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 *AMICI CURIAE* LAW AND ECONOMICS SCHOLARS IN SUPPORT OF PETITIONERS

SEAN P. GATES
CHARIS LEX P.C.
16 N. Marengo Ave.
Suite 300
Pasadena, CA 91101
(626) 508-1717

DAVID A. SHANEYFELT
Counsel of Record
THE ALVAREZ FIRM
24005 Ventura Boulevard
Calabasas, CA 91302
DShaneyfelt@alvarezfirm.com
(818) 224-7077

RICHARD A. EPSTEIN
800 North Michigan Ave.
Apartment 3502
Chicago, IL 60611
(773) 702-9494

Counsel for Amici Curiae

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

BOOKS

LAW REVIEW ARTICLES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amici who submit this brief are listed in the Appendix.

Amici are fourteen scholars in law, economics, and philosophy who study, teach, and have published on the application of economic principles to the law and to public policy.

Amici submit this brief to bring to the Court's attention critical economic analyses that bear on the issues in this case. In particular, *amici* address the erroneous economic reasoning of the court below and show that proper economic analyses demonstrate that application of state antidiscrimination laws in cases such as this diminishes social welfare.

SUMMARY OF ARGUMENT

In its defense of the unqualified application of its antidiscrimination law, Colorado contends it has a "compelling interest" in eliminating all forms of discrimination on the basis of sexual orientation through the Colorado Anti-Discrimination Act (CADA). Petitioner Jack Phillips contends that compliance with CADA would violate his First Amendment rights by requiring him to participate in or affirm a ceremony to which he in good faith objects on religious grounds.

---

[1] No party or counsel for a party authored this brief in whole or in part. No one other than *Amici* or their counsel made a monetary contribution to preparing or submitting this brief. Each of the parties has consented to the filing of this amicus brief.

The defenders of the state's position have uniformly contended that allowing *any* exceptions to any state's antidiscrimination law, no matter how narrow, would have deleterious economic consequences. The court below echoed these arguments, asserting that the state's antidiscrimination law is necessary to prevent "economic and social balkanization" and "ensures that the goods and services provided by public accommodations are available to all of the state's citizens." *Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 293-94 (Colo. App. 2015). Other state courts have taken similar positions. *See, e.g.*, *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 566 (Wash. 2017) (asserting that allowing exceptions to Washington's antidiscrimination law would "fatally undermine[]" goal of "eradicating barriers to the equal treatment of all citizens in the commercial marketplace").

These bald conclusions are presented without reference to any known body of economic theory or practice. That oversight is a tacit admission that these propositions are in every relevant respect contrary to basic economic theory. Application of state antidiscrimination laws to coerce those with sincere religious objections is unnecessary to ensure access to goods and services to LGBTQ individuals. That point is even more true when the only exception sought by the merchants in these cases is limited to that tiny sliver of the market where any obligation to provide services necessarily conflicts with their religious beliefs.

There is, moreover, no social reason to force such merchants to conform to the dominant social consen-

sus. Bakers, florists, and photographers are typically small family-run businesses with no market power. The terms and conditions on which they offer service are easily obtainable from scores of merchants, many of which are easily found through dozens of public websites offering a list of "gay-friendly" vendors of same-sex wedding services.

The extreme claims that the wedding services market will somehow shut down in the absence of state coercion is falsified by the simple observation that these online market sites operate successfully in all states of the union, including those that do not offer any protection against discrimination on matters related to sexual orientation. These services are as easily available in Texas, which has no such law, as in Colorado, which does. Economic theory and empirical evidence converge on this vital proposition. In the absence of monopoly, competitive market forces have produced, and will continue to produce providers willing and eager to provide products and services for same-sex weddings. Indeed, the ordinary give-and-take of the market will lead to better provider-consumer matches, lower prices, and greater market coverage than any coercion regime.

Nor would allowing exceptions lead to some diffuse pattern of "economic and social balkanization." It is not in the interest of any vendor to separate itself from its customer base. It is therefore no surprise that petitioner and those like him only seek an exception limited to providing specified services for same-sex wedding ceremonies. The only activities for which they seek an exception are those which require them to devote their labor and talents in a

manner that makes them complicit in marriage ceremonies that are inconsistent with their religious beliefs. As their consistent behavior demonstrates, they do not seek, nor do they want, a blanket exception to providing any services to a class of persons. Indeed, outside the context of same-sex marriage, we are not aware of any instance in which LGBTQ customers have been refused services because of their sexual orientation. It is only the religious objection of these vendors to all forms of marriage that are not between one man and one women that matters. They are as opposed on religious grounds to both polygamous and same-sex marriages.

At the same time, these small family businesses are all too aware that in today's world of social media they will face inspired boycotts and social pressure, including insults and threats of violence from groups with political power and influence far greater than their own. Under CADA, consumers, gay rights organizations, and other businesses may freely discriminate against merchants such as petitioner (and have done so), explicitly based on a dislike for their religious beliefs.

The constitutional exception claimed in this case lies at the periphery of market behavior, even as it goes to the core of religious beliefs. It poses no threat to market efficiency.

In contrast, the application of state antidiscrimination law to these small merchants will have an effect opposite to that which the defenders of CADA hope to achieve. The enforcement of the state antidiscrimination law against these isolated and out-

numbered religious believers will diminish social welfare in two ways. Enforcement will either force unwilling associations or force the exit of a class of market participants. The former market distortion results in poorly matched providers and consumers. The latter reduces social welfare by removing from the market merchants that some consumers may prefer (with or without regard to the merchant's religious views). A smaller marketplace is necessarily less diverse and less competitive than a larger market with a diverse set of providers. Enforcing CADA also imposes huge administrative costs, which the defenders of these laws ignore in their incomplete and inaccurate economic analysis of CADA.

Nor is enforcement justifiable on the ground that it is necessary to prevent negative externalities, including affronts to personal dignity. The key mistake in this claim is that it looks only at one side of the problem when both sides suffer dignitary losses. Any individual merchant who is coerced to violate his or her religious conscience or to exit the market certainly has at least an equal claim to dignitary harm. But, as this Court has wisely reaffirmed, the fact that some take personal offense at the conduct of others cannot justify state intrusion into the exercise of First Amendment rights. *Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017).

Accordingly, in the absence of monopoly, there is no economic basis to rule out the granting of exceptions from state antidiscrimination laws to those limited by religious convictions. Refusing to do so reduces social welfare.

ARGUMENT

Our country has a long tradition of accommodating diverse viewpoints, especially those motivated by religion. Such accommodations are of critical importance given the explosive growth of regulation in an increasingly religiously diverse and pluralistic society. *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 124-144 (1993) (showing that accommodations are necessary to avoid tyranny, and debunking argument that religious persons can simply avoid regulatory conflicts by changing their conduct).

In the context of CADA, a thoughtful accommodation based on First Amendment principles would enhance social welfare, enhance freedom, and constrain no one else's opportunities. Conversely, allowing the state to coerce religiously motivated merchants into compliance with its antidiscrimination law would diminish social welfare, reduce freedom, and harm an unwilling market participant coerced into compliance along with everyone else who respects and supports his or her views.

I. Markets Enhance Social Welfare by Matching Provider and Consumer Preferences and They Mitigate Discrimination.

It is now long beyond debate that markets premised on voluntary exchange serve as bulwarks that protect individual freedom, advance innovation, and enhance social welfare. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 8-21 (2002). "Underlying most arguments against the free market is a lack of belief in freedom itself." *Id.* at 15.

Because both sides gain from any voluntary transactions, competitive market dynamics lead to the most efficient allocation of goods and services. While economists typically focus on product, price, terms, and quality, markets match providers and consumers based on a wide spectrum of preferences dealing with many other aspects of a business transaction. Examples abound. Merchants who prefer to engage in "socially responsible" business practices will be matched with consumers who prefer to deal with such providers. Merchants who deal in only "Made in America" products will be matched with consumers who prefer such wares. Merchants who hire ex-convicts to help them rebuild their lives will be matched with consumers who share their social objectives. At the same time, other merchants aim for a larger audience and systematically avoid adopting any idiosyncratic practices that might offend certain political, ethnic, or religious groups.

Markets thus allow merchants who so decide to cater to the particular tastes of their chosen customer base. Merchants may, and frequently do, cater to certain ethnicities, religious groups, age groups, occupations, economic groups, etc. Consumers are free to choose the merchants who best suit their preferences.

As this Court has long recognized, the right of providers and consumers to choose their trading partners is a bulwark that underlies this country's market based system. The common law guaranteed the right to engage in voluntary trade by protecting the "long recognized" right of a merchant "freely to exercise his own independent discretion as to parties

with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). This right is part and parcel of the right to pursue an ordinary calling or trade, which is the "very essence of the personal freedom" protected by the Fourteenth Amendment. *Truax v. Raich*, 239 U.S. 33, 41 (1915).

These rights cover not only economic issues but religious ones, and therefore the overlap between the two. Thus in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court struck down a state law prohibiting the instruction of children in a foreign language. The Court held the right of the instructor in a parochial school to teach a foreign language "as part of his occupation" and "the right of parents to engage him so to instruct their children" to be "within the liberty of the [Fourteenth] Amendment." *Id.* at 400. And in *Pierce v. Society of Sisters*, 268 U.S. 510, 5343-35 (1925), the Court struck down the Oregon Compulsory Education Act because it prohibited all persons, including those with religious beliefs, from attending private schools.

These rights should be understood as part of a broader framework that embraces both freedom of contract and voluntary association in religious and economic life, including cases like this one that lie at the interaction of the two. As Thomas Jefferson wrote, "the first principle of association" is "'the guarantee to every one of a free exercise of his industry, and the fruits acquired by it.'" *Letter to Albert Gallatin (Oct. 16, 1815), in* THE WRITINGS OF THOMAS JEFFERSON (Andrew A. Lipscomb, Albert E. Bergh, & Richard H. Johnston, eds., Thomas Jefferson Memorial Association of the United States 1903).

The central insight here is that neither providers nor consumers are homogeneous. There is great variety beyond simply product differentiation. This variety and diversity is a social good because it expands opportunities for producers and consumers alike.

In the absence of monopoly, therefore, consumers benefit from being able to choose among those providers who most closely serve their tastes. In the context of bakers, for instance, consumers may choose to purchase from a particular baker for numerous reasons other than the price and quality of the product, such as seeking to support members of a particular race or ethnicity (e.g., minority owned businesses), a preference for bakers of a particular political persuasion, the novelty of purchasing from a former professional athlete, a like-mindedness with regard to theological issues, etc. By facilitating the accurate matching of consumer and merchant preferences, markets enhance social welfare.

In a monopoly situation, consumers are faced with a sole supplier who could decide for all sorts of reasons, including invidious motives, to refuse to deal with one group of potential consumers or another. Long before the rise of the modern antidiscrimination law, common law judges held that all common carriers and public utilities—the two main classes of providers that held such powers—were under an obligation to supply services to all comers at fair, reasonable, and nondiscriminatory rates. The doctrine originated with Sir Matthew Hale in his seventeenth century treatise *De Portibus Maris*. It was explicitly incorporated into English law in *Allnut v. Inglis*, 104

Eng. Rep. 206 (K.B. 1810). Thereafter it was carried over into American constitutional law dealing with rate regulation in *Munn v. Illinois*, 94 U.S. 113, 126-28 (1876). *See* RICHARD A. EPSTEIN, PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY AND THE COMMON GOOD 279-86 (1998). The key rationale behind this uniform set of decisions is that in the presence of a monopoly no consumer can find any close substitute for the needed good or service.

Those conditions do not hold in the absence of a monopoly; the presence of multiple alternatives greatly mitigates, if not eliminates, the effects of discrimination on any individual consumer and, in so doing, renders the complex structure of rate regulation superfluous. *See* FRIEDMAN, *supra*, at 108-115; RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 15-58 (1992); GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 39-47 (2d ed. 1971). Markets ensure that consumers who face potential discrimination can find other, better suited merchants from which to obtain goods and services. Markets punish merchants who choose not to serve certain persons, limiting the prevalence of discrimination. In contrast, the imposition of antidiscrimination laws on merchants with conscience-based objections undermines the workings of the market; these merchants do not have any easy way to avoid the imposition. They must either go out of business or face ruinous fines and other sanctions.

II. Allowing Limited Exceptions to State Antidiscrimination Laws Will Not Undermine the Economic Goals of Those Laws.

These economic principles give ample basis for exceptions from state antidiscrimination laws for those with conscience-based objections.

A. Market Forces Prevent Exclusion of Those Seeking Services for Same-Sex Ceremonies.

A refusal to grant an exception to state antidiscrimination laws cannot be justified on the ground that same-sex couples will be unable to obtain services or will be excluded from the market. Such a result is precluded by powerful market forces.

Those who contend there can be no exceptions from antidiscrimination laws invariably cite the success of Title II of the 1964 Civil Rights Act. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 79 (N.M. 2013) (Bosson, J., concurring). But the analogy is inapt. The social conditions under segregation that led to the enactment of the 1964 Civil Rights act attacked public institutions that actively supported private aggression and backstopped pervasive private discrimination. At the time, therefore, the "best practical argument for Title II was that it functioned as a corrective against private force and public abuse in government." Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Rig*ht, 66 STAN. L. REV. 1241, 1254-61 (2014). Such conditions do not exist today.

There also is no monopoly here. The retail bakery industry is highly fragmented and highly competitive. In 2016, there were 6,756 retail bakeries (some with multiple locations) in the U.S. with $5.16 billion in collective sales. Sundale Research, *State of the Industry: Retail Bakeries in the U.S.* (April 2017), http://www.retailbakersofamerica.org/industry-research-.html. These retail bakeries tend to be small businesses; the average sales per retail bakery was $764,491. *Id.* According to data available through the National Information Clearinghouse of the U.S. Small Business Administration, "The retail side of the [baking] industry is highly fragmented: the 50 largest companies generate about 20% of revenue, and the typical company operates just one facility." SBDCNet, *Bakery Business 2017*, http://www.sbdcnet.org/small-business-research-reports/bakery-business-2017. Barriers to entry are virtually non-existent, ensuring rapid response to any exclusion. Estimates of startup costs for retail bakeries range from $2,000 to $5,000 on the low end to $10,000 to $50,000 on the high end. *Id.* In addition, retail bakeries face increasing competition from in-store bakeries, which are no longer only in supermarkets but are now found in mass market superstores and club stores.

What is more, a legion of well-structured intermediaries reduces search costs as multiple sites cater to same-sex weddings so that the typical consumer need only turn on his or her computer to gain full

access to a rich array of services from *willing* merchants actively seeking their business.[2]

Although many of these sites explicitly provide services exclusively for same-sex weddings, the Colorado authorities have not applied CADA against these sites. Instead, using an explicit double-standard, it is only the tiny minority of religious bakers who face the full fury of the Colorado law. Yet there is no theoretical or empirical reason to distinguish between merchants declining to provide services for conscience-based reasons from those who decline such services for myriad other reasons, such as objections to the customer's political affiliations, conduct, sloppiness, or other personal attributes, all of which lie outside of CADA. Private markets work quite well even though there is no universal service requirement along any of these dimensions.

The dangers of this prosecution of the tiny fraction of the market that seeks a religious or conscience-based exception cannot be justified by a threat of market exclusion:

---

[2] *See, e.g.*, Equally Wed (https://equallywed.com/), MyGayWedding.com (https://my-gay-wedding.com/), MiLGBTWedding.com (http://milgbtwedding.com/the-expo/), LGBTWeddings.com (http://www.lgbtweddings.com/about-us.html), My-Gay-Wedding.com (https://my-gay-wedding.com), Purple Unions (https://www.purpleunions.com), Here Comes the Guide (https://www.herecomestheguide.com/best/lgbtq-weddings), and RainbowWeddingNetwork.com (http://www.rainbowweddingnetwork.com). *See also* Q-approved wedding guide, Q Saltlake Magazine (listing providers), *available at* https://qsaltlake.com/news/2013/03/22/q-approved-wedding-guide/.

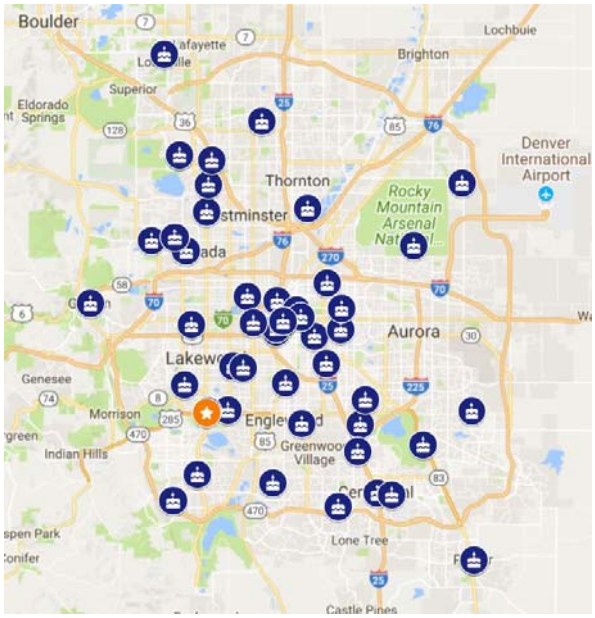
> Because antidiscrimination laws' economic purposes are a response to pervasive discrimination, they are not frustrated by discrimination that is unusual. If the law requires religious objectors to identify themselves to the public in order to be accommodated, few are likely to take advantage of that. If gay people are generally protected against discrimination, then a few outliers won't make any difference. Albuquerque has plenty of other wedding photographers from which Vanessa Willock and her partner [the plaintiff's in *Elane Photography*] could have chosen.

Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 627-28 (2015); *see also* Thomas C. Berg, *Symposium: Religious Accommodation and The Welfare State*, 38 HARV. J.L. & GENDER 103, 138 (2015) (when balancing interests, if "the patrons have access, without hardship, to another provider, then the legal burden on the provider is the more serious one").

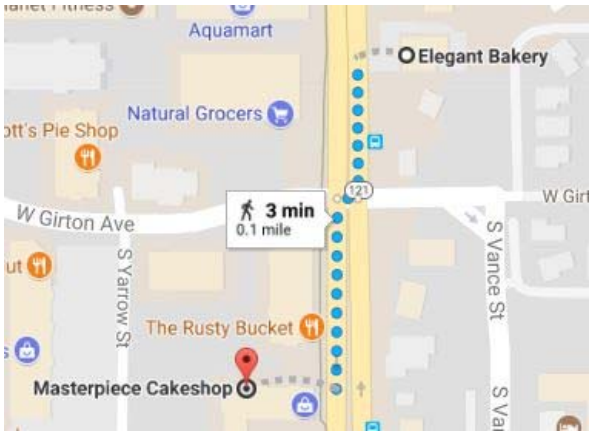
In competitive markets, exceptions to state antidiscrimination laws do "not represent a threat to meaningful participation in commercial life." Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693, 719 (2017). Allowing such limited exceptions will not lead to "economic and social balkanization." Indeed, if these fears were correct, then no merchant could ever refuse service to any potential customer for any reason, including their political orientation or other

social beliefs. Yet the same law that makes it impossible for religious individuals to honor their own beliefs allows other merchants to express their political beliefs by refusing, for example, to provide wares that support President Donald J. Trump. *See, e.g.*, Herb Scribner, *This 9-year-old boy can't find anyone to bake him a pro-Donald Trump cake*, THE DAILY AMERICAN (Somerset, Pennsylvania), August 9, 2017. It is the redundancy in a competitive market that prevents these individual preferences from dominating social norms.

These basic principles are fully at work in the instant case. In the Denver area, where petitioner operates, Gayweddings.com lists 67 bakeries that advertise a willingness to design a cake for a same-sex wedding. The 42 of those bakeries that provided a physical street address are plotted below.



In fact, as illustrated by the map below, the individual respondents in this case could have obtained a wedding cake from one of these bakeries only a tenth of a mile from Masterpiece Cakeshop.



These facts demonstrate that the prospect of market exclusion is nothing short of fanciful. Indeed, a similar map could be drawn for any other city *with or without* an antidiscrimination ordinance that covers sexual orientation.

B. Market Forces Ensure Only Those with Sincerely Held Beliefs Will Seek Exceptions.

Not only does the market ensure that those seeking services will find well-matched providers, the market also limits the number of those seeking exceptions to state antidiscrimination laws. *See* BECKER, *supra*, at 39-45 (2d ed. 1971) (showing that competitive forces drive out most forms of market discrimination). Those who choose not to provide services for same-sex ceremonies face a number of costs,

which will winnow out the insincere, leaving only those whose consciences would force them to leave the marketplace in the face of coercive antidiscrimination law.

First, such merchants bear the cost of lost sales, not only from those with whom the provider refuses to deal but also from the many individuals and firms who may disagree with that provider's stance. For instance, merchants who have declined to provide services for same-sex weddings have faced social-media-led boycotts and a flood of negative reviews on sites such as Yelp. *See* Amelia Irvine, *How technology and the free market can eliminate discrimination*, THE EXAMINER (Washington D.C.), July 13, 2017; Chris Taylor, *Anti-equality Indiana pizza joint gets seriously trolled, shuts up shop*, MASHABLE.COM, Apr. 2, 2015; Emily Pfund, *Walkerton police still investigating threats to 'burn down' Memories Pizza, prosecutors say*, THE ELKHART TRUTH (Indiana), Apr. 3, 2015; Steve Mocarsky, *Venue reportedly receives threats after refusing to host gay wedding receptions*, THE TIMES LEADER (Wilkes-Barre, Pennsylvania), July 11, 2014.

Potential losses include corporate accounts that fear retribution for doing business with such providers. By way of example, the Human Rights Campaign, which rates workplaces on "LGBT equality" and boasts that "199 of the Fortune 500-ranked businesses achieved a 100 percent rating," penalizes companies "found to have a connection with an anti-LGBT organization or activity." Human Rights Campaign, Corporate Quality Index at 6, 9 (2017), http://www.hrc.org/campaigns/corporate-equality-

index. The consequences in individual cases can be disastrous. *See, e.g.*, George Brown, *Bakery Forced To Close Over Gay Wedding Denial*, CBS-3 WREG (Memphis, Tennessee), Sept. 4, 2013.

Second, merchants who decline to provide services for same-sex weddings also face *illegitimate* forms of aggressive behaviors, including death threats, abusive phone calls, and a torrent of vitriolic hate mail. *See, e.g.*, Nikki Krize, *Bridal Shop Owners Get Death Threats Over Same-Sex Policy*, ABC-16 WNEP (Wilkes Barre, Scranton, Pennsylvania), Aug. 2, 2017; Warren Richey, *For those on front lines of religious liberty battle, a very human cost,* THE CHRISTIAN SCIENCE MONITOR, July 16, 2016. But as against these threats, the defenders of the Colorado antidiscrimination law remain largely silent.

Third, such merchants, like petitioner in this case, must defend against legal challenges. Even if the Court rules in favor of petitioner, providers seeking to be excepted from state antidiscrimination laws will likely still be forced to establish the grounds for such an exemption. A number of legal organizations have proven themselves eager to challenge such positions.

These huge economic and social costs, some legitimate, but many not, ensure that the goals of state antidiscrimination laws are not undermined by granting exceptions for the few whose convictions would lead them to endure the consequent losses and abuse.

C. Coercing Services for Same-Sex Ceremonies Over Religious Objections Diminishes Social Welfare.

By compelling respondents and similarly situated providers to provide services in violation of their religious beliefs, the application of state antidiscrimination laws seriously undermines the workings of market mechanisms. Those providers who choose to bow to the antidiscrimination law's demands would likely do so reluctantly, decreasing their incentives to provide their best efforts. Moreover, given the threat of legal retaliation, such providers would likely hide their reluctance and lack of motivation. Consumers search costs are thus increased; they are thus less able to find the best provider to match their preferences. And social welfare is diminished by the resulting poor match of provider skill with consumer preferences.

Alternatively, providers with conscience-based objections will exit the market. This will reduce the number and variety of providers, diminishing consumer choice. Consumers may prefer such excluded providers for a number of reasons. For instance, they may respect or value the provider's commitment to his or her religious convictions, even if they do not agree with those convictions. The provider's convictions may be closely aligned with related religious or moral convictions that consumers value. Or consumers may not even know of or care about the merchant's convictions; they just like that merchant's cakes.

By forcing such merchants out of the market, application of the antidiscrimination law not only harms the providers, it also harms other market participants, diminishing social welfare. As one English court recognized nearly three hundred years ago, restraints that cause market exit cannot "be endured; because the publick loses the benefit of the party's labour, and the party himself is rendered an useless member of the community." *Chessman v. Nainby*, 93 Eng. Rep. 819, 821 (1726).

D. Purported Economic Studies Used to Justify Antidiscrimination Laws Are Inapposite and Faulty

The court below sought to bolster its conclusion by citing a one-sided study that purported to demonstrate that discrimination based on sexual orientation "in places of public accommodation has measurable adverse economic effects." 370 P.3d at 293 (citing Mich. Dep't of Civil Rights, *Report on LGBT Inclusion Under Michigan Law with Recommendations for Action* 74-90 (Jan. 28, 2013) ["*Michigan Report*"]).

First, the study (and similar studies) is irrelevant. It seeks to show economic harm flowing from the failure to enact a state antidiscrimination law protecting sexual orientation. *Michigan Report* 74-90. The issue before this Court concerns only an exception for that tiny subset of cases in which merchants like petitioner refuses, on sincerely held religious grounds, to provide customized services involving creative and expressive services for any marriage that is not between one man and one woman, including both polygamous and same-sex weddings. As the

record makes clear, petitioner has no objections to the respondents' sexual orientation as such. Taken over the full range of bakers, florists and photographers, instances of religiously based refusals to serve represent only a minuscule fraction of all possible business transactions. There is no evidence any prospective customer has had any difficulty in procuring alternative services at competitive rates.

Moreover, the study purports to show economic harm because those in the LGBTQ community will purportedly leave the state of Michigan in the absence of an antidiscrimination law protecting sexual orientation. *Michigan Report* 74-90. The theory is that those in the LGBTQ community will prefer other states with more "friendly" legislation. Such arguments have also been raised in other studies funded by gay-rights advocacy groups. Bradford Richardson, *LGBT groups fund messages of economic doom*, THE WASHINGTON TIMES, Aug. 10, 2017. But neither the Michigan study nor any similar study presents a shred of statistical or other empirical evidence such a mass migration has or ever will occur. Indeed, such studies fail to address why Texas, which has no state antidiscrimination law that includes sexual orientation as a protected class, continues to grow in population and prosper economically. Moreover, such prognostications have no play here; a Court ruling on behalf of petitioner would ensure a level playing field for conscience-based exceptions in every state.

Second, the study is fundamentally flawed on methodological grounds. The data relied on by the study largely consists of anecdotes and anonymous

statements. The study does not even address, let alone quantify, the losses to firms like Masterpiece Cakeshop and their customers in its economic calculations. Nor does the study try to explain or quantify the damage that violent and abusive protestors can do to religious merchants, typically small family businesses, and their customers. It is, therefore, wildly speculative to attribute any positive economic effect to laws dealing with discrimination based on sexual orientation. By imposing heavy administrative burdens and disrupting voluntary markets, it is far more likely that these laws have had an adverse effect on economic growth in the states where they are in force.

Third, the study claims to find support in the fact that most major Fortune 50, 100 and 500 companies have adopted policies that forbid discrimination on grounds of sexual orientation and sexual identity. These firms find it easy to expand their market reach because they can accommodate the desires of employees that are opposed to working on same-sex marriage for religious reasons by assigning that work to others who are more than willing to do so. Rather than justifying the need to apply state antidiscrimination laws here, the voluntary and widespread adoption of these policies by major corporations gives assurance, as if any were needed, that same-sex couples will find merchants willing to serve them even if individuals are exempt from the law in the few transactions that raise matters of religious conscience.

State coercion against these few vulnerable family-run firms will undercut market choices, not im-

prove them. Worse, the study exhibits a peculiar blind spot when it comes to bullying and abuse. Petitioner and others like him have repeatedly been victimized by such actions by intolerant groups and their intolerant supporters. No state should back with a political juggernaut such outright attacks against discrete and insular minorities wholly without political power. *See United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938) (sadly applicable in this case: "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry").

III. There Are No Negative Externalities That Justify a Refusal to Grant Any Exceptions.

Finally, using the power of the state to coerce religiously motivated merchants to violate their consciences cannot be justified on notions of protecting "dignity." Each side has claims to violations of their "dignity." *See* Oman, *supra*, at 701. The "indignity" of being forced to provide services in violation of one's religious conscience or to exit one's profession cannot be so easily dismissed. *See* Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 N.W. J.L. & SOC. POL'Y 206, 207-08 (2010).

Moreover, the state seeks to regulate only one side of these voluntary transactions. Its antidiscrimination law (and all others that we are aware of) applies only to providers. Consumers are free (con-

sistent with basic notions of liberty) to refuse to deal with whichever provider for whatever reason. The state would thus condemn the very same discrimination by one set of market participants but not the other. There is no basis for doing so. The enforcement of state antidiscrimination laws against those with conscience-based objections causes the same negative outcomes these laws aim to prevent.

The lack of coherent justification is demonstrated by the reasoning of one state supreme court justice who sought to defend such state prejudice. In the end, he simply waved his hands, contending that enduring such state coercion in violation of one's conscience or being forced out of the market is simply "the price of citizenship." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J., concurring). Why being turned down by certain establishments is not a price of citizenship is never explained.

We leave it to others to discuss the lack of deontological justifications for such favoritism, and that the major premise of Religion Clauses is to "protect religious liberty and the integrity of individual conscience." JESSE CHOPER, SECURING RELIGIOUS LIBERTY 9 (1995). For our purposes, it is sufficient to note that laws like CADA cannot be justified simply by insisting that declining to provide services for same-sex weddings is offensive to some, but by no means all, segments of the community. Standard economic theory takes into account only those externalities whose harm to a stated victim correlates positively with the overall reduction in social welfare. It is for that reason that the standard set of *actionable* ex-

ternalities include aggression, nuisances and monopolies. Not included on the list are the harms that are suffered by firms that lose out in the competitive struggle, the loss of views that the landowner suffers when his or her neighbor builds, and, most relevant to this context, the offense that some individuals take at the activities of other persons.

This last point is for good reason. Within any enforcement context, a broad definition of externality that covers any and all offense taken by others systematically reduces overall social welfare. That proposition would lead to a situation in which every person could veto the activities of others based on a subjective offense. To allow such offense to restrict the activities of other individuals creates a perverse incentive to become ever angrier and more restive in order to gain a leg up on rivals. Let everyone adopt this strategy and widespread offense by this or that segment of the community will necessarily pit every group in society against others. It is this fundamental point that drove this Court's recent and emphatic rejection of any government efforts to impose restriction on "offensive" speech. *See Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017).

CONCLUSION

A refusal to grant exemptions from state antidiscrimination laws to those who have religious objections to providing services for same-sex weddings would be socially harmful. In the absence of government or natural monopoly, markets ensure all are served—same-sex couples can obtain wedding cakes, religiously motivated bakers can choose to fol-

low their conscience without being forced to abandon their profession. Imposing state antidiscrimination laws to force merchants into transactions against their religious convictions or to leave the market undermines freedom and diminishes social welfare. The Court should hold that the state cannot coerce such undesirable and oppressive outcomes.

Respectfully submitted,

SEAN P. GATES
CHARIS LEX P.C.
16 N. Marengo Ave.
Suite 300
Pasadena, CA 91101

RICHARD A. EPSTEIN
800 North Michigan Ave.
Apartment 3502
Chicago, IL 60611

DAVID A. SHANEYFELT
Counsel of Record
THE ALVAREZ FIRM
24005 Ventura Boulevard
Calabasas, CA 91302
DShaneyfelt@alvarezfirm.com
(818) 224-7077

September 6, 2017

APPENDIX

APPENDIX

Henry N. Butler, J.D., Ph.D., is Professor and the Dean at the Antonin Scalia Law School, George Mason University.

Lloyd Cohen, J.D., Ph.D., is Professor of Law at the Antonin Scalia Law School, George Mason University.

Richard A. Epstein is the Laurence A. Tisch Professor of Law at the New York University School of Law. He is also the James Parker Hall Distinguished Service Professor of Law Emeritus at the University of Chicago, and the Peter and Kirstin Bedford Senior Fellow at the Hoover Institution.

Samuel Gregg, D.Phil. (Oxon.), is Research Director at the Acton Institute.

Timothy R. Lickness is Professor of Law at Trinity Law School, Trinity International University

Allen Mendenhall, M.A., J.D., LL.M., Ph.D., is Associate Dean at the Thomas Goode Jones School of Law, and Executive Director of the Blackstone & Burke Center for Law & Liberty, Faulkner University.

Catherine R. Pakaluk, Ph.D., is Assistant Professor of Economics, at The Busch School of Business and Economics, and Fellow at the Institute for Human Ecology, The Catholic University of America.

Eric Rasmusen is Professor of Business Economics and Public Policy, Kelley School of Business, Indiana University

R. Neil Rodgers is Professor of Law at Trinity Law School, Trinity International University

Jay W. Richards, Ph.D., is Assistant Research Professor at The Busch School of Business and Economics, The Catholic University of America.

Lisa A Runquist is Adjunct Professor of Law at Trinity Law School, Trinity International University

Andrew Seeley is Tutor at Thomas Aquinas College and Executive Director of the Institute for Catholic Liberal Education

Myron Steeves is Dean and Professor of Law at Trinity Law School, Trinity International University, and Director of the Church Law Center of California

Andrew Westover is Adjunct Professor of Law at Trinity Law School, Trinity International University