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 FREEDOM FROM RELIGION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

REBECCA S. MARKERT
Counsel of Record
ELIZABETH CAVELL
ANDREW SEIDEL
PATRICK ELLIOTT
SAM GROVER
FREEDOM FROM RELIGION FOUNDATION
P.O. Box 750
Madison, WI 53701
(608) 256-8900
rmarkert@ffrf.org
Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Freedom From Religion Foundation ("FFRF"), a national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers in the United States, representing more than 29,000 atheists and agnostics, 10% of whom identify as LGBTQ. FFRF is a growing organization, with members in every state, the District of Columbia, and Puerto Rico. FFRF's two primary purposes are to educate the public about nontheism and to defend the constitutional separation between state and church. Radically redefining "religious freedom" as the right to impose one's religious beliefs on others is arguably the greatest threat to individual freedom of conscience. Commercial businesses seeking exemptions from anti-discrimination laws are a prime example of this alarming argument that believers have a right to impose their religion on others in violation of civil rights laws, or to inflict harm on third parties so long as their conduct is religiously motivated.

FFRF's interest in this case arises from the fact that most of its members are atheists or nonbelievers, as are the members of the public it serves as a state/church watchdog. As such, FFRF's members and constituents are among the most distrusted minorities in America. FFRF convinced the Madison City Council,

---

[1] This brief has not been authored, in whole or in part, by counsel for either party. No monetary contribution has been made to the preparation or submission of this brief other than the *amicus curiae*, its members or its counsel. Consent to this brief has been given by all parties.

where it is headquartered, to explicitly include nonreligion as a protected class under its civil rights ordinance to help fight this stigma and the discrimination it incites. A ruling in this case that state and local governments must tolerate religiously-motivated discrimination in places of public accommodation would invite discrimination against atheists, agnostics and other freethinkers, severely impacting FFRF's members and FFRF's work to uphold freedom of conscience under the First Amendment.

SUMMARY OF ARGUMENT

Thomas Jefferson, in a letter to the Danbury Baptist Association in 1802 – the letter in which he famously invoked the concept of a "wall of separation between Church & State" – wrote that the religious freedom principles enshrined in the newly penned Bill of Rights are premised in part on the idea "that the legitimate powers of government reach actions only, & not opinions. . . ." This bright line rule, that opinion is left to the conscience of each person while actions can be properly regulated by our government, has come under attack. In this case, a commercial business is asking nothing less than for this Court to redefine the right to religious freedom. That right has always been understood as the right to unfettered thought – freedom to believe whatever religion we choose, or none at all, without government interference of any kind. But the right to believe as we choose has never encompassed a right to act as we choose. Never has a citizen's

right to the free exercise of religion under the First Amendment – let alone a corporation's – been understood to include the ability to engage in conduct that infringes on the rights of others. But that is what the bakery is asking this Court to hold. It is asking the Court to rule that it has a constitutional right to take action that violates both the rights of another citizen and the civil law, and to have that action excused because it is rooted in religious belief.

This Court has historically rejected free exercise challenges to neutral, generally applicable laws that regulate action, especially actions that harm other citizens. The purpose of this *amicus* brief is to highlight that history and to urge the Court to follow it in this case. Interpreting a free exercise right to be exempted from anti-discrimination laws would have no practical limits, inviting discrimination against all protected classes not only in places of public accommodation, but many other contexts. This interpretation would also violate Establishment Clause principles by singling out religiously-motivated action for special exemption from civil laws, subjugating the rights of others and the general welfare.

ARGUMENT

I. The bakery seeks to redefine the free exercise of religion into an unlimited right to act on religious beliefs, but free exercise rights end where the rights of other citizens begin – and always have.

The Free Exercise Clause prevents the government from "*prohibiting* the free exercise" of religion; it does not prevent the government from regulating conduct, religiously motivated or otherwise. Because the First Amendment protects "free exercise," many Americans, like Jack Phillips, believe they have an absolute right not just to believe what they want, but to violate laws through their conduct because of their religious beliefs. The freedom of thought and belief – freedom of conscience – is absolute. But the freedom to act on religious beliefs in every circumstance of one's life is not absolute, and religious conduct can and must be burdened by civil laws, especially those that protect the rights of others.

The belief/action distinction is explicitly embodied in the language of the First Amendment: "Congress shall make no law . . . prohibiting the free exercise" of religion. Though it may not be prohibited, free exercise can be burdened, encumbered, hampered, impeded, strained, hindered, and obstructed – and can certainly be burdened when it infringes the rights of others. This has always been so. Justices throughout our history and from across the ideological spectrum have agreed on this basic point: Religiously-motivated action can be governed, religious belief cannot. *See, e.g.*, *Employment*

Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877, 110 S. Ct. 1595, 1599, 108 L. Ed. 2d 876 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); *Sherbert v. Verner*, 374 U.S. 398, 402, (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs as such*," (emphasis added) citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)); *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972) (recognizing the belief-action dichotomy and that "[i]t is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare. . . ."); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' ").[2]

---

[2] The petitioner mistakenly argues that *Hobby Lobby* established that the Masterpiece Cakeshop has Free Exercise rights as a closely held family business. Pet. Br. 38 n.6. However the Court in *Hobby Lobby* was interpreting a federal statute – the Religious Freedom Restoration Act – and did not address Free Exercise claims. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) ("Our decision on that statutory question makes it unnecessary to reach the First Amendment claim. . . ."). The Court in *Hobby Lobby* did not hold, as bakery claims, that "[T]he Free Exercise Clause protects . . . his closely held family business." In fact, this Court struck down the parts of RFRA that applied to state and local government, therefore RFRA has no applicability to this case. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Moreover, the State of Colorado has repeatedly declined to enact a state law modeled on RFRA.

The late Justice Scalia quoted this Court's 1879 case, *Reynolds v. United States*, in *Employment Division v. Smith* to make the same point: "Laws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166 (1879)). Scalia concluded, "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.*

This principle is essential to a civilization of laws, as was illustrated by this Court in *Reynolds*: "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?" *Reynolds*, 98 U.S. at 166.

The question then, becomes where to draw the line when it comes to government regulation of religiously-motivated action. When refusing to recognize an exemption to child labor laws for religion, Justice

Jackson explained that "the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public." *Prince v. Massachusetts*, 321 U.S. 158, 177, 64 S. Ct. 438, 445, 88 L. Ed. 645 (1944) (Jackson, J., concurring).

Thomas Jefferson made the same point a bit more colloquially, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." *Notes on the State of Virginia*, page 159 (ed. William Peden) (Chapel Hill, N.C., 1955). But if one's religion mandates picking pockets and breaking legs, that conduct comes under the purview of our secular law. No belief, no matter how fervent, gives citizens a right to infringe the rights of others while breaking the law.

To do as the bakery asks in this case, is to undermine this basic and elemental relationship between the government and the actions of the citizens who are governed. To do as the bakery asks would grant a license to pickpockets and leg-breakers, so long as they themselves believed that license to be divine. To accept this "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds*, 98 U.S. at 166.

II. The alternative, that free exercise includes the right to discriminate, is untenable.

If this Court approves the bakery's discrimination it is granting a right to believers to infringe on the rights of others. Even if this court were to try and limit the exemption of all religiously-motivated actions in its opinion, allowing it for discrimination *at all* is problematic. For example, there is no logical or practical way to draw a line between religiously-motivated racial discrimination and racial discrimination motivated by non-religious beliefs.

This Court has established that religiously-motivated action can be regulated. While drawing the line can be difficult, the Court has been consistent in allowing religiously-motivated action to be halted when "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. at 403. As the Colorado legislature has rightfully determined, discrimination surely poses such a threat.

This Court has refused to allow religious license to violate generally applicable laws, for example those that regulate child labor, among others. *See, e.g.*, *Reynolds*, (polygamy properly outlawed despite religious belief in practice); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (mandatory vaccinations for children are proper in spite of principled objections); *Prince v. Massachusetts*, 321 U.S. 158, (religious liberty does not permit parents to violate child labor laws); *Cleveland v. United States*, 329 U.S. 14, 67

S. Ct. 13, 91 L. Ed. 12 (1946) (no religious exemptions to the Mann Act, which prohibited interstate commerce of any female for prostitution or other immoral purpose, including polygamy.)

Like other laws this Court has upheld against religious challenges, laws against discrimination on the basis of race, religion, sex, or sexual orientation are meant to prevent concrete harm. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (noting that discrimination "generates a feeling of inferiority" which is harmful in itself and precipitates other injuries, including psychological injuries). The proper place to draw the line is where the Colorado Anti-Discrimination Act ("CADA") has drawn it. One person's actions cannot discriminate against, and thereby harm others. Here, the bakery's religiously-motivated discrimination harms other people and violates their rights. The lines it attempts to draw in its argument illuminate the problem.

III. There is no distinction between discriminating against the event and discriminating against the people in the event because the harm – inferior treatment on the basis of sexual orientation – is the same.

Two loving and committed adults just became engaged and are eager to get married. They excitedly plan what will likely be the most special day of their lives up to that point. They arrive at their chosen bakery for a cake tasting and are greeted by an employee.

As they begin looking at photos of the beautiful custom cakes made for other customers, the employee realizes that they are a gay couple planning their wedding. Immediately, he informs them that he will not sell them one of the lovely cakes in the photos for their wedding, because the bakery does not make cakes for gay customers' weddings. Those beautiful wedding cakes in the photographs are reserved for straight couples. The couple leaves the bakery, feeling humiliated, hurt, and marginalized.

Of course, the couple is just as marginalized because of their status as gay people if the baker claims that he is not refusing to sell them a wedding cake because they are *gay*, he's refusing to sell it because they are *gay and getting married*. This second-class treatment is a concrete dignitary harm that works to perpetuate the history of treating gay people as inferior to straight people.

This is the harm that the state of Colorado has sought to prevent by including sexual orientation as a class protected by law against discrimination in places that sell goods and services to the public. The Free Exercise Clause of the First Amendment cannot possibly be read to demand that anyone with a religious objection to the equal treatment of a protected class be permitted to disregard this religiously-neutral anti-discrimination law to the detriment of people in that class.

A. The bakery's attempts to re-characterize its conduct as something other than harmful discrimination fail for at least three reasons.

The bakery seeks to avoid the constitutionally prescribed limits on free exercise by mischaracterizing the injury its discrimination is causing. In effect, the bakery is asking the Court to recognize as constitutionally determinative the difference between refusing to sell a custom wedding cake to celebrate a gay *wedding* and refusing to sell a custom wedding cake to gay *people*. This distinction makes a mockery of the Constitution and this Court. The bakery sells custom cakes that celebrate weddings, but refuses to sell custom cakes that celebrate weddings of gay customers. Colorado has rightfully chosen to protect gay and lesbian citizens from unequal enjoyment of goods in places of public accommodation and the bakery's attempts to characterize its conduct as something other than harmful discrimination fail for at least three reasons.

First, the only people who will have a gay wedding are gay people. Providing commercial goods and services is not entitled to constitutional protection, and refusing to offer the same goods and services to gay couples as are offered to straight ones is clearly an act of discrimination that the state of Colorado is free to prohibit in places of public accommodation.

Second, it should be beyond serious argument that anti-discrimination laws may prohibit more than just outright refusal to do any business whatsoever with

members of a protected class. The plain language of CADA and similar laws, in effecting their purpose, ensures the *full and equal* enjoyment of places of public accommodation, not just the right to be offered a lesser level of service or certain limited goods.

The bakery makes much of the fact that it sells cakes to all customers regardless of sexual orientation, so long as they don't want its top-tier good – custom wedding cakes. It will serve gay customers any pre-made items "no questions asked," and will even design custom cakes for gay customers – just not for their wedding celebrations. There is no practical distinction between the bakery's practice and a restaurant offering separate seating areas or a limited menu of second-tier items for black customers. After all, such a restaurant could rightly claim to technically serve all customers regardless of race. Reserving special goods for customers in a favored class is the same as denying goods to customers in a disfavored class.

Third, the fact in this case cannot be escaped – the baker refused to sell a wedding cake before he and the couple even began discussing the design. There is nothing inherently unique about a gay wedding cake that distinguishes it from a wedding cake. There is simply no reason to assume that cakes for gay couples are any different than cakes for straight couples.

To sum up, the baker based his decision to sell or not sell a wedding cake to the respondents on only one thing: The fact that they are gay. Once he learned that these customers were gay, he refused to sell them the

goods and services he holds out to the public generally. This Court long ago resolved the question of whether separate was equal. *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954).

IV. This Court should decline the invitation to create a right to harm others in the name of religion, a right which would not have any practical limits.

The baker claims that even if his conduct amounts to discrimination in violation of CADA and even if hat discrimination harms gay and lesbian citizens by treating them as second-class, the Court should hold that he may inflict such harm because his right to act in accordance with his religious beliefs should be absolutely unfettered. Pet. Br. 52-56. This argument is troubling, but it is not new. This Court and other courts have heard and rejected such arguments many times.

A. Courts, including this one, have consistently rejected religious justifications for racial discrimination. To do otherwise would expand and increase such discrimination.

In the 1960s, Maurice Bessinger refused to let a minister's wife enter his South Carolina barbeque joint because she was black. He believed he had "a constitutional right to refuse to serve members of the Negro race in his business establishments [and] that to do so

would violate his sacred religious beliefs." *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968) (the issue on appeal was whether the Civil Rights Act applied to the restaurants, not his religious conclusion.). Accustomed to this dubious privilege, Bessinger fought the subsequent lawsuit all the way to the Supreme Court. He argued "that the [Civil Rights] Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'" *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 403 n.5 (1968) citing lower court opinion 377 F.2d 433, 437-38. This Court wrote that "this is not even a borderline case" and labeled Bessinger's "defenses . . . patently frivolous." *Id. n5.* No court involved in the case, including this one, countenanced the religiously-motivated discrimination, however well-entrenched.

Bob Jones, the televangelist and founder of an eponymous religious school, infamously declared that segregation was scriptural in his 1960 Easter sermon: "If you are against segregation and against racial separation, then you are against God. . . ." Bob Jones Sr., *Is Segregation Scriptural?* (Greenville, S.C.: Bob Jones University, 1960). Bob Jones's eponymous university enjoyed tax exemption, a privilege, but the IRS revoked the tax exemption because the school discriminated on the basis of race. BJU sued the government, arguing that its religious beliefs required the discrimination and that the government could not remove its privilege because of its religiously motivated action.

The Supreme Court held that the "governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

Born-again Christians who owned a chain of health clubs hired only Christians, refusing to "work with 'unbelievers.'" *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985). Their religious belief spilled over into their hiring in other ways. They refused to hire or retain "individuals living with but not married to a person of the opposite sex; a young, single woman working without her father's consent or a married woman working without her husband's consent; a person whose commitment to a non-Christian religion is strong; and someone who is 'antagonistic to the Bible,' which according to Galations 5:19-21 includes fornicators and homosexuals." *Id.* But these personal religious beliefs did not confer a right to discriminate. The owners were not in trouble under the Minnesota Human Rights Act for their belief, but for their "hiring and firing actions" and "for the actions taken." *Id.* at 847, 849. The Supreme Court of Minnesota rejected arguments that the Act "unconstitutionally infringes upon [the business owner's] rights of freedom of speech, free exercise of religion, and freedom of association." *Id.* at 846.

These examples tell us two things. *First*, actions can be regulated even if they are supported by a sincere religious belief. *Second*, there is no religious right to violate the civil rights of other Americans.

Prohibiting discrimination, whether religiously motivated or not, is not a violation of the discriminator's rights.

Accepting the bakery's arguments will undo this constitutional norm, which is critical to a free and equal society. This Court may attempt to draw lines between other protected classes such as race and sexual orientation, but there is no logical way to do so. Drawing the line in the wrong place – protecting all religious action instead of all religious belief – *will* allow for discrimination against other religions and any race more broadly. The Court's decision will impact more than just bakers and their LGBTQ customers. The Civil Rights Act and state equivalents were enacted in part because black Americans could be denied meals and hotel rooms and gas, their children denied entry into amusement parks, not just at one shop or motel or park, but across an entire state or even region.

Dr. King wrote about this depressing phenomenon in his *Letter from a Birmingham Jail*. The letter, written to King's "fellow clergymen," speaks eloquently of the indignity of being denied service and treated as an inferior class:

> when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority

> beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people . . . when you take a cross county drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored[.]" Martin Luther King, Jr. (April 16, 1963).

When discrimination was permitted, it was not limited to individual businesses but wide swaths of area. As this Court described discrimination in the hotel industry, citing a Senate report on the subject:

> Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations, and have had to call upon friends to put them up overnight, and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964) citations omitted.

Denver, Boulder, and other Colorado enclaves may remain welcoming to LGBTQ customers and customers of all racial and religious minorities if this Court sides with the bakery. But if this Court decides that states are required to permit discrimination in the name of religion, it is easy to envision entire regions of the nation rolling back the clock not only for the LGBTQ community but for blacks, muslims, latinos, jews, and atheists.

Commercial businesses claiming a right to violate anti-discrimination laws have long been in search of a constitutional sanction. In favoring equality and upholding the Civil Rights Act, this Court has rejected not just arguments that there was a free exercise right to discriminate, but also claims of involuntary servitude under the Thirteenth Amendment, violations of due process under the Fifth Amendment, just compensation, and more. *See, e.g.*, *Heart of Atlanta Motel*, 379 U.S. 241 (Fifth and Thirteenth Amendments).

B. Discrimination against other minorities will increase.

Religiously-motivated racial discrimination is not all that will be permitted if the Court redefines the right of free exercise. Elevating religion and actions based on religious beliefs above the law by granting them exemptions to general and neutrally applicable laws will create chaos and have far-reaching effects. As this Court noted, "Government could exist only in name under such circumstances." *Reynolds*, 98 U.S. at 167.

(1) Discrimination against Jews will increase.

"Jews will not replace us." The chant that rang in the torchlight at the University of Virginia reflected a disturbing sentiment that has become increasingly public. In the first quarter of 2017, anti-semitic attacks in the U.S. nearly doubled. Anti-Defamation League, Press Release "Spike 86 Percent So Far in 2017 After Surging Last Year, ADL Finds," (April 24, 2017), *at* https://www.adl.org/news/press-releases/us-anti-semitic-incidents-spike-86-percent-so-far-in-2017. Many anti-semitic groups, including the Ku Klux Klan, are explicitly Christian and believe that their hatred and desire to persecute Jews is divinely sanctioned.

If there is a right to refuse service to a protected class because one's religious belief demands it, American Jews may be among the first to feel the sting of this massive redefinition of the law. But they will not be the only ones.

(2) Discrimination against atheists will increase.

The bakery admits that its owner refuses to design custom cakes that "promote atheism" along with those that promote "racism, or indecency." Pet. Br. 9. Given that the company regards selling *any* wedding cake to a gay couple as "promoting gay marriage," it's easy to see how a desire not to "promote atheism" might similarly result in a refusal of service based on a customer's atheism rather than any actual design request.

The pernicious nature of this refusal is not just theoretical. There also exists a well-documented and extreme moral prejudice against atheists. A December 2011 study found that atheists are among our society's most distrusted groups. They ranked below Christians, Muslims, gay men, feminists, and Jews – ranking at the bottom, with rapists, as least trustworthy. A study from 2017 showed that people are so prejudiced against atheists that most assume serial killers are atheists.

If this Court allows religion-based actions to serve as an opt out for laws that protect the civil rights of minorities, those minorities will face more frequent discrimination, something that will be exacerbated by the shifting demographics. Overall, 23% of Americans identify as nonreligious. *America's Changing Religious Landscape*, Pew Research Center (May 12, 2015). That 8-point increase since 2007 and 15-point jump since 1990 makes the "nones" the fastest growing identification in America. *Nones on the Rise: One-in-Five Adults Have No Religious Affiliation*, The Pew Forum on Religion & Public Life (October 9, 2012); Barry Kosmin, *National Religious Identification Survey* 1989-1990. This trend is all but certain to continue because younger Americans are far less religious than older Americans. Nationally, about 35% of millennials – born after 1981 – are nonreligious. *America's Changing Religious Landscape*, Pew Research Center (May 12, 2015).

If this Court redefines religious freedom to allow a right to infringe on others in commercial enterprises, "Equal Justice Under Law" will be abandoned in favor religious privilege.

V. The Free Exercise Clause cannot be interpreted in a way that would undermine the Establishment Clause.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. In the first case incorporating the Establishment Clause, this Court wrote that "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . ." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1 (1947). Indeed, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). By any of this Court's chosen tests, such a decision would fly in the face of this Court's Establishment Clause jurisprudence: "Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. . . . Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on

questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 592-94 (1989) citing *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

A ruling in the bakery's favor would create an interpretation of the Free Exercise Clause that prefers, favors, promotes religion over nonreligion. Whatever keyword one chooses, such a decision would undermine long-settled and critically important principles under the First Amendment's Establishment Clause.

CONCLUSION

When one's religion tells them to violate a law meant to protect the rights of others – to pick a pocket or break a leg – that person cannot expect an exemption. If the baker's religion demands that he refuse to offer equal service to gay couples, as the law of Colorado demands, it is not for the law to bend to his religion, but for his action to bend to the law. He is free to alter the goods his bakery offers to the public or refrain from operating a commercial business subject to CADA. But ruling that he has a free exercise right to ignore anti-discrimination laws would lead to an increase in discrimination as well as undermining Establishment Clause principles. This Court has never held that the Free Exercise Clause requires an exemption from neutral laws regulating conduct. It should

decline to do so now and uphold the decision of the Colorado Court of Appeals.

Respectfully submitted,

REBECCA S. MARKERT
Counsel of Record
FREEDOM FROM RELIGION FOUNDATION
P.O. Box 750
Madison, WI 53701
(608) 256-8900
rmarkert@ffrf.org
Counsel for Amicus Curiae