No. 16-111

In the Supreme Court of the United States

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

v.

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

On Writ of Certiorari
to the Colorado Court of Appeals

BRIEF FOR RESPONDENT COLORADO CIVIL RIGHTS COMMISSION

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QUESTION PRESENTED

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

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

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides:

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

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

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

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

COLO. REV. STAT. § 24-34-601(2)(a).

INTRODUCTION

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

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

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

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

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

STATEMENT

I. Legal Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Facts and Procedural History

A. The Denial of Service.

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

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

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

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

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

B. The Division's Investigation.

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

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

C. Administrative Proceedings and Appeal.

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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