No. 16-111

In the Supreme Court of the United States

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

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF OF *AMICI CURIAE* COLORADO ORGANIZATIONS AND INDIVIDUALS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Amici include lesbian, gay, bisexual, or transgender (LGBT) individuals resident in the State of Colorado and LGBT membership organizations based in Colorado that rely on the protections of the Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. §§ 24-34-301 to -804, to ensure equal access to basic commercial services. Amici also include organizations and individuals that seek to address the discrimination that LGBT Coloradans have faced, and continue to face, on a daily basis.

Finally, amici include current and former Colorado lawmakers who have drafted or supported legislative initiatives pertaining to the rights of LGBT Coloradans, including CADA's provisions protecting LGBT Coloradans. These include former State Senator Jennifer Veiga and former State Representative Joel Judd, who sponsored the amendment to CADA that codified the protections challenged here.[1]

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[1] Pursuant to Rule 37, this brief is filed with the written consent of Respondents Craig and Mullins. Respondent Colorado Civil Rights Commission and Petitioner have lodged blanket consents for the filing of amicus briefs with this Court. Counsel for a party did not author this brief in whole or in part, and such counsel or a party did not make a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amici, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

CADA fulfills Colorado's compelling interest in protecting the rights of all its citizens, including LGBT Coloradans, to participate with equal dignity in the "transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Prohibited at various points in Colorado's history from engaging in intimate conduct, from "securing protection against . . . injuries . . . [in] public-accommodations," and from marrying their partners of choice, LGBT Coloradans were for decades treated as "stranger[s] to [the] laws" of Colorado. *Id.* at 635. In the pitched, public, state-wide battles that heralded each act of stigmatization, LGBT Coloradans were accused of being immoral and of committing sexual offenses. These encounters left LGBT individuals vulnerable, subject to discrimination and public scorn.

Faced with this ongoing history of discrimination, Colorado legislators in 2008 sought to protect LGBT individuals' ability to fully participate in the state's commercial life. In so doing, they carefully limited CADA to avoid overburdening Coloradans' First Amendment interests by introducing exemptions from the law's reach.

CADA seeks to protect LGBT individuals from the identical injuries that this Court recognized in *Romer* as being "far reaching." *Id.* at 627. The range of transactions and activities in which LGBT Coloradans are now protected by CADA are almost identical to the "specific legal protections" that Amendment 2 "nullifie[d]," including housing, real

estate, and other business transactions. *Id.* at 629. Many of these services—including access to food and basic health care—are in short supply in remote, mountainous areas of the state. Further, there is evidence that LGBT Coloradans face unique barriers and continued discrimination in accessing these essential services. Access—and discrimination—in those circumstances does not simply determine dignity and social acceptance, but can mark the line between life and death. Under existing interpretations of federal law, LGBT Coloradans lack the explicit protections from most kinds of discrimination that many other groups enjoy. LGBT Coloradans are therefore completely reliant on CADA to ensure this access.

An expression- or religion-based exception to CADA would achieve at a retail level what Amendment 2 sought to accomplish wholesale—denying LGBT individuals equal social dignity. If the baking of a wedding cake—over whose design and message the couple would have the final say—could somehow be construed as the baker's First Amendment-protected activity, then, as Colorado's history shows, stemming the tide of discrimination against LGBT Coloradans would prove difficult. Other vendors who provide essential services, often through the written or spoken word, could seek similar exemptions. Employers, likewise, could seek to escape antidiscrimination strictures. Indeed, it is hard to see why a First Amendment exemption to discriminate against LGBT Coloradans would not extend to other groups that consistently invoke CADA for their protection.

"[W]hen . . . sincere, personal opposition becomes . . . law . . . it creates an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). While all Coloradans are free to express sincere opposition to any protected group, allowing them to embed this opposition into a legal right to exclude such minorities from commercial activities would undermine the balance the legislative process has struck, and would forever alter "the structure and operation of modern antidiscrimination laws." *Romer*, 517 U.S. at 628.

ARGUMENT

I. CADA FULFILLS THE STATE'S COMPELLING INTEREST IN PROTECTING THE RIGHTS OF ALL ITS CITIZENS, INCLUDING LGBT COLORADANS, TO EQUAL DIGNITY AND THE OPPORTUNITY TO PARTICIPATE IN THE PUBLIC SPHERE BY PROTECTING THEM AGAINST DISCRIMINATION IN PUBLIC ACCOMMODATIONS

A. LGBT Coloradans have faced a history of demeaning and discriminatory treatment

The quest for equal treatment of LGBT individuals in Colorado has been long-running and has faced persistent, often hostile, opposition. Over the past 25 years, Colorado has enacted not one, but two, citizen-initiated amendments to the Colorado

Constitution specifically designed to declare gay men and lesbians "unequal to everyone else" and to "deem [them] a stranger to its laws." *Romer*, 517 U.S. at 635. The first, known as Amendment 2, worked a "[s]weeping and comprehensive" change in the status of lesbian, gay, and bisexual individuals that placed them, "by state decree . . . in a solitary class[.]" *Id.* at 627. The second, known as Amendment 43, denied Colorado's gay and lesbian citizens "equal dignity in the eyes of the law" by denying them the freedom to marry. *Obergefell*, 135 S. Ct. at 2608. While these two constitutional amendments garnered the most attention in Colorado's battle over the rights of LGBT people, they are just two chapters in a much longer story.

Until 1971, Colorado criminalized intimate conduct between individuals of the same sex. "Gays and lesbians lived hidden lives and in fear of exposure that could, and did, result in loss of a job and professional career—even eviction from one's home." Gerald A. Gerash, *On the Shoulders of the Gay Coalition of Denver*, *in* United We Stand: The Story of Unity and the Creation of The Center 3, 3 (Phil Nash ed., 2016). Police raided homes of openly gay men, imprisoned organizers of a prominent gay rights organization, and confiscated the group's mailing lists. *A Brief LGBT History of Colorado*, Out Front (Aug. 20, 2014).[2] Even after the repeal of Colorado's antisodomy laws, gay people faced

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[2] https://www.outfrontmagazine.com/news/colorado-lgbt-community/brief-lgbt-history-colorado/.

significant hostility. When the Boulder, Colorado, city council voted to prohibit employment discrimination against gay men and lesbians in 1974, voters withdrew those protections by ballot initiative. *See* Lisa Keen & Suzanne B. Goldberg, Strangers to the Law: Gay People on Trial 6 (2000).

In subsequent decades, the rights of LGBT people rode "a political see-saw" in Colorado. *Id.* While Boulder reinstated its antidiscrimination provisions in 1987, and Denver adopted similar measures in 1990, other cities rejected them. In these battles, some opponents of equal rights for gay people compared homosexuality with necrophilia and bestiality, and argued that homosexuality would lead to increased child molestation. *See* Susan Berry Casey, Appealing for Justice: One Colorado Lawyer, Four Decades, and the Landmark Gay Rights Case: *Romer v. Evans* 196 (2016); Stephen Bransford, Gay Politics vs. Colorado: The Inside Story of Amendment 2, at 21 (1994). By the time Amendment 2 was proposed, gay men and lesbians felt "beaten up, stigmatized, and more isolated than ever." Casey, *supra*, at 201. And even when some communities decided to protect the rights of LGBT citizens to participate fully in civic life, opponents responded with animosity, leading the charge for passage of Amendment 2. *See Romer*, 517 U.S. at 623.

The Amendment 2 campaign sought to demean and humiliate LGBT Coloradans. Both in mainstream media outlets, such as Newsweek and National Public Radio, and through more targeted means, proponents falsely claimed that gay men had sex with minors, that many had more than 1,000

partners, and that they consumed fecal material. *See generally* Brief for *Amicus Curiae* National Bar Association in Support of Respondents at 6, *Romer*, 517 U.S. 620 (No. 94-1039) [hereinafter Nat'l Bar Ass'n Brief] (listing sources).

Throughout the campaign, LGBT Coloradans "were subjected to constant scrutiny, anger and vitriol, unfair accusations, and blatant distortions about their lives." Glenda M. Russell, Voted Out: The Psychological Consequences of Anti-Gay Politics 3 (2000). Such invective was backed up by physical aggression. Even as violence against gay people decreased across the nation, Colorado saw an uptick. Nat'l Bar Ass'n Brief at 7 (citation omitted). Amendment 2, which "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else," passed with a comfortable majority. *Romer*, 517 U.S. at 635.

Romer struck down Amendment 2 as a violation of the Equal Protection Clause because it was born of "a bare . . . desire to harm a politically unpopular group." *Id.* at 634 (citations omitted). But even as *Romer* lay pending before the Court, prejudice against Colorado's LGBT community endured. In 1996, the Colorado legislature enacted a bill to prohibit marriage between individuals of the same sex. Governor Roy Romer vetoed the bill, but the legislature passed it again in 1997, only to have it vetoed once more. Governor Bill Owens signed yet a third version into law in 2000. *Governor Signs Gay-Marriage Ban Among Flock of Other Bills*, Colo. Springs Gazette, May 28, 2000, at 2.

The following years saw additional challenges. In 2003 and 2004, legislators proposed a civil union bill to give same-sex couples a portion of the legal protections afforded their heterosexual counterparts. The bill faced harsh opposition and died in committee both years. Michael Brewer, *Colorado's Battle Over Domestic Partnerships and Marriage Equality in 2006*, 4:1 J. GLBT Family Stud. 117, 118 (2008). In 2005 and 2006, Governor Owens vetoed proposed employment discrimination protections for gay and lesbian Coloradans. *Id.* at 123. And in 2006, the organizations behind Amendment 2 launched a new initiative—this time to cement into the State's constitution the denial of same-sex couples' freedom to marry. *Id.* at 118-19. Amendment 43, which prevented the legislature from ending gay Coloradans' exclusion from marriage, passed by a wide margin. *Id.* at 123.

Recognizing that it would be hard to obtain their freedom to marry, gay rights advocates sought to create family protections through state-level domestic partnership status. Because the Governor had previously vetoed similar protections for same-sex couples, advocates placed a domestic partnership proposal on the ballot. *Id.* at 119. Even this limited measure lost handily. *Id.* at 123.

As this history suggests, legal protections for gay and lesbian Coloradans were sorely needed and hard won. In 2007, the Colorado legislature finally passed a law prohibiting discrimination on the basis of sexual orientation in employment. Colo. Rev. Stat. § 24-34-402. In 2008, as discussed further below, CADA was amended to prohibit discrimination based

on sexual orientation in public accommodations and housing. In 2013, a civil union law provided some of the tangible protections and responsibilities of marriage, and, in 2014, following the Tenth Circuit's decision in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), same-sex couples in Colorado finally obtained equal freedom to marry.

B. The legislative record of CADA demonstrates that it was amended to address this history of discrimination

1. As this Court has recognized, "times can blind us to certain truths." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). The history of CADA provides an example of this reality.

Colorado has prohibited discrimination in public accommodations since 1885. *See generally* Resp't Colo. Civil Rights Comm'n Br. 7-8 (describing history). The law has been amended over time to add certain protected characteristics as society gained an understanding that discrimination on the basis of those characteristics was invidious, destructive, and without legitimate or rational purpose. But despite the long history of discrimination and stigma described above, sexual orientation was not included until the law had been in place for well over a century.

Colorado legislators sought for more than a decade to add protections for LGBT individuals in CADA, but their efforts were met with repeated failure. Compendium of Legis. Hist. of SB08-200 (2008 amendment to CADA) at 90-91 [hereinafter

Leg. Record].[3] Finally, in 2008, following extensive evidentiary hearings and debate, the Colorado General Assembly made clear that sexual orientation discrimination, like other enumerated forms of exclusion and disadvantage, should be and was prohibited in public accommodations and housing.

The purpose of the 2008 amendment was simple: as Representative Joel Judd, its chief sponsor in the Colorado House, explained, by extending protections to LGBT people in "places of public accommodation . . . [that] range from . . . barbershops, to hotels, to hospitals, [to] . . . funeral homes," the law ensures that LGBT individuals will "live in dignity and will ultimately die in dignity." *Id.* at 112.

Many opponents refused to acknowledge that sexual orientation discrimination is a serious problem, however, let alone something to be prevented. One legislator who opposed the bill suggested, ostensibly in jest, that discrimination against short people was far more pervasive and serious than was discrimination against gay people. *Id.* at 76-78. Another suggested that discriminating against gay people in housing was the same as refusing to rent to a "party[ing] college freshman." *Id.* at 131. Legislators objected to analogizing discrimination based on race to that based on homosexuality—"the science is still out on that[,]" one claimed. *Id.* at 148. Opponents argued that the measure was about nothing more than putting the "feelings" of LGBT people above the rights of others

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[3] http://scholar.law.colorado.edu/research-data/8/.

to decide to whom they want to rent apartments. *Id.* at 214.

Supporters of the legislation countered that the legislation fulfilled CADA's longstanding central purpose: protecting all Coloradans' ability to engage in "transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631. As Mark Ferrandino, Colorado's first openly gay male legislator, explained, this amendment was about the State's compelling interest in assuring all people the ability to find housing, to serve on a jury without discrimination, and to engage in the many other fundamentals of civic and commercial life. Leg. Record at 272-73. And, these legislators noted, Colorado had a compelling interest in enacting a law to end this discrimination, alongside others, because discrimination on the basis of sexual orientation was, and is, serious and ongoing.

In documenting the need for this protection, legislators relied in part on their own experiences in Colorado. Senator Chris Romer, the son of former Governor Roy Romer, described "how painful" it was for a former staffer of his father "to explain to people what it means to be afraid and to be gay" after Amendment 2 passed. *Id.* at 78-79. Another legislator explained how his son, a prosecutor, left Colorado for Oregon, because he found Colorado to be hostile to gay people. He concluded, "I don't have formal statistics, I just have one, and the one is my son. He was uncomfortable in Colorado." *Id.* at 88. Yet another representative explained that what motivated her was the need to ensure "basic human

decency," to guarantee that the housing and health care needs of her sister, her partner, and their three children were properly satisfied. *Id.* at 222-23.

Witnesses also testified to the prevalence of discrimination on the basis of sexual orientation. A representative from the Anti-Defamation League said that its office received calls about individuals being denied housing because of their sexual orientation. *Id.* at 42. The director of the LGBT Center reported calls from people who had heard doctors in emergency rooms suggesting that they did not want to treat gay patients because of their sexual orientation. *Id.* at 52.

2. In deliberating on the addition of sexual orientation to CADA, legislators were careful to consider possible effects on speech and religion. The question presented by this case was debated in the hearings. One witness testified about his concern that religious people who run businesses would be required to serve gay people despite their "personal conscience." *Id.* at 25-27. In response, the law's supporters noted that, by prohibiting discrimination based on sex, race, or creed, CADA already considered and rejected demands by those who elect to run a business for unfettered license to discriminate. *Id.* at 155-56.

As legislators explained, CADA seeks to strike the right balance between the desire of some individuals to discriminate, whatever their reason, and "the need for individuals to be able to acquire acceptable housing . . . to raise a family," *id.* at 127, or to access and participate in the marketplace without injury or insult. That familiar balance,

struck again and again over decades of civil rights legislation, one witness noted, separated "private organizations" that can "choose to exclude people based on their own creed and practices" from those in the commercial or "public sphere," such as "housing [and] education." *Id.* at 58. Accordingly, as one legislator observed, "[i]f you choose to go into the world of commerce and offer your services to the general public, then, at that point, you've given up the ability to draw a line on the basis of race, on the basis of religion, or on the basis of sexual preference." *Id.* at 197.

Even while defending the essential purposes that CADA served, legislators were eager to listen to, negotiate with, and accommodate religious interests. As Senator Jennifer Veiga, who sponsored the bill in the Senate, noted during the hearings, the proposal was amended to address the Catholic Church's one expressed concern: a provision concerning discrimination based on *religion* that the Church perceived as troublesome and duplicative. *Id.* at 40, 63-64, 71, 107. The legislature also amended the bill to allow restrictive covenants on cemetery plots to respect religious preferences. *Id.* at 62. And they expanded the exemption from CADA beyond just churches, synagogues, and mosques to include any "other place that is principally used for religious purposes," so that religious camps, among other entities, would not be subject to the law. *Id.* at 261-62.

Notably, the substantial majority of the testimony from religious organizations during the debate over amending CADA was supportive of

adding protections against discrimination on the basis of sexual orientation. *E.g.*, *id.* at 55-56, 176-79. As a Methodist minister, whose own congregation did not ordain gays and lesbians, explained, a "bill that protects gay and lesbian people from discrimination" in public accommodations helps Coloradans "rise to a higher standard from that of dehumanizing our fellow human beings." *Id.* at 56-57.

The amendment to CADA to include protections based on sexual orientation was the culmination of a "deliberative process" in which "people t[oo]k[ ] seriously questions that they may not have even regarded as questions before." *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting). The result of the careful democratic balance thus achieved should not be overridden.

II. AN EXPRESSIVE OR RELIGIOUS EXCEPTION TO CADA WOULD SEVERELY UNDERMINE ANTIDISCRIMINATION PROTECTIONS AND SUBJECT LGBT AND, MOST LIKELY, OTHER COLORADANS TO WIDESPREAD DISCRIMINATION

A novel expressive or religious exception to CADA would swallow the rule against discrimination that the law embodies, and mark a departure from the respect courts have given such laws over decades. CADA's protections span a vast array of services, through which LGBT Coloradans access basic needs, such as food, shelter, and health care. Weakening these protections invites would-be discriminators to

"inflict[ ] on them immediate, continuing, and real injuries." *Romer*, 517 U.S. at 635. Moreover, creating an exemption to permit discrimination on the basis of sexual orientation would either allow the same carve-out to discriminate on other bases (*e.g.*, gender, race, or even religion), or would impermissibly single out one class of citizens as "unequal to everyone else." *Id.* And although some assert that discrimination against LGBT citizens is not a "real concern," Pet'rs' Br. 52, Colorado's experience—and our nation's broader history—demonstrates that it is. LGBT people have been singled out for unequal treatment in critical contexts, from health care to housing to employment and, of course, to public accommodations.

A. CADA's protections reach across a wide array of public and commercial contexts

CADA's protections are nearly identical to the municipal protections that triggered the passage of Amendment 2. *See Romer*, 517 U.S. at 623-24. The list of "persons or entities subject to a duty not to discriminate . . . goes well beyond the entities covered by the common law." *Id.* at 628. The law prohibits "any place of business engaged in any sales to the public . . . [or] offering services, facilities, privileges, advantages, or accommodations to the public" from discriminating against protected classes of individuals. To be clear about the breadth of protection the legislature intended to provide, CADA non-exhaustively lists several such entities as examples:

> any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor.

Colo. Rev. Stat. § 24-34-601.

Fulfilling CADA's intent to eliminate invidious discrimination in commercial life, vulnerable groups have sought the protection of CADA for a wide variety of purposes. Children have sought access to recreational facilities to which they were allegedly denied access because of their race. *Creek Red Nation, LLC v. Jeffco Midget Football Ass'n,* 175 F. Supp. 3d 1290, 1292-93 (D. Colo. 2016). Women have sought access to local stores to purchase basic

necessities. *Arnold v. Anton Co-op. Ass'n*, 293 P.3d 99, 102 (Colo. Ct. App. 2011). Disabled individuals have sought access to major restaurant and retail chains. *Lucas v. Kmart Corp.*, No. 99-cv-01923-JLK, 2005 WL 1648182, at *1 (D. Colo. July 13, 2005); *Colo. Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 355-56 (D. Colo. 1999). Native Americans have used CADA to challenge school regulations that burdened their religious beliefs. *Sch. Dist. No. 11-J v. Howell*, 517 P.2d 422, 423 (Colo. Ct. App. 1973). Other plaintiffs have turned to CADA to combat discrimination in public transportation, *Reeves v. Queen City Transp.*, 10 F. Supp. 2d 1181, 1182-83 (D. Colo. 1998); in obtaining cellular telephones, *Lewis v. Strong*, No. 09-cv-02861-REB-KMT, 2010 WL 4318884, at *1, 5 (D. Colo. Aug. 19, 2010); and in obtaining access to essential medical care. *Colo. Cross-Disability Coal. v. Women's Health Care Assocs., P.C.*, No. 10-cv-01568-RPM, 2010 WL 4318845, at *1-2 (D. Colo. Oct. 25, 2010). In short, CADA is an essential tool to protect equal access to a vast array of public accommodations.

Access to these accommodations can be a matter of life and death for many Coloradans. Although most of Colorado's citizens live in or near the Denver metro area, the vast reaches of the State are rural, and citizens in those areas frequently lack choice as to where they can receive essential services. Of Colorado's 64 counties, 51 are wholly or partially designated as Primary Care Health Professional Shortage Areas by the federal government. Colorado Department of Public Health and Environment GIS, Primary Care Health Professional Shortage Areas

(HPSAs) (2015).[4] Similarly, a report found that "[a]ccess to supermarkets is a problem in many Colorado neighborhoods but exceedingly so in lower-income, inner-city and rural communities where the incidence of diet-related disease is highest." Allison Karpyn & John Weidman, The Food Trust, Special Report: The Need for More Supermarkets in Colorado at 10 (2009).[5] CADA ensures access to stores that do exist in such areas. *Cf. Anton Co-op. Ass'n*, 293 P.3d at 102 (CADA case in which plaintiff noted that the Association's store "is the only place within 30 miles to purchase many necessities"). Colorado's geography makes seeking alternative services in the Rockies even harder. Any exception to CADA could transform a shortage into a complete deprivation of basic services for vulnerable minorities.

B. An expressive or religious exception would sweep broadly, harming LGBT individuals and perhaps members of other protected classes as well

The implications of a carve-out from CADA based on the kind of compelled speech or free exercise claim put forward in this case would be far-reaching. If a merchant could refuse service in defiance of a civil rights law simply by asserting that its

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[4] https://www.colorado.gov/pacific/sites/default/files/PCO_HPSA-primary-care-map.pdf.

[5] http://www.coloradohealth.org/sites/default/files/documents/2017-01/Food_Trust_Rpt-Colorado-Special%20Report%20the%20Need%20for%20More%20Supermarkets%20in%20CO.pdf.

expressive or religious beliefs are implicated by the identity of the customer or the customer's exercise of his or her rights, then nearly any merchant could claim an expressive or religious license to evade the law. There is no principled way to limit such an exemption to wedding cake bakers or florists, or to discrimination based only on sexual orientation. The First Amendment requires no such exemption from generally applicable, content neutral antidiscrimination laws.

1. Even assuming that cakes have an expressive function, they hardly embody the *merchant's* message. Historically and culturally, the message on the wedding cake is that of the married couple; the design and any text "are often closely identified in the public mind with the [couple]," rather than with the baker; and the customer can "maintain[ ] direct control" and "final approval authority" over the product. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248-49 (2015) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 472, 473 (2009)) (identifying factors that determine to whom speech should be attributed). Similarly, no reasonable person imputes the message on a T-shirt to the weaver, the message on a wedding photograph to the photographer, or the billboard message or campaign ad to the advertising company. These messages are rightly imputed to the person with control over the message—the customer who paid for them. Indeed, why would a customer

pay a merchant to spread the merchant's message?[6]

If a new carve-out were based on a business owner's purported expressive interest, then any vendor who characterizes his or her work as including an expressive component could assert a right to refuse service. If this kind of discrimination were permitted because of a carve-out to CADA, then LGBT individuals could be denied even essential services. For example, medical treatment frequently requires verbal interaction between doctor and patient. Medical professionals have been held to engage in "speech" for the purposes of the First Amendment even when providing treatment. *King v. Governor of the State of N.J.*, 767 F.3d 216, 225 (3d Cir. 2014). Funeral parlors might similarly decline to provide services for same-sex couples, on the grounds that funerals, like weddings, have expressive components.

Further, such exemptions would create challenges for the LGBT groups and organizations that have been essential for fostering community and mutual support for individuals who frequently face familial rejection. For example, amicus Denver Gay

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[6] So understood, this case is distinct from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), wherein the organizers of a privately arranged parade—an inherently politically expressive activity—were required by the state to include a group in the parade that would alter their message. *Id.* at 559. Importantly, it was *the parade organizer's* message that controlled, not the message from the outside group. *Id.* at 568-70. Here, the merchant is not being forced to alter his speech, but is simply facilitating that of yet another customer.

Men's Chorus, with nearly 150 members, might be denied access to the few venues that can hold a group its size if the owners of those venues claimed that the Chorus's pro-LGBT message would be attributed to them and thus excused their compliance with the law.

Without a principled limit, exemptions created to CADA could easily be asserted for other protections embodied in state law. Just as a vendor here seeks an exemption to laws that prohibit discrimination against customers, employers may seek exemptions from state laws that prohibit discrimination against employees, arguing that the employers' religious or expressive rights entitle them to distance themselves from members of the LGBT community.

2. A commercial carve-out in the name of religious beliefs would have similarly damaging effects. While this case involves a wedding vendor, it is not difficult to imagine the landlord who refuses to rent to a gay couple because their marriage or cohabitation is contrary to his religious beliefs. *Cf. Evans v. Romer*, 882 P.2d 1335, 1342 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996) (proponents of Amendment 2 relied on cases holding that laws prohibiting marital discrimination in rentals burdened free exercise, even though those cases upheld the validity of the regulations as neutral principles of general applicability).

The impact of a religious carve-out could also cause significant harm to the children or parents of same-sex couples. In 2010, a preschool student in Boulder, Colorado was denied enrollment for kindergarten because the school learned the child's

parents were a lesbian couple. Sarah Netter, *Colorado Catholic School Boots Student with Lesbian Mothers*, ABC News (Mar. 9, 2010).[7] If teachers or principals in schools covered by CADA were permitted a religious exemption because of their personal beliefs, the line the law draws between religious institutions and those that do not serve a primarily religious purpose would be eviscerated. The potential harm to children, to parents seeking care in nursing homes, and to others associated with same-sex couples, in addition to the couples themselves, could be significant.

Indeed, a religious carve-out in the case now before the Court would raise additional concerns because courts are generally reluctant to question whether a particular asserted belief is consistent with a religion's other precepts or with the commonly known beliefs of a particular religion. *See, e.g.*, *United States v. Seeger*, 380 U.S. 163, 185 (1965) (the threshold question of whether a belief is "truly held" is a question of fact). Thus, while some businesspeople seeking to discriminate may harbor a genuine religious objection to married same-sex couples, others who seek to engage in invidious discrimination may use the religious carve-out as an opportunity to do so regardless of their actual religious convictions.

3. Equally troubling, there is no principled way to allow an exception for sexual orientation but not

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[7] http://abcnews.go.com/WN/colorado-catholic-school-kicks-student-lesbian-mothers/story?id=10043528.

for other characteristics protected under the same law. If commercial businesses can claim an expressive exception to CADA for participation in a wedding between two people of the same sex, a business that objected to a marriage between people of two different races, or two different religions, may also claim such an exception.

Even former Georgia Attorney General Michael Bowers—hardly a radical advocate of the equal rights of gay people, *see Bowers v. Hardwick*, 478 U.S. 186 (1986); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997)—has publicly declared that laws creating sweeping exceptions to non-discrimination statutes for those who do not want to comply in the name of religion are "unequivocally an excuse to discriminate." Letter from Michael J. Bowers to Jeff Graham, Executive Director, Georgia Equality, Inc. at 6 (Feb. 23, 2015).[8] If an exemption were allowed, Bowers asserted, "there is no limit to the discrimination and disruption that could be brought about in the name of religious freedom." *Id*. at 3.

Bowers, like many others, has recognized that "permitting citizens to opt out of laws because of a so-called burden on the exercise of religion in effect 'would permit every citizen to become a law unto himself.'" *Id*. at 6 (quoting *Jones v. City of Moultrie*, 27 S.E.2d 39, 42 (Ga. 1943)). "Allowing each person to become a law unto his or herself," in turn, "destroys uniformity to the law and creates mass

[8] https://drive.google.com/file/d/0B_KEK8-LWmzhUjdmMlRHZ0h2TEk/view.

uncertainty," a can of worms that would threaten our very democracy. *Id.* As Bowers concluded, "[t]his . . . is not about gay marriage, or contraception, or even so-called 'religious freedom.' It is more important than all of these, because it ultimately involves the rule of law." *Id.* at 7.

Accordingly, this Court has consistently rejected attempts to undermine neutrally applicable antidiscrimination laws based on the putative expressive or religious interests of those who seek to discriminate. For example, in *Hishon v. King & Spalding*, 467 U.S. 69 (1984), this Court rejected the argument that forcing a law firm to comply with Title VII's prohibition on gender discrimination infringed on the firm partnership's First Amendment freedom of association. *Id.* at 78-79. While recognizing that lawyers' work involves "a distinctive contribution . . . to the ideas and beliefs of our society," the Court concluded, as it had in other contexts, that "invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.* at 78 (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

Similarly, in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), owners of drive-in restaurants argued that they should be exempt from Title II of the Civil Rights Act of 1964 because, by mandating that they not discriminate against customers based on race, the law infringed on their free exercise of religion. *Id.* at 400. In awarding attorney's fees to the plaintiffs, the

Supreme Court characterized the merchant's free exercise argument as "patently frivolous." *Id.* at 402 n.5; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971."); *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

In its amicus brief, the federal government seeks to limit the damage to civil rights laws that a carve-out here could unleash by suggesting that, at least in the case of race, antidiscrimination laws "*may* survive heightened First Amendment scrutiny" because racial bias is "'a familiar and recurring evil' that poses 'unique historical, constitutional, and institutional concerns.'" United States Br. at 32 (emphasis added). It argues that, by contrast, anti-gay discrimination is tolerable and that the Colorado legislature's considered decision to include a prohibition of anti-gay discrimination alongside other prohibited bases somehow does "not advance[ ] a sufficient state interest." *Id.* at 33. The government's position is belied by the long history of anti-gay discrimination, the deliberate inclusion of LGBT protections in CADA, and the importance of access to vital services, including participation in the marketplace, which all demonstrate that the Colorado legislature acted with a compelling and sufficient interest. The government's argument taken to its logical extreme would mark LGBT Coloradans as uniquely underserving of the protections that the legislature has deemed appropriate for similarly vulnerable groups. The

damage that would flow from a license to discriminate here is a can of worms that should not be opened.

C. CADA is vital to protect LGBT Coloradans from ongoing discrimination in commercial settings

The compelling need for CADA's protections is not theoretical. It is real. LGBT Coloradans require access to the same services and opportunities as other Coloradans. CADA is an important measure for ensuring equal access. The need for CADA's protections is demonstrated by the sad reality that LGBT Coloradans still suffer discrimination that endangers access to these critical resources. A recent report on LGBT health care in Colorado revealed that 21% of health care providers refused to provide services to LGBT people. One Colorado Education Fund, Invisible: The State of LGBT Health in Colorado 9 (2012).[9] Among LGBT patients, 55% feared they would be treated differently if their provider found they were LGBT. *Id.* Another 28% reported that their sexual orientation stopped them from seeking health services. *Id.* Only 59% are very open about sexual orientation with their medical providers. *Id.* at 11.

Statistics from the Colorado Human Rights Commission tell a similar story. Since 2008, when

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[9] http://www.one-colorado.org/wp-content/uploads/2012/01/OneColorado_HealthSurveyResults.pdf

the Commission began collecting data about discrimination based on sexual orientation, there has been a regular uptick in complaints, from 23 in 2007-08, to 82 in 2015-16. Colorado Civil Rights Commission, Colorado Civil Rights Division, 2016 Annual Report 9 (2016); [10] Colorado Civil Rights Commission, Colorado Civil Rights Division, Annual Report 2014 5 (2014).[11]

Those statistics find even greater meaning in the stories of LGBT people around Colorado who have faced recent discrimination:

- In 2015, Tonya Smith and her wife, Rachel, were looking for an apartment to rent after their landlord sold the home in which they were living. They had a difficult time finding something in their price range. When they found a promising unit, the potential landlord asked invasive questions and told the couple at the last minute that she would not rent to them because of their "unique relationship." *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1197-98, 1201 (D. Colo. 2017). Tonya and Rachel ended up having to get rid of many of their belongings as they were unable to find another residence on short notice. *Id.* at 1198.
- In 2017, Cherry Creek Mortgage Company, Colorado's largest residential mortgage firm, was sued by a married lesbian couple because the firm declined to provide them with the same health care

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[10] https://drive.google.com/file/d/0B1oMNUeCI8FYQ21SNjdwTjhRRzg/view.

[11] https://drive.google.com/file/d/0Bz-k2zYFlBh6bUxwcmlvUGh3VzQ/view.

coverage that it provided to different-sex married couples. The company changed its policy to provide equal treatment to its gay employees only after facing litigation. Mark Harden, *Cherry Creek Mortgage Chairman Resigns as Company Changes Same-Sex Benefits Policy,* Denver Bus. J. (Aug. 26, 2017).[12]

- In 2012, Coy Mathis, a 6-year-old first grade student who is a transgender girl, was denied use of the girls' restroom at her elementary school. The Colorado Civil Rights Commission found that the school had "forced her to disengage from her group of friends" and "tasked [the 6-year-old] with the burden of having to plan her restroom visits to ensure that she has sufficient time to get to one of the approved restrooms." Coy Mathis, Charge No. P20130034X, Colo. Div. of Civil Rights, 11 (2012) (determination).[13]
- In the fall of 2017, the Equal Employment Opportunity Commission found sufficient evidence that a Denver tire company refused to hire a transgender man to support a lawsuit against the company under Title VII, and thereafter filed suit. Complaint at 2-3, *EEOC v. A&E Tire, Inc.*, No. 1:17-cv-02362-STV (D. Colo. Sept. 29, 2017). The applicant allegedly had been told that he "had the job so long as he could pass all of the screening process. *Id*. at 33. When he acknowledged in paperwork that he had been born female, the manager hired someone else. *Id*. at 42-55.

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[12] https://www.bizjournals.com/denver/news/2017/08/26/cherry-creek-mortgage-chairman-resigns-as-company.html.

[13] https://archive.org/details/716966-pdf-of-coy-mathis-ruling.

- In 2012, two different employees of the Colorado State Patrol received settlements from the agency as a result of their claims that they were discriminated against on the job because of their sexual orientation. Tak Landrock, *Colorado State Patrol Payouts Cost Taxpayers $2 Million in 2013*, KDVR (Dec. 27, 2013).[14]

Of course, experience teaches that, for every instance of discrimination such as the above, there are many more that go unreported.

Importantly, CADA and its analogous state protections in the employment context, Colo. Rev. Stat. § 24-34-402, currently provide the only reliable, robust, and explicit recourse for these and other LGBT Coloradans. For instance, federal protections are frequently interpreted not to include LGBT individuals. To take one example, Section 1557 of the Affordable Care Act, prohibits discrimination in health care settings based on race, sex, and other characteristics. But the federal government has stated that sexual orientation is not covered. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,390 (May 18, 2016) (codified at 45 C.F.R. pt. 92). And the Tenth Circuit Court of Appeals has refused to interpret Title VII to include protections for members of the LGBT community. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2010) (Title VII does not protect transgender individuals); *Medina v. Income*

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[14] http://kdvr.com/2013/12/27/colorado-state-patrols-payout-cost-taxpayers-2-million/.

Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections . . . do not extend to harassment due to a person's sexuality."). Granting would-be discriminators a license to discriminate in defiance of CADA risks undoing the protections Colorado has put in place to assure LGBT people, their families, and others, equal opportunity to participate in and contribute to the marketplace and other important areas of life.

* * * *

Colorado has a compelling interest in protecting the rights of all of its citizens. LGBT Coloradans have the same right to dignity and participation in the public sphere that CADA assures to all other citizens of the State. Creating a carve-out to permit discrimination against LGBT people would deny them that essential dignity, and threaten the civil rights laws themselves.

CONCLUSION

The decision of the Colorado Court of Appeals should be affirmed.

Respectfully submitted,

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OCTOBER 30, 2017

APPENDIX

APPENDIX: LIST OF AMICI CURIAE

Clemmie Engle is a retired attorney who formerly worked at the Colorado Attorney General's Office.

Daneya Esgar has served two terms in the Colorado House of Representatives. She works with the House leadership team as the Majority Caucus Chair. She is also the Chair of the Capital Development Committee and Vice-Chair of the House Health, Insurance, and Environment Committee. She sits on the House Agriculture, Livestock, and Natural Resource Committee, as well as the House Transportation and Energy Committee.

Mark Ferrandino is the Chief Financial Officer for the Denver Public Schools and, until January 2015, was speaker of the Colorado House of Representatives. Previously, he was a senior budget analyst for the Colorado Department of Health Care Policy and Financing under Governor Bill Owens; a program analyst for the United States Department of Justice, Office of the Inspector General; and a policy analyst for the White House Office of Management and Budget under Presidents Bill Clinton and George W. Bush.

Lucía Guzmán is the Minority Leader in the Colorado Senate. Appointed to the Colorado Senate in May 2010, she represents Senate District 34 in Denver.

Leslie Herod is a member of the Colorado House of Representatives representing District 8.

Joel Judd is an attorney who served in the Colorado State Legislature from 2003 to 2010, chairing the House Finance Committee from 2007 to 2010.

Dominick Moreno is the Assistant Majority Leader in the State Senate. He also serves on the Joint Budget Committee. He represented the 32nd District in the Colorado House of Representatives from 2012 to 2016, before being elected to the Colorado State Senate in 2016.

Paul Rosenthal is a community activist, teacher, and politician who was elected in 2012 to serve in the Colorado House of Representatives for House District 9.

Dr. Glenda Russell is a teacher and licensed psychologist in the state of Colorado. She has a Ph.D. degree in Clinical Psychology from the University of Colorado and an internship at the Neuropsychiatric Institute at UCLA Health Sciences Center.

Pat Steadman is an attorney, former legislator, and former lobbyist. He was appointed to the Colorado Senate in May 2009. He represented Senate District 31 from 2009 to 2017.

Jessie Uliberri served four years in the Colorado Senate representing District 21 in Adams County. He is Vice President of Impact and External Affairs at Wellstone.

Jennifer Veiga is an attorney and a former Colorado legislator. First elected to the Colorado House of Representatives in 1996, Veiga was appointed to the Colorado Senate in 2003 and subsequently elected to full terms in 2004 and 2008. She represented Senate District 31.

Center for Health Progress creates opportunities and eliminates barriers to health equity for Coloradans.

Colorado Ethics Watch is a Colorado nonprofit corporation devoted to using legal tools to promote ethics and transparency in government.

The Colorado Health Foundation is the state's largest private foundation and is dedicated to grantmaking, advocacy, and private sector partnerships that advance the Foundation's mission of improving the health of Coloradans.

The Colorado Lesbian Gay Bisexual Transgender ("LGBT") Bar Association is a voluntary professional association of gay, lesbian, bisexual and transgender attorneys, judges, paralegals, law students, and allies who provide a LGBT presence within Colorado's legal community.

The Denver Gay & Lesbian Flag Football League fosters the community through sport and promotes positive social and athletic enjoyment of flag football among the gay, lesbian, bisexual, and transgender community, as well as our straight allies living in the greater Denver area.

EBS Support Services, LLC works to advance social equity by supporting nonprofit organizations and individuals that use technology and media to build an educated and engaged public.

Gender Identity Center of Colorado provides support to anyone gender variant in their gender identity and expression, with resources available to anyone, male/female/other, who can benefit from its services or resources, including spouses, significant others, parents, and siblings. It is also an informational and educational resource to the community at large.

The GLBT Community Center of Colorado engages, empowers, enriches, and advances the gay, lesbian, bisexual, and transgender community of Colorado by ensuring that every member of the community has access to the programs, services, and resources they need to live happy, healthy, and productive lives.

The Interfaith Alliance of Colorado brings people together from multiple faith traditions to drive social change.

NARAL Pro-Choice Colorado develops and sustains a constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive health choices, including preventing unintended pregnancies, bearing healthy children, and choosing legal abortion.

New Era Colorado reinvents politics for young people, mobilizing and empowering a new generation to participate in our democracy to make Colorado a better place for everyone.

Northern Colorado Equality seeks to enhance the well-being of the LGBT+ community through activities, programs, services, and education, thus empowering our members and allies.

One Colorado is the state's leading advocacy organization dedicated to advancing equality for lesbian, gay, bisexual, transgender, and queer (LGBTQ) Coloradans and their families.

Padres & Jovenes Unidos is a multi-issue organization led by people of color who work for educational equity, racial justice, immigrant rights, and advocating for equal access to achieve a better quality of life.

PFLAG Boulder County is the extended family of the LGBTQ community, made up of LGBTQ individuals, family members, and allies. Because together it is stronger, PFLAG Boulder County provides support, education, and advocacy for the families, friends, and allies of lesbians, gays, bisexual, transgender, queer, and intersex (LBGTQI) people, as well as for the LGBTQI community itself.

PFLAG Greeley provides support, education, and advocacy for lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals, their families, friends, and allies in the Greeley community.

Planned Parenthood of the Rocky Mountains, which includes Planned Parenthood of Southern Nevada, Planned Parenthood of New Mexico, and Planned Parenthood of Wyoming, empowers individuals and families in the communities we serve to make informed choices about their sexual and reproductive health by providing high-quality health services, comprehensive sex education, and strategic advocacy.

ProgressNow Colorado Education works to improve the lives of all Coloradans by acting as the collective voice for the progressive movement in both traditional and new media.

Rocky Mountain Arts Association builds community through music performed by both the Denver Gay Men's Chorus and the Denver Women's chorus, providing educational, cultural, and social enrichment for our audiences and our members.

Southern Colorado Equality Alliance brings LGBTQ and ally communities together through education, advocacy, and empowerment for support and inclusion.

Trans* Youth Education and Support (TYES) empowers and supports families and caregivers of gender expansive youth by providing resources, education, outreach, and advocacy, in order to create supportive environments that allow youth to experience the joy of authenticity.

The Transformative Freedom Fund supports the authentic selves of transgender Coloradans by removing financial barriers to transition-related health care.

The Women's Lobby of Colorado has sought to provide better opportunities for women in our state since 1993 by ensuring that public policies reflect gender equity and justice.