlling in most matters involving Negroes." Franklin, *supra*, at 4. Thus, in his "Letter from a Birmingham Jail," Dr. Martin Luther King, Jr. poignantly explained the pain and indignity experienced by African Americans living in segregated societies:

> [W]hen you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her little eyes when she is told that Funtown is closed to colored children, and see the depressing clouds of inferiority begin to form in her little mental sky[;] . . . when you take a cross county drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored;" . . . when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at a tip-toe stance never quite knowing what to expect next . . . .

MARTIN LUTHER KING, JR., *Letter from a Birmingham Jail* 6-7 (April 16, 1963), *reprinted in* WHY WE CAN'T WAIT 76 (1964).[1]

Given the painful brutality of segregation, and despite the very real the threat of arrest and severe physical harm, African Americans and others opposed to segregation staged protests and boycotts throughout the early and mid-twentieth century. *See generally* David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F.L. Rev. 645 (1995). These efforts eventually brought national attention to the inhumanity of segregation, and strategic legal challenges to discrimination in access to the franchise,[2] interstate buses,[3] graduate school facilities,[4] law school admissions,[5] and, of course, public school education[6] slowly but steadily chipped away at segregation's reach.

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[1] For a comprehensive review of challenges to segregation in places of public accommodation, see National Park Service, U.S. Dep't of the Interior, Nat'l Historic Landmarks Program, *Civil Rights in America: Racial Desegregation of Public Accommodations* 22-83 (2004, Rev. 2009).

[2] *Smith v. Allwright*, 328 U.S. 649 (1944) (outlawing white-only Democratic primary election).

[3] *Morgan v. Virginia*, 328 U.S. 373 (1946) (Virginia law requiring segregated buses interfered with freedom to travel interstate).

[4] *McLaurin v. Okla. State Regents for Higher Ed.*, 339 U.S. 637 (1950) (segregated graduate school facilities unconstitutional).

[5] *Sweatt v. Painter*, 339 U.S. 629 (1950) (separate law school unconstitutional).

Finally, after numerous legal challenges, bus boycotts, lunch counter sit-ins, and other demonstrations of non-violent resistance to racial segregation in places of public accommodation—along with continued legal efforts to dismantle segregation—Congress passed the Civil Rights Act of 1964, which, in Title II of the Act, prohibits discrimination or segregation in places of public accommodation. *See* 42 U.S.C. § 2000a. The legislative history accompanying Title II makes clear that its primary purpose was to eliminate the loss of "personal dignity that surely accompanies denials of equal access to public establishments." S. Rep. No. 88-872, at 16-17 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370. The Senate Committee on Commerce went on to explain that "[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 because of his race or color." *Id.*

By the time that Title II was enacted into law, thirty-two states—including Colorado—already prohibited discrimination in places of public accommodations, and no legal challenge against a state public accommodations statute had succeeded. Therefore, "the constitutionality of such state statutes [stood] unquestioned." *Heart of Atlanta Motel, Inc.*, 379 U.S. at 260. Thus, as noted by the

[6] *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (segregated public schools unconstitutional).

Administrative Law Judge (ALJ) in the instant case, "for well over 100 years, Colorado has prohibited discrimination by businesses that offer goods and services to the public." Initial Decision Granting Complainants' Mot. For Summ. J. & Denying Resp'ts Mot. For Summ. J., *Craig v. Masterpiece Cakeshop*, No. P20130008X (Colo. Civ. Rights Div. Dec. 6, 2013) (citing § 1, ch. 61, Laws of 1895). By ensuring that Colorado goods and services are available to all people regardless of who they are, CADA prevents and, when necessary, addresses discrimination in places of public accommodation, thereby remedying the deprivation of personal dignity that accompanies a discriminatory refusal to serve. In 2008, CADA was amended to prohibit discrimination based on sexual orientation. Colo. Rev. Stat. § 24-34-601(2).

II. AS IN THE PRESENT CASE, RELIGION HAS BEEN USED TO JUSTIFY BLATANT FORMS OF DISCRIMINATION THROUGHOUT OUR NATION'S HISTORY.

Throughout the history of this country, sincerely-held religious beliefs have been used to justify racial discrimination and subordination. For example, leaders of the Christian faith often cited to religion in support of the forced enslavement of Africans:

> [W]e testify in the sight of God, that the relation of master and slave among us, however we may deplore abuses in this, as in other relations of mankind, is not incompatible with our holy Christianity, and that the presence of the Africans in our land is an occasion of gratitude on their behalf, before God.

Convention of Ministers, *An Address to Christians Throughout the World By a Convention of Ministers, Assembled at Richmond, Va., April 1863*, *available at* http://catalog.hathitrust.org/Record/010943739. These religious justifications were also commonly cited by the courts. Thus, in 1852, the Supreme Court of Missouri, in denying Dred Scott's claim for freedom from slavery, lamented the purported fact the "consequences of slavery" are "much more hurtful to the master than the slave," and explained that "we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God, . . . a means of placing that unhappy race within the pale of civilized nations." *Scott v. Emerson*, 15 Mo. 576, 587 (Mo. 1852); *see also*, *e.g.*, *Heirn v. Bridault*, 37 Miss. 209, 232 (Miss. Err. & App. 1859) (citing "the Divine and natural law" in denying an African-American woman's claim of freedom), *disapproved of by Berry v. Alsop*, 45 Miss. 1 (1871); *Vance v. Crawford*, 4 Ga. 445, 459 (1848) ("Neither humanity, nor religion, nor common justice, requires of us to sanction or favor domestic emancipation; to give our slaves their liberty at the risk of losing our own. They are incapable of taking part with ourselves, in the exercise of self-government. To set up a model empire

for the world, God in His wisdom planted on this virgin soil, the best blood of the human family. To allow it to be contaminated, is to be recreant to the weighty and solemn trust committed to our hands.").

Similarly, prior to start of the Civil War, many Southerners, including Jefferson Davis, the President of the Confederate States of America, cited Bible passages in support of slavery. R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World,* 29 Quinnipiac L. Rev. 433, 437 (2011). Likewise, Alexander Stephens, Vice President of the Confederate States of America, argued that enslaving African Americans was simply fulfilling God's plan:

> With us, all of the white race, however high or low, rich or poor, are equal in the eye of the law. Not so with the negro. Subordination is his place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system. . . . It is, indeed, in conformity with the ordinance of the Creator. It is not for us to inquire into the wisdom of His ordinances, or to question them. For His own purposes, He has made one race to differ from another, as He has made "one star to differ from another star in glory." The great objects of humanity are best attained when there is conformity to His laws and decrees, in the formation of governments as well as in all things else. Our confederacy is founded upon principles in strict conformity with these laws.

Alexander H. Stephens, *"Corner Stone" Speech* (1861), *available at* http://teachingamericanhistory.org/library/document/cornerstone-speech/. Stephens went on to explain that the Confederacy was bringing "Christianization" to the

"barbarous tribes of Africa . . . by first teaching them the lesson taught to Adam, that 'in the sweat of his brow he should eat his bread,' and teach them to work, and feed, and clothe themselves." *Id.*

Religious justifications also supported anti-miscegenation laws and racial segregation. In *Scott v. State*, 39 Ga. 321 (1869), the Georgia Supreme Court upheld a criminal conviction of an African-American woman for cohabitating with a white man by explaining that, though the laws of Georgia make all citizens equal, no laws create "moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it." *Id.* at 326. Similarly, in *Kinney v. Commonwealth*, 71 Va. 858 (Va. 1878), the Virginia Supreme Court relied on religion when it upheld the criminal conviction of an interracial couple under the state's anti-miscegenation statute:

> The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.

Id. at 869.

In *West Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 209 (Pa. 1867), the Court addressed a challenge to segregation on railroads and noted that "the Creator" made two distinct races, and that "He intends that they shall not overstep the natural boundaries He has assigned to them." *Id.* at 213. The Court held that such segregation "is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of the races established by the Creator himself, and not to compel them to intermix contrary to their instincts." *Id.* at 214. *Miles*, and its religious reasoning, was cited in 1906 by the Kentucky Supreme Court when it upheld a law prohibiting integrated schools. *Berea College v. Commonwealth*, 94 S.W. 623, 627-28 (Ky. 1906) (noting that "separation of the human family into races, distinguished . . . by color . . . is as certain as anything in nature" and is "divinely ordered").

The resistance to racial integration, both religiously-based and other, was most intense in the education context. In a concurring opinion that was issued one year after the United State Supreme Court's *Brown v. Board of Education* decision, justices of the Florida Supreme Court criticized school integration, explaining that "when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man." *State ex rel. Hawkins v. Bd. of Control*, 83 So. 2d 20,

28 (Fla. 1955) (concurring opinion). In fact, when addressing the states' obligation to comply with *Brown*, the court declared that "we are now advised that God's plan was in error and must be reversed." *Id.*

Even the Civil Rights Act of 1964 initially faced religious-based resistance proffered by those seeking to perpetuate racial discrimination. For example, West Virginia Senator Robert Byrd criticized the Act, citing a number of Biblical passages, including "the Levitical rules against interbreeding cattle and sowing with 'mingled seed'" to conclude that "God's statutes, therefore, recognize the natural order of the separateness of things." William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 675 (2011) (quoting 110 Cong. Rec. 13,206-207 (1964)). Given this history, it is hardly surprising that Title II of the Act, like CADA's public accommodation section, offers no exceptions for the religious beliefs of proprietors of places of public accommodation. 42 U.S.C. § 2000a.

Eventually, religious arguments in support of racial segregation fell out of favor, but not without notable holdouts. In his infamous "Segregation Now, Segregation Forever" inaugural address in 1963, Governor of Alabama George Wallace mentioned God twenty-seven times and declared that the federal

government's effort to enforce desegregation "is a system that is the very opposite of Christ." George Wallace, *Inaugural Address (1963): The "Segregation Now, Segregation Forever" Speech*, http://web.utk.edu/~mfitzge1/docs/374/wallace_seg63.pdf%20(1963) .

III. COURTS HAVE CONSISTENTLY REJECTED RELIGIOUS JUSTIFICATIONS FOR RACIAL DISCRIMINATION.

Despite persistent attempts, courts have repeatedly rejected religious arguments justifying racially discriminatory acts. In striking down Virginia's anti-miscegenation laws in *Loving v. Virginia*, the United States Supreme Court expressly rejected the trial court's reasoning that "Almighty God . . . did not intend for the races to mix." 388 U.S. 1, 3 (1967) (internal quotation marks omitted) (quoting trial court); *see also* Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* xii (2004) (considering *Loving* to be "one of the major landmarks of the civil rights movement"); John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 Howard L.J. 15, 52 (2007) ("Legalizing interracial marriage was an essential step toward racial equality.").

In *Newman v. Piggie Park. Enters., Inc.*, 256 F. Supp. 941 (D.S.C. 1966), LDF represented African-American residents of South Carolina in a lawsuit against a restaurant owner who refused to serve them because of their race. In

accordance with the United States Supreme Court's decisions in *Heart of Atlanta Motel, Inc.* and *Katzenbach v. McClung*, 379 U.S. 294 (1964), the court upheld the constitutionality of Title II, despite the restaurant owner's contention that the judicial enforcement of the public accommodations provision violated the free exercise of his religious beliefs in contravention of the First Amendment. *Piggie Park*, 256 F. Supp. at 945. "The free exercise of one's beliefs," the Court explained, "as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society." *Id.* [7]

More recently, in 1983, the United States Supreme Court rejected the religious justifications proffered by Bob Jones University to explain its violation of the IRS code, which prohibits tax-exempt organizations from practicing racial discrimination. Specifically, in *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983), Bob Jones University sought to defend its policy prohibiting prospective or current students from engaging in, or advocating for, interracial dating and marriage on the grounds that "the Bible forbids interracial dating and marriage." The United States Supreme Court held that the school's religious

[7] In her dissenting opinion in *Burwell v. Hobby Lobby Stores, Inc.*, Justice Ginsburg cites approvingly to *Piggie Park* for the proposition that commercial enterprises are not entitled to "exemptions from generally applicable laws on the basis of their religious beliefs." 134 S. Ct. 2751, 2804 (2014) (Ginsburg, J., dissenting) (citing 256 F. Supp. at 945).

justification could not overcome Congress's interest in developing charitable organizations that serve a useful public purpose, namely, "a firm national policy to prohibit racial segregation and discrimination in public education." *Id.* at 592-93.

Eventually, religious arguments were no longer cited as justification in support of racial segregation and subordination. Kelso, *Modern Moral Reasoning*, *supra*, at 439 ("[N]o major religious or secular tradition today attempts to defend the practices of the past supporting slavery, segregation, [or] anti-miscegenation laws."). Indeed, Bob Jones University has since apologized for its past discriminatory policies. Statement about Race at BJU, Bob Jones Univ., http://www.bju.edu/about/what-we-believe/race-statement.php (last visited Feb. 7, 2015). Moreover, in 1995, George Wallace, former Governor of Alabama, asked for forgiveness for his past words and deeds supporting segregation. Colman McCarthy, *George Wallace—From the Heart*, WASHINGTON POST, Mar. 17, 1995, at A27.

IV. AS WITH RACIAL DISCRIMINATION, RELIGIOUS BELIEFS CANNOT JUSTIFY SEXUAL ORIENTATION DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION.

The bases for the courts' rejection of religious arguments supporting racial discrimination are equally applicable to religious arguments supporting sexual orientation discrimination. Because the religious arguments supporting racial

discrimination in places of public accommodation failed, the religious arguments supporting discrimination in places of public accommodation based on sexual orientation must also fail.

The fundamental purpose of statutes prohibiting discrimination in places of public accommodation is to prevent the harm to a person's dignity that occurs when individuals are treated differently in the provision of publicly available goods and services simply because of who they are. As in cases involving racial discrimination, individuals denied access to public accommodations because of their sexual orientation unquestionably face the same loss of personal dignity:

> "It is hurtful to see that we are less welcome than the family dog," stated a lesbian couple refused a room at a Vermont inn. Another gay couple emphasized the 'shock and hurt' they experienced after being turned away by a florist in Washington State. "I was devastated . . . . I was crying," explained a lesbian in New Jersey as she described the aftermath of being sent out of a bridal shop. "I can't tell you how much it hurt to be essentially told, 'we don't do business with your kind of people,'" said a woman who, along with her long-term girlfriend, was denied accommodations at a hotel in Hawaii. "We don't want anyone else to experience that and be made to feel like they have no place in society," she continued.

Marvin Lim & Louise Melling, *Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws*, 22 J.L. & Pol'y 705, 706-07.

Such was certainly the case here. Petitioners-Appellees David Mullins and Charlie Craig sought to buy a wedding cake from Respondents-Appellants Jack

Phillips and his store Masterpiece Cakeshop, and Phillips refused, explaining that he does not sell wedding cakes for same-sex couples. Phillips further admitted that it was store policy not to provide wedding cakes for any same-sex couple or celebration. The actions of Respondents-Appellants, and the resultant insult and loss of dignity suffered by Mr. Mullins and Mr. Craig, hark back to the refusal of past owners of public accommodations to serve African Americans because their religion told them they are different. Such perceived differences cannot, and should not, justify such discriminatory treatment.

Colorado's public interest in promoting an inclusive society free from sexual orientation discrimination must trump any individual claims of religion justifying discrimination against gays and lesbians. Thus, the ALJ correctly determined that enforcement of CADA does not infringe Respondents-Appellants' First Amendment rights. Just as the defendant in *Piggie Park* could not escape a Title II violation because he interpreted his religion to require racial discrimination in public accommodations, Respondents-Appellants cannot avoid complying with CADA because they believe that their religion requires them to discriminate on the basis of sexual orientation. To ensure a truly equal society, individuals must be free to enjoy places of public accommodation without fear of discrimination for being who they are. Religion simply cannot sanction discrimination—anything to the

contrary would permit the existence of a caste system that contradicts the significant progress made in civil rights over the past several decades.

Religious challenges to state and local anti-discrimination laws that prohibit discrimination on the basis of sexual orientation in places of public accommodation consistently fail in courts and administrative agencies alike, like the challenges to Title II grounded in religious beliefs before them. *See*, *e.g.*, *N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Super. Ct.*, 189 P.3d 959, 966-67 (Cal. 2008) (First Amendment right to free exercise of religion did not guarantee right to deny fertility treatment to same-sex couple, in violation of law prohibiting discrimination on the basis of sexual orientation in public accommodations); *Gay Rights Coal. of Georgetown Univ. v. Georgetown Univ.*, 536 A.2d 1, 39 (D.C. 1987) (public accommodations law prohibiting discrimination on the basis of sexual orientation could not be defeated by a First Amendment defense, as prohibition of discrimination was least restrictive means of attaining compelling city interest of eradicating discrimination on basis of sexual orientation); *Cervelli v. Aloha Bed & Breakfast*, Civ. No. 11-1-3103-12 ECN, Order (Haw. Cir. Ct. Apr. 15, 2013), *available at* http://www.lambdalegal.org/sites/default/files/2013-04-15_-_cervelli_order.pdf (finding that bed and breakfast violated Hawaii's public accommodation law when

it refused service to same-sex couple); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (New Mexico Human Rights Act provision prohibiting discrimination on the basis of sexual orientation in public accommodations did not violate photography company's First Amendment right to free exercise of religion); *see also* Joel Connelly, *State Can Sue Florist Who Refused Flowers for Gay Wedding: Judge*, Seattle Pi (Jan. 7, 2015), http://blog.seattlepi.com/seattlepolitics/2015/01/07/state-can-sue-florist-who-refused-flowers-for-gay-wedding-judge/ (state court permitting state to sue florist who refused to serve same-sex couple on religious grounds); Zack Ford, *Lesbian Couple Wins Suit Against Discriminating Vermont Inn*, Think Progress (Aug. 23, 2012), http://thinkprogress.org/lgbt/2012/08/23/737991/lesbian-couple-wins-suit-against-discriminating-vermont-inn/ (Vermont Human Rights Commission finding discrimination despite religious arguments, resulting in settlement); Courtney Sherwood, *Judge Rules Oregon Bakery Discriminated Against Gay Couple in Wedding Cake Rebuke*, Reuters, Feb. 2, 2015, http://www.reuters.com/article/2015/02/03/us-usa-oregon-gaymarriage-idUSKBN0L703320150203 (finding bakery owners discriminated based on sexual orientation despite religious arguments).

Just as social attitudes evolved on the issue of racial discrimination, attitudes toward sexual orientation discrimination are also evolving. Over time, laws requiring racial segregation—and religious justifications for such discrimination—have become universally rejected. Similarly, attitudes toward sexual orientation discrimination have evolved such that, currently, twenty-one states and the District of Columbia explicitly prohibit discrimination on the basis of sexual orientation in places of public accommodation.[8] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995)[9], the United States Supreme Court noted that state statutes prohibiting discrimination in places of public accommodation, including discrimination on the basis of sexual orientation, are "well within the State's usual power to enact when a legislature has reason to

[8] Colorado, Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, Wisconsin, Illinois, Iowa, Minnesota, New Mexico, California, Nevada, Washington, Oregon, and the District of Columbia have laws that prohibit discrimination on the basis of sexual orientation in places of public accommodation. *See* ACLU, Non-Discrimination Laws: State by State Information – Map, https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (last visited Feb. 7, 2015).

[9] In *Hurley*, the Supreme Court held that a private group organizing a parade could exclude a gay organization without violating Massachusetts's law prohibiting discrimination on the basis of sexual orientation in places of public accommodations. The Court was careful to contrast the parade's private organizers with those in the business of the provision of publicly available goods and services. *Id.* at 572. In the case at hand, Respondents-Appellants' treatment of Mr. Craig and Mr. Mullins constitutes the type of discrimination in the provision of public goods that the Court in *Hurley* considered to be constitutionally prohibited.

believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Id.* at 572 (citing *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 11-16 (1988); *Roberts v. U.S. Jaycees*, 468 U.S. at 624-26; *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258-62.

These state laws, such as CADA, are targeted efforts to promote an inclusive society free of discrimination. Whether that discrimination is on the basis of race or sexual orientation, the policy goals are the same: to prevent the incalculable harm to an individual's dignity for being refused goods and services for simply being who they are. Using religion to justify such an affront to dignity is unacceptable in any just and equal society, and should not be tolerated by this Court.

CONCLUSION

At the heart of Title II of the Civil Rights Act of 1964 and state anti-discrimination statutes—such as CADA—is the principle that no person should be denied the full and equal enjoyment of the goods and services of any place of public accommodation based on who they are. Just as the religious beliefs of a proprietor cannot be used to justify racial discrimination in places of public accommodation, they cannot be used to justify sexual orientation discrimination.

The religious arguments supporting slavery, anti-miscegenation laws, and racial segregation have been relegated to the dustbin of history. In our collective pursuit of a truly equal society, we expect that someday soon, the religious arguments made in support of sexual orientation discrimination will meet the same fate.

Respectfully Submitted this 13th day of February, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015, a true and correct copy of the foregoing **BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES** was electronically filed with the Colorado Court of Appeals and served via Colorado ICCES, on the Colorado Civil Rights Commission and all counsel of record.

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