NO. 16-111

IN THE
Supreme Court of the United States

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

v.

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

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICUS CURIAE* LEGAL SCHOLAR ADAM J. MACLEOD IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Colorado tribunals' idiosyncratic application of Colorado's public accommodations law unnecessarily violates Petitioners' free speech and free exercise rights by falsely equating Petitioners' sincerely held religious beliefs about marriage with discrimination for the reason that Respondents are homosexual.

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INTEREST OF *AMICUS CURIAE*[1]

Adam J. MacLeod is Associate Professor at Faulkner University, Thomas Goode Jones School of Law. He is the author of *Property and Practical Reason* (Cambridge University Press 2015) and academic articles in peer-reviewed journals and law reviews in the United States, United Kingdom, and Australia, and co-editor of *Foundations of Law* (Carolina Academic Press 2017). Amicus has researched and written about the nondiscrimination norm in public accommodations laws such as the Colorado laws at issue in this case.

SUMMARY OF ARGUMENT

This case involves two personal beliefs. It is not a case of intentional discrimination. But Colorado tribunals applied Colorado's public accommodations law in a novel and idiosyncratic way to a private disagreement. This is one instance of disagreements around the United States between same-sex couples who "seek [marriage] for themselves because of their respect—and need—for its privileges and responsibilities" and those "reasonable and sincere people" who "in good faith" adhere to the conviction

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[1] Petitioners and the Respondent Colorado Civil Rights Commission have filed blanket consents with the Supreme Court; their consents are on file with the Clerk. Counsel for the individual Respondents Craig and Mullins granted consent to the filing of this brief; their consent accompanies this brief. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

that marriage "is by its nature a gender-differentiated union of man and woman." *Obergefell* v. *Hodges*, -- U.S. --, 135 S. Ct. 2584, 2594 (2015). Colorado officials transformed this disagreement into a constitutional case by disregarding long-standing public accommodations doctrine and this Court's guidance, thereby needlessly pitting fundamental rights of free exercise and speech against the liberty to conduct business on reasonable terms in places of public accommodation. While reversing to vindicate the Petitioners' First Amendment rights, this Court should remand with a fuller restatement of its earlier admonitions to state courts to interpret and apply their states' public accommodation laws to avoid unnecessary constitutional infirmities.

In *Hurley* v. *Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), *Christian Legal Society Chapter of the University of California, Hastings College of the Law* v. *Martinez*, 561 U.S. 661 (2011), and at other times, the Court has admonished state judiciaries and inferior federal tribunals to let institutions of plural ordering, especially property rights and licenses, resolve freighted moral conflicts except where the owner of a public accommodation excludes for a prohibited reason. In those decisions, the Court adhered to the common-law contours of the public accommodations doctrine as a source of the customer's license that is determined by the owner's intention, his reasons for opening his business to the public for some purposes and not others. The Colorado Civil Rights Commission ("Commission") and the Colorado Court of Appeals gutted that doctrine and replaced it with a

rule that unnecessarily curtails economic, civil, and constitutional liberties.

This Court should restate its earlier affirmation of public accommodations doctrine and should also commend to state supreme courts another common-law institution: the civil jury. Property estates and licenses are common-law rights, and where their boundaries are marked by standards of intention and reasonableness—questions of fact—it is the job of a jury to determine where those boundaries lie. Like property, the civil jury is a pluralist institution. Different juries confronted with different facts in different communities with different moral understandings at different times might draw the boundaries between the owner's estate and the customer's license differently. Unlike the Commission and Court of Appeals below, they can condemn acts of invidious discrimination while leaving room for the plural moral views that are so essential to personal identity. They need not impose one, uniform resolution on all controversial disagreements.

ARGUMENT

I. This Court Has Accurately Restated the Doctrine of Public Accommodations

A. Property: Pluralism and Reason

The Colorado Court of Appeals clearly stated what it accomplished. In the court's words, its ruling "juxtaposes" the "rights" of the parties. *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015), cert. denied, *Masterpiece Cakeshop, Inc.*

v. *Colorado Civil Rights Commission*, 2016 WL 1645027 (Colo. 2016). But the juxtaposition is fabricated and unnecessary. It results from the Commission's counter-evidentiary fact findings and the Court of Appeals' own misapplication of the public accommodations doctrine, which entails neither a customer's right to require a particular good or service from an owner nor an owner's right to discriminate for an invalid reason.

The doctrine never has vested in customers a claim-right "requiring" (the Colorado court's word) a baker to make a wedding cake for them, id. at 276, much less a right to require the baker to communicate what he understands to be a mistaken belief about what marriage is. Nor does the doctrine vest in the baker a right to "deny them its services" because of their membership in an enumerated class (as the Court of Appeals characterized the Petitioners' right claim, id. at 281). Instead, the doctrine secures the *liberties* of both customer and owner—the owner's liberty to grant and the customer's liberty to exercise—a license to meet on the owner's private property for the purpose of negotiating business, all consistent with the reasons for which the owner holds open to the public. The doctrine is one aspect of the broader pluralism of property ownership, which enables various groups with different moral visions to choose how and on what terms to interact with each other.

This Court accurately restated the common law of property ownership in *Hurley*, 515 U.S. at 571-72 and *Martinez*, 561 U.S. at 679. However, the decisions below demonstrate that a more complete restatement

is in order. As this Court observed in *Martinez*, 561 U.S. at 679, essential to property ownership is the right to decide for what purposes property will be used. Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 University of Toronto L. J. 275 (2008). This entails that property owners have the right to preserve the integrity of the purposes for which they hold their premises open to licensees when they act without discriminatory intent and have not created a public forum.

Many owners exercise this right to form and build together their own life plans, not only in the privacy of the home, but also in religious assemblies, charitable works, businesses, and civic groups. Adam J. MacLeod, *Property and Practical Reason* 74-87, 114-21 (2015). Those plans are often predicated on unique moral visions. Indeed, property rights have stood guard around many of the most powerful social reform movements in American history. The civil rights protests that were planned in Southern black churches and the LGBT activism of more recent decades were possible because of the owners' rights both to include others in their use of property and to tell others to keep out. MacLeod, *Property and Practical Reason*, at 33-34; John D. Inazu, *A Confident Pluralism*, 88 So. Cal. L. Rev. 587, 590 & n.17 (2015); Lawrence A. Wilson & Raphael Shannon, *Homosexual Organizations and the Right of Association*, 30 Hastings L.J. 1029, 1043, 1046-49, 1054-55 (1979).

Property ownership entails not only the right to exclude but also the right to include others for common purposes, for shared reasons in a common

plan. In the marketplace, those shared reasons are proposed by various businesses. As the *Hurley* Court observed, at common law those who profess to be employed by the public on their private property grant to the public a license to enter for the purpose of acquiring the goods or services on offer. II William Blackstone, *Commentaries on the Laws of England* *212 (1893) (1769). That license can be refused or terminated for a "good reason." *Hurley*, 515 U.S. at 571, citing *Lane* v. *Cotton*, 12 Mod. 472, 484–485, 88 Eng. Rep. 1458, 1464–1465 (K.B.1701) (Holt, C.J.); *Markham* v. *Brown*, 8 N.H. 523, 529-30, 531 (N.H. 1837); III Blackstone, at *164, *166. This means that business owners have a limited nondiscrimination duty; they can refuse service but must have a valid reason for that refusal.

This case falls in the broad category of public accommodations where the business owner has neither a general duty to serve nor a liberty to deny service arbitrarily. The strength and contours of the nondiscrimination duty vary according to the source of the public's license to enter. Where the customer's license is created by contract, such as a ticket to a sporting event, the license is a mere privilege terminable at the will of the venue owner. *Marrone* v. *Washington Jockey Club*, 227 U.S. 633, 636-37 (1913). At the other end of the spectrum, where the business is chartered as a common carrier, utility, or other public monopoly, the owner has a general (though not unlimited) duty to serve all on equal terms. *Jencks* v. *Coleman*, 13 F. Cas. 442 (D.R.I. 1835) (Story, J.); Earl M. Maltz,*"Separate But Equal" and the Law of Common Carriers in the Era of the Fourteenth Amendment*, 17 Rutgers L. J. 553 (1986). In between

those two poles are cases, such as this one, in which private property is held open for a particular business purpose. In these cases, the public's license to enter and conduct business is neither terminable at will nor a vested right to be served. It is a license carved out of the owner's estate by the owner's purpose for opening to the public. See generally Adam J. MacLeod, *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 Mich. St. L. Rev. 643, 686-702.

A reason that is related to the owner's purpose for the public's license will generally suffice to justify the owner in terminating a particular customer's license. Yet some reasons for exclusion have always been categorically invalid at common law. Race is chief among these. *Shepard* v. *Milwaukee Gas Light Co.*, 6 Wis. 539 (1858); *Coger* v. *Northwestern Union Packet Co.*, 37 Iowa 145 (1873); *Donnell* v. *State*, 48 Miss. 661, 682 (1873); *Messenger* v. *State*, 41 N.W. 638 (Neb. 1889). Thus, as Justice Goldberg observed in 1964, the duty of a business owner not to discriminate because of race is "firmly rooted in ancient Anglo-American tradition." *Bell* v. *Maryland*, 378 U.S. 226, 296-97 (1964) (Goldberg, J., concurring). Statutes prohibiting racial discrimination in public accommodations simply codify the rights and privileges of the "good old common law." Id. at 293-94. They do not change the law—it was never reasonable to exclude someone for the reason of their race—but instead restate conclusively, and add concrete sanction to, ancient principles.

In an exemplary decision, the Supreme Court of Michigan reasoned that to refuse service to a person

"for no other reason than" that person's race is contrary to the "absolute, unconditional equality of white and colored men before the law." *Ferguson* v. *Gies*, 46 N.W. 718, 719-20 (Mich. 1890). It is therefore "not for the courts to cater to or temporize with a prejudice which is not only not humane, but unreasonable." Id. at 721. A statute prohibiting racial discrimination is "only declaratory of the common law." Id. at 720. "Declaratory" is a term of art in common law jurisprudence, referring to that part of the unwritten law (e.g. custom, natural law) that is already law before it is declared by a judge or posited by a legislature. I Blackstone, *Commentaries*, at 42, 53-54, 86.

B. The Owner's Reasoning is Dispositive

Though most public accommodations statutes expand beyond race the list of reasons for exclusion that are categorically invalid, they do not abrogate common law rights and privileges. The structure of the doctrine remains unchanged. The owner's reasons are dispositive. Because the customer's license is carved out of the owner's property estate according to the purposes for which the property is held open, *State* v. *DeCoster*, 653 A.2d 891, 893–94 (Me. 1995), the purposes and intentions of the owner determine in the first instance what counts as a valid reason. Adam Mossoff, *The False Promise of the Right to Exclude*, 8 Econ Journal Watch 255, 260 (2011); Adam J. MacLeod, Property and Practical Reason 38 (2015). Public accommodation statutes identify discrete reasons that are never valid. In the language of Colorado's public accommodations statute, an owner's reason for excluding the customer must not be

"because of" the customer's race, sexual orientation, or other enumerated characteristic. C.R.S. § 24-34-601(2)(a).

If the owner excludes for any other reason, including a controversial reason, the owner's intention is lawful as long as it is reasonable all-things-considered, in light of the business's purposes. This is a fact question. If, as here, the owner does not refuse service for the reason that the potential customer is a member of a protected class, the parties are at liberty to decide whether to do business with each other. In case of irreconcilable dispute, the validity of an owner's reason is a fact question to be resolved by a jury.

An owner acts within his rights where his *intention* is not unreasonable even where the manifest *effect* of his decision unequally burdens identifiable minority groups within the community, such as traditional Christians at a state university in California, *Martinez*, 561 U.S. 661, and civil rights activists in the 1960s American South, *Adderley* v. *State of Florida*, 385 U.S. 39 (1966). This court emphasized this truth in *Hurley*. There, as here, the owner of the public accommodation did not act because of—for the reason of—the sexual orientation of those who were excluded. As this court noted, "Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march." *Hurley*, 515 U.S. at 572. The reason for excluding GLIB from the parade was to avoid

communicating a message about human sexuality that the parade organizers did not want to endorse.

So, application of the public accommodation doctrine turns on the owner's *reasons* for excluding a customer or refusing to provide a particular good or service to a customer. This feature of public accommodations doctrine is inherent in both the source and the structure of the rights and duties of which it consists. As this Court explained in *Martinez* and *Cornelius* v. *NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985), the owner of the property has the power to determine the uses to which the resource will be put and accordingly to determine the terms and limitations of others' licenses to enter and partake of the owner's uses. Put simply, the owner reserves the right to set the agenda—the governing plan of action—for use of the resource. Katz, *Exclusion and Exclusivity*, at 277-79, 285-93; MacLeod, *Property and Practical Reason*, at 1-11, 37-38, 216-19.

The genius of our pluralistic constitutional orders is that minority groups can gain lawful access to other property and organize in pursuit of their own moral purposes and commitments there. Adam J. MacLeod, *Universities as Constitutional Lawmakers (And Other Hidden Actors in Our Constitutional Orders)*, 17 U. Pa. J. Const. L. Online 1, 11-14 (2014). Thus, the public accommodations doctrine leaves resolution of moral disagreements about controversial questions in the first instance to institutions of private ordering, such as property ownership, contracts, and licenses. In cases of irresolvable conflict, resolution is for a civil jury. Only where it is undisputed as a matter of fact

that the owner excluded the customer *for the reason that* the customer is black, or gay or lesbian, etc. is the customer entitled to judgment as a matter of law.

II. The Decisions Below Threaten Liberty By Distorting Fact and Law

A. A Threat to Liberty

The property license thus enables a principled pluralism, securing the liberties of all. By contrast, the decisions of the Commission and Court of Appeals below are reductionist. They radically undermine the liberties secured by the public accommodations doctrine. By getting wrong both the facts about Phillips' reasons and the law governing his reasoning, those tribunals invented and imposed upon a religious business owner a new duty, transforming a customer's right not to be discriminated against for an invalid reason—an immunity against unjust termination of one's license to enter a retail business for the purpose of negotiating business there—into an affirmative claim-right to use other people's businesses and enterprises for one's own expressive purposes about the meaning of marriage. Compare *Hurley*, at 572-73. As a matter of principle, this transformation of public accommodations law deprives business owners and their potential customers of the freedom to choose the terms and conditions on which goods and services will be sold and purchased.

As this court explained in *Hurley*, such an expansive interpretation of the public accommodations law has "the effect of declaring the

sponsor's speech itself to be the public accommodation." *Hurley*, 515 U.S. at 573. It employs the coercive power of the state to create and enforce for the customer a right to shape the owner's speech and to determine the terms on which the owner will hold her services open to the public. Id. In short, it vests in the customer a right to control the owner's private property and to set the terms on which the owner can exercise his fundamental rights there.

B. No Wrongful Intention as a Matter of Fact

The reason the Petitioners declined to participate in celebrating the Respondents' wedding was *not* the Respondents' sexual orientation. As the Commission's administrative law judge ("ALJ") related, Phillips told Craig and Mullins, "I'll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings." Petition for a Writ of Certiorai, Appendix at 65a, par. 6. As a Christian, Phillips was compelled in conscience to avoid communicating what he understands to be a falsehood about the nature of marriage by contributing his marketable skills to celebrating "a same-sex marriage ceremony." *Masterpiece Cakeshop*, 370 P.3d at 277. Phillips believes that the Bible's teachings about marriage "are literally true, and that its commands are binding on him." Petition for a Writ of Certiorai, Appendix at 66a, par. 12.

Nevertheless, the Commission ALJ found that the Petitioners discriminated because of the Respondents' sexual orientation. The Commission ALJ asserted, "Only same-sex couples engage in same-sex

weddings." Petition for a Writ of Certiorai, Appendix at 69a-70a. On the basis of this assertion, the ALJ reasoned that the Petitioners' "objection to same-sex marriage is inextricably tied to the sexual orientation of the parties involved, and therefore disfavor of the parties' sexual orientation may be presumed" in spite of the lack of any evidence of such disfavor and the undisputed evidence that Phillips was willing to provide any number of other services to the Respondents. The Court of Appeals supplied a concise label for the Commission's rationale when it reasoned that the "act of same-sex marriage is closely correlated to Craig's and Mullins' sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece's refusal to create a wedding cake for Craig and Mullins was 'because of' their sexual orientation." *Masterpiece Cakeshop*, 370 P.3d at 279.

The putative correlation between homosexual status and same-sex marital acts directly contravenes the undisputed evidence about the Petitioner's actual intentions. In addition to that obvious defect in the findings, the correlation does not hold and is not relevant to the question of discriminatory intent. There is no plausible, factual coincidence between being homosexual and entering a same-sex marriage. Even if all same-sex marriages involve only homosexuals (a predicate assumed rather than demonstrated) it is implausible that all homosexuals are in same-sex marriages. That is the only correlation that could make the Colorado tribunals' reasoning coherent, which identifies being homosexual exactly with the activity of same-sex marriage.

Furthermore, even if it were coherent, the Colorado tribunals' reasoning would still be illogical. Even if all homosexuals were in a same-sex marriage, the collapse of the distinction between declining to serve same-sex marital activity and refusing to serve someone because of sexual orientation would still not follow. Most services to same-sex married couples do not concern marriage or its celebration. Phillips himself identified several such services he would be willing to provide to Craig and Mullins.

Homosexual-identity rights activists and legal scholar Andrew Koppelman explains why cases such as these are not about anti-gay discrimination. Whatever the merits of the idea that marriage is inherently a man-woman union, he says, "it is not about gay people. It is focused on the value of a certain kind of heterosexual union. The existence of gay people is a side issue." Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 So. Cal. L. Rev. 619, 625-26 (2015). The effects of this belief in man-woman marriage are not the purpose or motivating intention for the conscientious business owner's decision to decline service. They are unintended side effects.

Like the Christians who bore an unequal burden of the University of California's policy at issue in *Martinez*, and the demonstrators who experienced the unequal effects of the jail access policy challenged in *Adderley*, the Respondents experience the side effects of Petitioners' policy differently than opposite-sex couples do. But trying to regulate the *effects* of exclusion is a fraught enterprise. Consequences or side effects of an actor's decision are often unforeseen

and generally not intended. And any effort to adjudicate those side effects will lead courts into moral judgments that also have unintended consequences and side effects. See John Finnis, *Equality and Differences*, 56 Am. J. Juris. 17, 27-32 (2011). For example, a court that holds liable a business owner because her actions had the consequence of casting moral doubt on same-sex marriage would cause the further consequence of casting *both* moral *and* legal doubt on monotheistic beliefs concerning the nature of marriage.

The effects of moral differences are personal for both sides. From the perspective of the same-sex couple, their conduct in preparing for and participating in a wedding is "constitutive of identity," John Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* 80 (2017), and another's refusal to participate is felt as dignitary harm. *Id*. at 72-74, 168-75. From the perspective of the religious business owner, the liberty not to violate one's conscience is also constitutive of identity, and legal compulsion to participate harms the religious owner. *Id*. at 124-29, 138-43; Christopher Tollefsen, *Conscience, Religion, and the State*, in *Challenges to Religious Liberty in the Twenty-First Century* 111-35 (Gerard V. Bradley ed., 2012). To fashion a generally-applicable legal rule to combat one undesirable effect is to cause the other. Uniform rules are too blunt to solve this problem. Public accommodation doctrine is not.

Wrongful discrimination is an act of wrongful *intent*. "The wrongness of the act is not contingent on its consequences." Adam Slavny and Tom Parr,

Harmless Discrimination, 21 LEGAL THEORY 100, *14 (2015).[2] An employer or business owner who acts for wrongful, (e.g. racist) motivations should be liable even if the employee or customer was better off as a result (because, e.g., she found a better job or superior service elsewhere). *Id.* at *5-*13. For the same reason, a business owner such as Phillips who acts from motivations that are untainted by any of the wrongful reasons for action enumerated in law has not acted because of the customer's protected status even if his actions had the *effect* of burdening the customer's activities.

C. No Discrimination as a Matter of Law

Both the Commission and the Court of Appeals compounded the problem by confusing the law, collapsing the distinction between the conduct of entering a same-sex marriage and the status of being homosexual. The status-conduct distinction is not settled the same way for all purposes in all areas of law. Some constitutional rules protect status without regard to the right-holder's conduct, such as the right of minority groups to vote. Others protect conduct without regard to status, such as the rights of association, free expression, and free exercise of religion.

The Commission and the Court of Appeals also revealed their confusion about *Martinez*. They took as a general rule this Court's dictum, "Our decisions

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[2] Available at http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=1012417&fulltextType=RA&fileId=S1352325215000130.

have declined to distinguish between status and conduct in this context." *Martinez*, 561 U.S. at 689. But this Court in *Martinez* expressly grounded the University of California's right to conflate status and conduct not in Equal Protection, civil rights statutes, or any other generally-applicable laws but rather in a source of private rights: the University's "right to preserve the property under its control for the use to which it is lawfully dedicated." *Martinez*, 561 U.S. at 679. Because the University of California owns its campuses in fee simple absolute, it has the power to choose when to adhere to the distinction between status and conduct, subject to its constitutional obligations as a state actor. *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). Phillips and Masterpiece Cake enjoy an even more robust property right to choose because they are not state actors and have no duties to remain neutral between moral and religious viewpoints. And Phillips' liberty to obey his conscience is just as central to his identity and dignity as Craig's and Mullins' liberty to buy a wedding cake from a willing baker.

After creating this unnecessary legal conflict out of a personal disagreement, the Colorado courts left no way to resolve it without impugning someone's dignity. No standard exists for weighing the dignity of same-sex couples against the dignity of Bible-believing Christians, nor vice versa. No common standard of measurement can compare one to the other.[3] The problem is not merely that it cannot

[3] This problem is known in legal and moral philosophy as incommensurability. *See* Joseph Raz, *The Morality of Freedom* 321-66 (1986); Philippa Foot, *Moral Dilemmas and Other Topics*

lawfully be done; the problem is that any effort to do it is inherently nonsensical, and its resolution arbitrary.

III. Unavoidable Conflicts Belong to the Civil Jury

The simplest way to avoid this mess is for Colorado's courts to interpret Colorado's law as public accommodation laws have been interpreted throughout Anglo-American jurisprudence: as a prohibition against acting with an *intention* or *purpose* or *reason* to discriminate on a prohibited basis. That is the same guidance this Court offered in *Hurley*, to avoid unnecessary conflicts of civil and constitutional rights by confining application of public accommodation laws to cases of exclusion for invalid reasons. And it is consistent with the canons of charitable construction and natural meaning, and with the duty of courts to avoid constitutional conflicts where possible.

The inquiry into the owner's reasons logically proceeds in three stages. First one must know the purpose for which the business is held open to the public. Second one must know what was the owner's reason for denying service to this customer. Third and finally, a jury or other factfinder must determine

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in Moral Philosophy 76–77 (2002); John Finnis, *Natural Law and Natural Rights* 111-18 (2nd ed, 2011). One classic statement of incommensurability colorfully explains that the "injunction to maximize net good is senseless, in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book." Finnis, *Natural Law and Natural Rights*, at 113.

whether that reason was valid in light of the purposes for which the business is held open to the public. Macleod, *Tempering Civil Rights Conflicts*, at 676-77, 701-02.

These are fact questions. Naturally, the public accommodations statute determines the ultimate question conclusively as a matter of law where as a matter of fact an owner has acted for one of the prohibited reasons identified in the statute. But even in such a case the question what was the owner's actual reason remains a fact question. If the owner has not acted for one of the reasons prohibited by the statute, the owner has not acted unlawfully as a matter of law. Valid reasons other than race may be offered for an exclusion or a refusal of service, and no principle or rule of law excludes moral and religious reasons. Because property rights, such as the owner's estate and the customers license to enter, are common-law rights, these questions should be resolved by a civil jury. Macleod, *Tempering Civil Rights Conflicts*, at 704-11.

CONCLUSION

Racial discrimination in access to publicly-available resources is prohibited by law because race is irrelevant to the purposes for which the resources are held open, and race is therefore per se not a good reason for exclusion. Similarly, a customer's sexual orientation is generally irrelevant to the purposes of

a public accommodation.[4] By contrast, differing conceptions of marriage *are* relevant to a business owner specializing in weddings.

Properly understood, the public accommodations doctrine does not entail an equivalence between belief in man-woman marriage and unlawful discrimination. Nor does it leave the liberties of homosexual Americans unprotected in the marketplace. While reversing the Colorado tribunals' application of Colorado's public accommodation laws, this Court should remand with instructions to avoid unnecessary constitutional conflicts. By restating and extending its property jurisprudence of recent decades this Court can preserve the principled pluralism in which legal justice is vindicated and individuals and communities of differing moral beliefs can flourish side-by-side.

[4] But consider that it might not be irrelevant in particular cases, as where a bar or nightclub holds itself out as serving those with same-sex attraction.

Respectfully submitted,

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