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 OF CHURCH-STATE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ROBERTA A. KAPLAN
Counsel of Record
JOSHUA MATZ
KAPLAN & COMPANY, LLP
350 Fifth Avenue
Suite 7110
New York, NY 10118
(212) 763-0883
rkaplan@kaplanandcompany.com

Counsel for Amici Curiae

October 30, 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici are Church-State scholars. They submit this brief to explain that Petitioner's claim under the Free Exercise Clause is at odds with precedent and principles of religious liberty in a pluralistic society.[2] Accepting his novel theory would result in far-reaching and harmful consequences. *Amici* make no arguments as to whether Petitioner is entitled to succeed under the Free Speech Clause. A full list of *Amici* is attached as an appendix to this brief.

SUMMARY OF ARGUMENT

Like many free exercise claimants before him, Petitioner presents a sympathetic case. His sincere religious beliefs conflict with legal obligations imposed on all who engage in commerce with the public. As a result, he must decide whether to follow his conscience or obey the law. We do not minimize the gravity of this dilemma for Petitioner, or for other people of faith who confront similar situations.

But that dilemma alone is not the measure of a Free Exercise Clause violation. If it were, this would soon become a nation in which "each conscience is a law unto itself, or in which judges weigh the social importance of all laws against the centrality of all religious

---

[1] Pursuant to Sup. Ct. R. 37.6, *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici* and their counsel—contributed money intended to fund preparing or submitting the brief. Petitioners and Respondent Colorado Civil Rights Commission ("the Commission") have filed blanket letters of consent. The consent of the individual respondents is submitted with this brief.

[2] We refer to Phillips and his bakery together as "Petitioner."

beliefs." *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, 494 U.S 872, 890 (1990). America has long offered a home to many religions, each with unique teachings. In untold circumstances, commands of conscience may clash with laws that protect fundamental rights, equal protection, health and safety, free markets, or other social goods. They may also collide with the dictates of other religions in the same community.

For decades now, this Court has held that incidental burdens on religious beliefs and practices are not sufficient to establish a Free Exercise Clause violation. *See id.* at 878–880. That is true even when such burdens result in conscientious objections. *See, e.g.*, *Gillette* v. *United States*, 401 U.S. 437, 461 (1971). Instead, in *Smith*, this Court held that religious objectors must still "comply with a valid and neutral law of general applicability." 494 U.S. at 879 (citation and quotation marks omitted).

Here, however, Petitioner offers a reading of *Smith* that defies precedent and would sharply limit, if not overrule, that decision. Even if the Court were prepared to recognize new limits on *Smith*, this is not the case in which to redefine the jurisprudence of free exercise. Granting a mandatory constitutional exemption to a neutral and generally applicable civil rights law would destabilize free exercise doctrine and public accommodation laws nationwide. It would also infringe on values of dignity and equality.

Petitioner seeks to justify this radical revision by referring to recent advances in gay and lesbian rights. In his view, this is a case about allowing religious people—like married same-sex couples—to live consistently with their identity. As one of his *amici* writes,

the Court should "protect the liberty of both sides." Christian Legal Society *et al*. (CLS) Br. at 2.

But that framing of the case is mistaken. First, it disregards the dynamic and thoughtful deliberation underway at all levels of government about how to balance religious liberty with non-discrimination. In addressing such highly charged issues, this Court has historically proceeded with caution, developing jurisprudence over decades and engaging society in a respectful dialogue. Petitioner, however, would have the Court preempt that process by unleashing a new constitutional rule with no principled limit. And he makes that demand before courts and legislatures have had time to address the questions he asks.

Second, Petitioner mischaracterizes the facts on the ground. In Colorado, religious people cannot refuse to serve gay people by virtue of their sexual orientation. But neither can gay people (or anyone else) refuse to serve religious people by virtue of their religious identity or motivation. The State has created an even playing field in commerce. When Petitioner refers to protecting liberty on both sides, he smuggles in the far more extreme claim that religious people—but nobody else—should be deemed exempt from the most basic rules that define civil treatment in commerce and social life. Protecting groups *against discrimination* is not the same as giving only certain groups a constitutional right *to discriminate* whenever their religion so instructs.

Finally, Petitioner artificially limits the scope of the principles on which he relies. He suggests that his request for a narrowing of *Smith* is specific to—and justified by—the issue of same-sex marriage. Yet none of the principles that he offers would support such a limitation. Nor would this Court's precedent. In

another instructive case from Colorado, this Court rejected an effort to single out gays and lesbians for exclusion. *See Romer* v. *Evans*, 517 U.S. 620 (1996). It would be peculiar for the same court that decided *Romer* to hold now that Colorado uniquely *lacks* the power to protect gays and lesbians in public accommodations. Petitioner's rule must therefore be seen as a general theory that arises from the context of gay rights but would sweep much further.

I. This Court's precedents foreclose Petitioner's free exercise claim. Under *Smith* and subsequent cases, the Colorado Anti-Discrimination Act (CADA) is constitutional on its face and as applied to Petitioner. As *Smith* made clear, a law is both neutral and generally applicable where it does not target or uniquely burden religion. *See Smith*, 494 U.S. at 879; *see also Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 542–546 (1993); *City of Boerne* v. *Flores*, 521 U.S. 507, 531–534 (1997). There can be no dispute that CADA is constitutional on its face. The law applies to all public accommodations, and treats the religious and nonreligious alike in protecting certain classes from discrimination. Its only religion-focused exemptions are *protective* of religious institutions.

Petitioner's dominant theme is that religious opponents of same-sex marriage "always lose." Br. at 42. To support this claim, Petitioner argues that the Commission applied CADA in a manner that failed to protect William Jack, a religious opponent of same-sex marriage. But this claim is unsupported. CADA forbids discrimination on the basis of sexual orientation—whether motivated by pure bigotry, secular morality, or religious belief. And it allows places of public accommodation to refuse to create goods that express opposition to the rights of gays and lesbians, so long as that

denial is not based on a client's religious belief or motivation. Here, CADA was properly applied against Petitioner, who refused services to Craig and Mullens on the basis of their sexual orientation. And it properly provided no relief to William Jack, who was denied services for valid secular reasons unrelated to his religious beliefs.

Nothing about this enforcement pattern shows anti-religious animus. To the contrary, it is entirely typical of civil rights statutes. All anti-discrimination laws forbid disparate treatment of specified classes of customer. And no anti-discrimination laws require that specified classes of customers receive treatment superior to others. Anti-discrimination laws thus level the playing field by declaring that certain historically targeted characteristics are irrelevant to accessing public accommodations. Were the Court to conclude that this pattern is illegal, it would imperil hundreds of statutes nationwide. It would also necessarily redefine neutrality and generality in a manner at odds with *Smith*, *Lukumi*, and *Boerne*.

Petitioner attempts to shore up his contentions by invoking a "hybrid rights" theory under *Smith*. *See* Br. at 46–48. His *amici*, in turn, gesture vaguely to the Establishment Clause. *See* CLS Br. at 16. Both of these arguments are without merit. If anything, the Establishment Clause cuts against Petitioner here.

II. The First Amendment has never been read to require exemption of a for-profit business from public accommodations laws. If this Court were to order such an exemption, there would be no principled basis upon which to limit that ruling.

Recognizing this fact, Petitioner devotes little time to his proposed limits: (a) that weddings are "inherently religious" events; (b) that he is an "artist" creating personalized goods; and (c) that he operates a small business. Br. at 38. It is clear that none of these limits could confine the broad, disruptive implications of upholding Petitioner's claim.

Most important, while Petitioner emphasizes that this case concerns weddings, there is no basis for treating wedding-related services differently under the Free Exercise Clause. Generally, the Court has deferred to claimants on the question of whether specific practices or events are religiously significant. Yet under that deferential rule, there is no end to the conduct that Americans of different faiths might view as "inherently religious." Weddings are not unique for free exercise purposes, and to hold that they are would be to disregard the sacred significance that other faiths ascribe to many other events.

In thinking about Petitioner's broad claim, the Court may find guidance in our history and tradition. Throughout this nation's substantial experience with public accommodations laws, virtually no jurisdiction has seen fit to create an exemption of the type that Petitioner now demands as a matter of constitutional law. That is not due to disrespect for religion. Rather, it is because most Americans have decided that allowing such exemptions would cause too much harm, to too many people, in ways that matter too much. This insight was born of tragic experience and widespread suffering. It should not be set aside lightly.

The danger here is not only to civil rights law, but also to religious freedom and the broader cause of civility in American life. If Petitioner prevails, religious persons will have a unique right to deny services in

commerce on the basis of otherwise-protected characteristics. As a result, some may start to equate "religious freedom" with a lived experience of economic disadvantage, second-class citizenship, and daily subordination. It is one thing to lack civil rights protections; it is quite another to know that the Free Exercise Clause *forbids* the state from requiring true equality in the marketplace. It is not far-fetched to imagine that under Petitioner's legal theory, some citizens would have to consult guides for their gender, religion, or sexuality before setting out to buy essential goods and services.

Especially in these turbulent times, the Court would disserve itself and the nation by unleashing such a disruptive and divisive principle. The proper course is to hold that *Smith* governs this case and forecloses Petitioner's free exercise contentions.

ARGUMENT

I. PETITIONER'S FREE EXERCISE CLAIM IS FORECLOSED BY *SMITH*

This Court has long sought to acknowledge and respect the dignity of religious objectors. People of good faith whose religious beliefs conflict with legal duty face a difficult—at times agonizing—decision. It is essential for the American people to recognize that truth, even when a requested religious exemption inspires fury in some and sympathy in others.

At the same time, this is a diverse and pluralistic nation. Americans hold a dizzying array of beliefs, touching every aspect of individual and communal life. On some of the most difficult issues in society, we have enacted laws to vindicate widely-shared values of fairness, dignity, and safety. While nearly everyone disagrees strongly with at least a few of these rules, we

abide by them for the sake of creating a society in which people of many faiths, backgrounds, and world-views can co-exist in peace.

Here, like others before him, Petitioner faces a hard choice. In the end, however, his free exercise claim must fail for the same reason that Edwin Lee had to pay Social Security taxes (despite his Amish beliefs) and Tony and Susan Alamo had to pay their employees minimum wage (despite their evangelical beliefs). *See United States* v. *Lee*, 455 U.S. 252 (1982); *Tony & Susan Alamo Foundation* v. *Sec'y of Labor*, 471 U.S. 290 (1985). As this Court held in *Smith*, "the right of free exercise does not relieve an [objecting] individual of the obligation to comply with a valid and neutral law of general applicability." 494 U.S. at 879 (citation and quotation marks omitted).

Petitioner does not challenge *Smith*'s central principle, which has stood for decades.[3] Instead, he relies on a novel interpretation of "neutral" and "general applicability" that would lead *Smith*'s exceptions to swallow much of its rule. That effort to undermine *Smith*'s holding should not be accepted. Moreover, Petitioner's arguments are foreclosed by precedent. On its face and as applied, CADA complies with the Free Exercise Clause as interpreted by this Court in *Smith*, *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

---

[3] In his merits brief, Petitioner suggests—for the first time—that it may be necessary to reevaluate *Smith*. *See* Br. at 48 n.8. He offers little elaboration of this sweeping claim. In any event, by failing to raise this point earlier, he has waived it.

A. Neutrality and General Applicability

Smith referred to the criteria of neutrality and general applicability, but offered little elaboration. *See* 494 U.S. at 879. It may be presumed, however, that *Smith* did not see these criteria as so demanding that most laws would fail to satisfy them. In that event, strict scrutiny of statutes would be the norm and the rule in *Smith* would be nullified.

Shortly after *Smith*, this Court struck down a city's ordinances aimed at the suppression of ritual animal sacrifice by adherents of Santeria. In testing for a Free Exercise Clause violation, *Lukumi* adopted and reaffirmed *Smith*'s statement of the doctrine. *See* 508 U.S. at 531. On that basis, the Court reviewed the structure of the challenged ordinances, their purposes and legislative history, and their degree of tailoring to the state's purported interests. This analysis required the conclusion that the ordinances had been sculpted to prohibit Santerian practices, while leaving alone many other activities that similarly threatened animal welfare. The Court therefore held that the provisions were neither neutral nor generally applicable. *See id.* at 542, 545–546. Rather, they were "designed to persecute or oppress a religion or its practices." *Id.* at 547.

Lukumi clarified that *Smith*'s requirements of neutrality and general applicability share the objective of preventing *intentional* discrimination against religious beliefs and practices. Thus, a law is not neutral if it "targets religious conduct," *id.* at 534, or if its "object . . . is to infringe upon or restrict practices because of their religious motivation," *id.* at 533. A failure of general applicability, in turn, occurs "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at

542–543. Intent to suppress religion can be evidenced by the selective imposition of legal burdens on religious (but not secular) conduct. *See id.*

This understanding of *Smith* was confirmed by *City of Boerne* v. *Flores*. There, the Court invalidated the Religious Freedom Restoration Act (RFRA), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.*, as applied to the states. *Boerne* held that RFRA exceeded federal power under § 5 of the Fourteenth Amendment. *See* 521 U.S. at 511. In particular, RFRA was unlawful because it "alter[ed] the meaning of the Free Exercise Clause," and thus could not "be said to be enforcing the Clause." *Id.* at 519. And how did RFRA depart from the Free Exercise Clause? Writing for the Court, Justice Kennedy explained: "Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise." *Id.* at 534. *Boerne* thus reaffirmed that laws pass muster under *Smith* when they impose only "incidental burdens" on religious practice. *Boerne* was explicit that laws must be subjected to heightened scrutiny only when they reflect "animus or hostility to the burdened religious practices." *Id.* at 531.

Together, *Lukumi* and *Boerne* reinforce *Smith*'s lesson that laws burdening religion are "neutral" and "generally applicable" so long as they do not *intentionally* target or injure religion.

B. CADA is Facially Constitutional

Before addressing Petitioner's specific claims, it is helpful to consider the (undisputed) premise that CADA is facially constitutional under *Smith*.

CADA is a standard-issue civil rights statute. It first defines "places of public accommodation" as "any place of business engaged in any sales to the public" and

"any place offering services . . . or accommodations to the public." Colo. Rev. Stat. § 24-34-601(1). It then prohibits all such places from denying the full and equal enjoyment of their goods and services on the basis of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. *See id.* at § 24-34-601(2)(a).

CADA applies to any person who operates a place of public accommodation, without regard to their secular or religious motivations for engaging in discrimination. Put differently, under CADA it does not matter *why* a person refuses to serve blacks, women, or gays. All that matters is the fact of refusal. There is thus no indication that CADA is gerrymandered against religion. Any place of business engaged in commerce that refuses to serve a client because of a protected character trait is covered. For instance, refusing to bake a cake for an *inter*-faith wedding, while baking such cakes for *intra*-faith weddings, violates CADA regardless of whether the baker is motivated by secular hostility, disdain for a particular faith, or religious belief.

CADA has a few narrow exemptions, which prove that Colorado has sought to *protect* rather than harm religious liberty. Most important, CADA specifies that a "'[p]lace of public accommodation' shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes." § 24-34-601(1). This is a deliberate recognition that houses of worship are free to tailor services as they see fit—even if that means excluding people for reasons not otherwise permitted under CADA. This act of accommodation, encompassing all faiths in Colorado, makes CADA entirely unlike laws whose exemptions evince an anti-religious purpose. *Cf. Fraternal Order of Police*

Newark Lodge No. 12 v. *City of Newark*, 170 F.3d 359 (3d. Cir. 1999) (Alito, J.) (allowing exemptions to a no-beard rule for medical need, but not religious need, runs afoul of the Free Exercise Clause).[4]

C. CADA Has Not Been Applied in a Religiously Discriminatory Manner

CADA's public accommodations requirements are indisputably neutral and generally applicable. Nonetheless, Petitioner argues that CADA's application to him was unlawful because of how it was applied in three other cases. Specifically, Petitioner asserts that the Commission—in applying CADA—has discriminated against Christians who oppose same-sex marriage. According to Petitioner, the Commission has done so by declining to pursue CADA claims against bakers who refused to create custom cakes with anti-gay messages. Petitioner's characterization of these cases, however, is incorrect.

To see why, it is important to take a closer look at the three CADA cases brought by William Jack.[5] Those cases are the principal basis for Petitioner's claim that CADA has been applied non-neutrally. In each case, Jack requested that a baker create two cakes. The first would be shaped like Bible pages, with the words,

---

[4] Similarly, CADA allows public accommodations to restrict admission to "individuals of one sex if such restriction has a bone fide relationship" to the goods or services provided by the accommodation. Colo. Rev. Stat. § 24-34-601(3). While this might apply to a women's health clinic, it might also apply to a religiously affiliated single-sex school.

[5] *Jack* v. *Azucar Bakery*, Charge No. P20140069X (Colo. Civil Rights Div. Mar. 24, 2015) (J.A. at 230); *Jack* v. *Le Bakery Sensual*, *Inc*., Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015) (J.A. at 240); *Jack* v. *Gateaux, Ltd*., Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015) (J.A. at 249).

"Homosexuality is a detestable sin. Leviticus 18:2." The second would have two groomsmen, holding hands in front of a cross, with a red "X" over the image. When the bakers refused his requests, Jack brought claims under CADA, alleging that he had suffered discrimination on the basis of his Christian beliefs. Each time, the Commission found no probable cause to investigate Jack's claim.

Petitioner insists that this reflects a double-standard: "Cake artists who support same-sex marriage may decline to oppose it, while those who oppose same-sex marriage must support it." Br. at 39–40. But notice what's missing from Petitioner's own statement here: any reference to *religion*.

Like other civil rights statutes, CADA outlaws discrimination and protects refusal to discriminate. What it *doesn't* do is make religious motivation relevant to that inquiry. As Petitioner says, cake artists who *support* same-sex marriage—for any reason, religious or not—may decline to oppose it. And cake artists who *oppose* same-sex marriage—for any reason, religious or not—may not discriminate against same-sex couples. In none of these scenarios is religion targeted by the state. Instead, same-sex couples are shielded by law from discrimination in their opportunity to access the commercial market.

Where, then, is the religious discrimination that the Commission has supposedly allowed to pass unchallenged? Petitioner locates it in the Jack cases. He contends that all three bakers *necessarily* engaged in religious discrimination when they refused to make cakes that condemned gay people and same-sex couples. He adds that nothing but hatred of religion can explain why the Commission didn't uphold complaints against those bakers.

That is the central premise of Petitioner's Free Exercise Clause arguments. If the Commission acted reasonably in concluding that the bakers' refusal to serve Jack was *not* religious discrimination, then the anti-religious targeting alleged by Petitioner does not exist.

For several reasons, that is the correct conclusion. First, as the Commission explained, the bakers in Jack's cases would have refused *any* customer's request to create cakes with anti-gay messages "regardless of creed." J.A. at 231. Jack's religion, and his religious motive for seeking these cakes, had *nothing* to do with the bakers' refusal. As a result, it is implausible to describe their conduct as "religious discrimination." The bakers whom Jack solicited were indifferent to his motives, secular or religious, in deciding whether to serve him. They refused service because of their unwillingness to create a certain kind of product, rather than due to his status as a Christian or his religious motivation.

That fact is crucial to assessing whether CADA has been applied in a discriminatory or anti-religious manner. The purposes of a public accommodation statute like CADA include insuring equal access to services in the commercial market regardless of one's race, gender, religion, or sexual orientation. Denying services on those bases strikes at the heart of equal protection. By contrast, denying a Christian customer a service that would not be provided to customers of another religion—or of none—does not undermine the State's interest in equal treatment. *See* James Oleske, *Masterpiece Cakeshop and the Effort to Rewrite Smith and its Progeny*, Take Care (Sept. 21, 2017) <https://takecareblog.com/blog/masterpiece-cakeshop-and-the-effort-to-rewrite-smith-and-its-progeny>. Adopting this

interpretation of CADA is appropriate and sensible, and cannot be taken as evidence of hostility to religion.

For an example of discrimination *because of* a protected trait, consider Petitioner. He is willing to make wedding cakes for opposite-sex couples but is unwilling to make identical cakes for same-sex couples. For Petitioner, his clients' sexual orientation is determinative of his willingness to render specific services. He has discriminated because of sexual orientation. That is not what happened to Jack when the bakers declined to create anti-gay cakes for him.

Second, in Jack's cases there was compelling evidence that the bakers declined service only for a secular, legitimate reason. Specifically, they were unwilling to put on their cakes any messages that disparaged gays and lesbians. In so doing, they sought to avoid offending a class that is protected by CADA. *See, e.g.*, § 24-34-601(2)(a) (prohibiting places of public accommodation from publishing or posting communications indicating that individuals will be denied goods or services because of their protected characteristic). Had gay or lesbian customers seen cakes with such flagrantly anti-gay messages, they might have believed that people like them were always unwelcome or unwanted in those bakeries.[6]

Petitioner's attempt to turn the Jack cases into a violation of the general applicability requirement is thus mistaken. Religious opponents of same-sex marriage must be welcome in places of public accommodations to the same extent as all other customers.

---

[6] No reasonable person would think that the bakeries had been compelled by CADA to create a cake *attacking* same-sex couples, especially since gays and lesbians are otherwise protected by CADA itself from exactly that sort of discrimination.

What vendors may reject, however, is a request for business that would vividly signal to other classes of patrons—in this case, gays and lesbians—that they are not equally welcome. A state does not target religion when it permits vendors to decline *all* requests to send such messages.

Finally, despite Petitioner's suggestions to the contrary, refusing to create a cake with an anti-gay message is not *inherently* discriminatory. If a bakery would refuse to create cakes expressing an anti-gay message no matter who asked, it does not engage in religious discrimination by denying such requests—even if the particular client is a devout Christian and the message is a core tenet of his faith.

While this should not be a controversial point, Petitioner resists it. *See* Br. at 41. The Commission, he notes, has treated the refusal to provide same-sex wedding cakes as inherently linked to sexual orientation discrimination. Yet, he adds, Respondent does not equate other acts, such as refusing to create an anti-gay cake, with religious discrimination. In Petitioner's view, this is proof of religious animus.

That is a peculiar claim. Normally, the only reason a person would want to have a same-sex wedding (or engage in same-sex intimacy) is because of his or her sexual orientation. That is why this Court has rejected status/conduct distinctions in gay rights cases. *See Christian Legal Society Chap. of the Univ. of Cal., Hastings College of the Law* v. *Martinez*, 561 U.S. 661 (2010); *Lawrence* v. *Texas*, 539 U.S. 558 (2003). And it is why refusing to serve only *same*-sex couples—while offering identical services to *opposite*-sex couples—is widely understood to constitute a form of discrimination based on sexual orientation.

In contrast, people who object to same-sex marriage may do so for many reasons. It would be improper to lump them all together, acting as though their opinions are intrinsically linked to any specific religious (or secular) belief. Indeed, many would find it offensive to treat opposition to same-sex marriage, or condemnation of gays and lesbians, as inherently religious. Accordingly, the bare act of refusing to bake a cake opposing same-sex marriage should not be seen as religious discrimination. In that scenario, a claim of discrimination would lie only upon specific evidence that the baker refused to render goods or services *because of* the client's religion. Yet there is no such evidence that this occurred in Jack's cases.

This is not a case about official animus toward religion. Rather, it is a case arising from the operation of an anti-discrimination law. By design, such laws impose liability on *any* supporters of specific kinds of status-based discrimination when they seek to discriminate in commerce. The fact that the four CADA cases thus far in Colorado involved two religious people, rather than secular opponents of same-sex marriage, is happenstance. It is not proof that Colorado seeks to injure any particular faith.

In sum, CADA has not been applied in a way that targets religion. Nor has it been applied in a way that uniquely fails to protect religion. CADA forbids discrimination on the basis of sexual orientation, for *any* reason. And it allows bakers to refuse to create anti-gay cakes, so long as that denial is not based in hostility to a client's religion. In this case, CADA was properly applied against Petitioner, who would refuse specific services to clients on the basis of their sexual orientation. And relief was properly denied to Jack,

who was refused specific services for reasons wholly unrelated to his religious identity or motives.

Because CADA has been applied in a neutral and general manner, *Smith* controls the analysis and shows that there has been no free exercise violation.

D. Petitioner's "Hybrid Rights" Argument is Incorrect and Untenable

As a fallback, Petitioner argues that a "hybrid" of free expression and religious liberty rights triggers strict scrutiny. *See* Br. at 46–48. Presumably, this contention would come into play only if Petitioner's speech and free exercise claims otherwise fell short. In Petitioner's view, *Smith* would then allow this Court to take his (unmeritorious) free speech claim and his (unmeritorious) free exercise claim, and to mash them into a winning "hybrid rights" claim.

It does not require a fine parsing of precedent to conclude that this argument is deeply illogical. A losing claim cannot be transformed into a winning claim by being paired with a second losing claim. To decide the case on that basis would invite confusion and instability into the First Amendment.

Smith requires no such thing. It is now widely acknowledged that *Smith*'s reference to "hybrid situation[s]" was merely an effort to square the majority's reasoning with the Court's prior rulings. *See Smith*, 494 U.S. at 882. That part of *Smith* should not be seen as propounding new doctrine.

Furthermore, and with all due respect, *Smith*'s reasoning regarding hybrid rights was unconvincing and unnecessary. While this concept was apparently added to distinguish *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), *Yoder* is best seen as resting on the Free Exercise

Clause alone, rather than on a "hybrid" theory. *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder*".). The other cases that *Smith* invented the "hybrid" concept to distinguish likewise were justified by only one right. *See, e.g.*, *West Virginia State Bd. of Education* v. *Barnette*, 319 U.S. 624 (1943) (decided solely under the Free Speech Clause, not the Free Exercise Clause); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (invalidating discretionary prior restraints that violated the Free Speech Clause standing alone).

For these reasons, the Court should agree with Justice Souter's conclusion that the hybrid rights theory is "ultimately untenable" as a free-standing constitutional doctrine. *Lukumi*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in the judgment). As Justice Souter explained:

> If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Id. For all of these reasons, Petitioner's arguments based on a "hybrid rights" theory cannot succeed.

E. The Establishment Clause Supports Rather than Undermines the Decision Below

An amicus brief filed by the Christian Legal Society *et al.* asserts that the application of CADA to Petitioner violates the Establishment Clause because it requires him "to assist with an event he understands as religious." CLS Br. at 16. So far as we can tell, the implicit theory here is that government violates the Establishment Clause when a private person asserts that the law requires his involvement in any experience that he deems to be religious.

That theory has no basis in precedent. As this Court has explained, the Establishment Clause forbids government from coercing religious belief or practice, endorsing religion, or interfering with such purely ecclesiastical decisions as the selection of ministers. *See, e.g.*, *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1825 (2014); *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171, 184 (2012). Private parties, however, cannot convert secular government policies into religious matters simply by asserting that they view the subject matter in religious terms. On this approach, for example, a religious objector to environmental law might seek to avoid the Clean Air Act by asserting that the relationship between man and nature is inherently religious—and thus governed by a divine command for humans to subdue nature to their ends.

There are many reasons why this Court has taken a narrow view of ecclesiastical exceptions to generally applicable law. These considerations would all fall by the wayside if private persons could render any conduct ecclesiastical by declaring it so within the terms of their own faith. That is not the law.

Consider this very case. CADA is a general anti-discrimination provision. By its terms, CADA refers to religion only to protect it and accommodate core ecclesiastical functions (*e.g.*, hiring ministers). CADA itself has no religious purpose and neither coerces nor establishes religious belief. Accordingly, to say CADA establishes religion because Petitioner feels obliged to participate in something *he* deems religious would work an astonishing expansion of the Establishment Clause. This would be ill-advised, especially since laws that constitute establishments are invalidated without any further inquiry into relevant governmental interests.

Ultimately, if the Establishment Clause bears on this case, it does so in the opposite direction. Governmental accommodations of religion must avoid imposing harms on third parties, who may suffer materially or otherwise from those exemptions. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 713 (2005) (holding under the Establishment Clause that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 725 (1994) (Kennedy, J., concurring in the judgment) ("There is a point . . . at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment."); *Estate of Thornton* v. *Caldor*, 472 U.S. 703, 708–10 (1985) (invalidating a statute requiring accommodation by employers of all Sabbath observance by employees, on grounds of resulting harm to employers and fellow employees).

Here, Petitioner requests an exemption from CADA that would inflict material and dignitary injury on same-sex couples. *Cf. Romer*, 517 U.S. at 620. As a result, even if Petitioner could establish a *prima facie*

free exercise violation, the Establishment Clause would buttress Colorado's overpowering interest in denying an accommodation that harms third parties.

* * * * *

There is no evidence that the Commission has targeted or discriminated against anyone on the basis of their faith. That includes religious Christians who oppose same-sex marriage. Rather, the Commission has protected gays and lesbians against any form of discrimination in the commercial marketplace, whether motivated by religion or not. Further, the Commission has sensibly declined to treat opposition to same-sex marriage as inherently religious. For that reason, it has declined to pursue charges against three bakers who refused to create anti-gay cakes, where there was no evidence that their refusal was *because of* William Jack's religion or religious beliefs.

This is how a neutral and generally applicable anti-discrimination law functions. To hold that the Commission violated the Free Exercise Clause here would thus create a major gap in most anti-discrimination laws, at least as applied. That is true not only of rules protecting gays and lesbians, but also of rules shielding many other classes from discrimination in the marketplace. More broadly, a ruling for Petitioner on these facts would destabilize settled understandings of neutrality and general applicability—thus effectively overturning *Smith* in many fields beyond public accommodations law.

For all of these reasons, Petitioner's claim under the Free Exercise Clause cannot succeed.

II. THE CONSEQUENCES OF APPLYING HEIGHTENED SCRUTINY HERE WOULD BE FAR-REACHING AND HARMFUL

Petitioner repeatedly assures the Court that his position is narrow and fact-bound. It is neither. The limiting principles that he invokes collapse on inspection. Further, the premises necessary for him to prevail on his free exercise claim would have sweeping and disruptive implications. Were this Court to accept Petitioner's arguments, religious liberty in the United States would suffer.

A. Petitioner's Proposed Limiting Principles Are Inadequate and Unconstitutional

Perhaps recognizing that his free exercise claim is foreclosed by *Smith*, Petitioner laces his brief with implicit suggestions that settled doctrine should apply differently in this appeal. At various points, he gestures toward three considerations to set his case apart: (1) weddings are "inherently religious," Petr. Br. at 38; (2) he is an "artist," *id.* at 1, 38; and (3) he owns a small business, *id.* at 38 n. 6. To the extent Petitioner contends that a ruling in his favor could be limited on any or all these grounds, he is mistaken.

First consider Petitioner's theory of "inherently religious" events. Invoking his own Christian faith, Petitioner asserts that wedding ceremonies and receptions necessarily have religious significance to anyone involved—and must therefore receive special treatment under the Free Exercise Clause. Indeed, at times he seems to rely heavily on a Judeo-Christian premise of wedding exceptionalism. *See* Br. at 9, 38.

But that is an argument without limit. Who is to decide what events, conduct, and physical spaces

qualify as "inherently religious," and thus require some kind of enhanced First Amendment protection?

On matters of religious interpretation and meaning, this Court has left the final word to individual believers. Judges may not second-guess claims that a person's religious beliefs are implicated by compliance with a government policy. *See Hobby Lobby Stores Inc.* v. *Burwell*, 134 S. Ct. 2751, 2778 (2014); *Thomas* v. *Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981).

Because courts defer to the subjective views of free exercise claimants, the concept of "inherently religious" events has no limit. In the marriage sphere alone, we would undoubtedly see objections to serving same-sex, inter-faith, and inter-racial marriages, as well as re-marriages after divorce and many other unions opposed by one or another faith tradition. Recall that in this very case, Craig and Mullens were already married under Massachusetts law when they entered Petitioner's bakery. Petitioner, not the couple, decided that their Colorado reception was an event loaded with religious significance.

Moreover, if Petitioner's theory were accepted, courts could not limit "inherently religious" practices to marriage. The concept would apply in countless other contexts. For many believers across many faiths, every aspect of existence is imbued with spiritual significance. *See, e.g.*, CLS Br. at 10. As a result, every part of life could be described by some persons as "inherently religious"—at least in certain circumstances. Any doubt on this score is resolved by reference to our wide-ranging history of free exercise cases. *See Smith*, 494 U.S. at 888–889. Religious teachings apply to education, employment, healthcare, housing, dress, diet,

grooming, and an endless array of other daily practices. They also apply to a diverse list of life-cycle events, including but not limited to weddings. Indeed, it might well constitute denominational discrimination to hold that weddings are imbued with constitutionally-recognized religious significance, while denying the same status to events that hold equal importance for other faiths.

Accordingly, while it may be acknowledged that Petitioner ascribes profound religious meaning to wedding ceremonies, his theory of the case extends far beyond weddings. If every person can designate which parts of life they subjectively comprehend as religiously significant—and can thereby secure more robust accommodations—then American society will soon become a thicket of competing religious claims.

In addition to describing weddings as unique, Petitioner implies that he has a stronger basis to be exempted from CADA because he is an artist who creates personalized goods. That claim may bear on free speech issues, but it is irrelevant to free exercise.

As noted above, this Court has made clear that it will not peek behind a claimant's description of his own faith. *See Thomas*, 450 U.S. at 716. Some religions may care deeply about whether a vendor's role in a wedding involves customizing personalized goods, rather than selling off-the-rack items. But other religions may not care at all. They may equally condemn either role, or may draw entirely different lines regarding acceptable involvement. Cf. *Hobby Lobby*, 134 S. Ct. at 2778. The law of the Free Exercise Clause forbids drawing distinctions among these variations. Where a person claims that the law requires conduct at odds with his faith, no matter how personal his involvement is, *Smith* supplies the rule of decision without regard

to the quality of the person's precise role. The Constitution does not favor artists over laypeople—or wholesalers over retailers—in resolving free exercise claims.

Moreover, while Petitioner paints himself as unique, he is no different than any other vendor who deals with weddings. As anyone who has planned a ceremony and reception knows, every last detail must be customized. This explains why we already have seen analogous claims brought by florists, venue providers, photographers, and videographer.[7] And it is why we imagine similar claims will emerge from caterers, tailors, musicians, drivers, carpenters, lighting engineers, and many other businesses.

Of course, the provision of distinctive personal services to same-sex couples doesn't stop at weddings. Architects may refuse to create homes for same-sex couples and their children. Restaurants may decline to prepare desserts that say "Happy Anniversary." Physicians might decline to provide care relating to HIV treatment. The list of conceivable objections is endless—both for same-sex couples and for many other victims of discrimination.

Petitioner's asserted limit is thus no limit at all. Consistent with their consciences and teachings, religious believers may conclude that their actions in *any* vocation conflict with general legal obligations. While Petitioner presents himself as a special case, free exercise claims like this one are both ordinary and ubiquitous.

---

[7] *See, e.g.*, *Elane Photography, LLC* v. *Willock*, 309 P.3d 53 (N. M. 2013); *State* v. *Arlene's Flowers, Inc*., 389 P.3d 543, 550 (Wash. 2017); *Telescope Media Group* v. *Lindsey*, 2017 WL 4179899 (D. Minn. 2017), *303 Creative LLC* v. *Elenis*, 1:16-CV-02372 (D. Colo., filed September 20, 2016).

Finally, Petitioner suggests that he suffers a distinct burden because he is a small business owner. That fact, however, is likely irrelevant to the constitutional analysis. Three years ago, this Court decided that owners of large, closely-held businesses can assert religious exemption claims as a statutory matter. *See Hobby Lobby*, 137 U.S. at 2775. In that case, the claimant had 500 stores and 13,000 employees. Nothing in Petitioner's argument suggests any principle that would prevent a company like Hobby Lobby from seeking *exactly* the same exemptions from civil rights regulations that conflict with its owners' religious views.

Petitioner's request for an accommodation is not just a story of one man and his bakery. It poses a question that will define how millions of Americans will engage in basic commerce every day, whether at mom-and-pop stores or national chains.

In sum, the limitations that Petitioner scatters through his brief are illusory. His argument cannot be constrained to weddings, to artists, or to small businesses. Instead, Petitioner seeks to establish a broad, general principle—one that would allow believers to evade any law that conflicts with their religious practices across every field of American life.

B. Petitioner's Claim is at Odds with Our Nation's Tradition of Accommodation

There is a long and thoughtful tradition of religious accommodation in America. It is embodied not only in *Smith*, but also in a framework of state and federal laws that balance religious liberty with other public values. Here, Petitioner asks the Court to leapfrog precipitously beyond anything this nation has seen before. The broad rule that he seeks as a matter

of constitutional law jumps well past any familiar method of protecting religious freedom in commerce. As a result, were this Court to accept his arguments—which have only just begun percolating in the lower courts—it would unleash a novel legal principle of uncertain scope and implication.

In *Smith*, this Court recognized the importance of positive law in shielding religious liberty. *See* 494 U.S. at 890. Fulfilling that vision, the people of this nation have long supported an array of religious liberty protections, ranging from laws like RFRA to more targeted accommodations. *See generally* Ira C. Lupu and Robert W. Tuttle, Secular Government, Religious People 211–248 (2014). Those rules offer wisdom and balance born of experience. They also provide a sense of how the American people have understood the role of religious freedom in a pluralistic society.

It is therefore telling that Petitioner's claim finds no support in our traditions. As a recent survey concluded, "Public accommodations laws typically do not offer religious exemptions. When exemptions exist, they tend to be limited to a narrow range of activities of religious non-profits and to co-religionist favoritism alone." Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631, 637 (2016).

Indeed, such treatment of religious entities is better understood as excluding such entities from coverage under the public accommodations statutes. States have not created comparable exclusions or exemptions in the context of for-profit businesses. The distinctive treatment of religious entities has been framed in terms that respect their special character yet still preserve the vital purposes of public accommodations laws.

Those purposes are diverse. They include combating economic inequality and disadvantage; protecting equal citizenship, both in the marketplace and in democracy; condemning bias against groups that have faced discrimination; and minimizing domestic strife and unrest. *See, e.g.*, *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 625 (1984); *see also* Sepper, *The Role of Religion*, at 663–668.

Exempting for-profit businesses from laws like CADA whenever their owners object on religious grounds would undermine all of these purposes. A broad scheme of religious exemptions could swiftly condemn racial minorities, immigrants, women, gays, and others to a world in which they must check handbooks before figuring out where they can obtain basic goods and services. Our nation rejected that divisive model in the mid-20th century. States have thus crafted their laws with a proper understanding that equal accommodation is a societal decision of overwhelming importance.

Petitioner would have the Court jettison all that. On the basis of speculation and conjecture—but without any favorable lower court decisions, and without any models in state or federal government—he would have this Court constitutionalize a rule flatly at odds with decades of American legal tradition. In particular, he would redefine neutrality and general applicability in a manner that could render hundreds of state and federal laws unconstitutional in innumerable applications. This Court should not go down that uncertain path.

C. Arguments Against Narrowing *Smith* Are at Their Zenith Here

Petitioner's view of the Free Exercise Clause would effectively overrule *Smith* and require courts to apply

strict scrutiny in countless new contexts. *Smith* itself expressed grave concern about the far-reaching implications of that undertaking:

> [This rule] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service; to the payment of taxes; to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

494 U.S. at 888–889 (citations omitted).

Smith's warning about the potential for disruption applies with special force here. This is not a case about a religious institution or a non-profit entity. Rather, it's a case about whether the people of this nation lack the democratic power to bar a culture of segregation in the ordinary course of for-profit commerce. Long before *Smith*, this Court made clear that the Free Exercise Clause does not impose limitations on generally applicable regulation of the marketplace. *See United States* v. *Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

Further, this is a case about civil rights law—in particular, public accommodations law. The regulations

at issue here are fundamental to protecting equal treatment and anti-discrimination values. *Cf. Hobby Lobby*, 134 S. Ct. at 2783. Holding that people of faith are uniquely privileged to deny service to others would thus raise a host of troubling questions about the implications of that rule. Could service also be denied to Jews, divorcees, immigrants, Republicans, and Asian-Americans? And how would courts set about making these decisions? Because civil rights laws involve profoundly important decisions about which groups should receive legal protection, opening them up to constitutionally-mandated exceptions would raise exceptionally difficult and socially divisive questions.

These questions would arise as constitutional disputes requiring a yes/no answer. They would also reach the courts in a scattershot, *ad hoc* manner. This would prevent the pragmatic, panoramic, and flexible approach that a legislature or agency could use in addressing accommodations. Moreover, courts would have to build this body of law from the ground up, as there is currently no federal appellate jurisprudence to offer guidance on when to impose a free exercise exemption from a civil rights statute.[8]

This Court is often told that its rulings may have a slippery slope effect. But here we begin at the bottom of the slope. This case involves a for-profit business seeking a mandatory exemption from a state civil

---

[8] To our knowledge, there is only a single case in which an appellate court has subjected a public accommodations law to Free Exercise Clause review, and this Court concluded that the claim in that case was frivolous. *See Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.5 (1968). In *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), this Court held that federal anti-discrimination law does not apply at all when religious groups select ministers.

rights requirement. If there is any legal context in which the Court should adhere to *Smith*, it is this one.

D. Petitioner's Theory Would Sow Cultural Discord and Harm Religious Freedom

The rule in *Smith* seeks to achieve a balance between religious liberty and the protection of other constitutional values.[9] On the one hand, religion may not be singled out for burdens or targeted on the basis of animus. On the other hand, in a diverse nation, religious convictions cannot relieve citizens from the need to comply with democratically-enacted laws protecting against discrimination in the marketplace. To create a middle ground between those commitments, jurisdictions throughout the country have passed civil rights statutes—like CADA—that safeguard religious liberty in a manner consistent with securing other important values.

In the name of religious freedom, Petitioner wants the Court to reject this settlement. He seeks a broad ruling that religious participants in the marketplace are constitutionally entitled to opt-out of any dealings with those whom they view as sinners. His position would undermine the ideal of peaceful coexistence amid religious pluralism and our national commitment to equal dignity in the market.

Religious freedom would suffer if this Court held that religion—and religion alone—allows any person to excuse himself from even the most fundamental rules of acceptable conduct in our society. That would

---

[9] Some *amici* would strike that balance in a different place, but they recognize the force of the Court's precedent in *Smith*, *Lukumi*, and *Boerne*, and for the reasons set forth herein they fully support the application of those principles in this case.

invite many to see religion as a principal force opposing tolerance, pluralism, and peaceful diversity. To millions of people, "religious freedom" would become synonymous with their lived experience of unequal treatment and material disadvantage. The possibility of compromise—and mutual understanding—would recede. And religious communities would have a new right to draw up their moats, refusing any interaction with "sinners" even in the course of commerce. At least, that is a path on which this Court would set the nation were it to rule in Petitioner's favor.

The Constitution does not require that result. Instead, and wisely, our constitutional law bars the path to that outcome. As a matter of principle and free exercise precedent, Petitioner's claim should be rejected in order to preserve the equal citizenship of all persons in our diverse democratic society.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should affirm the judgment below.

Respectfully submitted,

ROBERTA A. KAPLAN
Counsel of Record
JOSHUA MATZ
KAPLAN & COMPANY, LLP
350 Fifth Avenue
Suite 7110
New York, NY 10118
(212) 763-0883
rkaplan@kaplanandcompany.com

Counsel for Amici Curiae

October 30, 2017

APPENDIX

APPENDIX

Amici Curiae are constitutional law scholars. Their titles and institutional affiliations are listed for identification purposes only.

Ira C. Lupu
F. Elwood and Eleanor Davis Professor
Emeritus of Law
George Washington University School of Law

Micah Schwartzman
Joseph W. Dorn Research Professor of Law
University of Virginia School of Law

Nelson Tebbe
Professor of Law
Cornell Law School

Robert Tuttle
David R. and Sherry Kirschner Berz
Research Professor of Law and Religion
The George Washington University School of Law

Caroline Mala Corbin
Professor of Law
University of Miami School of Law

Frederick Gedicks
Professor of Law
Brigham Young University School of Law

Steven K. Green
Fred H. Paulus Professor of Law and
Director, Center for Religion, Law and Democracy
Willamette University College of Law

Lawrence Sager
Alice Jane Drysdale Sheffield Regents Chair
The University of Texas at Austin Law School

Richard C. Schragger
Perre Bowen Professor of Law
Joseph C. Carter, Jr. Research Professor of Law
University of Virginia School of Law

Nomi Stolzenberg
Nathan and Lilly Shapell Chair in Law
USC Gould School of Law

Laurence H. Tribe
Carl M. Loeb University Professor
Professor of Constitutional Law
Harvard Law School

Laura Underkuffler
J. DuPratt White Professor of Law
Cornell Law School