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 COURT OF APPEALS OF COLORADO

## BRIEF FOR LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, CENTER FOR CONSTITUTIONAL RIGHTS, COLOR OF CHANGE, THE LEADERSHIP CONFERENCE OF CIVIL AND HUMAN RIGHTS, NATIONAL ACTION NETWORK, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL URBAN LEAGUE AND SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* SUPPORTING RESPONDENTS


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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are the Lawyers' Committee for Civil Rights Under Law; Asian American Legal Defense and Education Fund; Center for Constitutional Rights; Color of Change; The Leadership Conference of Civil and Human Rights; National Action Network; National Association for the Advancement of Colored People; National Urban League; and Southern Poverty Law Center. These organizations have different missions, but each is committed to furthering the goal of eradicating discrimination in public accommodations.

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, nonprofit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes relating to voting rights, housing, employment, education, and public accommodation. See, *e.g.*, *Shelby Cty.* v. *Holder*, 133 S. Ct. 2612 (2013); *Arizona* v. *Inter Tribal Council of Az., Inc.* 133 S. Ct. 2247 (2013); *Mhany Mgmt., Inc.* v. *Cty. of Nassau*, 819 F.3d 581 (2d Cir. 2016); *Gonzalez* v. *Pritzker*, 28 F. Supp. 3d 222 (S.D.N.Y.

1. All parties have consented to the filing of this brief by blanket consent or letter. No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief.

2014); *Coalition for Equity & Excellence in Md. Higher Educ.* v. *Md. Higher Educ. Comm'n*, 977 F. Supp. 2d 507 (D. Md. 2013); *Dominic Hardie* v. *NCAA*, 861 F.3d 875 (9th Cir. 2017). As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that racial and ethnic minorities, including minorities who identify as lesbian, gay, bisexual and transgender, have strong, enforceable protections from discrimination in places of public accommodation.

Statements of interest for all other *amici* are included in Appendix A.

## SUMMARY OF ARGUMENT

*Amici* respectfully submit this brief in support of respondents to detail how petitioners' proposed free speech exception to anti-discrimination public accommodation laws could decimate those laws' critical protections for African Americans, including the growing number of African Americans who identify as lesbian, gay, bisexual, transgender (LGBT), and other minority populations that have been subjected to a history of discrimination.

State public accommodation laws that prohibit discrimination by businesses against vulnerable populations are constitutional and necessary. Throughout this country's history, public accommodation laws have played a vital role in ensuring that all businesses are open to everyone on a nondiscriminatory basis and that individuals from marginalized communities are not treated like second-class citizens. This Court has repeatedly and emphatically rejected challenges to public accommodation laws similar to the challenges brought by petitioners

Masterpiece Cakeshop, Ltd., and Jack C. Phillips (together, Masterpiece) because a state's "commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is a "goal, which is unrelated to the suppression of expression, [that] plainly serves compelling state interests of the highest order." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 624 (1984); see also *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 260 (1964) ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.").

And, when this Court has upheld the constitutionality of public accommodation laws, it has not limited its reasoning to laws that protect against racial discrimination; rather, it has observed that modern public accommodation statutes that prohibit discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation * * *, deafness, blindness or any physical or mental disability or ancestry" are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination and do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571–572 (1995) (citation omitted).

Despite the advances our country has made in eradicating segregation and other forms of invidious discrimination, African Americans, including LGBT African Americans who experience discrimination at the intersection of race and sexual orientation or gender identity, continue to suffer from structural and pervasive

discrimination, as evidenced by the recent increase in hate crimes across the country. Discrimination infects the marketplace as well, where minority consumers continue to receive worse treatment and experience disparate access to goods and services as a result of business owners' biased attitudes. Today, public accommodation laws remain vital by providing relief when consumers experience discrimination.

Public accommodation laws strengthen our country by ensuring our economy is an inclusive one where all people regardless of background, identity, or belief can participate free of discrimination. This Court must see Masterpiece's arguments for what they are—a request for permission to lawfully discriminate against minorities. Business owners' religious and speech interests must not trump the rights of disenfranchised individuals to be free from discrimination. Masterpiece's proposed exception to public accommodation laws would potentially apply to *any* business and would gut this Court's well-established precedent and nullify long standing state, federal, and local public accommodation laws, causing a dramatic rollback of hard-won civil rights protections.

## ARGUMENT

### I. Civil Rights Laws Have Played an Integral Role in Rooting Out Discrimination in Public Accommodations.

Civil rights laws in this country have a deep and storied history. To combat racial oppression, both Congress and most states enacted public accommodation laws, which have consistently been upheld as constitutional. *State*

*Public Accommodation Laws,* Nat'l Conference of State Legislators (July 13, 2016).[2] Public accommodation laws, although vitally important during past decades, continue to do critical work today to bring equality to all of this country's residents. State and federal efforts to root out discrimination continue to be necessary to ensure that places of public accommodation cannot deny goods and services to individuals based on their personal characteristics.

Since the Civil War, African Americans have faced discriminatory laws and practices that excluded them from places of public accommodation. In the post-Reconstruction United States, African Americans were systematically relegated to second-class citizenship. This was accomplished through the enactment of a system of laws, ordinances, and customs that separated white and African American people in every conceivable area of life. C. Vann Woodward, *The Strange Career of Jim Crow* 7 (1955). This code of segregation "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking," and "that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries." *Ibid.* Such racial segregation was not limited to the post-Civil War South. To the contrary, some northern states maintained separate schools for white and African American children and had laws against intermarriage, while the United States military remained segregated through the

2. Available at http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

Civil War. See John Hope Franklin, *History of Racial Segregation in the United States*, in The Annals of the American Academy of Political and Social Science Vol. 304, 305–306 (Mar. 1956).

After the Civil Rights Act of 1875, Congress's first attempt to prohibit discrimination on the basis of race in places of public accommodation, was found to exceed Congress's power under the Thirteenth and Fourteenth Amendments, southern states introduced a steady onslaught of legislation to ensure that African Americans remained segregated from whites in nearly every aspect of society. Franklin, *supra*, at 6–9; see also *Civil Rights Cases*, 109 U.S. 3 (1883).[3] The supply of ideas for new ways to segregate seemed inexhaustible: "Numerous devices were employed to perpetuate segregation in housing, education, and places of public accommodation," including "[s]eparate Bibles for oath taking in courts of law, separate doors for whites and Negroes, separate elevators and stairways, separate drinking fountains, and separate toilets existed even where the law did not require them." Franklin, *supra*, at 8.

Given the painful brutality of segregation, and despite the very real threat of arrest and severe physical harm, African Americans and others opposed to segregation staged protests and boycotts throughout the early and mid-twentieth century. See generally David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and*

3. This Court later distinguished the *Civil Rights Cases* and affirmed Congress's Commerce-Clause authority to establish federal public accommodations laws affecting interstate commerce through the enactment of the Civil Rights of Act of 1964. See *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 250-262 (1964).

*Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F.L. Rev. 645 (1995). Those efforts eventually brought national attention to the inhumanity of segregation and strategic legal challenges to discrimination in access to voting (*Smith* v. *Allwright*, 321 U.S. 649 (1944) (outlawing white-only Democratic primary election)), interstate buses (*Morgan* v. *Virginia*, 328 U.S. 373 (1946) (Virginia law requiring segregated buses interfered with freedom to travel interstate)), graduate school facilities (*McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950) (segregated graduate school facilities unconstitutional)), law school admissions (*Sweatt* v. *Painter*, 339 U.S. 629 (1950) (separate law schools unconstitutional)), and, of course, public school education (*Brown* v. *Board of Ed.*, 347 U.S. 483 (1954) (segregated public schools unconstitutional)), which slowly but steadily chipped away at segregation's reach.

In addition to those legal efforts, many states stepped in to combat discriminatory business practices by enacting public accommodation statutes. See *Jaycees*, 468 U.S. at 624. Such state laws "provided the primary means for protecting the civil rights of historically disadvantaged groups until the Federal Government reentered the field in 1957." *Ibid.*

After numerous legal challenges and demonstrations of non-violent resistance to racial segregation in places of public accommodation, Congress passed the Civil Rights Act of 1964, which, in Title II of the Act, prohibits discrimination or segregation in places of public accommodation. See 42 U.S.C. 2000a(a) (Title II) ("All persons shall be entitled to the full and equal

enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."). Title II was a watershed piece of legislation that aimed to eliminate the loss of "personal dignity that surely accompanies denials of equal access to public establishments." S. Rep. No. 88-872 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2370. The Senate Committee on Commerce went on to explain that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color." *Ibid.*

By ensuring that goods and services are available to all people regardless of who they are, anti-discrimination public accommodation statutes prevent and, when necessary, respond to discrimination in places of public accommodation, thereby remedying the deprivation of personal dignity that accompanies a discriminatory refusal to serve.

## II. This Court Has Emphatically Upheld State and Federal Public Accommodation Laws Against Free Speech Challenges and Colorado's Law Should Be No Different.

Just like the Colorado public accommodation statute at issue here—and similar state statutes throughout the country—Title II of the Civil Rights Act of 1964 also faced strong opposition from recalcitrant business owners who sought to maintain the Jim Crow system of segregation.

Those opponents, like Masterpiece here, also raised free speech arguments, and other liberty-related arguments, to justify their refusal to serve (and thus discriminate against) specific groups. As one commentator notes, "[o]pponents argued that Title II violated the rights of owners of public accommodations to decide whom to serve, characterizing this as both an individual right of association and a property right." Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 Hamline J. Pub. L. & Pol'y 1, 4 (2014). Masterpiece's arguments seek to resurrect the same claims raised by Title II opponents: it contends that offering its custom cakes on a nondiscriminatory basis infringes on its rights to free expression and association. See Pet. Br. 16–48.

But, this Court has routinely and, without reservation, upheld federal and state public accommodation laws against freedom of expression and association challenges. In *Heart of Atlanta Motel*, this Court squarely rejected the claim that Title II violated the liberty and property rights of business owners. 379 U.S. at 260 ("[I]n a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty.").

Likewise, this Court has repeatedly confirmed that state public accommodation laws do not generally infringe on free speech or other liberty interests. See, *e.g.*, *New York State Club Ass'n, Inc.* v. *City of N.Y.*, 487 U.S. 1, 13–14 (1988) (upholding local public accommodation law against First Amendment challenge by private clubs and *rejecting* notion that "every setting in which individuals exercise some discrimination in choosing associates, their

selective process of inclusion and exclusion is protected by the Constitution"); *Jaycees*, 468 U.S. at 625 (upholding public accommodation statute against constitutional challenge and stating that "[a] State enjoys broad authority to create rights of public access on behalf of its citizens"). This Court has emphasized the important role of public accommodation laws, which evince states' "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services"—a goal "which is unrelated to the suppression of expression," and which "plainly serves compelling state interests of the highest order." *Jaycees*, 468 U.S. at 624; *Board of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("Even if the [public accommodation statute] does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women.").

This Court's analysis has not wavered even as state public accommodation laws have expanded beyond protected characteristics and categories of public accommodations originally covered by Title II. Indeed, this Court has expressly affirmed the states' power to expand public accommodation protections to additional groups that the state believes are the target of discrimination. *Hurley*, 515 U.S. at 572. Public accommodation statutes, this Court found, are an extension of the common-law principle that "innkeepers, smiths, and others who 'made profession of a public employment' were prohibited from refusing, without good reason, to serve a customer." *Id.* at 571.

That general common-law duty, however, "proved insufficient in many instances," and gave way to modern statutes that build on common-law protections by "enumerating the groups or persons within their ambit of protection." *Romer* v. *Evans*, 517 U.S. 620, 627–628 (1996). In so doing, this Court recognized that states and localities have not "limited antidiscrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases[,] * * * [r]ather, they set forth an extensive catalog of traits which cannot be the basis for discrimination, including * * * sexual orientation." *Id.* at 628–629. That "[e]numeration is the essential device [states] used to make the duty not to discriminate concrete and to provide guidance for those who must comply." *Id.* at 628.

Such expanded protections generally satisfy both the First and Fourteenth Amendments because they do not "on [their] face, target speech or discriminate on the basis of [their] content, the focal point of [their] prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley*, 515 U.S. at 571–572. The Colorado public accommodations law thus continues the "venerable history" of state efforts to weed out discriminatory treatment of any of its residents in the provision of goods and services.

Likewise, "one would expect" retail shops, including businesses that deliver custom goods like Masterpiece, "to be places where the public is invited," that is, "clearly commercial entities" properly subject to state non-discrimination provisions. *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 657 (2000); see also *Romer*, 517 U.S. at 628.

Masterpiece and other small custom-goods businesses thus fall squarely within the traditional ambit of non-discrimination laws that this Court has considered to be constitutional. Masterpiece therefore must provide its goods and services in a nondiscriminatory manner; after all, retailers are not guaranteed "a right to choose * * * customers * * * or those with whom one engages in simple commercial transactions without restraint from the State." *Jaycees,* 468 U.S. at 634 (O'Connor, J., concurring). The Court must not grant businesses like Masterpiece the constitutional right to deal only with persons of one background, identity, or as is the case here, to provide certain goods only to heterosexual couples.

### A. Masterpiece's attempt, supported by the federal government, to create a new exception to public accommodation laws fails.

This Court should reject Masterpiece's attempt to establish a novel and expansive exception to public accommodation laws for custom goods, like its wedding cakes. See generally Pet. Br. 18–25. Masterpiece argues that the Colorado public accommodation law forces it to endorse same-sex marriage by baking and selling cakes for same-sex couples, and that its cake design is entitled to First Amendment free-speech protection. Pet. Br. 2-3. Masterpiece's design of wedding cakes for sale is insufficient to exempt it from public accommodation laws that require Masterpiece to provide equal access to its goods and services. By requiring Masterpiece to offer its services on a nondiscriminatory basis, Colorado's public accommodation statute does not compel Masterpiece to express endorsement for same-sex marriage; nor does Colorado compel Masterpiece to participate in a wedding ceremony to which it objects.

Importantly, the First Amendment analysis requires an objective test, and, therefore, to determine whether expression is compelled or infringed the Court does not take at face value whether a party subjectively believes its actions convey a message that is protected by the First Amendment. This Court has thus "rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Texas* v. *Johnson*, 491 U.S. 397, 404 (1989) (quoting *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968)) (internal quotation marks omitted). Instead, as the Court did in *Jaycees*, *New York State Club*, and *Duarte*, the Court examines the actual expression at issue to determine whether the application of the public accommodation law objectively and materially affects the speaker's message. In conducting that analysis, it matters whether "[a]n intent to convey a particularized message [is] present, and * * * [whether] the likelihood [is] great that the message would be understood by those who view it." *Spence* v. *Washington*, 418 U.S. 405, 410-411 (1974).

This Court cannot therefore accept Masterpiece's bare assertion (Pet. Br. 21-22) that its cakes convey an implicit message that is inextricably intertwined with the identity of the customers themselves when nothing about the design of Masterpiece's wedding cakes *objectively* conveys any message about Masterpiece's own views on the propriety of the particular wedding celebrated, much less an objective endorsement of the couple's same-sex wedding. See *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (observing that law schools were not permitted to "erect a shield' against laws requiring [equal] access [by military recruiters] 'simply by asserting' that mere association 'would impair its message") (citations omitted).

And even if some greater communicative element can be found in the design of a wedding cake itself, Colorado's enforcement of its public accommodation law to require that Masterpiece bake a cake without discriminating against customers on the basis of their personal characteristics does not unconstitutionally infringe on Masterpiece's expressive interests. The Colorado law leaves Masterpiece's creative process entirely intact: it does not demand that Masterpiece design a cake a particular way or seek to interfere with whatever artistic skill goes into Masterpiece's wedding cake design. "It has never been deemed an abridgment of freedom of speech * * * to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) (citation omitted). More importantly, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ibid.*

Masterpiece attempts to confuse the Court by urging it to focus on the artistic elements of designing a cake. Yet, there is no doubt that Masterpiece's primary function is to sell goods to customers for a profit. "Once [an association] enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Jaycees*, 468 U.S. at 636 (O'Connor, J., concurring). Here, too, by operating a retail bakery, Masterpiece has lost control over its customer base. As long as Masterpiece keeps its doors open, the Colorado law simply requires that Masterpiece design a cake for whomever walks through them, regardless of sexual orientation, race, gender, or

other protected classifications under Colorado law. See also *Heart of Atlanta Motel*, 379 U.S. at 261 (rejecting involuntary servitude challenge to public accommodations laws prohibiting racial discrimination).

Neither *Dale* nor *Hurley* hold otherwise. Masterpiece's and the federal government's arguments analogizing the present case to *Dale* and *Hurley* fall short.

Masterpiece's and the federal government's reliance on *Dale* depends on a flawed analysis. This Court held in *Dale* that public accommodation laws could not mandate that the Boy Scouts admit gay scoutmasters. 530 U.S. at 658-661. It was only because the Boy Scouts were a *private* membership organization, however, that the Court concluded that the Boy Scouts had a constitutionally protected right to exclude gay members, since the forced inclusion of a gay member would otherwise infringe on the Scouts' right to expressive association and would "affect[] in a significant way the group's ability to advocate [its] public or private viewpoints" against homosexuality. 530 U.S. at 648. But *Dale* took care to distinguish the expressive association rights of private membership organizations like the Boy Scouts to exclude members from "clearly commercial entities" and other places "where the public is invited," such as "retail shops," where public accommodation laws have traditionally applied. See *id.* at 657. A retail bakery like Masterpiece plainly falls into the category of commercial establishments where public accommodation laws may be validly enforced.

Similarly, Masterpiece and the federal government incorrectly assert (Pet. Br. 26-28; U.S. Br. 19-20) that *Hurley*'s narrow holding governs this case. In *Hurley*,

this Court described parades as "public dramas of social relations" that "indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Hurley*, 515 U.S. at 568 (citation omitted). Marching in a parade, this Court observed, is "a form of expression" that "reflect[s] an exercise of * * * basic constitutional rights in their most pristine and classic form." *Id.* at 568-569 (citations omitted). For that reason, the Court held that "the selection of contingents to make [the] parade" was entitled to the core First Amendment protections due any "edited compilation of speech." *Id.* at 570.

Masterpiece and the federal government read *Hurley* too broadly when they argue that Masterpiece's discrimination against its customers on the basis of sexual orientation merits similar constitutional protection as a parade organizer's selection of parade contingents. Pet. Br. 27; U.S. Br. 21. Commercial bakeries that sell cakes to the public may choose the *design* of their cakes, but not the identity of their clientele. See *Hurley*, 515 U.S. at 578 (States may "ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public * * * that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference.").

The federal government's argument that the state may "not compel an unwilling speaker to *join* a group or event at odds with his religious or moral beliefs" also fails to persuade. U.S. Br. 19. A retail business does not have a constitutionally protected interest in freedom of association with its *customers* or the manner in which

its customers might later seek to use the merchant's wares at the customer's personal event or ceremony. A business that sells a good does not "join" the customer's event in any constitutionally relevant way. As this Court explained in *Jaycees*, only "highly personal relationships" characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" merit constitutional protections of intimate and expressive association. 468 U.S. at 619-620; accord *Dale*, 530 U.S. at 655-656 (examining the characteristics of the Boys Scouts organization before concluding that it is an expressive association). This Court has never suggested that a merchant-client relationship comes even close to meeting the standard for constitutionally protected expressive association.

Nor has this Court endorsed the federal government's staggering assertion that, whenever a business performs a custom service or creates a custom good, the First Amendment protects its right to discriminate among its customers to avoid being "compelled" into "*figurative*" participation with its customer's "expressive event." U.S. Br. 19 (emphasis added). To the contrary, this Court has time and again endorsed the policy, dating back to early common law, that retail businesses have a duty to serve the public and have no right to discriminate among their customers. See *Hurley*, 515 U.S. at 571; *Romer*, 517 U.S. at 627; see also *Dale*, 530 U.S. at 657 (observing that "retail shops" are well within the expected locations subject to public accommodation laws).

### B. The federal government's attempt to distinguish this case based on sexual orientation also fails.

Recognizing the unprecedented implications of the arguments advanced here, the federal government attempts to reassure this Court that a decision for the bakery would not (necessarily) open the door to race-based discrimination. In the federal government's misguided view not "every application of a public accommodations law to protected expression will violate the Constitution. In particular, laws targeting race-based discrimination may survive heightened First Amendment scrutiny." U.S. Br. 32. The government contends that, because this Court has not decided whether sexual orientation is a protected class subject to strict scrutiny (as race is), Colorado's interest in protecting same-sex couples from discrimination in public accommodations is not compelling. That analysis is wrong and contrary to this Court's precedent.

This Court has repeatedly affirmed that a state has a valid and compelling interest in assuring equal access to public accommodations for all residents and may accomplish that goal by enumerating groups and characteristics "within the ambit of protection." *Romer*, 517 U.S. at 628 ("Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."). For example, in *Jaycees*, despite the fact that gender discrimination has not received the same scrutiny as race discrimination by the Court (compare *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), with *McLaughlin v. Florida,* 379 U.S. 184 (1964)), the Court concluded that the state nonetheless had a compelling interest in preventing gender discrimination in public

accommodations. See *Jaycees*, 468 U.S. at 623. And this Court in *Hurley* made this point crystal clear when it found that states have the power and the prerogative to create public accommodation laws that protect their residents on a wide variety of bases including "race, color, religious creed, national origin, sex, *sexual orientation* * * * , deafness, blindness or any physical or mental disability or ancestry." 515 U.S. at 572 (quoting Mass. Gen. Laws § 272:98 (1992)) (emphasis added).

Colorado undeniably has a compelling interest in protecting its population—and whatever classes of persons within that population are in need protection—from discrimination in public accommodations. See *Hurley*, 515 U.S. at 572. The federal government's argument to the contrary conflates states' compelling interests in eradicating all forms of discrimination by *businesses* and other public accommodations in the provision of goods and services with the level of scrutiny that applies when the *government* engages in discrimination on the basis of protected classifications. It is therefore irrelevant whether government-sponsored sexual orientation discrimination receives the same scrutiny as government-sponsored racial discrimination. The federal government's argument must therefore be rejected and seen for what it truly is: an unsupportable suggestion that sexual orientation discrimination—or, for that matter, discrimination on the basis of any other personal characteristic—in public accommodations does not warrant government intervention. The federal government's theory would upend our longstanding state and federal laws proscribing discrimination in places of public accommodation, and would invite discrimination not only against LGBT people, but people of color, religious minorities, people with disabilities, women, and more.

## III. Minorities Continue to Experience Discrimination and Greatly Need the Protection of Strong Public Accommodation Laws.

Even though Masterpiece and the federal government attempt to limit the potential application of the proposed free-speech exception, any such limitation is artificial. *Amici* are gravely concerned about the potential impact that such a broad-ranging exception would have on minorities who continue to be subjected to discrimination in public accommodations. Our country is increasingly becoming more diverse and laws prohibiting discrimination must be preserved, not diluted.

People of color, including people of color who identify as LGBT—a growing population in our country—need the protection of strong anti-discrimination public accommodation laws. During the 2010 Census, 38.9 million people (or 13 percent) identified as African American, 50.5 million people (or 16 percent) were of Hispanic or Latino origin, and 17.3 million people (or 5.6 percent) identified as Asian, either alone or in combination with another race.[4] Gallup reports show that 4.6 percent of African-Americans identify as LGBT, along with 4.0 percent of Hispanics and 4.3 percent of Asians. Gary J. Gates and Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT,*

4. U.S. Census Bureau, *The Black Population: 2010,* (Sept. 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf; U.S. Census Bureau, *The Hispanic Population: 2010,* (May 2011), https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf; U.S. Census Bureau, *The Asian Population: 2010,* (March 2012), https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf.

Gallup News, (Oct. 18, 2012).[5] In fact, nonwhites are now more likely than whites to identify as LGBT, and racial and ethnic minorities comprise 40 percent of all LGBT-identified individuals. *Ibid.* A significant segment of that population lives in cities and states (for example, District of Columbia, Maryland, and New York) with laws that prohibit discrimination on the basis of race and sexual orientation. *Ibid.*

Racial and ethnic minorities, including those that are LGBT, still suffer from overt discrimination and structural inequality, as evidenced by the increased rate of hate crimes targeting those populations. In California, for example, hate crimes increased by 11.2 percent from 2015 to 2016, with the most common crime involving racial bias and the second most common involving bias against gay people. Harriet Sinclair, *In Liberal California, Discrimination Against Black and Gay Americans Still a Big Problem, Report Finds,* Newsweek, (July 3, 2017). People who experience discrimination doubly on the basis of race or ethnicity and sexual orientation are even more susceptible to hate and bias incidents. Research by the National Coalition of Anti-Violence Program found that racial minorities are more likely to be victims of anti-LGBTQ hate crimes than whites. Nat'l Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016* (2017). Public accommodation laws are not a necessity of the past but remain vital to ensuring equal access to the marketplace by people from historically disadvantaged backgrounds.

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5. Available at http://news.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx.

### A. Consumers of color still receive worse treatment than non-minorities in the marketplace.

Discrimination still pervades the marketplace. In retail settings, "shopping while black" or consumer racial profiling is all too familiar for people of color who have experienced being following by security guards, receiving bad service, or worse, being wrongly apprehended for shoplifting. According to a 2016 Gallup poll, African Americans feel most discriminated against while shopping. Jim Norman, *Nearly Half of Blacks Treated Unfairly 'in Last 30 Days'*, Gallup (Aug. 22, 2016). These attitudes have been confirmed by research showing that black customers are ten times more likely to be targeted as potential thieves than white customers. Catherine Dunn, *Shopping While Black: America's Retailers Know They Have a Racial Profiling Problem. Now What?*, Int'l Business Times (Dec. 15, 2015). One academic researcher noted that, "since 1990, the popular press has reported hundreds of accounts of consumer racial profiling and marketplace discrimination against consumers of color." Ann-Marie Harris, *et al.*, *Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination,* 24 J. Pub. Pol'y & Mktg. 163, 164 (Spring 2005). Researchers who analyzed over 80 federal court cases between 1990 and 2002 involving customers' allegations of discrimination on the basis of race or ethnicity concluded that "real and perceived consumer discrimination remains a problem in the U.S." *Ibid.*

### B. Legal actions brought under state and federal public accommodation laws have helped ensure equal access to the marketplace by remedying consumer discrimination.

African Americans and other racial and ethnic minorities have, in the past few decades, relied on state and federal public accommodation laws to combat this ongoing discrimination. Legal actions enforcing anti-discrimination public accommodation laws have successfully remedied discrimination faced by minority consumers in restaurants, retail settings, and other businesses. Significant public accommodation cases resolving allegations of race and national origin discrimination under Title II in the past twenty-five years have included:

- Lawsuits against a national restaurant chain, by and on behalf of black customers who were allegedly treated more poorly than white customers and were discouraged from eating at the restaurant. See generally *Dyson* v. *Flagsgtar Corp and Denny's Inc.*, C.A. No. DKC-93-1503 (D.Md.) and *Ridgeway* v. *Denny's Inc.*, Case No. C 93-20202 JW (N.D. Cal.). The U.S. Department of Justice (DOJ) alleged that the restaurant required identification of black customers, denied free birthday meals to black customers, and in some cases forced black customers to leave the restaurant. *United States* v. *Flagstar Corp, and Denny's Inc.*, Case. No. 93-20208-JW (N.D. Cal.). See https://www.justice.gov/crt/housing-cases-summary-page#denny. In 1994, the restaurant entered into a consent decree with DOJ that required it to pay $45 million in

damages and implement a "nationwide program to prevent future discrimination." The decrees expired in November 24, 2000, with the Court noting the plaintiffs' view that "over the last six years the Company performed its obligations in a highly commendable and exemplary manner." *Dyson,* Docket No. 98 (Final Order), at 2.

- Lawsuits against a national rental car company alleging that the company maintained a practice of denying African Americans the right to rent vehicles on the same terms as white customers, that the company's employees "search[ed] for reasons to deny car rentals to African-Americans," and "question[ed] African-American customers more rigorously than similarly situated white customers." See *Pugh* v. *Avis*, No. 7:96-cv-00091-F (E.D.N.C. 1998) and *Pugh* v. *Avis Rent a Car Sys.*, No. M8-85, 1997 US. Dist. LEXIS 16671, at *2 (S.D.N.Y Oct. 28, 1997). The case settled for $5.1 million, and the Court terminated the decree in February, 2002 citing the company's "exemplary compliance." *Pugh*, Docket No. 387 (Final Order), at 2.

- Lawsuits against a national restaurant chain in 2004 alleging that it had treated minority customers worse than white customers. DOJ's lawsuit alleged that the restaurant "allowed white servers to refuse to wait on African-American customers; segregated customer seating by race; seated white customers before African-American customers who arrived earlier; and provided inferior service to African-American customers after they were seated." See https://www.justice.gov/archive/opa/

pr/2004/May/04_crt_288.htm. DOJ alleged that this discriminatory conduct was not isolated to a few locations, but occurred in more than 30 percent of the approximately 155 restaurants in seven states. See *United States* v. *Cracker Barrel Old Country Store, Inc.*, Case No. 04-109 (N.D. Ga. 2004). In May 2004, DOJ entered into a settlement agreement with the restaurant requiring them to implement extensive injunctive relief to ensure equal access to all patrons. See https://www.justice.gov/archive/opa/pr/2004/May/04_crt_288.htm. In August 2010, the case was dismissed after DOJ determined that the restaurant had "substantially complied" with the settlement agreement's provisions. A similar lawsuit was filed by private plaintiffs and settled for $8.7 million in 2004. See http://www.foxnews.com/story/2004/09/09/cracker-barrel-settles-racial-discrimination-lawsuits-for-87m.html.

There have also been important victories for consumers of color under state public accommodation laws:

- In 2000, the Attorney General for the Commonwealth of Massachusetts initiated an investigation into the profiling practices of a children's clothing retailer, alleging that the retail store's employees displayed a pattern of following African-American patrons while they shopped, and of scrutinizing African-American patrons' credit card purchases, more frequently than white patrons. The case settled in December 2000, requiring the company to implement extensive injunctive relief, including spending up to $100,000 for an independent consultant to improve the company's anti-discrimination policies. See

http://www.nytimes.com/2000/12/22/us/accused-of-discrimination-clothing-chain-settles-case.html.

- In 2014, the Attorney General for the State of New York announced a $650,000 settlement with a department store to settle allegations of racial profiling and false detention by more than a dozen African-American and Latino customers; see https://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-macys-prevent-discrimination-against-customers; and a $525,000 settlement with another department store to resolve allegations of racial profiling prompted by two African-American customers who were falsely accused of credit card fraud. See https://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-barneys-new-york-address-discrimination-against. Both settlements required the retailers to hire consultants to improve their internal policies and practices, provide anti-discrimination training to their employees, maintain records related to detentions, and investigate consumer complaints of discrimination.

- In April 2017, the California Department of Fair Employment and Housing (DFEH) announced a settlement agreement with an online housing rental company. Under the agreement, DFEH will "conduct fair housing testing of certain" rental house hosts and will require company to "advise all users with complaints of racial discrimination of their right to file a complaint with DFEH," and to "regularly report to the Department on guest acceptances by race in California." See https://www.

dfeh.ca.gov/wpcontent/uploads/sites/32/2017/06/Press-release-4-27-17.pdf. In July 2017, DFEH also announced a settlement agreement on behalf of a guest whose reservation was canceled after the company host found out she was Asian. See https://www.dfeh.ca.gov/wpContent/uploads/sites/32/2017/07/2017-07-13-Suh-Airbnb-Press-Release.pdf.

Those cases[6] are a stark reminder that consumers continue to face indignity in the marketplace on the basis of their race or national origin. As demonstrated by the successful cases above, Title II and state public accommodation laws still play a vital role in ensuring that minority consumers who are harmed by invidious discrimination can obtain justice. Businesses engaged in discriminatory practices must not be allowed to use an unprecedented free-speech claim to evade those vital protections.

### C. Masterpiece's asserted free-speech exception to public accommodation laws would gut civil rights protections, harm our economy, and make it harder for plaintiffs to bring claims of discrimination.

If the Court accepts Masterpiece's reasoning, the most immediate harm would fall on members of the LGBT community, including LGBT communities of color, living in states or municipalities with public accommodation

6. A listing of additional cases alleging race and national origin discrimination in public accommodations since 1990 is attached as Appendix B.

laws prohibiting discrimination on the basis of sexual orientation.[7] Masterpiece's asserted free-speech exception to public accommodation laws would undermine such anti-discrimination protections and further subject this already vulnerable population to legalized discrimination by businesses. It would also likely result in a chilling effect on affected individuals' filing of complaints of public accommodation discrimination since they would be less likely to prevail.

Furthermore, such an exception threatens to halt the progress African Americans and other minorities have made in using public accommodation laws to combat continued and pervasive discrimination. The "custom goods" and "sexual orientation" carve-outs proposed by Masterpiece and the federal government have no limiting principles. Indeed, the federal government cannot even confirm that the "custom goods" carve-out could not be used to discriminate against racial minorities. See U.S. Br. 32 ("[L]aws targeting race-based discrimination *may* survive heightened First Amendment Scrutiny.") (emphasis added).

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7. States with public accommodation laws prohibiting discrimination on the basis of sexual orientation include California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia. *State Public Accommodation Laws,* Nat'l Conference of State Legislators, (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx. Many counties and municipalities have likewise passed ordinances that include sexual orientation as a proscribed ground for discrimination in public accommodation. See https://www.transequality.org/know-your-rights/public-accommodations.

The unprecedented carve-outs proposed by Masterpiece and the federal government could apply well beyond the wedding context to other businesses that are also arguably engaged in expressive activities, such as culinary arts, interior design and architecture firms, fashion boutiques, beauty salons, and barber shops, who would prefer not to associate with racial, ethnic, or other underrepresented minorities. And even beyond artistic commercial enterprises, a free-speech exception could potentially exempt a broad range of businesses that claim free-speech objections from serving particular customer groups. As Professor Corbin aptly noted, "recognition of free speech rights" in support of a business's right to discriminate in public accommodations "might actually serve as a more powerful sword than religious rights, since it can be wielded by any objector with strong viewpoints (which is basically everybody), not just religiously devout objectors." See Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 Emory L.J 241, 269 n.138 (2015).

Professor Corbin's scenario is not theoretical. In fact, several businesses have recently raised free-speech defenses under the First Amendment to justify discrimination against Muslim customers, including an African-American Muslim customer. For example, at a gun range in Oklahoma, the owners posted a sign at the entrance of their business stating, "This privately-owned business is a Muslim-free establishment!!! We reserve the right to refuse service to anyone!!!" See *Fatihah* v. *Neal*, No. 16-00058, Docket entry No. 71, at 2 (E.D. Okl. Apr. 28, 2017). In addition to posting a prominent sign at their entrance, the owners posted a notice on its Facebook page stating:

> Save Yourself Survival and Tactical Gear and Gun Range is now a Muslim free business. We will not support or condone those who hate our country. We love our country and want our fellow Americans to know we do not tolerate terrorism. They have come to our home and attacked us on our soil. We reserve the right to refuse service to anyone. Thank you.

*Id.* at 2.

In the fall of 2015, that gun range denied service to an African-American Muslim U.S. Army reserve member on the basis of his religion. In their answer to the complaint, the defendant owners invoked their First Amendment free-speech rights as an affirmative defense, arguing that their "Muslim Free" sign is "political and public issue speech such that any cause of action based on this speech is barred by the First and Fourteenth Amendments." *Fatihah*, Docket entry No. 36, at 8, ¶ 2 (Aug. 1, 2016).[8] In *CAIR Florida* v. *Teotwawki Investments LLC, d/b/a Florida Gun Supply*, a gun store that declared its business to be a "Muslim Free Zone" similarly alleged it was shielded from liability by the First Amendment. No. 15-61541 (S.D. Fla. 2015).[9]

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8. The defendants' motion for summary judgment is still pending.

9. The court ultimately dismissed the plaintiff's complaint for lack of constitutional standing. *See CAIR Florida, Inc.* v. *Teotwawki Investments, LLC*, No. 15-61541, 2015 WL 11198249, at *7 (S.D. Fla. Nov. 24, 2015).

As highlighted by the cases discussed in Section III.B, minority customers are still too often treated as second-class citizens. An exemption to public accommodation laws would give business owners with biased and discriminatory attitudes new ammunition to refuse equal service to people of racial, ethnic and other minorities. Under Masterpiece's theory, businesses could avoid compliance with public accommodation laws by asserting that the contents of their goods and services are imbued with subjective expressions that depend on the identity of their customers, or simply by asserting that they would rather not associate with certain customers.

* * * *

Masterpiece's request for an exemption to public accommodation law for custom goods cannot withstand judicial scrutiny. A decision from this Court in favor of Masterpiece would require reasoning that would be readily deployed to trample the rights of the most vulnerable people in our society by excusing discrimination based upon race, national origin, or any other protected category, and would roll back the substantial strides this country has made in eradicating discrimination in our public life and economy. This Court should not open a new avenue for discrimination by commercial businesses—one that is inconsistent with this Court's precedents and the principle that states may protect equal access to publicly available goods and services for all its residents.

## CONCLUSION

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

Respectfully submitted,

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# APPENDIX

## APPENDIX A — STATEMENTS OF INTEREST FOR ALL OTHER *AMICI*

The **Asian American Legal Defense and Education Fund** (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The Appellants' arguments undermine the enforcement of the civil rights laws throughout the county and threaten the civil rights of Asian Americans and other racial, ethnic and religious minorities.

The **Center for Constitutional Rights** (CCR) is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has since litigated numerous cases on behalf of individuals challenging discrimination and persecution by both state and private actors on the basis of race, gender, and sexual orientation and gender identity. See, *e.g.*, *DuVernay* v. *United States* 394 U.S. 309 (1969), challenging the exclusion of Black people from draft boards in predominately Black neighborhoods; *Palmer* v. *Thompson,* 403 U.S. 217 (1971), brought by Black citizens of Jackson, Mississippi, against the City for closing public city schools to avoid desegregating them; *Crumsey* v. *Justice Knights of the Ku Klux Klan*, No. 80-287 (E.D. Tenn. Mar. 1, 1982), brought by five woman injured during a shooting spree by member of the KKK;

*Appendix A*

*Floyd* v. *City of New York*, 959 F .Supp. 2d 540 (S.D.N.Y. 2013), a federal class action lawsuit against the New York Police Department's practices of racial profiling and unconstitutional stops and frisks; *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), challenging gender-based discrimination through compulsory maternity leave policy of the New York City Board of Education; *Sexual Minorities Uganda* v. *Lively,* 960 F. Supp. 2d 304 (D. Mass 2013), brought by a Ugandan LGBT organization against a U.S. citizen for his role in the persecution of LGBT people in Uganda; and *Doe* v. *Jindal,* 851 F. Supp. 2d 995 (E.D. La. 2012), an equal protection challenge to a Louisiana law that required individuals convicted of Crimes Against Nature by Solicitation as sex offenders.

**Color Of Change** is the nation's largest online racial justice organization driven by over 1 million members. Using an integrated and intersectional approach to help people do something real about injustice, Color of Change fights the policies and racism that hold Black folks back and champions solutions that move us all forward in the economy, our democracy, the media landscape—everywhere. Color of Change advocates in cases involving issues of discrimination nationwide. Color of Change has been involved in efforts to ensure that federal legislation and policy are fair and enforced without discrimination based on race, gender, sexual orientation, class or religious beliefs. As the nation's largest racial justice organization, Color of Change's track record of addressing issues at the intersection of race, gender and sexual orientation make us well suited to address the questions of public accommodation laws here.

*Appendix A*

**The Leadership Conference on Civil and Human Rights** (The Leadership Conference) is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States. It is the nation's largest and most diverse civil and human rights coalition. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals. Towards that end, we have participated as an amicus party in cases of great public importance that will affect many individuals other than the parties before the court and, in particular, the interests of constituencies in The Leadership Conference coalition.

**National Action Network** (NAN) founded in 1991, works tirelessly in the tradition of Dr. Martin Luther King, Jr. to secure equal justice for all. NAN serves as a bulwark against societal regression in a nation faced with many challenges.

The **National Association for the Advancement of Colored People, Inc.** (NAACP) is the nation's largest and oldest grassroots-based civil rights organization. Founded in 1909, the NAACP's mission is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. The NAACP has long advocated for equality in public accommodations. See, *e.g.*, *Bell* v. *Maryland*, 378 U.S.

226 (1964); *NAACP* v. *Cracker Barrel Old Country Store, Inc.*, No. 4:01-CV-325-HLM (D.S.C. *filed* April 11, 2002); Consent Decree in *NAACP* v. *J Edwards Great Ribs*, No. 4:04-cv-01690-RBH (D. S.C. Apr. 22, 2005); Consent Decree in *NAACP* v. *Molly Darcy Inc.*, No. 11--10293 (D. S.C. Nov. 2, 2012). Moreover, the NAACP has previously filed amicus curiae briefs in this Court arguing that the U.S. Constitution requires that all persons receive equal treatment under the law. See, *e.g.*, *United States* v. *Windsor*, 133 S Ct. 2675 (2013) and *Obergefell* v. *Hodges*, 135 S Ct. 2584 (2015).

Established in 1910, the **National Urban League** is the nation's oldest and largest community based movement devoted to empowering African Americans to enter the economic and social mainstream. Today, the National Urban League, headquartered in New York City, spearheads the non-partisan efforts of its local affiliates. There are over 100 local affiliates of the National Urban League located in 35 states and the District of Columbia providing direct services to more than 2 million people nationwide through programs, advocacy, and research. The mission of the Urban League movement is to enable African Americans to secure economic self-reliance, parity, power and civil rights. The Urban League seeks to implement that mission by, among other things, empowering all people in attaining economic self-sufficiency through job training, good jobs, homeownership, entrepreneurship and wealth accumulation and promoting and ensuring our civil rights by actively working to eradicate all barriers to equal participation in all aspects of American society, whether political, economic, social, educational or cultural.

*Appendix A*

The **Southern Poverty Law Center** (SPLC) is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. The SPLC's lawsuits have toppled institutional racism in the South, bankrupted some of the nation's most violent white supremacist groups, and won justice for exploited workers, abused prison inmates, disabled children, and other victims of discrimination. The SPLC's advocacy and impact litigation on behalf of the lesbian, gay, bisexual, and transgender community spans decades, beginning with a case challenging the military's anti-gay policy in the late 1970s and the monitoring of anti-gay hate and extremist groups today. The SPLC has a strong interest in ensuring that laws and policies do not reflect animus towards gay men and lesbians, and African-Americans and other vulnerable members of society.

## APPENDIX B — LISTING OF ADDITIONAL CASES ALLEGING RACE AND NATIONAL ORIGIN DISCRIMINATION IN PUBLIC ACCOMMODATIONS SINCE 1990

Settlement Agreement, *Massachusetts State Attorney General Maura Healey and Jamaica Plain Post 76 of the American Legion* (Oct. 4, 2016), *available at* http://www.mass.gov/ago/news-and-updates/press-releases/2016/jamaica-plain-american-legion-agrees-to-adopt-new-policies-pay-15-000-to-resolve-allegations-of-racial-discrimination.html (Agreement resolved allegations of discrimination against African-American party guests and vendors based on their race and/or color.)

*Commission on Human Rights ex rel. Jordan* v. *Raza*, 3 NYC HRC 8 (July 7, 2016) (Respondent taxi driver violated NYC Human Rights Law by refusing to pick complainant up and provide her service on the basis of her race.)

*United States* v. *Ayman Jarrah*, 16- 02906 (S.D. Tex. 2016) (Lawsuit alleging bar and nightclub discriminated against African-American, Hispanic and Asian-American patrons in violation of Title II of the Civil Rights Act of 1964).

*Commission on Human Rights ex rel. Longmire* v. *S & A Stores, Inc.*, 193 NY OATH 5 (July 6, 2015) (Respondent Store discriminated against complainant by denying him access to a public accommodation based on his race in violation of NYC Human Rights Law.)

Consent Order, *United States* v. *Routh Guys, L.L.C. d/b/a Kung Fu Saloon*, No. 3:15-cv-02191 (N.D. Tex.

June 30, 2015), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2015/07/06/kungfusettle.pdf (Settlement agreement resolved allegations that Kung Fu Saloons denied African-American and Asian-American patrons admission on the basis of race and national origin, in violation of Title II of the Civil Rights Act of 1964.)

Settlement Agreement, *Schneiderman* v. *Circle Nightclub* (June 27, 2013), *available at* https://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-midtown-nightclub-ensuring-equal-access-all (Settlement agreement resolved allegations that Circle nightclub excluded customers on the basis of race and ethnicity.)

*Massachusetts Comm'n Against Discrimination* v. *Capitol Coffee House*, 35 Mass. Comm. Discrim. 61 (Apr. 26, 2013) (Coffee shop discriminated against African-American customer on the basis of race in violation of Massachusetts' public accommodation law by requiring him, but not his white colleagues to pay prior to being served.)

Stipulated Settlement Agreement, *United States* v. *The Valley Club of Huntingdon Valley*, No. 09-18744SR (E.D. Pa. Aug. 16, 2012), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2012/08/20/huntingdonsettle.pdf (Settlement agreement resolved allegations that the swimming facility discriminated against African-American children and their families in violation of Title II of the Civil Rights Act of 1964.)

*Appendix B*

*Burford* v. *Complete Roofing*, 2 CCHR 1 (Oct. 19, 2011) (Company violated the Chicago Human Rights Ordinance by engaging in harassment and discrimination directed at African-American complainants on the basis of their race when they sought roofing services.)

*Commission on Human Rights ex rel. Mcintosh* v. *Vance*, 219 NY OATH 19 (July 18, 2011) (Company discriminated against African-American complainant by denying her access to a public accommodation because of her race, in violation of New York City Human Rights Law.)

*Rafael Scott* v. *Owner of Club 720*; *Lyke* v. *Owner of Club 720 d/b/a Avila*, 15 CCHR (Feb. 16, 2011) (Company engaged in race and religion discrimination by denying admission to Muslim and African-American complainants in violation of the Chicago Human Rights Ordinance.)

Consent Decree, *United States* v. *Pasco Cty. Fair Ass'n, Inc.*, No. 8:10-cv-01554-EAK-MAP (M.D. Fla. July 19, 2010), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/pascosettle.pdf (Settlement resolved allegations that Pasco County Fair Association discriminated against Hispanic patrons in the rental of a reception hall in violation of Title II of the Civil Rights Act of 1964.)

Agreed Order, *United States* v. *Cracker Barrel Old Country Store*, No. 4:04-CV-109-HLM (N.D. Ga. May 18, 2009), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/cracker_agreed_order_5-18-09.

pdf (Settlement resolved allegations that restaurant chain violated Title II of the Civil Rights Act of 1964 by discriminating against African-American customers on the basis of race.)

*Drayton* v. *Toys 'R' Us Inc.*, 645 F. Supp. 2d 149 (S.D.N.Y. 2009) (African-American shoppers alleged racial discrimination in defendant's store in violation of federal, New York State Human Rights Law and New York City Human Rights Law.)

*Keck* v. *Graham Hotel Sys.*, 566 F.3d 634 (6th Cir. 2009) (African-American couple alleged racial discrimination on the basis of race in violation of the Elliot-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2302 when the defendants refused to host their wedding reception.)

*Shumate* v. *Twin Tier Hosp., LLC*, 655 F. Supp. 2d 521 (M.D. Pa. 2009) (African-American family alleged hotel denied them access on the basis of their race in violation of federal laws, including Title II of the Civil Rights Act of 1964.)

*Commission on Human Rights ex rel. Gardner* v. *I.J.K. Service, Inc. a/k/a Shack's Private Car Serv.*, 228 NY OATH 6 (Oct. 10, 2008) (Taxi driver violated New York City Administrative Code by discriminating against African-American patron on the basis of his race.)

Consent Decree, *United States* v. *Davis d/b/a Kokoamos Island Bar & Grill,* No. 2:07cv430 (E.D. Va. Mar. 10, 2008), *available at* https://www.justice.gov/

sites/default/files/crt/legacy/2010/12/15/kokosettlefinal.pdf (Settlement resolved allegations that nightclub discriminated against African-American patrons by denying them admission on the basis of race in violation of Title II of the Civil Rights Act of 1964.)

*Morrow* v. *Driver of Cab # 1357 (Surrender Tumala)*, 11 CCHR 11 (Apr. 18, 2007) (Cab driver discriminated against African-American female customer on the basis of her sex and race in violation of the Chicago Municipal Code.)

*Blakemore* v. *Bitritto Enters., Inc. d/b/a Cold Stone Creamery # 0430*, 13 CCHR 23-24 (2007) (Cold Stone Creamery violated the Chicago Municipal Code by discriminating against African-American patrons on the basis of race.)

Consent Decree, *United States* v. *Candy II, d/b/a Eve*, No. 05-C-1358 (E.D. Wis. Dec. 29, 2006), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2015/01/21/candysettle.pdf (Settlement resolved allegations that nightclub denied admission to African-Americans on the basis of their race in violation of Title II of the Civil Rights Act of 1964.)

Settlement Agreement, *NAACP* v. *PAAR Inc., d/b/a Damon's Grill*, No. 4:04-cv-01691-RBH (D.S.C. Apr. 1, 2006) (Settlement resolved allegations that businesses denied service to African-American patrons during "Black Bike Week" in violation of Title II of the Civil Rights Act of 1964 and the South Carolina Public Accommodations Act.)

*Appendix B*

*Immacula Saint Louis* v. *La Reine Boutique*, 14 Mass. Comm. Discrim. 2 (Feb. 10, 2006) (Store violated Massachusetts General Laws by discriminating against African-American customers on the basis of their race.)

*Watkins* v. *Lovley Dev., Inc.*, No. 04-211-B-H, 2005 U.S. Dist. LEXIS 24779 (D. Me. Oct. 24, 2005) (African-American customers alleged defendant donut store violated federal laws and the Maine Human Rights Act by denying them service on the basis of their race.

*Slocumb* v. *Waffle House, Inc.*, 365 F. Supp. 2d 1332 (N.D. Ga. 2005) (African-American family alleged they were denied service at restaurant on the basis of race in violation of *inter alia* Title II of the Civil Rights Act of 1964.)

*Kilpatrick* v. *Lifetime Fitness, Inc.*, 40 IL HUM 2 (Apr. 27, 2005) (Fitness center violated Illinois Human Rights Act by denying complainant full and equal enjoyment of its facility on account of his race.)

*Williams* v. *Thant Co.*, No. 02-1214-MO, 2004 U.S. Dist. LEXIS 12100 (D. Or. June 22, 2004) (Defendant nightclub selectively enforced dress code on basis of race, which Plaintiffs argued violated Title II of the Civil Rights Act of 1964 and the Oregon Public Accommodations Act.)

Settlement Agreement and Order, *United States* v. *Camp Riverview, Inc., d/b/a as Camp Riverview*, No. SA-02-CA-1021XR (W.D. Tex. Mar, 9, 2004), *available at* https://www.justice.gov/crt/housing-and-civil-

enforcement-cases-documents-344 (Settlement agreement resolved allegations that the camp discriminated against Hispanic campers on the basis of their national origin in violation of Title II of the Civil Rights Act of 1964.)

Consent Order, *United States* v. *Black Wolf, Inc. d/b/a The Mounty* (N.D. W.Va. Nov. 20, 2003), *available at* https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-303

(Settlement agreement resolved allegations that restaurant discriminated against African-American customers on the basis of their race in violation of Title II of the Civil Rights Act of 1964.)

*Commission on Human Rights* v. *Silver Dragon Restaurant*, 1 NYC HRC (July 28, 2003) (Restaurant violated New York City Administrative Code by discriminating against African-American investigator on the basis of her race.)

Settlement Agreement, *New York State Attorney General Eliot Spitzer and Remedy Restaurant and Lounge d/b/a Anju* (June 3, 2003), *available at* https://ag.ny.gov/press-release/settlement-manhattan-nightclub-ends-investigation-discrimination-allegations (Settlement agreement resolved allegations that nightclub's admission policy discriminated against South Asians on the basis of race or national origin in violation of federal and state civil rights laws.)

*Buchanan* v. *Chevy / GEO*, 51 IL HUM 4 (Apr. 24, 2003) (Dealership violated the Illinois Human Rights Act

by discriminating against African-American customer on the basis of her race.)

*Turner* v. *Wong,* 363 N.J. Super. 186 (N.J. Super. Ct. App. Div. 2003) (African-American patron alleged store discriminated against her on the basis of her race in violation of the New Jersey Law Against Discrimination.)

Consent Decree, *United States* v. *Freeway Club* (N.D. Ala. May 13, 2002), *available at* https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-421 (Decree resolved allegations that Freeway Club violated Title II of the Civil Rights Act of 1964 by refusing admission to African-Americans on the basis of race.)

Consent Order, *United States* v. *Satyam, L.L.C. d/b/a Selma Comfort Inn*, No. 01-0046-CB-L (S.D. Ala. Apr. 4, 2002), *available at* https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-173 (Decree resolved allegations that Inn violated Title II of the Civil Rights Act of 1964 by denying African-American guests equal access to their establishment, on the basis of their race.)

Consent Order, *United States* v. *Badeen* (D. Kan. Mar. 8, 2002), *available at* https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-321 (Decree resolved allegations that the nightclub violated Title II of the Civil Rights Act of 1964 by discriminating against Latino and African-American patrons.)

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*Russo* v. *Corbin*, C.A. No. 01A-07-001 HDR, 2002 Del. Super. LEXIS 49 (Del. Super. Ct. Jan. 8, 2002) (Restaurant violated Delaware's Equal Accommodations Law by refusing to serve complainants on the basis of their race.)

Consent Decree, *United States* v. *Fred Thomas d/b/a Best Western Scenic Motor Inn*, No. 1:01CV000007 GH (E.D. Ark. Sept. 27, 2001), *available at* https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-369 (Decree resolved allegations that Inn violated Title II of the Civil Rights Act of 1964 by discriminating against African-American guests on the basis of race.)

Consent Order, *United States* v. *Walker d/b/a The Knights*, No 7:01-0008 (M.D. Ga. June 27, 2001), *available at* https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-591 (Decree resolved allegations that the business violated Title II of the Civil Rights Act of 1964 by denying admission to African-Americans on the basis of their race.)

Consent Decree, *United States* v. *HBE Corporation d/b/a Adam's Mark Hotels*, No. 99-1604-CIV-ORL-22C (M.D. Fla. Nov. 6, 2000), *available at* https://www.justice.gov/crt/housing-cases-summary-page#adam (Decree resolved allegations that Adam's Mark Hotels violated Title II of the Civil Rights Act of 1964 by discriminating against minority guests.)

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Consent Order, *United States* v. *Patel d/b/a Econo Lodge*, No. 00-3832 (S.D. Fla. Oct. 20, 2000), *available at* https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-3 (Order resolves allegations that Econo Lodge discriminated against African-American guests in violation of Title II of the Civil Rights Act of 1964.)

*Joseph* v. *N.Y. Yankees Pshp.*, 2000 U.S. Dist. LEXIS 15417 (S.D.N.Y. Oct. 19, 2000) (African-American plaintiff alleged Yankees' dress code violated federal and New York state and city civil rights laws.)

*Halton* v. *Great Clips, Inc.*, 94 F. Supp. 2d 856 (N.D. Ohio 2000) (African-American customers alleged discrimination by the hair salon in violation of federal laws, including Title II of the Civil Rights Act of 1964 and Ohio's public accommodation law.)

*Horn* v. *A-Aero 24 Hour Locksmith Serv.*, Chicago Comm'n on Human Relations, (July 19, 2000) (Company violated Chicago Human Rights Ordinance by discriminating against African-American customer on the basis of her race.)

Consent Decree, *United States* v. *Byron Richard d/b/a Hylites Lounge*, No. 99-1594 (W.D. La. Feb. 25, 2000), *available at* https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-425 (Decree resolved allegations that Hylites Lounge refused admission and service to African-American customers in violation of Title II of the Civil Rights Act of 1964.)

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*Hill* v. *Kookies*, No. 97 C 6723, 1999 WL 608713 (N.D. Ill. Aug. 4, 1999) (African-American patrons alleged discrimination in violation of federal laws, including Title II of the Civil Rights Act 0f 1964, and Illinois state law.)

*Brown* v. *Emil Denemark Cadillac*, Chi. Com. Hum. Rel., 96-PA-76 (Nov. 18, 1998) (Company violated Chicago Human Rights Ordinance by discriminating against African-American patrons.)

*Bobbitt* v. *Rage Inc.*, 19 F.Supp.2d 512 (W.D.N.C. 1998) (African-American patrons alleged restaurant violated federal laws, including Title II of the Civil Rights Act of 1964, by discriminating against them on the basis of their race.)

*Robinson* v. *Power Pizza*, 993 F.Supp.1458 (M.D. Fla. 1998) (African-American residents alleged violation of Title II of the Civil Rights Act of 1964 where restaurant failed to deliver to their neighborhood.)

News Release, *West Virginia Nightclub Agrees Not to Turn Away African-American Patrons, Under Agreement with Justice Department* (Jan. 27, 1998), *available at* https://www.justice.gov/archive/opa/pr/1998/January/028.htm (Agreement resolved allegations that nightclub refused entry to African-American patrons in violation of Title II of the Civil Rights Act of 1964.)

*Spencer* v. *Kings Plaza Unisex Palace of Hair Design, Inc., d/b/a Unisex Hair Design*, N.Y.C. Com. Hum. Rts. (June 27, 1991) (Hair salon engaged in unlawful

discrimination by charging African-American customers higher prices for service in violation of New York City Administrative Code.)

*Jones* v. *Boston*, 738 F. Supp. 604, 605 (D. Mass. 1990) (African-American hotel guest alleged hotel discriminated against him on the basis of his race in violation of federal laws, including Title II of the Civil Rights Act of 1964, and Massachusetts civil rights statute.)