COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80203	
COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050, Denver, CO 80202 Case No. 2013-0008	▲ COURT USE ONLY▲
Respondents-Appellants: MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, **v.** **Petitioners-Appellees**: CHARLIE CRAIG and DAVID MULLINS.	Case Number: 2014CA1351
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BRIEF FOR MAIN STREET ALLIANCE, HOPSCOTCH BAKERY AND GARY'S AUTO SERVICE AS *AMICI CURIAE* SUPPORTING PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief contains 7,612 words.

C.A.R. 28(k) does not apply to *amicus curiae* briefs.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 32.

/s/ Craig R. May

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Colorado Anti-Discrimination Act ensures that members of protected classes are not stigmatized or treated like second-class citizens. CADA categorically prohibits businesses that provide goods or services to the public from discriminating against members of those classes by refusing to sell to them. Broad and uniform application of antidiscrimination laws is good for business and the Colorado economy as a whole. This Court should not perforate CADA with exceptions that provide an excuse for discrimination. Creating such loopholes would foster a reputation for divisiveness and intolerance that would drive talent and customers away from this State and its business community. The recognition of exceptions to CADA's clear rule of nondiscrimination would also make it difficult for small businesses to know how to conform their conduct to the law.

In this case, Masterpiece Cakeshop refused even to consider baking a wedding cake for a gay couple. Masterpiece contends that this refusal was not because of the couple's sexual orientation but instead was because of religious objections to marriage of same-sex couples. That just means that Masterpiece *will* sell to marrying couples who are heterosexual but *won't* sell to similarly situated couples who are lesbians or gay men. Masterpiece's refusal is the archetype of discrimination on the basis of sexual orientation. It is precisely what CADA prohibits.

The Court should not credit Masterpiece's argument that selling wedding cakes is speech protected by the First Amendment and that enforcing CADA here is therefore impermissible compelled speech. Selling a good to members of a disfavored group on the same terms as one sells that same good to a favored group because the law requires it does not constitute compelled speech in support of the disfavored group. If it did, all antidiscrimination law would be a nullity. If Masterpiece's reasoning were correct, a baker could refuse to sell wedding cakes to mixed-race couples to express beliefs about the sin of miscegenation. Another could refuse to bake birthday cakes for children of unwed mothers to express views about the sin of premarital sex. Still another could refuse to bake cakes for Bar Mitzvahs to communicate anti-Semitic sentiments. It is precisely this sort of status-based refusal of service that CADA bars. And properly so.

Nothing in CADA prevents Colorado businesses from contributing to the marketplace of ideas. Businesses and their owners with strongly held views are generally free to express those views. They can brand themselves in whatever manner they like, from posting signs proclaiming the evils of homosexuality to displaying rainbow banners proclaiming support for the rights of lesbians and gay men. Or they may refrain from doing so. CADA allows for all of that. Indeed, far from compelling businesses to speak, CADA *removes* any possible presumption

that the mere act of selling a good or service on equal terms to all comers is by itself the communication of any idea whatever about any customer.

The administrative law judge here appropriately analyzed and dismissed Masterpiece's arguments that it was not discriminating "because of" sexual orientation and that the application of CADA violated Masterpiece's free-speech rights; and the Colorado Civil Rights Commission properly adopted the ALJ's decision. This Court should affirm that ruling.

INTEREST OF THE *AMICI CURIAE*

The Main Street Alliance is a national network of state-based small-business coalitions that provide their members with a platform to express views on issues affecting their businesses and local economies. The Alliance has affiliates in twelve states, including Colorado. Initially formed in 2008 by the Alliance for a Just Society to provide a voice for small businesses in the healthcare-reform debate, the Alliance has since expanded its work to encompass a broad range of important issues affecting the business community, including matters relating to civil rights and the lawful and fair treatment of customers and patrons. The Alliance has approximately 350 member businesses in Colorado that together provide a diverse array of goods and services to the people of this State.

Hopscotch Bakery is a local bakery in Pueblo and a member of the Alliance. Owned and operated by a native of the town, Hopscotch employs traditional

baking techniques with modern flair to make cakes, confections, and other baked goods for weddings and other special occasions. Hopscotch supports its community, and particularly the less advantaged members of that community, by frequently donating its products to shelters, charities, schools, and nonprofit organizations. Gary's Auto Service is an automobile-repair business located in the Santa Fe Art District of downtown Denver, and is also an Alliance member. In addition to providing quality car-care services for more than thirty years, Gary's is committed to supporting its community. It displays the artwork of its customers and participates in a neighborhood art walk held on the first Friday of every month.

As operators of small businesses serving the public, *amici* and Alliance members understand that the broad, uniform application of CADA is good for the people and the economy of this State. When same-sex couples have reason to worry that some businesses lining Main Street may reject their patronage, the entire business community suffers. *Amici* strongly believe that consistent and reliable enforcement of antidiscrimination principles is essential to the vitality of Colorado's business districts and its public spaces in general. Accordingly, *amici* have a strong interest in urging this Court to affirm the decision below.

ARGUMENT

For more than a century, Colorado has been a national leader in working to ensure equal treatment of all people by stamping out discrimination in places of

public accommodation. The trend toward ever-expanding protections against invidious discrimination has been good for this State, its people, and the businesses that serve them. These long-standing efforts by the General Assembly, the courts, and the citizens of Colorado should not be undermined by the creation of unwarranted exceptions to Colorado's straightforward public-accommodations requirements. Neither law nor public policy supports Masterpiece's bid to do so here.

I. THE BROAD, UNIFORM APPLICATION OF CADA IS CRUCIAL TO THE WELL-BEING OF THIS STATE, ITS CITIZENRY, AND ITS ECONOMY.

A. CADA's History Reflects The State's Long-Standing Commitment To Preventing Discrimination.

The General Assembly enacted the Public Accommodations Act—the forerunner to CADA—in 1895 to guarantee that "all persons . . . shall be entitled to the full and equal enjoyment of all accommodations, advantages, facilities and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theaters and all other places of public accommodation and amusement." Act of April 9, 1895, ch. 61, 1895 Colo. Sess. Laws 139. In keeping with that vision, the General Assembly has since continually strengthened and expanded the protections against discrimination in public accommodations afforded to the State's residents.

In 1917, for example, the Public Accommodations Act was amended to prevent establishments from indirectly refusing service to protected classes by using advertisements and other communications to tell customers that they were not welcome because of their "race, sect, creed, denomination or nationality." Act of March 30, 1917, ch. 55, 1917 Colo. Sess. Laws 163-64. In 1957, the year in which CADA was enacted, the General Assembly charged the Colorado Anti-Discrimination Commission with the public-accommodations provision's enforcement, in order to ensure that its important purposes were fully realized. *See* Act of March 13, 1957, ch. 176, 1957 Colo. Sess. Laws 492. And in the years since, Colorado has carried on this tradition by extending CADA's protections to commercial activities in the spheres of housing and employment, and to classifications such as sex, marital status, age, and disability. *See* COLO. CIVIL RIGHTS COMM'N, COLO. CIVIL RIGHTS DIV., ANNUAL REPORT 2014, at 16-18.[1] Most recently, the General Assembly amended CADA in 2008 to prohibit discrimination on the basis of sexual orientation. *See* 2008 Colo. Legis. Serv. Ch. 341 (S.B. 08-200).

As amended, CADA provides that "[i]t is a discriminatory practice and unlawful" for a person or business, "directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex,

[1] Available at http://cdn.colorado.gov/cs/Satellite/DORA-DCR/CBON/DORA/1251631542607.

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) (2014). CADA and the Commission that enforces it thus carry out more than a century of legislative intent "to provide a mechanism by which Colorado could eradicate the underlying causes of discrimination and halt discriminatory practices" that had previously stigmatized and made second-class citizens of many Coloradans. *Red Seal Potato Chip Co. v. Colo. Civil Rights Comm'n*, 618 P.2d 697, 700 (Colo. App. 1980).

B. Uniform Application Of CADA Is Good For Colorado And For The Economic Health Of Its Business Community.

1. CADA's "beneficent purpose" (*State ex rel. Colo. Civil Rights Comm'n v. Adolph Coors Corp.*, 486 P.2d 43, 46 (Colo. App. 1971)) of providing public accommodations without regard for race, sex, sexual orientation, or other protected attributes has served the people and the economy of this State well. In part, that is because a state's commitment to and reputation for inclusivity and equal treatment in the provision of public accommodations creates a positive climate not only for the state's residents but also for the businesses that serve them. The converse is also true: "[D]iscriminatory situations caus[e] wide unrest and hav[e] a depressant effect on general business conditions in . . . communities." *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (describing content of

congressional debates leading to passage of the Civil Rights Act of 1964). Simply put, broad, uniform enforcement of CADA makes Colorado a more desirable place to live, work, shop, and dine, as well as an attractive vacation destination. Thus, enforcement of CADA is good not just for the consumers whom it protects but also for the economy more broadly, because it helps create a hospitable environment for businesses, both large and small. *Cf.*, *e.g.*, Mark Berman, *How Apple, the NFL and other big businesses helped kill the Arizona bill*, WASH. POST, Feb. 27, 2014 (explaining how and why businesses advocated against an Arizona law that would have let businesses deny service to LGBT customers).[2]

2. From an economic standpoint, such a hospitable environment is especially important because the growth of minority buying power is greatly outpacing that of the market as a whole. *See* Alison Kenny Paul et al., *Diversity as an Engine of Innovation*, 8 DELOITTE REV. 108, 110 (2011).[3] Thus, "[i]ncreasingly, retailers and consumer goods companies must embrace diversity as a market force, and that includes diversifying their workforces—not simply to do what is right, but because they know that a diverse employee base will drive affinity with and understanding of the customer." *Id.* This workforce diversity in turn spurs

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[2] Available at http://www.washingtonpost.com/news/post-nation/wp/2014/02/27/how-apple-the-nfl-and-other-big-businesses-helped-kill-the-arizona-bill/.

[3] Available at http://dupress.com/wp-content/uploads/2011/01/US_deloittereview_Diversity_as_an_Engine_of_Innovation_Jan11.pdf.

innovation and product diversification, benefiting all consumers as well as the businesses themselves. *See* Max Nathan & Neil Lee, *Does Cultural Diversity Help Innovation in Cities? Evidence from London Firms*, SERC Discussion Paper No. 69 (Feb. 2011) (finding "small but robust positive effects of management diversity on the development of new products and processes")[4]; Huasheng Gao & Wei Zhang, *Does Workplace Discrimination Impede Innovation?* (Jan. 2015) (finding "a negative causal effect of workplace discrimination on corporate innovation")[5].

What is more, when public accommodations are open to all on a nondiscriminatory basis, as Colorado law requires, it creates a public space in which different people meet, mingle, and exchange ideas. These interactions not only promote a well-informed citizenry, which is a critically important public good in its own right, but also help encourage the innovation that Colorado needs to remain a vibrant economic competitor and to continue to develop as a leader in emerging technologies and other growth sectors in the national economy.

3. In the past few years, this State has done comparatively well in emerging from recession and getting on the road to economic recovery and growth. Among the key drivers of that success are a vibrant high-tech industry that employs many young, well-educated people, and a tourism industry that attracts

[4] Available at http://files.lsecities.net/files/2011/03/diversity-innovation-SERC.pdf.

[5] Available at http://www.ntu.edu.sg/home/hsgao/GaoZhang20150113.pdf.

visitors from across the country and around the world. *See* Wells Fargo Sec., Econ. Grp., *Special Commentary, Colorado Economic Outlook: December 2014* (Dec. 30, 2014).[6] These industries and the people whom they employ and serve are vital to this State's continuing economic health and prosperity. And for many, CADA and the inclusive culture that its protections foster are part of what makes Colorado attractive.

4. The General Assembly's extension of CADA's protections to forbid discrimination in public accommodations on the basis of sexual orientation is an appropriate measure for achieving these important ends. As historic bias against lesbian, gay, bisexual, and transgender members of our families and communities continues to wane, the tremendous size of the market for serving LGBT clientele has become more apparent. Nationally, this market is projected to reach $830 *billion* in 2015. Advertising Week, *2015 Should Be the Year of LGBT Marketing*, Jan. 19, 2015, http://www.theawsc.com/2015/01/19/2015-should-be-the-year-of-lgbt-marketing/.[7] Reaching and serving this market is thus critical to Colorado

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[6] Available at https://www08.wellsfargomedia.com/downloads/pdf/com/insights/economics/regional-reports/Colorado_12302014.pdf.

[7] Recognition of the right of same-sex couples to marry can itself have a significant positive effect on a state's economy. A 2009 article in *Forbes* magazine estimated that nationwide legalization of same-sex marriage would result in $9.5 billion in additional wedding-related revenues alone. Miriam Marcus, *The $9.5 Billion Gay Marriage Windfall*, FORBES, June 16, 2009, *available at* http://www.forbes.com/2009/06/15/same-sex-marriage-entrepreneurs-finance-windfall.html. Similarly, a study published by the Williams Institute estimates that

from a business and economic-development standpoint. And that will become only more true in the future:

> Recent studies regarding the LGBT market's buying power and purchasing characteristics indicate that a high percentage of gay consumers are college-educated, shop online and purchase the latest technology. Among other traits cited, gay and lesbian consumers tend to be more optimistic than other Americans about the overall direction of the country and the economic recovery, an observation that has led industry analysts to anticipate that this group's spending may increase, despite the country's slow progress in regaining its financial health.

Diversity as an Engine of Innovation, *supra*, at 116. Moreover, many people will eschew businesses and communities that discriminate even if they, themselves, are not members of the disfavored class. Thus, there were and still are strong economic reasons—not to mention ethical ones—for Colorado's decision to expand its public-accommodations law to encompass sexual orientation.[8]

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legalization of same-sex marriage in Colorado would result in $50 million in spending over the first three years between the money that same-sex couples would spend on weddings and the money that their guests would spend to travel for the occasions. WILLIAMS INST., ESTIMATING THE ECONOMIC BOOST OF MARRIAGE FOR SAME-SEX COUPLES IN COLORADO (Apr. 2014), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Colorado-Econ-Impact-Apr-2013.pdf. Related expenditures on wedding gifts, honeymoons, and the like are not included in this figure but surely would be significant.

[8] The serious negative economic effects of excluding LGBT individuals from antidiscrimination laws are now equally clear. *See, e.g.*, MICH. DEP'T OF CIVIL RIGHTS, REPORT ON LGBT INCLUSION UNDER MICHIGAN LAW WITH RECOMMENDATIONS FOR ACTION (Jan. 28, 2013), *available at* http://www.michigan.gov/documents/mdcr/MDCR_Report_on_LGBT_Inclusion_409727_7.pdf (studying the negative economic effect of anti-LGBT discrimination

5. Although a rule of inclusion in the commercial sphere stimulates the economy generally, a subset of businesses may seek to profit through exclusionary practices. It is unfortunately still the case that some members of the public prefer to patronize establishments that exclude members of protected classes, and that some businesses cater to these odious preferences.

Indeed, the economic incentive to discriminate in order to cultivate a customer base among persons with discriminatory animus has played an outsize role in the history of overt discrimination and segregation in this country. As Gavin Wright, a scholar of American economic history, has explained: "The starting point for understanding conflict over public accommodations is the proposition that racial segregation [in the American South] was fundamentally a calculated business policy by profit-seeking firms. . . . The business motivation for segregation was relatively straightforward: [Businesses] feared that serving blacks, particularly in socially sensitive activities such as eating and sleeping, would result in the loss of white customers." Gavin Wright, *Southern Business and Public Accommodations: An Economic-Historical Paradox*, at 4-5 (2008).[9]

In light of this history, one can readily imagine businesses, such as those that provide wedding-related goods and services, dividing into two groups—one

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and recommending that Michigan's public-accommodations law be expanded to cover sexual orientation).

[9] Available at http://web.stanford.edu/~write/papers/ParadoxR.pdf.

serving same-sex couples and the other excluding them—with each group catering to separate clientele. Such a division might benefit the discriminatory enterprises that profit from the trade of like-minded customers, but this balkanization would invariably diminish the overall vitality and diversity of the market. [10]

In *amici*'s experience, state and local governments that allow this form of discrimination to flourish gain a deservedly bad reputation—and so do the communities that they govern, which become less desirable places for all types of people from all walks of life to live, work, and visit. The businesses that nonetheless adhere to the nondiscrimination principle in those environments will inevitably suffer too: Members of the community shop and dine out less often for fear that they will face discrimination when they venture into the market; tourism is depressed as travelers understandably avoid destinations where they may be shunned or otherwise made to feel unwelcome; and it becomes harder to recruit and retain talented employees, who may themselves be members of some disfavored class or may simply be unwilling to live and raise their children in an environment in which open and invidious discrimination is tolerated. *See Veto*

[10] In describing these economic incentives to discriminate, we do not question the sincerity of Masterpiece's dislike of same-sex marriage or doubt the genuineness of Masterpiece's professed motivation for discriminating against same-sex couples. Our point is just that, as a law of general applicability that ensures fair access to public accommodations, CADA removes the strong economic incentives that may otherwise encourage some businesses to discriminate.

follows business backlash over Arizona anti-gay bill, CNN MONEY, Feb. 26, 2014, http://money.cnn.com/2014/02/25/news/economy/arizona-anti-gay-bill (noting that many national corporations "urg[ed] [Arizona Governor Jan] Brewer to veto [a] bill" that would have allowed businesses to refuse to serve LGBT customers, "saying the law would be bad for the state's reputation and bad for business—repelling tourists, potential employees and current workers who live in the state"). And when businesses are forced expressly to reassure potential patrons that they do *not* discriminate, that simply underscores that those establishments are not the norm in the community and that the customers are not welcome everywhere.

If that is not bad enough, when some businesses trade on a reputation for discrimination, making it a selling point for their goods or services, they put competitive pressure on others to discriminate as well. At best, the result is economic balkanization; at worst, communities fragment and resegregate as providers of public accommodations are driven to serve only their own "kind" in order to survive.

These ills are precisely the ones that the antidiscrimination laws, such as CADA, were designed to forestall. *See, e.g.*, RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE *HEART OF ATLANTA MOTEL* AND *MCCLUNG* CASES 167 (2001) (describing testimony in the legislative history supporting the Civil Rights Act of 1964, including testimony that "racial discrimination by one

restaurant in a city encouraged the practice throughout the area because of the other proprietors' fear of the competitive advantage gained by the segregated restaurant in increased white trade"); *see also* Wright, *supra*, at 20 (contending that "Southern businessmen were locked into a low-level equilibrium, in which their own perception of prejudice on the part of white customers was a crucial factor").

6. To be sure, some individual firms will always profit from discrimination (and others may be driven to engage in similar or complementary discrimination in order to compete). But whatever these actors may gain at the expense of protected classes is vastly outweighed by the harms suffered by the business community, the broader economy, the State, and the citizenry as a whole. The incentives to backslide into invidious discrimination thus present a classic case for regulation: When individual economic actors are able to reap financial benefits from an activity without absorbing all the costs—that is, when they stand to profit from imposing so-called negative externalities on others, especially vulnerable or socially disfavored populations—regulation is appropriate to realign the incentive structure and thereby avoid or ameliorate the harms to the public.

That is what Colorado has wisely chosen to do in passing, expanding, reaffirming, and consistently enforcing its public-accommodations law. A reputation for discrimination in public accommodations could quickly curtail or even reverse the strides that Colorado has made, driving people to flee to more

hospitable, inclusive environments elsewhere. In the long run, this State will not benefit from a regulatory regime that permits economic rewards go to those who discriminate while imposing the costs of that discrimination on the individuals and businesses who would remain true to the antidiscrimination laws that have served Colorado and Coloradans so well for so long. *Amici* wish to see Colorado's economy continue to thrive. Only through the application of broad, uniform nondiscrimination principles can Colorado's place in the national economy be preserved.

II. MASTERPIECE'S ATTEMPTS TO EXEMPT ITSELF FROM CADA ARE LEGALLY AND FACTUALLY INDEFENSIBLE.

Masterpiece contends that its refusal to sell wedding cakes to same-sex couples—even though it would provide identical cakes to all other couples—does not constitute prohibited discrimination based on sexual orientation, and in any event should be permitted as an exercise of the bakery's free expression. Br. 6-10, 11-25. Neither purported justification for discrimination is legally defensible. Discrimination against gay couples who marry is discrimination against gay couples; to contend otherwise is simply not credible. And the sale of baked goods is ordinary commercial activity, not constitutionally protected speech.

Masterpiece and its proprietor are free to exercise their First Amendment rights by expressing their views about marriage between same-sex partners—or any other important questions of public policy—regardless of what those views

might be. What Masterpiece may not do under the laws of this State is to refuse goods and services to certain customers because of their sexual orientation. The First Amendment does nothing to override that prohibition.

A. Masterpiece Violated CADA By Refusing To Offer Its Services To Messrs. Craig And Mullins Because Of Their Sexual Orientation.

There can be no serious doubt that Masterpiece refused goods or services to Messrs. Craig and Mullins "because of" their sexual orientation (Colo. Rev. Stat. § 24-34-601(2)(a) (2014)), in contravention of CADA. The ALJ so found (Supp. PR. CF, Vol. 1, p. 714), and this Court should defer to that well-supported factual finding. Masterpiece contends that it refused to serve Messrs. Craig and Mullins based on their intended conduct—*i.e.*, entering into marriage with a same-sex partner—rather than their status—*i.e.*, being gay. But if CADA is to serve its goal of preventing discrimination in public accommodations and creating the uniformly welcoming business community that the General Assembly envisioned, that sort of artificial line-drawing must be rejected.

1. In essence, Masterpiece invites this Court to deem the act of marrying a same-sex partner to be wholly independent of one's sexual orientation, and based on that premise, Masterpiece asks the Court to regard discrimination against same-sex couples who are getting married as something entirely different from discrimination against same-sex couples qua same-sex couples. Br. 6-10. That is nonsense: Conduct cannot be divorced from status when the people engaging in the

conduct bear the status and the fact of the status relates to their engaging in the conduct. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (concluding that "discrimination on the basis of racial affiliation and association is a form of racial discrimination"). For that reason, the U.S. Supreme Court "ha[s] declined to distinguish between status and conduct in this context." *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 689 (2010). So should this Court.

Indeed, the New Mexico Supreme Court reached precisely the same conclusion under that state's antidiscrimination law, in a case that is indistinguishable from this one. In rejecting the proffered status-conduct distinction and hence denying a wedding photographer's claim of a constitutional right not to photograph weddings of same-sex couples, the New Mexico court held that permitting "discrimination based on conduct so closely correlated with sexual

orientation would severely undermine the purpose of" New Mexico's antidiscrimination law. *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 61 (N.M. 2013).

2. Eschewing all the case law dealing with discrimination against "homosexual conduct" (*Lawrence*, 539 U.S. at 575), Masterpiece looks instead to *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), as support for its proffered status-conduct distinction. Br. 7-10. But even if *Bray* could somehow displace the U.S. Supreme Court's more pertinent later decision in *Lawrence*, it would be of no help to Masterpiece here. To be sure, *Bray* declined to equate opposition to voluntary abortion with discrimination against women. Yet *Bray* also recognized that, under certain circumstances, conduct is so closely related to a particular class of persons that disfavor of the conduct is necessarily also discrimination against the class: "Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews." *Id.* at 270. So too, an attack on weddings of same-sex couples is an attack on same-sex couples.

Masterpiece's insistence that it did not "target[] homosexuals as a group or . . . target[] Complainants" because it focused on unions of same-sex couples (Br.

9) misses the point. When, as here, there is no daylight between conduct and status, discrimination against a protected class may be presumed from the targeting of an activity engaged in by members of that protected class. *See Bray*, 506 U.S. at 270. As the ALJ properly recognized, opposition to the marriage of same-sex partners is simply not like the opposition to abortion in *Bray*. While it is certainly true that women alone have the capacity to become pregnant and therefore only women may conceivably have abortions, opposition to abortion typically is not reducible to views regarding women as a class. The same cannot be said for Masterpiece's objection to same-sex marriage, which is "inextricably tied to the sexual orientation of the parties involved" (Supp. PR. CF, Vol. 1, p. 714).

Citing the staged marriage of two heterosexual men for a radio competition, Masterpiece counters that the ALJ "wrongly assume[d]—without supporting evidence—that only homosexual couples engage in same-sex weddings." Br. 7 & n.1. That contention cannot be taken seriously. The test in *Bray* is whether the conduct that is the object of unfavorable treatment is "engaged in . . . *predominantly* by" members of a protected class. 506 U.S. at 270 (emphasis added). A single publicity stunt hardly disproves the obvious fact that it is predominantly not heterosexual people who get married to partners of the same sex.

As for Masterpiece's attempt to import from *Bray* a requirement that there must be a "desire to cause harm to an identifiable group" or "disdain or ill will toward homosexuals" to trigger CADA's protections (Br. 8), *Bray* itself explicitly refutes such a requirement. *See* 506 U.S. at 269-70 ("We do not think that the 'animus' requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It . . . [merely] demand[s] . . . a purpose that focuses upon women by *reason of their sex* . . . ."). In all events, CADA on its face has no malice requirement and is to be "liberally construed in favor of the legal remedies which it provides," in light of its "beneficent purpose" (*Adolph Coors*, 486 P.2d at 46).

3. Nor is there any doubt that Masterpiece discriminated against Messrs. Craig and Mullins on the basis of sexual orientation, whatever Masterpiece's motivation for doing so might have been. CADA prohibits businesses that are open to the general public from discriminating either "directly or indirectly" on the basis of customers' sexual orientation. Colo. Rev. Stat. § 24-34-601(2)(a) (2014). While *amici* believe that Masterpiece's refusal to sell a cake to a same-sex couple is direct discrimination, even on Masterpiece's own view of its conduct the refusal to provide cakes for the weddings of same-sex couples must be regarded as indirect discrimination at the very least, because the weddings of same-sex couples function as a proxy for the couples themselves. Like its New Mexico counterpart in

Elane Photography, CADA "prohibits public accommodations from making *any* distinction in the services they offer to customers on the basis of protected classifications. . . . [It] does not permit businesses to offer a 'limited menu' of goods or services to customers on the basis of a status that fits within one of the protected categories." *Elane Photography*, 309 P.3d at 62 (emphasis added).

Refusing to sell cakes to be used at the weddings of same-sex couples is no different either structurally or legally from refusing to sell cakes for the weddings of couples in which the bride and groom are of difference races or religions. Protestations in those circumstances that a bakery was not unlawfully discriminating against blacks or Jews, for example, because it was declining to serve only those blacks who marry whites or those Jews who marry Christians would ring hollow. So too must Masterpiece's argument here.

* * *

Public-accommodations statutes like Colorado's 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 [such statutes] do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995); *see also Dist. of Columbia v. Thompson Co.*, 346 U.S. 100, 109 (1952) ("[C]ertainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the

basis of race in the use of facilities serving a public function is within the police power of the States."). That is because these laws do not "target speech or discriminate on the basis of its content, [but instead] foc[us] . . . on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on . . . proscribed grounds." *Hurley*, 515 U.S. at 572. Colorado's public-accommodations law does not prohibit businesses from either expressing their views on the issues of the day or branding themselves as they see fit; it merely prevents refusals of service based on a customer's membership in a protected class.

B. Masterpiece's Argument That Commercial Baking Is First Amendment-Protected Expressive Activity Is An Unlimited, Unwarranted, And Unacceptable End-Run Around CADA.

1. Selling baked goods is not constitutionally protected speech.

While baking wedding cakes undeniably involves creativity, selling baked goods is ordinary commercial conduct, not speech. And refusing to sell cakes to members of a legally protected and historically disfavored class is not protected speech for purposes of the First Amendment.

The United States Supreme Court stated long ago that it "c[ould] not accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Selling a cake is not inherently

symbolic expression, and Masterpiece's attempt (Br. 12 & nn.2-3) to equate it to holding a parade (*Hurley*, 515 U.S. at 568) or wearing an armband to protest the Vietnam War (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969)) or refusing to salute the American flag (*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)) or displaying a Communist Party banner (*Stromberg v. California*, 283 U.S. 359, 369-70 (1931)) or engaging in exotic dance (*Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion)) does not change that fact.

Masterpiece assures this Court that refusing to sell to same-sex couples is symbolic expression of its distaste for and disagreement with extending the institution of marriage to same-sex couples. But if that were enough to transform commerce into protected speech, it would also justify any other refusal of service because turning a customer away based on membership in a disfavored group will almost inevitably communicate a message of disapprobation. Declining to sell a loaf of bread to a customer who is gay could be defended as expression of disagreement with "the homosexual lifestyle." Excluding people of color from one's store could be justified as a statement about how blacks and whites should not be allowed to interact. Refraining from providing handicap access could be defended as a statement about how people should not be allowed to "flaunt" their

disabilities in public. And hiring only male employees could be justified as making a statement about how women should not be permitted to work outside the home.

The point is not, of course, that commercial activity can never involve expressive content. Rather, it is that the *bare act* of engaging in commerce is not symbolic speech. Yet that is precisely what Masterpiece is claiming when it hyperbolically contends that "the Commission's order compels [it] to design and create any conceivable wedding cake requested of him, . . . includ[ing] a wedding cake stating 'Jack Phillips [Masterpiece's proprietor] supports same-sex marriages' or 'Jesus endorses same-sex marriages'" (Br. 14). In fact, the Civil Rights Commission merely ordered Masterpiece to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [that the bakery] would sell to heterosexual couples." *See* Supp. PR. CF, Vol. 1, p. 627-28.[11]

Nothing about that order would compel Masterpiece to prepare a pornographic cake, for example, just because the person who ordered it happens to be gay or black or Jewish. But it does mean that Masterpiece may not refuse to sell an "off the shelf" cake to a same-sex couple when it would sell precisely that same cake to an opposite-sex couple. Yet that is what Masterpiece did: Masterpiece

[11] The relevant page from the Commission's final order was inadvertently omitted from the record. There is a pending motion to supplement the record so that it includes the missing page.

apparently did not wait to hear what Messrs. Craig and Mullins wanted on their cake. Instead, it simply refused to serve them out of hand, and it now defends that refusal of service by contending that "the wedding cake itself—without words or figurines, is protected symbolic speech" (Br. 13).[12] If Masterpiece's argument were correct, as a practical matter there would be no way to differentiate between improper status-based refusals to sell and refusals based on a merchant's desire to express and communicate a message of disdain for a protected status or the people who bear that status. CADA would be riddled with loopholes and businesses would be entirely without guidance about what the law actually requires or how to comply with it.

[12] It is also no answer for Masterpiece to say that it is not discriminating against same-sex couples because it would refrain from providing cakes that "express[] a positive message about same-sex marriage, whether requested by homosexuals, heterosexuals, or others" (Br. at 7). "[I]f anything, these arguments support a finding that [Masterpiece] intended to discriminate against [would-be customers] based on [their] same-sex sexual orientation." *Elane Photography*, 309 P.3d at 62-63. Masterpiece's description of its conduct as refusing to design and produce cakes that "express a positive message about same-sex marriage" must be considered in light of its insistence that providing any cake at all for a wedding of a same-sex couple—regardless of whether the cake has words, figurines, or anything else on it—would express such a message. Replace sexual orientation with race, and the fallacy is clear: Could Masterpiece justify refusing to sell wedding cakes to African-American couples by asserting that it would not engage in business that "expresses a positive message about African-Americans getting married, whether requested by African-Americans, whites, or others"? We think not.

2. Even if baking wedding cakes involved speech, the obligation to sell cakes for use at same-sex weddings on the same terms as opposite-sex weddings would not be unconstitutional compelled speech.

Even if selling cakes were expressive activity, neither CADA nor the Commission's order would impermissibly compel speech. Masterpiece relies on *Wooley v. Maynard*, 430 U.S. 705 (1977), in asserting that Colorado is impermissibly "punish[ing] [a] private actor[] for refusing to engage in unwanted expression." Br. 17. There can be no doubt that compelling private actors to speak the government's favored message may raise First Amendment concerns. *See, e.g.*, *Barnette*, 319 U.S. at 642. But "the United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation." *Elane Photography*, 309 P.3d at 65. Public-accommodations laws give rise to potential constitutional concerns solely "when states have applied [them] to free-speech events such as privately organized parades and private membership organizations," not when they regulate "a clearly commercial entity that sells goods and services to the public." *Id.* at 66 (internal citations omitted).

A First Amendment violation based on compelled speech can occur, if at all, only where the government compels an "individual personally [to] speak the government's message," or where the government "force[s] one speaker to host or accommodate another speaker's message." *Rumsfeld v. Forum for Academic &*

Institutional Rights, Inc., 547 U.S. 47, 63 (2006); *see, e.g.*, *Jerry Beeman & Pharmacy Servs. v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085, 1098 (9th Cir. 2011) ("Even as broadly construed, . . . the holdings of both *Barnette* and *Wooley* are limited to compelled speech that affects the content of the speaker's message by touching on matters of opinion, or to compulsions that force the speaker to endorse a particular viewpoint."), *vacated on other grounds*, 741 F.3d 29 (9th Cir. 2014) (en banc); *Elane Photography*, 309 P. 3d at 63-65 ("Elane Photography reads *Wooley* and *Barnette* to mean that the government may not compel people 'to engage in unwanted expression.' However, the cases themselves are narrower than Elane Photography suggests; they involve situations in which the speakers were compelled to publicly speak the government's message." (internal quotation marks omitted)).

This case has nothing to do with forcing private actors to voice the government's message on gay rights, any more than prohibitions against "Whites Only" lunch counters compel restauranteurs to espouse the government's message on racial equality. The pertinent question for First Amendment purposes is whether a private party is being made to parrot the government's message in its own speech, not whether it must conform its conduct to the law's prohibitions against discrimination. There is no mandated speech here.

What is more, even actual compelled speech does not violate the First Amendment if "the State's countervailing interest is sufficiently compelling to justify requiring [the compulsion]." *Wooley*, 430 U.S. at 715-16. Thus, the compelled-speech doctrine has little bearing when, among other things, the asserted right "brings [the refusers] into collision with rights asserted by any other individual." *Barnette*, 319 U.S. at 630. Masterpiece asserts the right to engage in invidious discrimination so as to communicate its message that invidious discrimination is a good thing—or that being gay is not. We are aware of nothing in First Amendment jurisprudence that requires Mr. Craig, Mr. Mullins, or any other Coloradan to be victimized by discrimination in public accommodations in order to allow Masterpiece to express that view.

For similar reasons, Masterpiece cannot legitimately invoke cases in which the government forces a private party to "host or accommodate another speaker's message." *Rumsfeld*, 547 U.S. at 63 (rejecting the claim that requiring law schools to treat military recruiters the same way as civilian recruiters forces the schools to communicate a message of agreement with the military's Don't Ask, Don't Tell policy). There can be a First Amendment violation under the "host or accommodate" cases only if "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* Although Masterpiece contends that the Commission's order requiring it to sell wedding cakes to same-sex couples

on the same terms as it sells to opposite-sex couples "irreversibly alters" the bakery's message about the meaning of marriage and "effectively requires [Masterpiece] to disavow [its] religious beliefs about marriage" (Br. 21-22), that is precisely the argument that the Supreme Court rejected in *Rumsfeld*:

> The schools respond that if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do. . . . Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. . . . *[S]tudents can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy*.

547 U.S. at 64-65 (emphasis added).[13]

What was true in *Rumsfeld* is all the more true here. Unlike a law school, a bakery is not an institution that people would normally expect to espouse firm and fierce convictions on social issues in and through its routine sales of baked goods.

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[13] By contrast, in *Miami Herald Publishing Co. v. Tornillo*, a newspaper publisher challenged a Florida statute that required it to publish a response to any editorial critique that the paper published of a politician. 418 U.S. 241 (1974). In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, a utility company challenged an administrative regulation requiring it to include a third party's message together with the newsletter that the utility distributed to customers with their monthly bills. 475 U.S. 1 (1986) (plurality opinion). And in *Hurley*, a parade organizer challenged a court order requiring it to include an LGBT group in a parade. 515 U.S. 557. None of these cases involved a public accommodation refusing service to members of a protected class.

CADA eliminates any possible presumption that the mere act of selling a good or service communicates a message that the business endorses the customer, because it should be readily apparent to observers that obeying a legal requirement not to discriminate says nothing whatsoever about whether one harbors animus.

To be sure, proprietors of small businesses may have strong views on social issues and may wish to engage in public debate on those issues. This *amicus* brief itself belies any suggestion to the contrary. But *amici* represent a diverse array of political and social views, and we each often serve customers with whom we disagree, perhaps vehemently. Customers may patronize our establishments, or not, because of our expressed views, or they may be indifferent to those views when they choose whether to do business with us as opposed to our competitors.

Either way, though, our experience is that patrons normally do *not* view us as engaging in expressive activity in the ordinary course of providing goods or services for sale; and they do not normally draw any conclusions about our political, social, religious, or philosophical perspectives from the bare fact that we comply with the antidiscrimination laws to which we are all subject. Unlike the law schools in *Rumsfeld*, which are in the business of communicating and often endorsing ideas, a bakery is normally presumed by its customers to be acting as a bakery, not as a political speaker, unless it goes out of its way to present itself as a

speaker. To suggest otherwise is simply to mischaracterize how businesses—even sole proprietorships—operate and how customers perceive them.

* * *

If this Court were to conclude that Masterpiece is a speaker for First Amendment purposes and that CADA must therefore give way whenever Masterpiece refuses to sell a cake to a would-be customer based on that individual's membership in a disfavored class, the Court would effectively nullify CADA. And in so holding, it would not just override the General Assembly's considered judgment that public accommodations should be open equally to all people regardless of race, sex, religion, national origin, sexual orientation, and disability. It would also send the message that Colorado is a place where overt discrimination is tolerated and people of diverse backgrounds, faiths, and orientations are not. That message is not one that the First Amendment requires. And it is not one that will benefit this State, its citizens, or its economy. Allowing Colorado to continue to enforce its antidiscrimination laws will do no violence to Masterpiece's or anyone else's free-speech rights, but it will help to preserve the State's reputation as a place where people want to live, work, and play.

CONCLUSION

The judgment of the Colorado Civil Rights Commission should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2015, a true and correct copy of the foregoing **BRIEF FOR MAIN STREET ALLIANCE, HOPSCOTCH BAKERY AND GARY'S AUTO SERVICE AS *AMICI CURIAE* SUPPORTING PETITIONERS** was filed and served via ICCES on the following:

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