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

AMICUS CURIAE BRIEF OF RYAN T. ANDERSON, Ph.D., AND AFRICAN-AMERICAN AND CIVIL RIGHTS LEADERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Colorado Civil Rights Commission ruled that Jack Phillips, a cake artist, engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act when he declined to design and create a custom cake honoring a same-sex marriage because doing so conflicts with his sincerely held religious beliefs. The Colorado Court of Appeals found no violation of the Free Speech or Free Exercise Clauses because it deemed Phillips' speech to be mere conduct compelled by a neutral and generally applicable law.

The question presented is:

> Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

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INTEREST OF AMICI[1]

Ryan T. Anderson, Ph.D. (A.B., Princeton University, M.A., Ph.D. University of Notre Dame) is a researcher who has published extensively on marriage and religious liberty. With Sherif Girgis and Robert P. George, he is co-author of "What Is Marriage?" (*Harvard Journal of Law and Public Policy*, 2011), and of *What Is Marriage? Man and Woman: A Defense* (Encounter Books, 2012). He is author of *Truth Overruled: The Future of Marriage and Religious Freedom* (Regnery, 2015), and of "Marriage, the Court, and the Future" (*Harvard Journal of Law and Public Policy*, 2017). With Sherif Girgis, in counterpoint to John Corvino, he is co-author of *Debating Religious Liberty and Discrimination* (Oxford University Press, 2017), from which portions of this brief are drawn. His dissertation was entitled, *Neither Liberal Nor Libertarian: A Natural Law Approach to Social Justice and Economic Rights*.

African-American and Civil Rights Leaders are a diverse group of civil rights leaders, churches, pastors, religious organizations, community groups and individuals that serve constituents largely made up of racial minorities that have directly suffered the

[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to its preparation or submission. Counsel of record for petitioners and respondent Colorado Civil Rights Commission have filed consents to the filing of amicus curiae briefs, in support of either party or of neither party. Counsel of record for respondents Charlie Craig and David Mullins received timely notice of the intent to file this brief and have consented to its filing.

indignity of racism and the ongoing consequences of racial bigotry. Amici include 21 organizations, listed in the appendix, that serve millions of people who believe in conjugal marriage and the right of citizens to operate their businesses in accordance with this belief. Many of the people amici serve own businesses and work in the wedding industry. Amici offer this brief to provide the Court historical context on marriage, the scourge of racism, and how First Amendment protections in the racism and conjugal marriage contexts differ. Amici believe it is vital for the Court to review this brief in support of the views of millions of citizens who have worked against racism and reject the proposition that support for conjugal marriage is similar to racism.

SUMMARY OF ARGUMENT

In *Obergefell v. Hodges*, this Court correctly noted that "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." 576 U.S. ___, 135 S. Ct. 2584, 2602 (2015). At stake in this case is whether these people and their decent and honorable beliefs may, consistent with the protections of the U.S. Constitution, be so disparaged by state governments. Advocates argue that if this Court finds a First Amendment right to decline to use one's artistic talents to create a cake for the celebration of a same-sex wedding,

then this Court would also have to protect the choice to refuse to bake for an interracial wedding.

But no such conclusion follows.

Opposition to interracial marriage developed as one aspect of a larger system of racism and white supremacy. It is an outlier from the historic understanding and practice of marriage, founded not on decent and honorable premises but on bigotry. By contrast, support for marriage as the conjugal union of husband and wife has been a human universal until just recently, regardless of views about sexual orientation. This view of marriage is based on the capacity that a man and a woman possess to unite in a conjugal act, create new life, and unite that new life with both a mother and a father. Whether ultimately sound or not, this view of marriage is reasonable, based on decent and honorable premises, and disparages no one.

Exemptions from laws banning discrimination on the basis of race run the risk of undermining the valid purposes of those laws – such as eliminating the public effects of racist bigotry – by perpetuating the myth that blacks are inferior to whites. This myth contributes to a culture where the badges and incidents of slavery persist, as African-Americans continue to confront a host of disadvantages. But First Amendment protections for people who act in accordance with the conjugal understanding of marriage need not undermine the valid purposes of laws that ban discrimination on the basis of sexual orientation – such as

eliminating the public effects of anti-gay bigotry – because support for conjugal marriage is not anti-gay: A ruling in favor of Jack Phillips sends no message about the supposed inferiority of people who identify as gay, for it sends no message about them or their sexual orientation at all. It says that citizens who support the historic understanding of marriage are not bigots and that the state may not drive them out of business or civic life. Such a ruling does not threaten the social status of people who identify as gay or their community's profound and still-growing political influence.

A better comparison for this case is to laws that ban discrimination on the basis of sex. If a state were to apply such a law in a way that forced a Catholic hospital to perform abortions or a crisis pregnancy center to advertise abortion, this Court's ruling in favor of a right not to perform or promote abortion would not undermine the valid purposes of a sex nondiscrimination policy – such as eliminating the public effects of sexism – because pro-life medicine is not sexist. Pro-life convictions need not flow from or communicate hostility to women. A ruling in their favor sends no message about patriarchy or female subordination; it says that pro-life citizens are not bigots and that the state may not exclude them from public life. A ruling to protect the liberties of citizens who support a conjugal understanding of marriage would do the same for those citizens.

But if this Court were to rule against Phillips it would tar citizens who support the conjugal understanding of marriage with the charge of bigotry. This

Court's refusal to grant First Amendment protections to Phillips would teach that his reasonable convictions and associated conduct are so gravely unjust that they cannot be tolerated in a pluralistic society. If *Obergefell* was about respecting the freedom of people who identify as gay to live as they wish, then that same freedom should be respected for Americans who believe in the conjugal understanding of marriage. No doubt many people are opposed to what Phillips believes. But, as this Court noted in *Obergefell*, when that "personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." *Obergefell*, 576 U.S. ___, 135 S. Ct. 2584, 2602. This Court should not allow Colorado to so demean and stigmatize conjugal marriage supporters. It should not allow the state to "punish the wicked."[2]

In short, pro-life conscience protections do not undermine *Roe v. Wade* or women's equality. Neither do conscience protections for conjugal marriage supporters undermine *Obergefell* or gay equality. By contrast, conscience protections for opponents of interracial marriage could undermine the purposes of *Loving v. Virginia, Brown v. Board of Education*, and the Civil Rights Act of 1964: racial equality.

[2] Quote from Tim Gill, Andy Kroll, *Meet the Megadonor Behind the LGBTQ Rights Movement*, ROLLING STONE (June 23, 2017), http://www.rollingstone.com/politics/features/meet-tim-gill-megadonor-behind-lgbtq-rights-movement-wins-w489213.

ARGUMENT

I. The Context of Race-Based Refusals.

Comparisons of this case to a case involving a hypothetical racist go wrong right from the start because social context matters for claims of discrimination, and the social contexts for these two cases are profoundly different. Jack Phillips has always served all customers – black and white, gay and straight – but has had to turn down certain orders because of the nature of the occasion being celebrated and the message he would be forced to communicate. He has previously turned down requests to create Halloween-themed cakes, bachelor-party cakes, and a cake celebrating a divorce. When he turned down the request for a same-sex wedding cake, he offered to sell any other item in his store to the customers. As the Commission's administrative law judge noted, Phillips told the customers, "I'll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings."[3]

By contrast, bakers who declined to bake cakes for interracial weddings also declined to treat African-Americans equally in a host of circumstances: They refused to make birthday cakes and shower cakes, and sell cookies and brownies. They refused to serve them at all. Racists did not and do not simply object to interracial marriage; they objected and object to contact with African-Americans on an equal footing.

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[3] Petition for a Writ of Certiorari, at 65a, ¶6.

History makes this fact clear. Before the Civil War, a dehumanizing regime of race-based chattel slavery existed in many states. After abolition, Jim Crow laws enforced race-based segregation. Those laws mandated the separation of blacks from whites, preventing them from associating or contracting with one another. Even after this Court struck down Jim Crow laws, integration did not come easily or willingly in many instances. Public policy, therefore, sought to eliminate racial discrimination even when committed by private actors on private property.

Before the enactment of the Civil Rights Act of 1964, racial segregation was rampant and entrenched, and African-Americans were treated as second-class citizens. Individuals, businesses, and associations across the country excluded blacks in ways that caused grave material and social harms without justification, without market forces acting as a corrective, and with the government's tacit and often explicit backing. As the NAACP points out in its brief filed with the Colorado Court of Appeals in this case:

> African Americans were relegated to second-class citizenship by a system of laws, ordinances, and customs that segregated white and African-American people in every possible area of life, including places of public accommodation. This system of segregation was designed to prevent African Americans from

> breaking the racial hierarchy established during slavery.[4]

African-Americans were denied loans, kept out of decent homes, and denied job opportunities – except as servants, janitors, and manual laborers. These material harms both built on and fortified the social harms of a culture corrupted by views of white supremacy that treated blacks as less intelligent, less skilled, and in some respects less human. Making it harder for blacks and whites to mingle on equal terms was not just incidental: It was the whole point. Discrimination was so pervasive that the risks of lost economic opportunities or sullied reputation were nonexistent to those who engaged in it. Social and market forces, instead of punishing discrimination, rewarded it through the collusion of many whites, with a heavy assist from the state. Given the irrelevance of race to almost any transaction, and given the widespread and flagrant racial animus of the time, no claims of benign motives are plausible.[5]

The context of Phillips' case could not be more different. There is no heterosexual-supremacist movement akin to the movement for white supremacy.

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[4] Brief of NAACP Legal Defense & Educational Fund, Inc., as Amici Curiae Supporting Appellees, *Charlie Craig, et al. v. Masterpiece Cakeshop, Inc., et al.*, No. 2014CA135 (Colo. App. Ct. Feb. 17, 2015), *available at* https://www.aclu.org/sites/default/files/field_document/0007-2015-02-17_09-05-34_2015.02.13_ldf_amicus_brief_as_filed.pdf.

[5] *See* JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 162-184 (2017).

There has never been an equivalent of Jim Crow for people who identify as gay. There are no denials of their right to vote, no lynching campaigns, no signs over water fountains saying "Gay" and "Straight." This is not to deny that those identified as gay have experienced bigotry or that they still do. Homophobia exists. As with other forms of mistreatment, our communities must fight it. But Phillips' conduct is not an instance of bigotry, as explained below, and the actual instances of anti-gay bigotry that remain simply cannot be compared to the systematic material and social harms wrought by racism. As a result, as argued below, enforcing Phillips' First Amendment rights would not undermine the social standing of people who identify as gay, or the valid purposes of a sexual orientation nondiscrimination policy.

II. Opposition to Interracial Marriage Was Part of a Racist System; Support for Conjugal Marriage Is Not Anti-Anything.

Bans on interracial marriage were the exception in world history. They have existed *only* in societies with a race-based caste system, in connection with race-based slavery. Opposition to interracial marriage was based on racism and belief in white supremacy, and thus contributed to a dehumanizing system treating African-Americans first as property and later as second-class citizens.

The understanding of marriage as the union of a man and a woman, on the other hand, has been the

norm throughout human history, shared by the great thinkers and religions of both East and West, and by cultures with a wide variety of viewpoints about homosexuality. Likewise, many religions reasonably teach that human beings are created male and female, and that male and female are created for each other in marriage.[6] Nothing even remotely similar is true of race and legally enforced racial separation.

Interracial marriage bans were unknown to history until colonial America. English common law, which the U.S. inherited, imposed no barriers to interracial marriage.[7] Anti-miscegenation statutes, which first appeared in Maryland in 1661, were the result of African slavery.[8] Since then, they have existed *only* in societies with a race-based caste system. Thus, Harvard historian Nancy Cott:

> It is important to retrieve the singularity of the racial basis for these laws. Ever since ancient Rome, class-stratified and estate-based societies had instituted laws against intermarriage between individuals of unequal social or civil status, with the aim of preserving the integrity of the ruling class. . . . But the

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[6] *See* SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012); RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM (2015).

[7] Irving G. Tragen, *Statutory Prohibitions against Interracial Marriage*, 32 CAL. L. REV. 269 (1944); *see also* Francis Beckwith, *Interracial Marriage and Same-Sex Marriage*, PUBLIC DISCOURSE (May 21, 2010), http://www.thepublicdiscourse.com/2010/05/1324/.

[8] Beckwith, *supra* note 7.

> English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations.[9]

This history shows that anti-miscegenation laws were part of an effort to hold a race of people in a condition of economic and political inferiority and servitude. They were openly premised on the idea that contact with African-Americans on an equal plane was wrong. That idea, and its basic premises in the supposed inferiority of African-Americans, is of the essence of bigotry. Actions based on it contribute to the wider culture of dehumanization and subordination that antidiscrimination law is justly aimed to combat.

The convictions behind Jack Phillips' conscience claims could not form a sharper contrast with the rationale of racism. His conviction about marriage has been present throughout human history. As one historian observes: "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies. Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."[10]

Great thinkers, too, affirm the special value of male-female unions as the foundations of family life.

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[9] NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 483 (2000).

[10] G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988).

Plato wrote favorably of legislating to have people "couple[ ], male and female, and lovingly pair together, and live the rest of their lives" together.[11] Plutarch wrote of marriage as "a union of life between man and woman for the delights of love and the begetting of children."[12] He considered marriage a distinct form of friendship embodied in the "physical union" of intercourse.[13] For Musonius Rufus, the first-century Roman Stoic, a "husband and wife" should "come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them . . . even their own bodies."[14]

Not one of these thinkers was Jewish or Christian or in contact with Abrahamic religion. Nor were they ignorant of same-sex sexual relations, which were common in their societies. They were not motivated by sectarian religious concerns, ignorance, or hostility of any type toward anyone. They and other great thinkers who have shared their views – of both East and West, from Augustine and Aquinas, Maimonides and al-Farabi, and Luther and Calvin, to Locke and Kant,

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[11] 4 PLATO, THE DIALOGUES OF PLATO 407 (Benjamin Jowett trans. & ed., Oxford Univ. 1953) (c. 360 B.C.).

[12] Plutarch, *Life of Solon*, *in* 20 PLUTARCH'S LIVES 4 (Loeb ed. 1961) (c. 100).

[13] Plutarch, *Erotikas*, *in* 20 PLUTARCH'S LIVES 769 (Loeb ed. 1961) (c. 100).

[14] Musonius Rufus, *Discourses XIIIA*, *in* CORA E. LUTZ, MUSONIUS RUFUS "THE ROMAN SOCRATES" (Yale Univ. Press 1947), *available at* https://sites.google.com/site/thestoiclife/the_teachers/musonius-rufus/lectures/13-0.

Confucius, Gandhi and Martin Luther King – held the honest and reasoned conviction that male-female sexual bonds had distinctive value for individuals and society.

To note this is not merely to say something about the past but to shed light on the present. Today's beliefs about conjugal marriage are not isolated. They grew organically out of millennia-old religious and moral traditions that taught the distinct value of male-female union; of mothers and fathers; of joining man and woman as one flesh, and generations as one family.[15] Whether those principles are ultimately sound or unsound, they continue to provide intelligible reasons to affirm conjugal marriage that have nothing to do with animus.

Jack Phillips and many other citizens today are shaped by, and find guidance and motivation in, those traditions, be it the classical Western legal-philosophical traditions stretching from Plato to our day, or the Jewish or Christian or Muslim traditions. History demonstrates that these intellectual streams do not have bigotry as their source. It is therefore unfair to assume that those they nourish are bigots. Thus, a First Amendment ruling in their favor need not send any negative social message about anyone. The only message sent in protections for citizens who believe in the conjugal nature of marriage is that Americans of good will reasonably disagree about marriage, whereas

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[15] GIRGIS, ET AL., *supra* note 6; ANDERSON, *supra* note 6.

the message sent in opposition to interracial marriage is that one group of citizens is inferior.

Some critics say that while it might have been possible for Aristotle, Kant, or Gandhi to hold such views without animus, it is not for us, knowing what we do now about sexuality. Not so. These traditions teach that there is distinct value in the one-flesh union that only man and woman can form, and in the kinship ties that such union offers children. Those ideals do not hang precariously on empirical assumptions about sexual orientation. Nor does the recent trend toward a more flexible, marriage-as-simple-companionship model make it irrational to continue to affirm these ideals.

No doubt bigotry motivates some traditionalists. But not Phillips, and it would be unfair to punish him and similar professionals who believe in conjugal marriage. After all, as George Chauncey and other historians of the LGBT experience, who submitted their research to advance gay rights litigation, noted, "widespread discrimination" based on "homosexual status developed only in the twentieth century . . . and peaked from the 1930s to the 1960s."[16] Bigotry is not the reasonable, much less the most natural, motive to read into Phillips' decision to decline a cake order. And

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[16] Brief of Professors of History George Chauncey, Nancy F. Cott, et al., as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003), *available at* http://cdm16035.contentdm.oclc.org/cdm/ref/collection/p16035coll2/id/23; *see also* GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940 173, 337 (1994).

ruling in his favor would not have negative social costs, as the next sections explain.

III. The Social Costs of Protections for Racists.

Exemptions from laws banning discrimination on the basis of race run the risk of undermining the valid purposes of those laws – such as eliminating the public effects of racist bigotry – by perpetuating the myth that blacks are inferior to whites. Indeed, actions based on religious beliefs justifying white supremacy were part of the racism that the laws were meant to combat. The NAACP brief mentioned above notes the "religious arguments justifying slavery, defending Jim Crow segregation, implementing anti-miscegenation laws, and, of course, supporting laws and practices that denied African Americans the full and equal enjoyment of places of public accommodation."[17] The purpose of such practices was to retain the wicked system of white supremacy: "Proprietors unwilling to serve African-American customers relied on religious arguments that validated fears of racial integration."[18] As the NAACP notes, "These laws, policies, and customs were designed to dehumanize African Americans and maintain the racial hierarchy established during the time of slavery."[19]

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[17] NAACP, *supra* note 4, at 4.

[18] *Id*.

[19] *Id*. at 6.

The Vice President of the Confederate States of America exemplified the way in which religion was perverted to justify racism and slavery: "With us, all of the white race, however high or low, rich or poor, are equal in the eye of the law. Not so with the negro. Subordination is his place. He, by nature, or by the curse against Canaan, is fitted for that condition which he occupies in our system. . . . It is, indeed, in conformity with the ordinance of the Creator."[20]

This belief system was geared precisely to racial subordination. We should not minimize how pervasive and destructive white supremacy was, and is. Dr. Martin Luther King, Jr., in his "Letter from a Birmingham Jail," aptly highlighted the overarching purpose of segregation and racial discrimination:

> when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five year old son who is asking: "Daddy, why do white people treat colored

[20] Alexander H. Stephens, "Corner Stone" Speech (Mar. 21, 1861), *available at* http://teachingamericanhistory.org/library/document/cornerstone-speech/.

> people so mean?"; when you take a cross county drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored"; when your first name becomes "nigger," your middle name becomes "boy" (however old you are) and your last name becomes "John," and your wife and mother are never given the respected title "Mrs."; when you are harried by day and haunted by night by the fact that you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments.[21]

These are the realities that laws banning discrimination on the basis of race were meant to combat. And combatting racial discrimination is a compelling government interest pursued in narrowly tailored ways. As this Court noted in *Burwell v. Hobby Lobby Stores, Inc.*: "The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." 573 U.S. ___, 134 S. Ct. 2751, 2783 (2014). What the Court said regarding employment law could also apply to public accommodations law. An exemption to a law prohibiting racial discrimination in

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[21] Martin Luther King, Jr., *Letter From A Birmingham Jail* (Apr. 16, 1963), *available at* https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

public accommodation could undermine the purpose of that law by sending the message that intentional racism is protected conduct. In sending that message, it amplifies existing messages that say African-Americans count for less, are subhuman, and may be treated as such. In doing so, it increases the odds that people engage in deplorable acts based on notions of white supremacy.

Therefore, comparing First Amendment protections for Phillips to protections for a racist ignores the differing social context and how that context shapes the relevant legal analysis. For not only are the acts of the racist and of Phillips different, so too are the messages that rulings in favor of each would send – and the harms that those messages could contribute to.

Moreover, these concerns about racist messages and ensuing material harms are by no means obsolete as sadly witnessed by recent events. Combatting racism is a compelling state interest given not just the history of government-endorsed white supremacy but also its current effects, the badges and incidents of slavery. Despite the progress made in combatting racism, African-Americans continue to face both outright discrimination and systemic disadvantages.

As the NAACP notes, "African Americans are incarcerated at more than 5 times the rate of whites."[22] Police officers are more likely to employ force against

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[22] *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/criminal-justice-fact-sheet/ (last visited Aug. 29, 2017).

African-Americans.[23] 26.2% of African-Americans live in poverty compared to 10.1% of whites.[24] African-American students have persistently lower graduation rates than White Americans.[25] The unemployment rate for African-American recent college graduates is twice that of White graduates.[26] African-Americans earn less than White Americans and that wage gap is widening.[27] Studies show that White men with criminal records are more likely to be hired than black men with the same resumes who do not possess criminal records.[28]

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[23] Phillip A. Goff, et al., *The Science of Justice: Race, Arrests, and Police Use of Force*, CTR. FOR POLICING EQ., July 2016, *available at* http://policingequity.org/wp-content/uploads/2016/07/CPE_SoJ_Race-Arrests-UoF_2016-07-08-1130.pdf.

[24] Carmen DeNavas-Walt & Bernadette D. Proctor, *Income and Poverty in the United States: 2014*, U.S. CENSUS BUREAU, Dec. 2015, at 12-14, *available at* https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf.

[25] Lauren Musu-Gillete, et al., *Status and Trends in the Education of Racial and Ethnic Groups 2016*, NAT'L CTR. FOR EDUC. STAT., Aug. 2016, *available at* https://nces.ed.gov/pubs2016/2016007.pdf.

[26] Janell Ross, *African-Americans With College Degrees Are Twice As Likely to Be Unemployed As Other Graduates*, THE ATLANTIC (May 27, 2014), https://www.theatlantic.com/politics/archive/2014/05/african-americans-with-college-degrees-are-twice-as-likely-to-be-unemployed-as-other-graduates/430971/.

[27] Valerie Wilson & William M. Rodgers III, *Black-white wage gaps expand with rising wage inequality*, ECON. POL'Y INST., Sept. 19, 2016, at 3, *available at* http://www.epi.org/files/pdf/101972.pdf.

[28] Ross, *supra* note 26.

Similar patterns exist in the context of housing. Margery Austin Turner notes in the Indiana Law Review that "Despite the significant progress since 1989, levels of discrimination against African-American and Hispanic homeseekers remain unacceptably high. . . . [Levels of] discrimination in the rental market are relatively similar across racial/ethnic groups, ranging from 29% for Native Americans to 20% for blacks. In the sales market, levels of discrimination are somewhat lower, but still significant – ranging from 17% for African-Americans to 20% for Asians."[29] Similar patterns exist for home loans and home insurance.

These patterns have consequences beyond housing: "patterns of racial and ethnic exclusion coincide with economic exclusion; almost all economically exclusive neighborhoods also exclude African-Americans, and most neighborhoods in which non-whites predominate are economically isolated as well."[30] The result of such racial segregation is that it "distances minority jobseekers from areas of employment growth and opportunity."[31] And this plays a role in disparities in education, employment and income: "Residential segregation also contributes to minorities' unequal educational attainment, and hence to their disadvantaged position in the evolving labor market. Black high school graduation rates, employment rates, and wages

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[29] Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 IND. L. REV. 797, 800 (2008).

[30] *Id*. at 808.

[31] *Id*. at 809.

are all negatively associated with the level of black-white segregation in a city."[32]

Racial segregation continues to exist for many reasons, but "considerable evidence suggests that the fears of white people perpetuate neighborhood segregation."[33] There is further evidence to suggest that many white Americans hold entrenched racist opinions. As Sean McElwee notes:

> Spencer Piston, a professor at the Campbell Institute at Syracuse University, examined how young whites ranked the intelligence and work ethic of whites to blacks. He finds that 51 percent of whites between the ages of 17 and 34 rate blacks as lazier than whites, and 43 percent say blacks are less intelligent. These numbers aren't statistically different from older whites. On issues related to structural racism, it is incredibly clear that young whites aren't very different from their parents.[34]

The United States is still confronting racism and its effects. The persistence of the badges and incidents of slavery demonstrates the need for racial nondiscrimination laws and how exemptions from race nondiscrimination laws could undermine those laws'

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[32] *Id*. at 811.

[33] *Id*. at 814.

[34] Sean McElwee, *The hidden racism of young white Americans*, PBS (Mar. 24, 2015, 1:40 PM), http://www.pbs.org/newshour/updates/americas-racism-problem-far-complicated-think/.

purpose by spreading the idea that African-Americans are inferior and may be treated as such.

These important social and historical differences help explain why this Court could rule in favor of Phillips but not in favor of a racist baker. Combatting racism through a nondiscrimination statute that is applied without exemptions may be the least restrictive means to achieving compelling interests because any exemption could allow the cancer of racism to grow, spread the idea that African-Americans are inferior, and thus cause the harms it was meant to combat.

IV. The Social Costs of Protections for Conjugal Marriage Supporters.

First Amendment protections for people who act according to the conjugal understanding of marriage need not undermine any of the valid purposes of laws that ban discrimination on the basis of sexual orientation – eliminating the public effects of anti-gay bigotry – because support for conjugal marriage is not anti-gay.[35] A ruling in favor of Jack Phillips sends no message about the supposed inferiority of people who identify as gay, for it sends no message about them or their sexual orientation at all. It says that citizens who support the historic understanding of marriage are not

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[35] CORVINO, ET AL., *supra* note 5; *see also* Ryan T. Anderson, *How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom*, THE HERITAGE FOUND., Feb. 13, 2017, *available at* http://www.heritage.org/sites/default/files/2017-03/BG3194.pdf.

bigots and that the state may not exclude them from civic life. It reflects the reality that, as this Court noted, citizens of good will reasonably disagree about marriage.

Phillips and other citizens like him who believe marriage is the conjugal union of husband and wife are not discriminating on the basis of sexual orientation because they are not even taking sexual orientation into account, but rather are acting (and distinguishing) based on their reasonable view of marriage. As a result, recognizing a First Amendment protection of Phillips sends no anti-gay message and thus does not have similar social costs as an exemption for a racist baker. Conjugal marriage conscience protections do not undermine *Obergefell v. Hodges* or gay equality.

Discrimination in the broad sense is simply the making of distinctions. It's a necessity of life. Discrimination in the familiar moralized sense, however, involves mistreatment based on irrelevant factors. For clarity, this brief uses "distinguish" to refer to conduct neutrally, and "discriminate" to refer to wrongful distinctions. We distinguish or discriminate based on X when we take X as a reason for treating someone differently. We "distinguish" based on relevant factors – as when we require recipients of driver's licenses to be able to see. We "discriminate" based on *irrelevant* factors – as when many states once required voters to be white.[36] Of course, there might be some traits on which

[36] CORVINO, ET AL., *supra* note 5, at 163-168.

we both distinguish and discriminate, and disentangling the two can take work: We distinguish on the basis of sex when we have separate male and female bathrooms; we discriminate on the basis of sex when we say men should take economics and women take home economics in high school.[37]

Invidious discrimination is rooted in unfair, socially debilitating attitudes or ideas about individuals' worth, proper social status, abilities, or actions. Bans on interracial marriage were paradigms of invidious discrimination.[38] They were based on beliefs about African-Americans, especially their supposed incompetence and threat to whites (especially women). A baker refusing to bake for an interracial wedding discriminates invidiously on the basis of race. He takes that factor – race – into consideration where it is irrelevant and mistreats people on that basis, and thus his behavior serves to perpetuate myths about African-Americans that are unfair and socially debilitating.

Jack Phillips, by contrast, did not discriminate – nor did he even distinguish – on the basis of sexual orientation. He refuses to create an artistic cake to celebrate a same-sex wedding because he objects to same-sex marriage, based on the common Christian belief that it is not marital (along with many other relationships – sexual and not, dyadic and larger, same- and

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[37] *See*, *e.g.*, 45 C.F.R. §§ 618.405, 618.410 (Regulations implementing Title IX).

[38] *See Loving v. Virginia*, 388 U.S. 1 (1967).

opposite-sex).[39] Nowhere need his reasoning even refer to the partners' sexual orientation – or any ideas or attitudes about gay people, good or bad, explicit or implicit.

Jack Phillips' reason for refusing to bake same-sex wedding cakes is manifestly *not* to avoid contact with gay people on equal terms. As noted above, Phillips told the customers, "I'll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings."[40] Phillips was simply trying to avoid complicity in what he considers one distortion of marriage among others – as witnessed by his refusal to create divorce cakes as well. Some people's refusals to create wedding cakes for same-sex weddings might be ill motivated. However, as the previous section demonstrated, it's unfair to assume that actions based on the conjugal understanding of marriage are premised on ideas hostile to people who identify as gay. Indeed, refusals to create wedding cakes for same-sex wedding celebrations need not be based on beliefs or attitudes about people who identify as gay at all, good or bad. Though they might have disparate impact, they need not discriminate *or distinguish* on the basis of sexual orientation.

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[39] *See* 3 JOHN FINNIS, HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS 315-388 (2011); JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (2nd ed., 2012); SCOTT YENOR, FAMILY POLITICS: THE IDEA OF MARRIAGE IN MODERN POLITICAL THOUGHT (2011).

[40] Petition for a Writ of Certiorari, at 65a, ¶6.

This is seen most clearly in the case of Catholic Charities adoption agencies. They decline to place the children entrusted to their care with same-sex couples not because of their sexual orientation, but because of the conviction that children deserve both a mother and a father. These agencies believe that men and women are not interchangeable, that mothers and fathers are not replaceable, that the two best dads in the world cannot make up for a missing mom, and the two best moms in the world cannot make up for a missing dad. These beliefs have nothing to do with sexual orientation.[41] Catholic Charities does not say that people who identify as gay cannot love or care for children; it does not consider sexual orientation *at all*. Its preference for placing children with mothers and fathers is not an instance of discrimination based on sexual orientation.[42]

Therefore, affirming Phillips' First Amendment rights here would not undermine any of the valid purposes of the state's sexual orientation nondiscrimination law. By contrast, an exemption from such a law for a hospital that refused to perform chemotherapy because the patient identified as gay could undermine the valid purpose of such a law. As could an exemption for Jack Phillips had he refused to sell brownies to customers who identify as gay. Because the underlying act discriminates on the basis of sexual orientation per se, and has no root in "decent and honorable" beliefs, exemptions in these cases could, like exemptions in the

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[41] GIRGIS, ET AL., *supra* note 6; ANDERSON, *supra* note 6.

[42] CORVINO, ET AL., *supra* note 5.

cases of racism, send the signal that citizens who identify as gay count as less than other citizens. But acting in accordance with the conviction that marriage is the union of husband and wife sends no such message. Indeed, within a two-year time span Colorado citizens voted to define marriage as the union of husband and wife and to ban discrimination on the basis of sexual orientation. Many states simultaneously enacted sexual orientation nondiscrimination policies while insisting that conjugal marriage is not discriminatory.

That affirming a First Amendment protection for Phillips would not undermine the valid purposes of antidiscrimination law is more clearly seen when one considers the larger social context. An astonishingly small number of business-owners cannot in good conscience support same-sex wedding celebrations. Among this small group, Phillips is not an outlier in treating people who identify as gay with respect but declining to lend his talents to the celebrations of same-sex weddings. Professor Andrew Koppelman, a longtime LGBT advocate, acknowledges as much.

> Hardly any of these cases have occurred: a handful in a country of 300 million people. In all of them, the people who objected to the law were asked directly to facilitate same-sex relationships, by providing wedding, adoption, or artificial insemination services, counseling, or rental of bedrooms. There have been no

> claims of a right to simply refuse to deal with gay people.[43]

Those three sentences shatter the strongest argument for denying a First Amendment protection in cases like these. There is no incipient movement ready to deny people who identify as gay access to markets and goods and services. Indeed, there is a reason why there have been "no claims of a right to simply refuse to deal with gay people" – no faith teaches it. As law professor and religious liberty expert Douglas Laycock – a same-sex marriage supporter – notes: "I know of no American religious group that teaches discrimination against gays as such, and few judges would be persuaded of the sincerity of such a claim. The religious liberty issue with respect to gays and lesbians is about directly facilitating the marriage, as with wedding services and marital counseling."[44] As a result, Robin Fretwell Wilson, a law professor who supports same-sex marriage as a policy matter, explains, "The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination."[45]

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[43] Andrew Koppelman, *A Zombie in the Supreme Court: The Elane Photography Cert Denial*, 7 ALA. C.R. & C.L. L. REV. 77, 77-95 (2016).

[44] Doug Laycock, *What Arizona SB1062 Actually Said*, THE WASH. POST (Feb. 27, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/guest-post-from-prof-doug-laycock-what-arizona-sb1062-actually-said/.

[45] Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* SAME-SEX

The refusals of bakers like Phillips have nothing like the sweep or shape of racist practices. They do not span every domain but focus on marriage and sex. Within that domain, they're about refusing to communicate certain messages about marriage, not avoiding contact with certain people. Thus, Barronelle Stutzman, who declined to create floral arrangements to celebrate the same-sex wedding of her client whom she had served for nearly ten years, clearly did not think gay people vicious, incompetent, or unproductive. She did not think they mattered less or deserved shunning. She employed them and served them faithfully as clients, gladly creating anything else they requested.[46] As Professor Koppelman writes, "These people are not homophobic bigots who want to hurt gay people."[47]

These considerations in favor of affirming First Amendment protections for conjugal marriage supporters are buttressed by the socioeconomic standing of people who identify as gay, in contrast to that of African-Americans historically and presently. For example, there is no evidence that a single hotel chain, a single major restaurant, or a single major

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MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 101 (Douglas Laycock, et al., eds., 2008).

[46] Barronelle Stutzman, *Why a Friend is Suing Me: The Arlene's Flowers Story*, THE SEATTLE TIMES (Nov. 9, 2015, 4:23 PM), http://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlenes-flowers-story/.

[47] Koppelman, *supra* note 43, at 13.

employer has turned away individuals who identify as gay.[48] In fact:

- The Human Rights Campaign (HRC) – the nation's premier LGBT advocacy group – reports that 89 percent of *Fortune* 500 companies have policies against considering sexual orientation in employment decisions.[49]
- According to Prudential, "median LGBT household income is $61,500 vs. $50,000 for the average American household."[50]
- An August 2016 report from the U.S. Treasury – based on tax returns, not surveys – shows opposite-sex couples earning on average $113,115, compared to $123,995 for lesbian couples and $175,590 for gay male couples. For couples with children, the gap is even more

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[48] The Equal Employment Opportunity Commission suggests that it secured a total of $4.4 million in awards for complainants of LGBT discrimination last year, but these figures appear to be overstated, because "[m]onetary benefits include amounts which have been recovered exclusively or partially on non-LGBT claims included in the charge." *LGBT-Based Sex Discrimination Charges FY 2013-FY 2016*, U.S. EQUAL EMP'T OPP. COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm.

[49] *LGBTQ Equality at the Fortune 500*, HUMAN R. CAMPAIGN, http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500.

[50] *The LGBT Financial Experience: 2012-2013 Prudential Research Study*, PRUDENTIAL, https://www.prudential.com/media/managed/Prudential_LGBT_Financial_Experience.pdf.

> dramatic: $104,475 for opposite-sex couples but $130,865 for lesbian couples and $274,855 for gay couples.[51]

Social acceptance of gays and lesbians, as well as support for same-sex marriage and protection from discrimination on the basis of sexual orientation, has seen remarkable growth in recent years. LGBT Americans overwhelmingly believe that their social standing has improved in the last decade and will continue to improve in the coming one.[52] Three-quarters of LGBT youth report that their peers are accepting of their identities.[53] A growing percentage of Americans support legal protection and recognition of same-sex relationships.[54]

The improvement in the perception and treatment of people who identify as gay in the United States is

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[51] Robin Fisher, et al., *Joint Filing by Same-Sex Couples After Windsor: Characteristics of Married Tax Filers in 2013 and 2014*, U.S. DEPT. OF THE TREASURY, OFFICE OF TAX ANALYSIS, Aug. 2016, https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-108.pdf.

[52] *A Survey of LGBT Americans*, PEW RESEARCH CTR., June 13, 2013, http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/.

[53] *Growing Up LGBT in America*, HUMAN R. CAMPAIGN, http://www.hrc.org/youth-report/view-and-share-statistics.

[54] *Changing Attitudes on Gay Marriage*, PEW RESEARCH CTR., June 26, 2017, http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage; Hannah Fingerhut, *Support steady for same-sex marriage and acceptance of homosexuality*, PEW RESEARCH CTR. (May 12, 2016), http://www.pewresearch.org/fact-tank/2016/05/12/support-steady-for-same-sex-marriage-and-acceptance-of-homosexuality/.

also visible in the cultural changes that have taken place. GLAAD's annual report on LGBT issues in media found that in 2016 a record-high number of LGBT characters were featured on television.[55] Despite the controversy these portrayals occasionally create, the entertainment industry believes that positive depictions of people who identify as gay are both acceptable and profitable. Likewise, last year's Pride parade in New York City featured floats sponsored by a variety of well-known corporations, and major political figures including presidential candidate Hillary Clinton and New York Governor Andrew Cuomo were in attendance.[56]

Furthermore, the few cases of refusals that have garnered media attention – cases involving cake designers, a florist, and a photographer – hardly diminish a single person or couple's range of opportunities for room, board, or entertainment. If businesses started to refuse service specifically to individuals who identify as gay, it is hard to imagine a sector of commerce or a region of the U.S. where media coverage would not provide a remedy swift and decisive enough to restore access in days – or shutter the business.

Think, for example, of the pizzeria in a small Indiana town that, after the local news reported that its owners would not cater a same-sex wedding, became

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[55] *Where We Are on TV Report – 2016*, GLAAD, http://glaad.org/files/WWAT/WWAT_GLAAD_2016-2017.pdf.

[56] Megan Jula, *Highlights From New York's Gay Pride Parade*, N.Y. TIMES (June 26, 2016, 6:54 PM), https://www.nytimes.com/live/gay-pride-parade-nyc-2016/.

the target of protests, boycotts, and death threats that forced it to shut down for several months.[57] Had this been an actual refusal, not a mere hypothetical one in response to a journalist's questioning, and had it involved a blanket "No Gays Allowed" policy, not simply a conviction about marriage, the resultant media coverage and social pressure would likely have been even more intense. This example and others like it highlight a related point: The LGBT community's political influence is profound and still growing. When corporate giants like the NBA, the NCAA, Apple, Salesforce, Delta, and the Coca-Cola Company threaten to boycott states over laws merely giving believers their day in court, it's hard to see the case for denying a First Amendment protection.

Finally, given the small numbers of such refusals, the enormous and growing social and market pressures to decrease their number over time, the wide availability of professionals willing to help celebrate same-sex weddings, and the consistent failure of very motivated and focused media outlets and advocacy groups to prove otherwise, there's no reason to think that granting these conscience claims would deny access to basic goods, or markets, or income brackets.

Progressives like Professor Koppelman have noted the cultural pressures fast at work and how they

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[57] Madeline Buckley, *Threat tied to RFRA prompt Indiana pizzeria to close its doors*, IND. STAR (Apr. 2, 2015, 4:42 PM, updated Apr. 3, 2015, 4:33 PM), http://www.indystar.com/story/news/2015/04/02/threats-tied-rfra-prompt-indiana-pizzeria-close-doors/70847230/.

weaken the case for legal coercion against people like Phillips: "With respect to the religious condemnation of homosexuality, this marginalization is already taking place. But that does not mean that the conservatives need to be punished or driven out of the marketplace. There remains room for the kind of cold respect that toleration among exclusivist religions entails."[58] In another article, Koppelman expands: "The reshaping of culture to marginalize anti-gay discrimination is inevitable. To say it again: The gay rights movement has won. It will not be stopped by a few exemptions. It should be magnanimous in victory."[59]

V. A Better Comparison: Pro-Life Medicine and Sex Discrimination.

We protect First Amendment rights in this country because they protect aspects of human dignity and create the space for citizens to communicate, collaborate, and associate. Sometimes, First Amendment rights have to be limited, but when they can be protected, they contribute to the rich associational life we call civil society, and they protect the dignity of the human person as people try to live life in conformity with what they believe to be the truth, particularly the truth about morality and the divine.[60] A ruling against Phillips would therefore threaten his dignity – and the

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[58] Koppelman, *supra* note 43, at 14.

[59] Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 628 (2015).

[60] CORVINO, ET AL., *supra* note 5.

status of millions of fellow citizens who share the same beliefs about marriage.

Instead of comparing Phillips' case to an opponent of interracial marriage, a more instructive comparison involves pro-life citizens punished under a state's prohibition of discrimination on the basis of sex. As noted above, if a state were to apply such a law in a way that forced a Catholic hospital to perform abortions or a crisis pregnancy center to advertise abortion, no one should suggest that this Court's ruling in favor of a right not to perform or promote abortion would undermine the valid purposes of a sex nondiscrimination policy – such as eliminating the social effects of sexism – because pro-life medicine is not sexist. Pro-life citizens who object to abortion do not do so out of hostility to women. A ruling in their favor sends no message about patriarchy or female subordination, it simply says that pro-life citizens are not bigots and that the state may not exclude them from public life.

Pro-life objection to abortion is built on no premises about women, let alone discriminatory premises. Pro-life objection to abortion is based on a belief about the equal dignity of all human beings, including unborn babies. True or untrue, it has nothing to do with sexism. Even those who argue that abortion access gives women equal opportunities in the marketplace and public life will recognize that pro-life medicine and messages are not inspired by, nor do they contribute to, a culture of sexism or patriarchy. Just so, a First Amendment protection for pro-life citizens would not

undermine any of the valid purposes of a sex nondiscrimination statute.

The same is true in the case of Phillips. His beliefs about marriage are built on no premises about sexual orientation or people who identify as gay – let alone discriminatory premises. He distinguishes based on whether the relationship is (in his religious understanding) marital, which turns on whether it involves a man and woman. That does, of course, turn on the *sex* of the partners, but even that sex-based distinction is not invidious.

That is, the conjugal view of marriage that motivates Phillips' decision makes no reference to sexual orientation. It does make reference to biological sex, but its sex-based distinction is not rooted in animus against women or unfair generalizations about men and women's abilities or equal opportunities in public life. It simply says that marriage requires *both* sexes. Focused on marriage as a conjugal union, this vision of marriage is rooted only in the idea, implicit in the very concept of biological sex, that a male and female are required for the conjugal act.

It cannot be sex discrimination to recognize biological sex precisely in how the concepts of male and female are inter-defined. The distinguishing on the basis of sex that takes place in support of conjugal marriage is more akin to the distinguishing on the basis of sex that takes place in providing separate intimate facilities for men and women. It does nothing to perpetuate

unjust stereotypes or a sex-based caste to say that both sexes matter and deserve privacy.

Therefore, while First Amendment protections for Phillips would not undermine any of the legitimate purposes of sex *or* sexual orientation nondiscrimination statutes, a ruling against him would undermine his equal status in civil society just as a ruling against pro-life citizens would. Feminists for Life certainly do not think their convictions are sexist, and pro-choice people might agree for now. But the more that academic, media, and governmental officials declare – and operate on the assumption – that opposing abortion is sexist, the more it will take on that meaning by the general public.

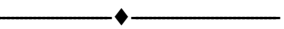
So, too, if this Court were to rule against Phillips it would tar citizens who support the conjugal understanding of marriage with the charge of bigotry. The Court would do what it said in *Obergefell v. Hodges* it was not doing, disparaging them and their decent and honorable religious and philosophical premises. And in doing so, it would teach everyone else in America that Phillips and people like him are bigots, and that the only reason one could support conjugal marriage is because one is anti-gay.

In so doing, this Court would inflict a dignitary harm on Phillips and millions of citizens like him that would result in serious material harm – loss of business, livelihood, and professional vocations. This Court would allow states to say that people who support conjugal marriage can be forced to violate their beliefs or

be excluded from public life in various ways – in this case in the commercial sphere, but in future cases perhaps in social services, education, and eventually professional licensure for law and medicine. In a word, such a ruling would prevent people who support the conjugal understanding of marriage from being treated as full and equal citizens. This Court should respect their full and equal status as citizens.

Some LGBT activists express concerns about the message that First Amendment protections send. They claim that such laws teach that people have a "license to discriminate." However, their criticism proves a different point: This Court's refusal to grant First Amendment protections to Phillips would teach that his reasonable convictions and associated conduct are so gravely unjust that they cannot be tolerated in a pluralistic society. The law should not be used to punish and hound those who believe that marriage unites husband and wife. If *Obergefell v. Hodges* was about respecting the freedom of people who identify as gay to live as they wish, then that same freedom should be respected for Americans who believe in the conjugal understanding of marriage. No doubt many people are opposed to what Phillips believes. But, as this Court noted in *Obergefell*, when "personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those

whose own liberty is then denied." *Obergefell*, 576 U.S. ___, 135 S. Ct. 2584, 2602. This Court should not allow Colorado to "punish the wicked."[61]



CONCLUSION

Jack Phillips' conflict of conscience is motivated by his reasonable beliefs about the nature of marriage. To say that his refusal to support a same-sex wedding is the same as discriminating against people who identify as gay is to misstate the facts of the case and the relationship between the parties. To compare his refusal to race discrimination ignores the history of racism in this country and flies in the face of the history and purpose of marriage itself. A better comparison can be found in pro-life protections after *Roe v. Wade*. Just as pro-life conscience protections do not undermine *Roe v. Wade* or women's equality, so too conjugal marriage conscience protections do not undermine *Obergefell v. Hodges* or gay equality.

Professor Koppelman says that he has "worked very hard to create a regime in which it's safe to be gay" and for similar reasons "would also like that regime to be one that's safe for religious dissenters."[62]

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[61] Kroll, *supra* note 2.

[62] Koppelman, *supra* note 59, at 621.

The Koppelmans of the world should also support protections for people like Jack Phillips. This Court has a chance to do so.

Respectfully submitted,

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September 6, 2017

APPENDIX

DESCRIPTION OF AMICI

1. Douglas Leadership Institute – Rev. Dean Nelson, Chairman of the Board.

The Douglas Leadership Institute's (DLI) mission is to educate, equip and empower faith-based leaders to embrace and apply biblical principles to life and in the marketplace. The DLI envisions and works for a nation of prosperous, flourishing communities transformed by men and women who embrace a biblical worldview in cultural and civic engagement.

https://www.dlinstitute.org

2. Frederick Douglas Foundation – Troy Rolling, Vice Chairman.

The Frederick Douglas Foundation is a national Christ-centered education and public policy organization with local chapters across the United States which brings the sanctity of free market and limited government ideas to bear on the hardest problems facing our nation. The Foundation is a collection of pro-active individuals committed to developing innovative and new approaches to today's problems with the assistance of elected officials, scholars from universities and colleges and community activists.

http://tfdf.fdfnational.org

3. Center for Urban Renewal and Education – Star Parker, President and Founder; Rev. Derek McCoy, Executive Vice President.

The Center for Urban Renewal and Education's (CURE) mission is to fight poverty and restore dignity through the message of faith, freedom and personal responsibility. CURE does that by building awareness that a conservative agenda of traditional values, limited government and free markets is of the greatest marginal benefit to low-income Americans. CURE works in the media, on Capitol Hill and in poor communities to promote social policy that protects unborn life; and market-based public policy that transitions poor Americans from government dependency to economic independence.

http://www.urbancure.org

4. Carol Swain Foundation, Carol Swain Enterprises, LLC – Dr. Carol M. Swain, President and Founder.

Dr. Carol M. Swain is an award-winning political scientist, a former professor of political science and professor of law at Vanderbilt University, and a lifetime member of the James Madison Society, an international community of scholars affiliated with the James Madison Program in American Ideals and Institutions at Princeton University. The Carol Swain

Foundation seeks to educate Americans about conservative values and principles using a Judeo-Christian perspective.

http://www.carolmswain.net/foundation/

5. Urban Family Communications – Wilbert Addison, Jr., Network Director.

Urban Family Communications (UFC) is a multimedia communications network and outreach ministry. UFC is born from the conviction that the Black community deserves truth, more specifically, Biblical truth. UFC is a collection of people operating in ministry, media, and politics who are committed to one goal: the spiritual revitalization of urban communities. UFC's mission is to inform and empower Black families to grow into mature disciples by wisely applying Biblical truth to our issues and interests. In short, we stand for truth, wisdom, and empowerment.

https://urbanfamilytalk.com

6. Restoration Project – Catherine Davis, President and Founder.

The Restoration Project (TRP) is a non-profit organization dedicated to rebuilding families, promoting the sanctity of life, and providing related educational materials, in order to transform American public policy and culture's impact on Black life. TRP works with pastors, ministry leaders and organizations to restore a culture of uprightness, evenhandedness, and virtue.

http://www.the-restoration-project.org

7. The Radiance Foundation – Ryan Scott Bomberger, Co-Founder and Chief Creative Officer; Bethany Bomberger, Co-Founder, Executive Director.

The Radiance Foundation was born out of a passion to illuminate hope-inducing, life-transforming Truths. Ryan and Bethany Bomberger created this 501c3 educational, faith-based, life-affirming organization to help people understand and embrace their God-given Purpose. Throughout their adult lives they have worked in communities of need and love to see others, despite what may seem hopeless, shine.

http://www.theradiancefoundation.org

8. Issues4Life Foundation – Rev. Walter C. Hoye, II, President and Founder.

The Issues4Life Foundation targets and works directly with Black American leaders nationwide to strengthen their stand against abortion on demand and resolve the questions surrounding the bioethical issues that impact humanity. The Issues4Life Foundation is committed to protecting both the civil and human rights of the child in the womb by recognizing the inherent dignity and unalienable rights of all members of the human family, so that in law and in practice every life is valued.

http://issues4life.org

9. Freedoms Journal Institute for the Study of Faith and Public Policy – Rev. Eric M. Wallace, Ph.D., President and Co-founder; Jennifer Wallace, Co-founder.

The Freedoms Journal Institute's mission is devoted to the research, education, and the advancement of public policy that promotes: Responsible government, Individual liberty and fidelity, Strong Family Values, and Economic Empowerment (R.I.S.E Principles), with a biblical worldview. The Freedoms Journal Institute's vision is Proclaiming "good news" to the poor. (Luke 4:18; Acts 26:18.) In that vision "the poor" are those who are not only spiritually and physically held captive, blind and oppressed but includes those who are politically captive, blind and oppressed. Public policy can either promote liberty or oppression and captivity. Political blindness leads to disenfranchisement and ultimately to poverty. Proclaiming the good news will set the captives free.

https://freedomsjournalinstitute.org

10. The Beloved Community Redevelopment Coalition – Pastor Ceasar I. LeFlore, III, Executive Director.

The Beloved Community Development Coalition (BCDC) is a "values based" 501c3 organization that employs programs built on the divine guidance of the Holy Scriptures in concert with the creative energy of concerned citizens to create, construct, and control

a healthy community that consist of spiritually developed residents, fully invested local businesses, effective educational institutions, and responsive government agencies. BCDC's slogan is "Bringing the faith community together to act as agents of change. Working to create a 'Beloved Community' by transforming people through education, encouragement, and engagement. Transforming our Community – One Heart at a Time."

http://voiceofthebeloved.org

11. Protect Life and Marriage Texas – Pastor Stephn Broden, President and Founder.

Protect Life and Marriage Texas (PLMT) was founded by Pastor Stephen Broden, a multi-faceted leader with a career in business, years as a newscaster and radio broadcaster, and a former adjunct professor at Dallas Baptist University. PLMT's mission is to uphold America's Judeo-Christian ethic established by the Founding Fathers inscribed in the Constitution.

https://www.facebook.com/Protect-Life-and-Marriage-Texas-Pastor-Stephen-Broden-1056564917764431/

12. Content of Character Series.

The Content of Character Series (CCS) explores the value and dignity of black America. CCS identifies black leaders who will partner in a movement to inform, educate and activate communities in public policy and culture through a Biblical Worldview. CCS offers an array of transformational and educational

programs with well-known speakers for events and conferences.

https://www.contentofcharacterseries.com

13. LibertyMESSENGER USA – K. Carl Smith, President and CEO.

Following the lead of Frederick Douglass (the ultimate entrepreneur and American Dream Story), LibertyMESSENGER USA (LMUSA) promotes the values of liberty and free market enterprise – champion policies that enable Americans to pursue their dreams – "stand on their own legs" – and contribute to a more prosperous America, especially the disadvantaged. LMUSA supports a "wealth-fare economy" and not a "welfare state."

http://libertymessengerusa.org

14. One Nation Back to God – Rev. C.L. Bryant, President and Founder.

C.L. Bryant is recognized as one of Americas most Dynamic Orators and he is a highly sought after Speaker, Motivator, Activist, Organizer, and Gospel Preacher. He is narrator of the critically acclaimed documentary Runaway Slave. His vision statement is "You are the Salt of the Earth. You are the Light of the World. Bring our Nation Back to God." Matthew 5:13-16.

http://theclbryantshow.com

15. National Black Prolife Coalition.

The National Black Prolife Coalition's mission is to end abortion by restoring a culture of Life and the foundation of Family in the Black community. Via a message campaign, it seeks to inform, educate, activate and transform the culture of death to a culture of life.

http://blackprolifecoalition.life/

16. Staying True to America's National Destiny (STAND) – Bp. E.W. Jackson, President and Founder.

Staying True to America's National Destiny's (STAND) is a non-profit organization that reaches across racial and cultural lines to bring people together around the foundational principles that made America great. STAND engages the community through town hall meetings, conference calls, and STAND organizers to promote educational choice, to strengthen families, and to support entrepreneurship.

http://standamerica.us/

17. Civil Rights for the Unborn (CRU) for Priests for Life – Dr. Alveda King, Evangelist, Director.

Civil Rights for the Unborn's (CRU) mission is to inform African-Americans and the general public about the harmful impact of abortion and artificial family planning, educate the community about the sanctity of life, and activate the community to combat

the harmful impact and scourge of abortion and genocide.

http://www.priestsforlife.org/africanamerican/

18. Mason Media Company – Rev. Clarence Mason-Weaver, Founder.

Clarence A. Mason is the founder of Clarence A. Mason Enterprises and works as an author and motivational speaker. His goal is to change how people do business, interact with others, and to teach, train, and reach people with a message of hope for the future. He works hard to empower individuals with the tools they need to affect positive change in the world.

http://www.clarenceamason.com

19. More Rebellious Members – Zina Hackworth, President and Founder.

More Rebellious Members is a pro-life outreach to Black Pastors and those who minister in and to the Black Community. It takes its name from a quote by Margaret Sanger, Founder of Planned Parenthood: "We do not want word to go out that we want to exterminate the negro population and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members."

http://www.morerebelliousmembers.org

20. All Lives Matter Foundation – Min. Patrick Hampton, President and Founder.

The All Lives Matter Foundation affirms that ALL human life has value and purpose regardless of ethnicity.

https://www.facebook.com/alllivesmatterfoundation/

21. Everlasting Light Ministries – Rev. Brian and Pastor Denise Walker, Co-founders.

Everlasting Light Ministries (ELM) is a growing ministry dedicated to healing abortion and miscarriage wounds through the Rich in Mercy program, and, strengthening couples to win at marriage through the Everlasting Love Marriage Enrichment curriculum. The Rich in Mercy Abortion and Miscarriage Recovery program is a safe, non-judgmental place for participants to be healed and made whole again through the merciful love and power of Jesus Christ. ELM is a Biblically-saturated 8-week program where participants are introduced to a grace-filled, merciful God who loves them so much that He died to reconcile them back to Him and set them free from sin.

http://www.ellm.org