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 FOR THE RESTORING RELIGIOUS FREEDOM PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MARK GOLDFEDER
ANTON SORKIN
Restoring Religious Freedom Project
Emory University
School of Law
Gambrell Hall,
Suite 310
1301 Clifton Road
NE
Atlanta, GA 30322

DAVID I. SCHOEN
Counsel of Record
2800 Zelda Road
Suite 100-6
Montgomery, AL 36106
(334) 395-6611
Dschoen593@aol.com

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INTEREST OF AMICI[1]

Amici are academics and practitioners who write and work in the field of law and religion. Our interest is in making sure that the proper balance is struck in this complicated First Amendment issue. Amici support same-sex marriage, and yet also feel that the false dichotomy between "equality" and "religion" is dangerous for our country.

David Schoen has 30 years of extensive experience throughout the nation as lead counsel in trial and appellate level complex litigation cases. In addition to his law practice, he has taught as an adjunct professor in the fields of Criminal Procedure, Trial Skills, and the First Amendment. He has lectured in different continuing legal education programs in these fields, and in others including Legal Ethics, Civil Rights Litigation, Evidence, and litigation under the Anti-Terrorism Act.

Mark Goldfeder is Senior Lecturer at Emory Law School, Senior Fellow at the Center for the Study of Law and Religion, Director of the Law and Religion Student Program, and the Director of the Restoring Religious Freedom Project at Emory, where he works with graduate fellows including Mr. Amin Sadri, JD, LLM and Mr. Andrea Natale, JD. He is also adjunct professor of Religion at Emory University and an adjunct Professor of Law at

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[1] Amici curiae affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund this brief. No person, other than amici, made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties have consented to the filing of this brief.

Georgia State University. He has written dozens of articles on law and religion topics.

Anton Sorkin is a graduate student at Emory University's Center for the Study of Law and Religion. He received his JD from Regent University School of Law and his LLM in Law and Religion from Emory University School of Law. He has worked extensively on various projects in the area of law and religion.

SUMMARY OF ARGUMENT

The Colorado Court of Appeals, in upholding its broad antidiscrimination provision, failed to properly consider Petitioner's sincerely held beliefs and the competing First Amendment defenses available in this case. By classifying the issue at stake to be a matter of identity based discrimination, the State of Colorado attempts to create a loophole in this Court's First Amendment jurisprudence whereby statutory rights can override constitutional guarantees so long as the claimant's alleged violation is worded through the lens of status discrimination. This goes against the notion that "the Constitution ought to be preferred to the statute." The Federalist No. 78 (Alexander Hamilton). It also cuts against this Court's intent in *Obergefell*, which added language specifically to protect religious organizations and persons from being made complicit in the celebration of same-sex marriage if it is against their religious beliefs. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

We ask this Court to correct this error and to incorporate the First Amendment defenses in respect to the Petitioner's sincerely held religious beliefs—in particular here, a right to expressive association. The hybrid rights of religion and speech should be strictly protected.

ARGUMENT

The Petitioner ("Jack C. Phillips") owns and operates Masterpiece Cakeshop, LTD., a bakery in Colorado, where he sells baked goods and creates designer wedding cakes that he considers to be "a form of art." *Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 277 (Col. Ct. App. 2015). While engaged in his work, Phillips was asked by the Respondents—a same-sex couple—to design and deliver a wedding cake for their upcoming wedding ceremony. Phillips refused to do so for religious reasons, as it is his sincerely held religious belief that providing the cake for a same-sex wedding ceremony would be displeasing to God. *Id.* In fact, Mr. Phillips assured the Respondents that he "would design and create any other bakery product for them, just not a wedding cake." *Id.* at 280. Mr. Phillips has been an observant Christian for approximately 35 years and has been a baker for 22-years; the State of Colorado now demands that he choose between his God and his livelihood. *Id.* at 277; *Brief for Petitioner* (SCOTUS) at 4.

Amici support legalized same-sex marriage, and are not asking this Court to re-consider the merits of *Obergefell* or any of the other important same-sex equality cases. In fact, we simply ask the Court to uphold the very language of that decision in ensuring that the First Amendment continues to protect religious organizations and persons who "continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell*, 135 S. Ct. at 2607. Nor do Amici believe that the LGBT-community deserves to be discriminated against or

feel again the weight of second-class citizenship. We simply ask this Court to reject the legal fiction of conflated "content/identity" discrimination, and keep each category separate. In doing so we hope the Court will recognize the competing First Amendment rights that entitle Jack Phillips to have his case heard under the strict scrutiny hybrid-rights doctrine laid out in *Employment Division v. Smith*. 494 U.S. 872, 882 (1990).

I. THE COLORADO COURT OF APPEALS VIOLATED THIS COURT'S JURISPRUDENCE ON SINCERITY BY REFUSING TO ACKNOWLEDGE A DISTINCTION BETWEEN IDENTITY AND CONDUCT BASED DISCRIMINATION.

In general, courts are forewarned about challenging the veracity of a claimant's sincerely held religious beliefs. Anna Su, *Judging Religious Sincerity*, 3(1) Oxford J. L. & Rel. 28, 31 (2016). The "law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *United States v. Ballard*, 322 U.S 78, 86 (1944) (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1872)). "The [First] Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. Connecticut*, 310 U.S. 296, 303–4 (1940).

The Establishment Clause demands that states remain neutral on the question of faith: neither favoring nor inhibiting religion. *See, e.g., Everson v.*

Bd. of Ed. of Ewing Twp., 330 U.S. 1, 18 (1947); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring); *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669, (1970). Infringement can happen when government either endorses or disapproves of religion thereby sending "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S. Ct. 1355, 1367, 79 L. Ed. 2d 604 (1984) (O'Connor, J., concurring). In *Lemon v. Kurtzman*, this Court prohibited a state's entanglement with religion, noting that the "objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." 403 U.S. 602, 614 (1971). When the "government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring).

In *Lee v. Weisman*, this Court proscribed indirect government coercion in an instance where an individual's religion forbade them from passively taking part in what they considered to be a religious aspect of a secular ceremony. 505 U.S. 577 (1992). In this case, the government is coercing Phillips by effectively threatening to destroy is livelihood in an instance where his sincerely held belief is that his religion forbids him from taking part in what he considers to be a religious aspect of a secular

ceremony. Note that Phillips is not claiming this is a religious ceremony, nor is he asking the Court to declare religion in any way; he is merely asking that they do not force him to engage in what he considers to be the sin of religious complicity in a secular ceremony.

This Court has stated time and again that the door of the Free Exercise Clause stands tightly closed to government regulation of religious beliefs, punishment of doctrines the government finds false, the questioning of the centrality of a particular belief, and the conditioning of a benefit on violating a religious tenet. *Emp't Div., Dep't of Human Resources of Or. v. Smith*, 494 U.S. 872, 877 (1990); *Hernandez v. C.I.R.,* 490 U.S. 680, 699 (1989); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 402–03, 406 (1963); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

While courts must inquire to some degree regarding the beliefs of an individual, scholars and jurists have suggested what the depth and breadth of this inquiry should be. Richard Garnett wrote that "public officials may inquire into the sincerity, but not the consistency, reasonableness, or orthodoxy of religious beliefs." Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 Notre Dame L. Rev. 837, 848 (2009). The Tenth Circuit summarized these principles in its *Hobby Lobby* decision, which this Court went on to affirm, when it wrote that the claimants had "drawn a line at providing coverage for drugs or devices they consider inducing abortions, and it is not for us to question whether the line is reasonable." *Hobby Lobby Stores, Inc. v.*

Sebelius, 723 F.3d 1114, 1141 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *accord Thomas*, 450 U.S. at 715. This does not mean that judges cannot hold orthodox beliefs, but it does mean that in the arena of judicial decision-making, judges are to refrain from deciding questions relating to orthodoxy. *Cf.* Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property,* 98 Colum. L. Rev. 1843, 1844 (1998) ("[g]overnment must keep out of internal problems of religious bodies when those problems concern religious understandings").

Courts are, however, given some latitude to distinguish a sincerely held religious belief from a sham purpose or pretext held in an effort to obtain the benefits of the statute. Su, *supra*, at 32; *see also Cutter v. Wilkinson*, 544 U.S. 709, 725 n. 13 (2005) ("prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic"); *United States v. Seeger*, 380 U.S. 163, 185 (1965) ("threshold question of sincerity" is whether a belief is "truly held"); *Burwell,* 134 S. Ct. at 2774 n. 28 ("a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail"). Looking again to the Tenth Circuit and their examination of a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), summarized this discretion, writing that sincerity requires determining whether a claimant "is seeking to perpetrate a fraud on the court" or "whether he actually holds the beliefs he claims to hold." *Yellowbear v. Lampert*, 741 F.3d 48, 54 (10th Cir. 2014); *Davila v. Gladden,* 777 F.3d

1198, 1204 (11th Cir. 2015) (same). In extreme cases, a court can also refuse to acknowledge a "claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas*, 450 U.S. at 715; *see also Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819 at 824 (D. Neb. 2016) (court ruled that FSMism [i.e. Flying Spaghetti Monster] is beyond the protection of RLUIPA); *Brown v. Pena*, 441 F. Supp. 1382, 1385 (S.D. Fla. 1977) (eating cat food was not a religious belief entitled to constitutional protection).

The Colorado Court of Appeals ignored the sincerely held beliefs of Petitioner[2] by conflating his refusal to provide a service in celebration of a same-sex wedding (conduct) with a refusal to serve the customer on the basis of that customer's sexual orientation (identity). *Masterpiece Cakeshop*, 370 P.3d at 280. The Court used a boilerplate string of citations that purvey the doctrine of refusal to make the status/conduct distinction, citing to this Court's decision in *Obergefell* to support the conclusion that in some instances, a person's conduct and status remains inextricable and attempts to pry them apart will not be legally cognizable. *Id.* at 280–81. In essence, all the court did was place its thumb on the proverbial scale of protected class jurisprudence, where sexual orientation takes primacy over

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[2] The ALJ found that Phillips... Believes...he would displease God by creating cakes for same-sex marriages. Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶ 4, 370 P.3d 272, 277, cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), and cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

religious identity, and viable First Amendment defenses are interpreted as calls for returning to the days when business owners refused to serve black customers.

There are a number of problems with this approach that need resolution. First, Phillips is not denying the couple their right to get married; he is refusing to be complicit in the underlying conduct, because his religion refuses to accept the ideological basis for the wedding. As this Court pointed out, a traditional view on marriage can be held "based on decent and honorable religious or philosophical premises[.]" *Obergefell*, 135 S. Ct. at 2602. Although they ruled that the statute does not require intent, the Colorado Court of Appeals said that his views are rooted in discriminatory animus. *Cf. Masterpiece Cakeshop Court* 370 P.3d at 282 ("the ALJ reasonably could have inferred from Masterpiece's conduct an intent to discriminate against Craig and Mullins because of' their sexual orientation). The dissenters in *Obergefell* predicted this would happen when they noted that the disparaging remarks of the majority tend to lay an indictment "on the character of fair-minded people" and move us farther away from a simple right to protect same-sex marriage, into the arena of portraying everyone who does not share the majority's "better informed understanding" as bigoted. *Obergefell,* 135 S. Ct. at 2626 (Roberts, J., dissenting). What the Court hinted to in *Obergefell* is what the Court is currently faced with in the case at bar: the beliefs of individuals—should they ever choose to change them—do not change overnight. Here, Mr. Phillips is forced to make a fundamental choice between his

livelihood and his religious beliefs, something he simply should not have to do.

Second, individual dignity is deeply connected with a constitutional right to freedom of religion. *Burwell*, 134 S. Ct. at 2785 (2014) (Kennedy, J., concurring) ("In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity"). Applying this logic, denying Phillips his sincerely held beliefs is tantamount to denying his very dignity since the Christian identity is inextricably connected with the conduct of abstaining from sin. Specific to Phillip's refusal, the New Testament considers sinful not only those who engage in sinful behavior, but perhaps even worse those who "give approval to those who practice [sinful behavior]." *Romans* 1:32; *see also* Thomas R. Schreiner, Romans 100 (1998) ("Those who encourage others to pursue evil commit a greater evil in that they foment the spread of evil and are complicit in the destruction of others.") A court cannot simply dismiss Phillips' beliefs as incorrect without engaging in the question of religious veracity prohibited by this Court. The First Amendment is adamant that the individual right to speech and association entail a right to be wrong and a right to join in associating with others who hold wrong beliefs. *See Boy Scouts*, 530 U.S. at 651 ("not the role of the courts to reject a group's expressed values because they disagree with those values"); *Democratic Party of United States v. Wis. ex rel. La Follette,* 450 U.S. 107, 124 (1981) ("as is true of all expressions of First Amendment

freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); *Thomas*, 450 U.S. at 714 ("religious beliefs need not be acceptable, logical, consistent, or comprehensible . . . in order to merit First Amendment protection"). Michael McConnell reminds us that in "the liberal tradition, the government's role is not to make theological judgments but to protect the right of the people to pursue their own understanding of the truth, within the limits of the common good." *Why Protect Religious Freedom?,* 123 Yale L. J. 770, 781 (2013). As this Court has rightly pointed out, "protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts*, 468 U.S. at 622.

Again, the dissenters in *Obergefell* foresaw these concerns. For example, Justice Roberts noted that the majority "suggests that religious believers may continue to 'advocate' and 'teach' their views on marriage," while conspicuously failing to affirm the right to act (or exercise) on those beliefs. *Obergefell,* 135 S. Ct. at 2625 (Robert, J., dissenting). Legal scholars have also noted the oddity of positing "some 'humiliation and dignitary harm' as a trump on the side of a disappointed customer, without recognizing that the mandated services now impose humiliation and dignitary harm on business proprietors who are also human beings[.]" Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts As A Human Right*, 66 Stan. L. Rev. 1241, 1283 (2014). There are plenty of other voices who offer much needed

clarification concerning the false-comparison between status and conduct based discrimination in this type of case. Professor Carlos A. Ball, for example, notes that it is false to label unequivocally "all business owners who refuse on religious grounds to provide goods and services to same-sex couples [as bigots]," especially if that owner (like Phillips) is otherwise willing to serve the gay couple in a different context (for example a non-wedding related request). *Bigotry and Same-Sex Marriage*, 84 UMKC L. Rev. 639, 642 (2016). An amicus brief in favor of a similar business owner from Washington signed by nearly thirty of today's leading First Amendment scholars on both sides of the marriage debate has also taken the position that a proper distinction must be made between religious objection in celebrating a same-sex marriage and a particular *non-objection* to serving same-sex customers. *Brief of Legal Scholars in Support of Equality and Religious and Expressive Freedom as Amici Curiae* at 3, State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (No. 91615-2). The brief argued that by failing to make this distinction, lower courts undervalued the owner's "constitutional rights by misinterpreting her religious convictions as offensive and invidious." *Id.* at 4. While the brief points out instances of discriminatory practices based on secondary justifications (i.e. refusing entrance to black customers for fears of being robbed)—without which antidiscrimination laws could not survive—it distinguishes the facts in cases like the one at issue here because the justification offered by the owner for her refusal was unrelated to the couple's sexual orientation. *Id.* at 6. Of course, it is always possible

that the owner and others will use some pretense as a cover for bigotry, but a court cannot and should not simply assume that into the record. *Id.* The brief noted how an oversimplified conflation clouded the State's determination of "*prima facie* liability" and its "dismissive treatment of [the owner's] constitutional defenses." *Id.* at 10. This is equally true of Jack Phillips' defenses in this case.

This Court should clarify the constitutional issue regarding sincerity and the distinction between discrimination based on identity (as exemplified in cases dealing with, e.g., race or gender) and that based on ideological disagreements.

II. THE COLORADO COURT OF APPEALS IGNORED VIABLE FREEDOM OF ASSOCIATION DEFENSES

The First Amendment guarantees the freedom of association. Erwin Chemerinsky, Constitutional Law: Principles and Policies 1198 (4th ed. 2011); *see also Roberts v. Jaycees,* 468 U.S. 609, 618 (1984) ("[F]reedom of association receives protection as a fundamental element of personal liberty . . ."). It extends First Amendment solicitude for free speech to include the liberty of individuals to gather together to advance a common purpose, declare a common belief, engage in common worship, or petition the government for common relief, without state interference and irrespective of one's religious or secular beliefs. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 565 U.S. 171, 189 (2012)*; Roberts*, 468 U.S. at 622; *New York State Club Ass'n v. New York*, 487 U.S. 1, 13 (1988); *Knox v. SEIU, Local 1000*, 567 U.S. 298,

308, 132 S. Ct. 2277, 2288 (2012); *City of Bremerton v. Widell,* 146 Wash. 2d 561, 575, 51 P.3d 733, 740 (2002). It emerged historically in the context of protecting the right to hold unpopular views—which Amici believe include those espoused by Phillips—and remains a stepping stone towards a "full promise of liberty." *See Obergefell*, 135 S. Ct. at 2600.

Recent trends show that views around sexual morality are changing, particularly with the younger generation and in no small part due to the contribution of this Court. Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?,* 4 Oxford J. L. & Religion 373 (Oct. 2015); Margaret E. Tankard and Elizabeth L. Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitude*, Psychological Sci. (July 31, 2017) (studies show that *Obergefell* ruling increased social norms in support of gay marriage). For these reasons, consideration must be provided for those like Jack Phillips in a landscape increasingly hostile to his views.

A. The Supreme Court has a history of extending the right to freedom of association to Christian groups facing discrimination claims from the LGBT community.

This Court should consider the ramifications of forcing religious adherents to choose between their

religion and their business.[3] This Court has dealt with the issue of freedom of association and perceived LGBT discrimination in three applicable cases. In each, the Court was careful to balance the interest of both groups and in many instances extend the right to freedom of association despite the undoubtedly important interest of preventing discrimination.

First, in *Hurley v. GLIB*, this Court looked at whether Massachusetts can allow a private parade organizer to exclude a group of marchers who sought to take part in the procession beneath a

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[3] "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1139 (10th Cir. 2013), *aff'd sub nom*. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (court noted that *Lee* "demonstrate[d] that the burden analysis does not turn on whether the government mandate operates directly or indirectly, but on the coercion the claimant feels to violate his beliefs"). The Supreme Court has said that the fact that the harm came from private actors is irrelevant if state pressure is the proximate case leading to diminished capacity for association. *See Alabama,* 357 U.S. at 463. The issue in *Lee,* like the issue here, deals with the concern of facilitating wrongdoing according to a religious belief. *Id.* at 1139. As the Supreme Court noted in *Burwell*, "a law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2770 (2014) (citing Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).

banner that celebrated likeminded individuals within the Irish gay, lesbian, and bisexual community. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 570, 572 (1995). The law being cited by the marchers prohibited discrimination[4] in the admission of any person into a "place of public accommodation, resort or amusement" in an effort to ensure that discrimination against individuals be eliminated in the "provision of publicly available goods, privileges, and services." *Id.* at 572. However, the Supreme Court refused to classify the private parade as a form of public accommodation thereby forcing the "communication produced by the private organizers [to] be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own." *Id.* at 573. While the audience may not attribute each message to the parade organizers, the Court noted that "in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Id.* at 577.

As with Jack Phillips, the organizers of the parade had no intention of excluding members of the LGBT community from marching in the parade on

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[4] "[T]he object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 578 (1995).

the basis of their sexual orientation. *Id.* at 572. Instead, the disagreement was really with allowing them to march beneath a banner that advocated a message at odds with the intended "expressive content" of the parade organizers. *Id.* at 572–73. This Court in ruling for the parade organizers held that laws may certainly have a broader objective in prohibiting acts of discrimination toward certain classes in order to produce a society bereft of corresponding biases, but the law is not "free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579.

Given the cultural debate on same-sex marriage, both sides are keeping a close eye on the "individual presentations" of public figures and businesses alike in an effort to perceive endorsement. It makes sense why Colorado would want to avoid the inference of bias against the LGBT community lest they be made a target of boycotts as seen in other states. *See, e.g.,* Kay Steiger, *The Growing Backlash Against Indiana's New LGBT Discrimination Law,* Think Progress (Mar. 27, 2015), https://think progress.org/the-growing-backlash-against-indianas-new-lgbt-discrimination-law-68727eff4f02/; Jackie Wattles, *Georgia's 'anti-LGBT' bill: These companies are speaking out the loudest*, CNN Money (Mar. 25, 2016), http://money.cnn.com/2016/03/25/news/companies/georgia- religious-freedom-bill/index.html. While amici are sympathetic to these concerns, Phillips has no interest in discriminating against the LGBT community, but simply refuses to participate in their weddings. In light of the importance of private

speech to this nation, the Court in *Hurley* held that the "disapproval of a private speaker's statement does not legitimize use of Commonwealth's power to compel the speaker to alter" their message. *Hurley*, 515 U.S. at 579, 581. We simply ask this Court to consider the links[5] between speech and association as viable First Amendment defenses to anti-discrimination laws in light of the holding in *Hurley* as a helpful analogy to Phillips' own desire to proverbially "walk beneath a banner" alongside others that reflects his own particular viewpoints on marriage, a point made clearer in the next case.

Second, in *Boy Scouts of America v. Dale*, this Court reviewed the organization's policy stating that homosexual *conduct* was inconsistent with the values the Boy Scouts sought to instill. 530 U.S. 640, 644 (2000). The Boy Scouts objected to James Dale's "avowed homosexual and gay rights activism." *Id.* Dale sued under "New Jersey's public accommodations statute" that prohibits "discrimination on the basis of sexual orientation in places of public accommodation." *Id.* at 645. After determining that the Boy Scouts organization "is a private, nonprofit organization," *id.* at 649, and that they engaged in "expressive activity," this Court went on to consider whether the "forced inclusion of Dale . . . would significantly affect the Boy Scouts' ability to advocate public or private viewpoints." *Id.* at 650. In order to do so, this Court was forced to look at the Boy Scouts view of homosexuality, in the end, noting rightly that "it is not the role of the courts to reject a group's expressed values because

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[5] *See Martinez*, 561 U.S. 661, 680 ("speech and expressive-association rights are closely linked").

they disagree with those values or find them internally inconsistent." *Id.* at 650–51. In short, this Court accepted that the Boy Scouts believed that homosexual *conduct* alone was the issue and not the identity of the individual and simply refused to promote it "as a legitimate form of behavior." *Id.* at 651, 654.

Expanding on the *Hurley* decision, the Court noted that "associations do not have to associate for the 'purpose' of disseminating a certain message" to warrant First Amendment protection, but may simply "engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 654-55 (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 575 (1995)).[6] While claimants may not necessarily be disseminating a message through the workings of their organization, they are still afforded a right to exclude certain participants in order to remain faithful to a larger associative purpose. *Id.*

Phillips' refusal to provide certain artistic services is an act of expressive "*disassociation*" and at the same an act of expressive *association* in respects to a certain community's view on marriage. The presence of state action, and legal measures taken as enforcement, elevate this issue to a First Amendment violation because the state now "materially interferes" with Phillips' right to associate in public with other likeminded

[6] "As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654 (2000).

individuals, including members of his religion. Like the public accommodation laws in *Dale*, the Colorado law "directly and immediately affects associational rights" of Phillips and must be seen through the lens of strict scrutiny review. *Id.* at 659. Just as New Jersey's law "does not justify such a severe intrusion on the Boy Scouts' right to freedom of expressive association," so too the Colorado law does not justify that Phillips be compelled to not only speak the state's message but also associate with the state's preferred messengers. *Id.* The state may choose to acknowledge the changed "public perception of homosexuality," but "this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views." *Id.* at 660.

A "significant burden" or a "severe intrusion" on a group's right to express their message may even trump the interest of the state in eliminating discrimination. *Cf. Id.* at 658–59. While this is still a balancing inquiry, it is certainly consistent with the interest of this Court in preventing government restrictions, manifested in various forms, which intend to silence those views that the First Amendment desires to protect. *FAIR*, 547 U.S. at 68; *Patterson*, 357 U.S. at 460. Certainly, it is an approach worthy of consideration and an approach that the Colorado Court of Appeals failed to acknowledge.

Third, the Court in *Christian Legal Society v. Martinez* upheld a school's "Policy on Non-Discrimination," which requires all approved groups to accept members regardless of their religion or sexual orientation. 561 U.S. 661, 671 (2010). While the policy was upheld, there are key sections in the

opinion that stand to reinforce the claim of Mr. Phillips in seeking a right to expressive association.

In *Martinez*, the Court found that the actions taken by CLS in refusing to abide by the terms of the Policy required only that certain attached benefits be withheld, and did not actually compel the group to include members like in prior expressive association cases. This is simply not the issue in this case. Under the Courts limited-forum analysis, a violation of expressive-association requires regulations "that compel a group to include unwanted members, with no choice to opt out." Id. at 682. By forcing Mr. Phillips with legal action to provide an artistic service, the state is compelling the individual towards the state's own preferred expressive association and is not simply withholding some benefit for failure to comply.

The Court rejected the idea that refusal to include an individual on the basis of their sexual orientation is for reasons of conduct and not identity. *Id.* at 689. The Court reasoned that the conduct is so "closely correlated with" their identity that it is impossible to punish them for their conduct without also punishing them for their identity. *Id.* The Colorado Court of Appeal bases much of its reasoning on this part of the opinion while also acknowledging that the conflation is not always appropriate. *Masterpiece Cakeshop,* 370 P.3d at 280.

Lastly, this Court in *Martinez* dismissed as "more hypothetical than real" the concern that non-discrimination policies would facilitate hostility towards religious groups. *Martinez*, 561 U.S. at 692. However, in the past four years, changed "public perception of homosexuality" has unintentionally

frustrated attempts by Christians to remain active members of society while still upholding their traditional religious convictions. *Boy Scouts*, 530 U.S. at 660.

B. The freedom of association should be extended to commercial enterprises open to the general public.

Colorado Court of Appeals did not deal substantively with the question of association. Other courts, however, looking at similar fact patterns have done so, and have dismissed this issue by arguing that this Court "has never held that a commercial enterprise, open to the general public, is an 'expressive association' for purposes of First Amendment protections[.]" *Arlene's Flowers*, 187 Wash. 2d at 853, 389 P.3d at 567 (2017). This mirrors the language in Justice O'Connor concurrence where she noted that "[p]redominately commercial organizations are not entitled to claim a First Amendment associational or expressive right to be free from the anti-discrimination provisions triggered by the law." *New York State Club*, 487 U.S. at 20. This also mirrors attempts made in this Court's *Hobby Lobby* decision to remove for-profit corporations from the protections of RFRA "because the purpose of such corporations is simply to make money." *Burwell*, 134 S. Ct. at 2770. This Court soundly rejected this argument by noting that "corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so." *Id.* at 2771; *see also Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761

(1976) ("Speech . . . is protected even though it is carried in a form that is 'sold' for profit"); *Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 801 (1988) ("[A] speaker is no less a speaker because he or she is paid to speak.").

O'Connor's "predominately commercial" test has been rightly criticized for, among other reasons, creating a "false dichotomy between commercial and expressive associations [since] associations can be both commercial and expressive." John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 Conn. L. Rev. 149, 188 (2010). But even if we accept her model, O'Connor readily acknowledges the difficulty in "[d]etermining whether an association's activity is predominantly protected expression . . . because a broad range of activities can be expressive," including protected expression involving a form of "quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring). In the end, her recommendation is to "distinguish nonexpressive from expressive associations and to recognize that the former lack the full constitutional protections possessed by the latter." *Id.* at 638.

Similar concerns surround Phillips' bakery, where products and services cannot both be so readily assumed to possess a predominantly commercial or expressive character. As already noted, Phillips is more than willing to sell certain goods and bake certain items so long as his artistic services do not go towards participation in a same-sex wedding. The Colorado Court of Appeals rejected his "willingness to sell birthday cakes, cookies, and other non-wedding cake products to gay and lesbian

customers" by requiring that his services must also be provided for weddings if they remain available to the general public. *Masterpiece Cakeshop,* 370 P.3d at 282. While the items he sells over the counter certainly possess a purely commercial character and rightfully subject to antidiscrimination provisions that trump purported rights of association, his service at issue here is one dealing with artistic expression that is predominantly noncommercial. While the quality of his service is certainly connected to the commercial incentive for more customers, it does not predominate over the artistic purposes of Jack Phillips' baking, understood by him to be "a form of art." *Masterpiece Cakeshop, Inc.,* 370 P.3d at 277; *see also United States v. Nat'l Treasury Emp.'s Union,* 513 U.S. 454, 469 (1995) ("Publishers compensate authors because compensation provides a significant incentive toward more expression"); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.").

Finally, as Petitioners have noted in their lower court Brief, "[w]hen a law infringes upon two or more fundamental rights, strict scrutiny applies under the hybrid rights doctrine." *Brief of Appellants* at 40. As demonstrated above, in the discussions of the freedoms of religion, speech, and association, the standard that the Court should have used in this case is strict scrutiny. It is "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters"—state action that has "the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449,

460–61 (1958); *see also City of Tacoma v. Luvene*, 118 Wash. 2d 826, 841, 827 P.2d 1374, 1382 (1992) ("First Amendment right of expressive association encompasses association to engage in political and nonpolitical speech. . .").

CONCLUSION

The idea of combining freedom of association with for-profit ventures is evidenced by the nearly two dozen businesses and business associations—including Amazon, Expedia, and Microsoft—that joined in supporting other gay couples in bringing similar claims. *See Washington Businesses Amicus Curiae in Support of Plaintiffs-Respondents*, State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017) (No. 91615-2). These organizations are not bound by a common membership or common articles of incorporation, but by a common ideology, increased in its volume by the coalescing of common interests.[7]

What this Court noted in the context of the free exercise of religion should be noted in the context of expressive association, i.e. that "a law that 'operates so as to make the practice of . . . religious beliefs more expensive' in the context of business activities imposes a burden on the exercise of religion." *Burwell*, 134 S. Ct. at 2770 (citing *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)). Discounting the First Amendment in its aggregate protection of speech, religion, and association by punishing small

[7] *Cf. Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.").

businesses will not allay the broader concerns of a nation divided. The burden on Jack Phillips is evidenced here in the form of looming monetary consequences placed on him for a failure to disassociate. He refuses to be complicit in underlying conduct he finds inconsistent with his religious beliefs, and maintains his conviction that the act of providing certain services compels him to participate.

Finally, the Court must be mindful of the possible outcome of this case. Mr. Phillips is not the only individual in the country who feels that engaging in an expressive act in connection with a same-sex marriage would be an affront to God. Following the decision in *Hurley*, there were mixed reviews from all parties, with representatives of Lambda Legal even seeing it as a positive for same-sex individuals who could now use the precedent to make inroads into other civil rights cases. David Dunlap, *The Supreme Court: The New York Parade; Hibernians See Vindication In Emphasis on Free Speech*. N.Y. TIMES (June 20, 1995), http://www.nytimes.com /1995/06/20/us/supreme-court-the-new-york-parade-hibern ians-see-vindication-emphasis-free-speech.html. A ruling for Mr. Phillips does not end the discussion; it respects the rights of all parties and allows the national conversation to continue. 2015 marked the first time in 20 years that a sitting mayor had participated in the parade, as organizers had finally decided to allow a gay veterans organization to march. Andrew Ryan, *Walsh, Moulton to march in St. Patrick's Day Parade*, THE BOSTON GLOBE (Mar. 11, 2015), https://www.bostonglobe.com/metro/2015/03/11/rep-seth-moulton-march-south-boston-patrick-day-

parade-with-gay veterans-group/3VCKCz9BaSHHoOd8y3h3ZJ/story.html. As the Boston Globe noted, "After more than 20 years, the issue seems to have melted like an ice dam on a sunny day." *Id.*

Amici sympathize with both sides of this debate—both those who feel they have been denied their rights for too long and those who feel their rights are suddenly being denied—but positive lasting change will not come from the chambers of any courtroom in this country. Positive change will come only from a continued and respectful dialogue between two sides who feel that they have room to express their sincerest beliefs and have their rights respected.

Respectfully submitted,

DAVID I. SCHOEN
Counsel of Record
2800 Zelda Road
Suite 100-6
Montgomery, AL
36106
(334) 395-6611
Dschoen593@aol.com