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 211 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PETER T. BARBUR
Counsel of Record
CHARLES E. LOESER
NATHALIE J.K. BAKER
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
pbarbur@cravath.com
Telephone: (212) 474-1000

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A complete list of the 36 U.S. Senators and the 175 Members of the House of Representatives participating as *Amici* is provided in an appendix to this brief. Among them are:

SEN. CHARLES E. SCHUMER
Senate Democratic Leader

REP. NANCY PELOSI
House Democratic Leader

SEN. TAMMY BALDWIN
Lead Senate Amici on Brief

REP. SEAN PATRICK MALONEY
Lead House Amici on Brief

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes & Rules

Page(s)

Other Authorities

Page(s)

Page(s)

INTEREST OF *AMICI CURIAE*[1]

Amici are 36 United States Senators and 175 Members of the United States House of Representatives, (together, "Members of Congress").[2]

This Court's interpretation and application of the Colorado Anti-Discrimination Act ("CADA") will decide whether commercial enterprises that do business with the public have a constitutional right to discriminate. The Court's decision will therefore have significant implications for federal civil rights laws with public accommodation provisions including Title II of the Civil Rights Act of 1964 ("Civil Rights Act"), 42 U.S.C. § 2000a (2012) and Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12182 (2012), which were enacted to protect historically marginalized classes from discrimination in places of public accommodation. Creating exemptions for businesses that claim to engage in expressive conduct—exemptions that are exceedingly difficult to both define and limit—would do serious

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici* certify that Petitioners and Respondent Colorado Civil Rights Commission have given blanket consent to the filing of *amicus* briefs. Respondents Charlie Craig and David Mullins have given written consent to the filing of this brief. Pursuant to Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of *amici* appears in the appendix to this brief.

damage to CADA, and likewise undermine federal statutory schemes like the Civil Rights Act and the ADA.

As Members of Congress, *Amici* have a unique and inherent interest in the application and enforceability of federal laws, particularly when differing views on the applicability of these laws affect the rights of the constituents we represent. Because the way this Court decides to apply and enforce CADA will affect the applicability and enforceability of similar federal laws, *Amici* are well positioned to advise the Court on the purpose of these federal laws and the adverse implications of a ruling for Petitioners.

Amici urge this Court to affirm the Colorado Court of Appeals' decision requiring Petitioners to comply with CADA and reject the applicability of Petitioners' proposed exemption for businesses that claim to engage in expressive conduct. To recognize a constitutional right, as Petitioners assert, for such businesses to discriminate, even where such discrimination arises around allegedly expressive conduct, would contravene the spirit, purpose and plain language of federal laws like the Civil Rights Act and the ADA. This Court should not establish a precedent inviting discrimination against historically marginalized communities, including but not limited to the lesbian, gay, bisexual, transgender and queer (LGBTQ) community.

SUMMARY OF ARGUMENT

Colorado's public accommodations law, CADA, provides, in relevant part:

> It is a discriminatory practice and unlawful . . . to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

Colo. Rev. Stat. § 24-34-601(2)(a).

CADA provides expansive civil rights protections for historically marginalized groups, working in tandem with federal laws like Title II of the Civil Rights Act and Title III of the ADA, both of which similarly contain public accommodations provisions. Nondiscrimination laws like these, which exist in nearly every State in the country, target commercial conduct, not expression. These laws ensure that membership in a historically marginalized community is not synonymous with exclusion and protect members of these communities from the indignity and humiliation that comes from being denied service on a discriminatory basis. These laws make it possible for everyone to participate in public life.

Allowing the exemption to CADA that Petitioners seek would not only undercut CADA and countless nondiscrimination laws in state and local

jurisdictions, but it could also damage the public accommodations provisions of federal nondiscrimination laws. Indeed, constitutional exemptions to a state public accommodations law such as CADA could apply with equal force to parallel public accommodations provisions in federal nondiscrimination laws. Not only are these laws of general applicability that do not target speech or religion in any way, but there is simply no way to meaningfully cabin the "expressive conduct" exemption argued for by Petitioners without undercutting crucial elements of public accommodations laws. This Court should decline to issue an opinion that would recognize such an exemption.

First, Congress enacted federal statutory schemes like the Civil Rights Act and the ADA to fulfill the Government's compelling interest in eliminating discrimination in places of public accommodation. It is critical that these federal nondiscrimination schemes remain intact to protect the Government's compelling interest and preserve Congress's ability to continue to enact nondiscrimination protections. Any interest served by creating the type of exemption sought by Petitioners is outweighed by the overriding federal interest in eradicating discrimination in places of public accommodation. This is only more true where, as here, nondiscrimination laws target commercial, not expressive, conduct and any arguably expressive conduct would be attributed to the customer, not to the business claiming the exemption. Moreover, courts have time and again rejected attempts to read

new religious exemptions into generally applicable nondiscrimination laws.

Second, the exemption Petitioners seek for businesses that claim to engage in expressive conduct is unworkable. These nondiscrimination laws target commercial activity, not expression. Exempting arguably expressive commercial conduct ignores the fact that the purpose of these laws is to ensure that everyone can participate freely in all aspects of public life. In doing so, these laws prohibit *any* commercial actor who voluntarily provides services to the general public from discriminating on the basis of certain protected characteristics. Moreover, there is no practicable limitation to the exemption Petitioners seek. If such an exemption were recognized, not just cakeshops but all businesses whose owners have sincerely held religious beliefs and which have arguably expressive components would be permitted to discriminate against potential customers on the basis of not only sexual orientation but also race, religion and ability, among other characteristics.

CADA does not require that Mr. Phillips make wedding cakes. It only requires that once Mr. Phillips decides to operate his business as a public accommodation, he not discriminate on the basis of the characteristics enumerated in CADA.

ARGUMENT

I. Federal Nondiscrimination Laws Fulfill a Compelling Governmental Interest in Eliminating Discrimination in Places of Public Accommodation.

A. The Legislative History of Federal Nondiscrimination Laws Reveals that Congress Found that Eliminating Discrimination in Places of Public Accommodation Was a Compelling Governmental Interest.

Prohibiting discrimination in places of public accommodation is a critical piece of the protections codified in the Civil Rights Act of 1964. Title II of the Civil Rights Act requires that "all persons" be "entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin". 42 U.S.C. § 2000a (2012). Congress passed Title II of the Civil Rights Act because "no action is more contrary to the spirit of our democracy and Constitution—or more rightfully resented by a Negro citizen who seeks only equal treatment—than the barring of that citizen from . . . public accommodations and facilities". 109 Cong. Rec. 11942 (1963).

For the enacting Congress, equal treatment in places of public accommodation was an essential feature of a functioning and successful American society. To erect barriers to equal treatment or

otherwise perpetuate "the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public" was to "contravene the concepts of liberty and democracy which have guided us in achieving our amazing growth and progress during the past century". *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969) (citing 110 Cong. Rec. 7184 (1964) (statement of Sen. Magnuson)); 110 Cong. Rec. 7413 (1964) (statement of Sen. Magnuson). Ultimately, Congress envisioned a federal statutory scheme that would "both end discriminatory access to public places and protect against unfair competition with those citizens who wish voluntarily to treat all Americans on an equal basis". 110 Cong. Rec. 7413 (1964) (statement of Sen. Magnuson). In passing Title II, Congress simply conferred on historically marginalized groups the "right to enter and be served in establishments holding themselves out to serve the public"—nothing more and nothing less. 110 Cong. Rec. 7379 (1964) (statement of Sen. Kennedy). Title II reinforced the basic and fundamental right to be treated as an equal in American society. *Id.*[3]

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[3] Title II of the Civil Rights Act also contemplated a role for state and local legislation, like CADA, because Title II was narrowly drafted to avoid a successful commerce clause challenge. Congress readily acknowledged that state legislation could cover a broader range of commercial activity. *See*, *e.g.*, H.R. Rep. No. 88-914, pt. 2, at 9 (1963) ("States have also enacted public accommodations laws—frequently broader in context than this, and pursuing the reasoning of the old common law principle that inns and way stations were open to all."); 110 Cong. Rec. 7476 (1964) ("[Public accommodation laws] have been adopted in 31 States and dozens of cities, and in

The arguments once made against Title II are not so different from the arguments Petitioners advance here. In 1964, opponents of the Civil Rights Act insisted that, if passed, the Act would "cause nothing but turmoil, strife, emotionalism and all of the bad things that make up a disturbed population". 110 Cong. Rec. 8060 (1964) (statement of Sen. Johnston). Today, *Amici* Senators and Representatives in support of Petitioners assert that denying the overbroad exemption sought by Petitioners would constitute an inappropriate "price of citizenship" and be a "dangerous error, blind to human aspirations to live and work consistent with faith". Brief for United States Senators and Representatives as *Amici Curiae* in Support of Petitioners at 27, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (Sep. 7, 2017). These arguments ignore the core purpose of nondiscrimination laws—to preserve and protect "liberty and democracy", the cornerstones of American citizenship, and the antithesis of the values espoused by a "disturbed population". Indeed, the discrimination Title II sought to remedy "contradict[s] at home the message we preach abroad. It mars the atmosphere of a united and classless society in which this Nation rose to greatness". 110 Cong. Rec. 7399 (1964) (Statement of Sen. Magnuson (quoting President John F. Kennedy, Feb. 28, 1963)). The civil rights laws are not, then, an unwarranted "price of citizenship" as

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many cases have been on the books for 10 years or more. Most of them are far tougher than Title II, and are broader in coverage.") (Bipartisan Civil Rights Newsletter No. 7, March 17, 1964).

Petitioners contend: The obligation to comply with federal civil rights laws is at least the "cost" of doing business, and, more broadly, these laws constitute an aspiration by the United States Congress to recognize and reunify "the united and classless society in which this Nation rose to greatness". *Id.*

Similarly, Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation". 42 U.S.C. § 12182(a) (2012). Like the Civil Rights Act, Congress enacted the ADA to ensure that individuals with disabilities possessed certain basic, fundamental rights and to eliminate "the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life". Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 Weekly Comp. Pres. Doc. 1165 (July 20, 1990). The Act was "a civil rights priority" intended to "give to the disabled of our country back their personal and professional dignity". *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989*, 101st Cong. 2 (1989) (statement of Rep. Matthew G. Martinez).

Importantly, Congress sought to:

> [S]end a clear message to . . . places of public accommodations . . . that the full force of the Federal law will come down on anyone who continues to subject persons with disabilities to discrimination by segregating them, by excluding them, or by denying them equally effective and

> meaningful opportunity to benefit from all aspects of life in America.

135 Cong. Rec. 8506 (1989) (statement of Sen. Harkin).

"By approving the Americans with Disabilities Act" Congress "affirm[ed] its commitment to remove the physical barriers and the antiquated social attitudes that have condemned people with disabilities to second-class citizenship for too long". 136 Cong. Rec. 17360 (1990) (statement of Sen. Kennedy).

Both the Civil Rights Act and the ADA were crafted to be directives of inclusion, designed to advance "liberty and democracy" and protect the dignity and equal treatment of historically marginalized groups. *See* 110 Cong. Rec. 7400 (1964) (statement of Sen. Magnuson (quoting Roy Wilkins, Executive Secretary of the NAACP)) ("[T]he affronts and denials that [Title II], if enacted, would correct are intensely human and personal. Very often . . . they strike at the root of the human spirit, at the very core of human dignity"); *Hearing on H.R. 2273, The Americans with Disabilities Act of 1989*, 101st Cong. 2 (1989) (statement of Rep. Matthew G. Martinez) ("Now is the time to give to the disabled of our country back their personal and professional dignity."). It is critical that these protections remain in full force. To allow the exemptions sought by Petitioners would effectively create a constitutional rule condoning broad-based discriminatory conduct while hamstringing Congress from enacting comprehensive nondiscrimination legislation in the future.

B. Case Law Confirms that Eliminating Discrimination in Places of Public Accommodation Is a Compelling Governmental Interest.

Since the enactment of both the Civil Rights Act and the ADA, courts have interpreted these federal schemes consistently with their central, animating purpose—to promote equal treatment in the United States and preserve the dignity of Americans. The exemptions sought by Petitioners would represent a sea change in the law, reverse course on over 50 years of progress and constitutionalize precisely what the legislators responsible for enacting the Civil Rights Act and the ADA sought to avoid—the exclusion of historically marginalized groups from American society.

Indeed, courts have interpreted Title II of the Civil Rights Act "with open minds attuned to the clear and strong purpose of the Act, namely, to secure for all citizens the full enjoyment of facilities described in the Act which are open to the general public". *Rousseve v. Shape Spa for Health & Beauty, Inc.*, 516 F.2d 64, 67 (5th Cir. 1975) (internal quotation marks omitted). The "right to service" in places of public accommodation is "a right or privilege secured . . . by virtue of the 1964 Act", *United States v. Johnson*, 390 U.S. 563, 565–66 (1968), and the Government's compelling interest in eradicating discrimination has been acknowledged by this Court time and again, *e.g.*, *United States v. Paradise*, 480 U.S. 149, 170 (1987) (recognizing a "compelling interest in remedying the discrimination that permeated" certain hiring and promotional practices of Alabama Department of Public Safety);

Bob Jones Univ. v. United States, 461 U.S. 574, 603–04 (1983) (recognizing the government's "fundamental, overriding interest in eradicating racial discrimination in education" and finding the "governmental interest[ ] so compelling as to allow even regulations prohibiting religiously based conduct").

Moreover, arguments that Title II of the Civil Rights Act is "invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of Defendant's religion'" are outside of the realm of "good faith" defenses to enforcement of Title II. *Newman v. Piggie Park, Inc.*, 377 F.2d 433, 437–38 (4th Cir. 1967) (Winter, J., concurring).

With respect to the ADA, courts have recognized that "[a]fter thoroughly investigating the problem, Congress concluded that there was a 'compelling need' for a 'clear and comprehensive national mandate' to eliminate discrimination against" individuals with disabilities, "and to integrate them 'into the economic and social mainstream of American life'". *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (quoting S. Rep. No. 101-116, at 20 (1989)); *see also Harris v. H&W Contracting Co.*, 102 F.3d 516, 519 (11th Cir. 1996).

Arguments claiming that the obligation to exercise equal treatment is an improper "price of citizenship", *see* Brief for United States Senators and Representatives as *Amici Curiae* in Support of Petitioners at 27, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (Sept. 7, 2017), are not only inconsistent with the history and purpose of federal nondiscrimination

laws but also lack support in case law. Indeed, this Court has held:

> [E]very person cannot be shielded from all burdens incident to exercising every aspect to the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory scheme which are binding on others in that activity.

United States v. Lee, 455 U.S. 254, 261 (1982).

Therefore, *at a minimum*, the obligation to recognize basic civil rights and practice equal treatment is at least the "cost" of doing business. Put simply, doing business in a society of equals necessitates equal treatment. To find otherwise would undermine longstanding federal protections and "mar[ ] the atmosphere of a united and classless society in which in which this Nation rose to greatness". 110 Cong. Rec. 7399 (1964) (Statement of Sen. Magnuson (quoting President John F. Kennedy, Feb. 28, 1963)).

II. Federal Nondiscrimination Laws Are Necessary To Curb Discriminatory Practices and Would Be Alarmingly Impaired by the Exemptions Sought by Petitioners.

Federal laws like the Civil Rights Act and ADA are necessary because they ensure that public

accommodations do not serve only certain customers and discriminate "as they see fit". *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 282 (1964) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948)). These laws are designed so that an interracial couple or a man living with HIV cannot be told "we don't serve your kind here". But this is precisely the kind of conduct that a ruling in favor of Petitioners would sanction.

A. Petitioners' Proposed Exemption Is Impracticable and Would Condone Discrimination in Public Accommodations in Violation of State and Federal Nondiscrimination Laws.

The exemption Petitioners seek—allowing discrimination by businesses that claim to engage in expressive conduct—is unworkable. If Mr. Phillips chooses to provide goods or services to the public, then public accommodation laws demand that he do so without discriminating against certain historically marginalized classes. Though Mr. Phillips may abide by certain tenets of his own faith, those tenets cannot be "superimposed on the statutory schemes which are binding on others in that activity". *Lee,* 455 U.S. at 261.

Moreover, it would be impracticable for this Court to accept Petitioners' argument and attempt to draw distinctions between or otherwise define what is or is not an expressive profession. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 71 (N.M. 2013) ("Courts cannot be in the business of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws."). To

attempt to draw such a line would disrupt the basic function of state and federal nondiscrimination laws by creating exemptions that state legislatures and Congress did not intend. Public accommodation laws mandate how businesses open to the general public must treat individuals with certain protected characteristics. Indeed, no matter how much or how little a particular business engages in "expressive" conduct, nondiscrimination laws like CADA, Title II of the Civil Right Act and Title III of the ADA govern any kind of commercial activity without regard to the level of expression involved. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (recognizing that even though lawyers "make a distinctive contribution to the ideas and beliefs of our society", freedom of expression did not give a law firm the right to refuse to hire women as partners or otherwise exempt the law firm from its obligation to comply with Title VII as part of running its business). To attempt to articulate another standard that allows public accommodations to close themselves off to parts of the general public because the particular business claims "expressive" components is not only unworkable, but such a standard would also ignore what nondiscrimination laws seek to do in the first place—eradicate discrimination, not compel or curb expression in any way. Allowing certain businesses to discriminate on the basis of sex, sexual orientation, race and ability, among other characteristics, frustrates the goal of eradicating discrimination underpinning state and federal public accommodations laws.

Not only would the exemption Petitioners seek be practically unworkable, but a decision allowing

discrimination under CADA would affect far more than cakeshops in Colorado. *See, e.g.*, Brief for 479 Creative Professionals as *Amici Curiae* in Support of Petitioner at 1a–19a, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (Sep. 7, 2017) (listing many different types of professionals—including graphic designers, filmmakers, DJs, bloggers, marketers and consultants—who deem their professions expressive). Under Petitioners' theory, a wide range of activities that federal public accommodation laws sought to outlaw would be permitted. Indeed, the very reasons once cited for the pervasive exclusion of African-Americans from places of public accommodation—that "to serve members of the Negro race in . . . business establishments . . . would violate . . . sacred religious beliefs"—could be cited in support of conduct invoking this exemption. *See Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 945 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968).

Examples of how this exemption could operate to circumvent the Civil Rights Act of 1964 abound. If Mr. Phillips's argument that he "cannot be forced to create wedding cakes that celebrate marriages at odds with his faith", Brief of Petitioners at 15, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (Aug. 31, 2017), is accepted, another bakery could argue that it may refuse to sell a specialty cake for a Jewish child's bar mitzvah, because providing a cake for the ceremony of a different religion could surely be considered "at odds" with the proprietor's faith. A banquet hall owned by an Orthodox Jewish family could contend that it may

decline to host a feast and celebration for the end of Ramadan because designing a menu and decorating the hall (arguably "expressive conduct") for another religion's holiday is similarly "at odds" with the proprietor's faith. A restaurant could insist that it can refuse to serve an interracial couple requesting a catered wedding rehearsal or anniversary dinner, claiming that a custom menu is expressive conduct (with its tailor-made fonts and hand-picked courses of food and drink) that would violate the owner's "sacred religious beliefs" concerning interracial marriage.[4] A hotel could claim that it can refuse to host that same interracial couple on their wedding night because the hotel's specially curated "honeymoon package" is expressive conduct that, if used in celebration of interracial marriage, would violate the tenets of the proprietor's faith.

This Court has repeatedly declined to decide whether a particular religious belief warrants accommodation. *See, e.g.*, *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular

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[4] There is a history of religious beliefs being cited in support of opposition to racial integration. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (overturning trial court's opinion, which found that, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages"); *Newman*, 256 F. Supp. at 944 ("Defendant . . . further contends that the Act violates his freedom of religion under the First Amendment 'since his religious beliefs compel him to oppose any integration of the races whatever.'").

litigants' interpretations of those creeds."). But particularly in light of this Court's understandable hesitancy to wade into questioning the sincerity of religious beliefs, the exemptions sought by Petitioners would result in remarkable deference to businesses that discriminate on the basis of the religion of their owners or employees.

The exemption Petitioners seek would reach beyond the Civil Rights Act of 1964 to other federal laws, including the ADA. Accepting the Petitioners' argument raises the specter that a contractor could refuse to construct a building—arguably expressive conduct—for a community center focused on serving people with HIV/AIDS, who are protected under the ADA, *e.g., Rivera v. Heyman*, 157 F.3d 101, 103 (2d Cir. 1998) (citing *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998)), because he or she associates HIV/AIDS with conduct that violates his or her religious principles, such as sexual intercourse out of wedlock or homosexuality. *See, e.g.*, Katharine Q. Seelye, *Helms Put the Brakes To a Bill Financing AIDS Treatment*, N.Y. Times, July 5, 1995, (quoting then-Senator Jesse Helms who "vigorously fought" to "reduce the amount of Federal money spent on AIDS sufferers" because "we've got to have some common sense . . . about a disease transmitted by people deliberately engaging in unnatural acts"); Edward I. Koch, *Senator Helms's Callousness Towards AIDS Victims*, N.Y. Times, Nov. 7, 1987, (quoting then-Senator Jesse Helms, who voted in favor of legislation "prohibit[ing] the Federal Centers for Disease Control from funding AIDS programs that promote, encourage or condone homosexual activities" because "a perverted human being [is] a

perverted human being"). Or that an architect could refuse to design a wheelchair-accessible building because the presence of a wheelchair ramp would conflict with her artistic vision. Or that a flower shop could refuse to design and sell a flower arrangement to a bereaved parent of a child who died from complications related to AIDS.

These consequences would further exclude and ostracize members of historically marginalized groups from their communities, now with the imprimatur of the United States Constitution. This result is not mitigated by the possibility that the HIV/AIDS center could select a different contractor, the mother could go to a different flower shop for her son or the interracial couple could go to a different restaurant. Petitioners are eager to point out that "[t]he evidence shows that Craig and Mullins acquired (free of charge) a custom-made, rainbow-layered wedding cake from another local cake artist". Brief of Petitioners at 50, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, No. 16-111 (Aug. 31, 2017). But this Court has rejected such arguments before, observing that "[d]iscrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public. . . ." *Heart of Atlanta Motel,* 379 U.S. at 292 (Goldberg, J., concurring) (citing S. Rep. No. 88-872, at 16 (1964)). This "humiliation, frustration, and embarrassment" are surely compounded in communities where there might be only one bakery or one flower shop or one hotel or one banquet hall. There, the fact that the interracial couple or Muslim

family or mother of a child with HIV/AIDS can travel to the next community 50 miles away provides little relief. The result of the exemption Petitioners seeks, then, is that no matter how large or small the community, members of historically marginalized groups could continue to face indignity and humiliation as they try to participate in public life, from building a home or community center to engaging in the most momentous societal rituals—weddings, funerals, baby showers and the like. This kind of systematic exclusion carries serious implications, including increased suicide, crime and truancy rates among members of the marginalized groups.[5]

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[5] The social ills of discrimination and exclusion have been extensively studied and documented, and include detriments to physical and mental health among the excluded populations. *See, e.g.*, David R. Williams, Harold W. Neighbors, & James S. Jackson, *Racial/Ethnic Discrimination and Health: Findings From Community Studies*, 93 Am. J. Pub. Health 200, 206 (2003); *Stress in America: The Impact of Discrimination*, Am. Psychol. Ass'n (Mar. 10, 2016), https://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf ("Regardless of the cause, experiencing discrimination is associated with higher reported stress and poorer reported health."). Title II of the Civil Rights Act and Title III of the ADA both work to remedy these ills in an effort to integrate historically marginalized groups in American society.

The negative impact of discrimination on the basis of sex, sexual orientation and gender identity is similarly well documented. *See, e.g.*, Sarah Holmes & Sean Cahill, *School Experiences of Gay, Lesbian, Bisexual and Transgender Youth*, 1 J. Gay & Lesbian Issues in Educ. 53, 57 (2004) (finding discrimination and harassment against LGBTQ youth "can

Federal nondiscrimination laws were enacted to reverse the trend of systematic exclusion of certain groups of people and restore and preserve human dignity for all citizens. *See supra* Part I.A. Congress sought to create and sustain a fair and equitable society, recognizing that "[t]he free exercise of one's beliefs . . . as distinguished from the absolute right to a belief, is subject to regulation when religious acts require accommodation to society". *Newman*, 256 F. Supp. at 945.

B. Petitioners Misinterpret This Court's Precedent and Fail To Differentiate Between Private Expressive Events and Businesses Serving the General Public.

Public accommodations laws serve important government interests that the Petitioners' proposed exemption would undermine. This Court's prior decisions, including *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, Inc.*, 515 U.S.

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have devastating effects . . . including higher rates of suicidal ideation and attempted suicide, higher truancy and drop-out rates, substance abuse and running away from home"); Vickie Mays and Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 Am. J. of Pub. Health 1869 (2001). Should this Court issue a ruling for Petitioners, then any future legislation attempting to mitigate the negative effects of discrimination on the basis of sex, sexual orientation, marital status, national origin and ancestry at the federal level would suffer the same fate as already-existing nondiscrimination laws like the Civil Rights Act and the ADA because businesses that claim to engage in expressive conduct would be permitted to discriminate.

557 (1995), do not require the exemption Petitioners seek. In *Hurley*, the Court held that the application of Massachusetts's public accommodation law to a private association organizing an expressive event—a parade—violated the First Amendment. The *Hurley* Court went on to observe that public accommodation laws generally do not run afoul of the First Amendment. *See id.* at 572 ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.").

Operating a commercial enterprise that is open to the public like Masterpiece Cakeshop (or a restaurant, hotel, flower shop, banquet hall or contracting business) is fundamentally different than organizing a free-speech event like a parade (or admitting members to a private organization, as in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)). As such, cases involving public accommodations, like *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), are more instructive in this case. In *PruneYard*, this Court upheld a California state law that forbade the owner of a public shopping center from preventing pamphleteers on his property, holding that it did not violate the owner's First Amendment rights because the shopping center was "open to the public to come and go" and "[t]he views expressed by members of the public in passing out pamphlets . . . will not likely be identified with those of the owner". *Id.* at 87.

Here, as in *PruneYard*, the subject of the state's regulation is open to the public and is not a private

expressive organization like the one at issue in *Hurley*. Moreover, it is highly unlikely that whatever views, if any, expressed by Charlie Craig and David Mullins's wedding cake would be attributed to Jack Phillips or Masterpiece Cakeshop. Rather, just as the views of the pamphleteers in *PruneYard* would be imputed only to the pamphleteers and not the shopping center owner, whatever views are arguably expressed by a wedding cake would be attributed to the couple being wedded.[6]

Religiously motivated or "expressive" conduct exemptions should not be used to further entrench discriminatory conduct in places of public accommodation. The Colorado Court of Appeals' decision should be affirmed because the exemption sought by Petitioners cannot be appropriately limited and would weaken the protections of CADA and federal civil rights laws by condoning discrimination

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[6] Whether or not the arguably expressive conduct is ultimately attributed to the buyer or seller, businesses are free to adopt neutral and generally applicable terms-of-service policies. For example, a business could adopt a terms-of-service policy refusing to sell products containing hate speech. State, local and federal nondiscrimination laws simply require that if a business does adopt a terms-of-service policy that policy must apply to everyone equally. The business cannot refuse to sell products containing hate speech directed toward one group while agreeing to sell products containing hate speech directed toward another group. In the case of Masterpiece Cakeshop, because Mr. Phillips would sell a wedding cake to a straight couple but would refuse to sell an identical wedding cake to a same-sex couple, it is the fact that he treats similarly situated individuals differently with respect to the sale of a particular product that violates CADA.

in public accommodations in ways that legislatures explicitly sought to proscribe.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm.

October 30, 2017

Respectfully submitted,

PETER T. BARBUR
Counsel of Record
CHARLES E. LOESER
NATHALIE J.K. BAKER
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
pbarbur@cravath.com
Telephone: (212) 474-1000

APPENDIX

I. COMPLETE LIST OF *AMICI CURIAE*

A. United States Senators (36)

Tammy Baldwin
Michael F. Bennet
Richard Blumenthal
Cory A. Booker
Sherrod Brown
Maria Cantwell
Benjamin L. Cardin
Thomas R. Carper
Robert P. Casey, Jr.
Christopher A. Coons
Catherine Cortez Masto
Tammy Duckworth
Richard J. Durbin
Dianne Feinstein
Al Franken
Kirsten E. Gillibrand
Kamala D. Harris
Margaret Wood Hassan
Martin Heinrich
Mazie K. Hirono
Tim Kaine
Amy Klobuchar
Edward J. Markey
Robert Menendez
Jeffrey A. Merkley
Patty Murray
Bill Nelson
Jack Reed
Bernard Sanders
Brian Schatz
Charles E. Schumer
Jeanne Shaheen
Chris Van Hollen
Elizabeth Warren
Sheldon Whitehouse
Ron Wyden

B. Members of the United States House of Representatives (175)

Alma S. Adams
Pete Aguilar
Nanette Diaz Barragán
Karen Bass
Joyce Beatty
Ami Bera
Donald S. Beyer Jr.
Earl Blumenauer
Lisa Blunt Rochester
Suzanne Bonamici
Madeleine Z. Bordallo
Brendan F. Boyle
Robert A. Brady
Anthony Brown

Julia Brownley
G. K. Butterfield
Michael E. Capuano
Salud Carbajal
Tony Cárdenas
André Carson
Matt Cartwright
Kathy Castor
Joaquin Castro
Judy Chu
David N. Cicilline
Katherine Clark
Yvette D. Clarke
James E. Clyburn
Steve Cohen
Gerald E. Connolly
John Conyers, Jr.
Jim Cooper
J. Luis Correa
Joe Courtney
Charlie Crist
Joe Crowley
Elijah E. Cummings
Susan Davis
Danny K. Davis
Peter DeFazio
Diana DeGette
John K. Delaney
Rosa L. DeLauro
Suzan DelBene
Val Demings
Mark DeSaulnier
Theodore E. Deutch
Debbie Dingell
Lloyd Doggett
Mike Doyle
Keith Ellison
Eliot L. Engel
Anna G. Eshoo
Adriano Espaillat
Elizabeth H. Esty
Bill Foster
Lois Frankel
Marcia L. Fudge
Tulsi Gabbard
Ruben Gallego
Jimmy Gomez
Josh Gottheimer
Al Green
Raúl M. Grijalva
Luis V. Gutiérrez
Colleen Hanabusa
Alcee L. Hastings
Denny Heck
Brian Higgins
Jim Himes
Steny H. Hoyer
Jared Huffman
Sheila Jackson Lee
Pramila Jayapal
Hakeem Jeffries
Eddie Bernice Johnson
Henry C. "Hank" Johnson
Marcy Kaptur
William R. Keating
Robin L. Kelly
Joseph P. Kennedy, III
Ro Khanna
Ruben Kihuen

Daniel T. Kildee
Derek Kilmer
Ron Kind
Raja Krishnamoorthi
Ann McLane Kuster
James R. Langevin
John B. Larson
Brenda L. Lawrence
Barbara Lee
Sander Levin
John Lewis
Ted W. Lieu
Dave Loebsack
Zoe Lofgren
Alan Lowenthal
Nita M. Lowey
Ben Ray Luján
Michelle Lujan Grisham
Stephen F. Lynch
Carolyn Maloney
Sean Patrick Maloney
Doris Matsui
Betty McCollum
A. Donald McEachin
James P. McGovern
Jerry McNerney
Gregory W. Meeks
Grace Meng
Gwen S. Moore
Seth Moulton
Jerrold Nadler
Grace Napolitano
Richard E. Neal
Richard M. Nolan
Donald Norcross
Eleanor Holmes Norton
Frank Pallone, Jr.
Jimmy Panetta
Bill Pascrell, Jr.
Donald M. Payne, Jr.
Nancy Pelosi
Ed Perlmutter
Scott H. Peters
Chellie Pingree
Stacey Plaskett
Mark Pocan
Jared Polis
David Price
Mike Quigley
Jamie Raskin
Kathleen Rice
Jacky Rosen
Lucille Roybal-Allard
Raul Ruiz
C.A. Dutch Ruppersberger
Bobby L. Rush
Tim Ryan
Linda T. Sánchez
John Sarbanes
Jan Schakowsky
Adam B. Schiff
Bradley S. Schneider
Kurt Schrader
Robert C. "Bobby" Scott
José E. Serrano
Terri Sewell
Carol Shea-Porter
Brad Sherman
Kyrsten Sinema

Albio Sires
Louise M. Slaughter
Adam Smith
Darren Soto
Jackie Speier
Thomas R. Suozzi
Eric Swalwell
Mark Takano
Mike Thompson
Dina Titus
Paul D. Tonko
Norma J. Torres
Niki Tsongas
Juan Vargas
Marc A. Veasy
Filemon Vela
Nydia Velazquez
Tim Walz
Debbie Wasserman Schultz
Maxine Waters
Bonnie Watson Coleman
Peter Welch
John Yarmuth