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 PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Free Speech Clause provides a business that is open to the public with a defense to a claim that it engaged in discriminatory conduct prohibited by a content- and viewpoint-neutral state law that does not target speech?

2. Whether the Free Exercise Clause provides a business that is open to the public with a defense to a claim that it engaged in discriminatory conduct prohibited by a state law that is neutral and generally applicable?

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INTRODUCTION

Petitioner Masterpiece Cakeshop, Ltd. (the "Company")[1] offers no basis for the Court to review this straightforward enforcement action under the Colorado Anti-Discrimination Act (the "Act"), which prohibits discrimination because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry by places of public accommodation, employers, and housing providers.

The Company does not deny that it refuses to provide same-sex couples certain goods that it provides to different-sex couples—specifically, baked goods for a wedding—regardless of the customers' desired design or message (if any) to be displayed on the cake. Rather, it argues that the First Amendment guarantee of freedom of speech entitles it to engage in this discrimination. That claim has no merit, as the court below held, because the Act regulates conduct, not speech. The Company attempts to manufacture circuit conflicts to gain this Court's review but the alleged conflicts are either non-existent or immaterial to resolving this case.

Nor is there merit to the Company's claim that it is constitutionally entitled to a religious exemption from Colorado's prohibition against discrimination in the public marketplace. This Court has made clear that the right to the free exercise of religion does not

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[1] Respondents David Mullins and Charlie Craig use the "Ltd." designation consistent with the caption and preliminary sections of the Company's petition for a writ of certiorari, *see* Pet. ii, but note that the Company was identified as Masterpiece Cakeshop, Inc. throughout the state proceedings, *see, e.g.*, Pet. App. 1a, 54a, 56a, 61a; *see also* Pet. 4.

include a right to disobey neutral and generally applicable laws, including non-discrimination laws.

For decades, this Court has recognized government's powerful interest in enacting and enforcing anti-discrimination laws, and it has refused to create a gaping loophole in such laws by recognizing the sort of constitutional exemptions that the Company seeks here. Consistent with those rulings, the court below held only that a business cannot avoid the dictates of a generally applicable anti-discrimination law by asserting that it has an ideological or religiously based objection to compliance. There is no reason for this Court to review that decision.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

In July 2012, Respondents David Mullins and Charlie Craig were planning their wedding reception in Denver, Colorado. Craig's mother, Deborah Munn, was helping the couple shop for a wedding cake. Pet. App. 64a. The three of them visited Petitioner Masterpiece Cakeshop, a retail business in Colorado that sells wedding cakes and other baked goods to the public. Pet. App. 64a. Petitioner Jack Phillips owns and operates the Company. Pet. App. 64a.

Mullins and Craig expressed interest in buying a cake for "our wedding." Pet. App. 64a. Phillips refused to serve them, explaining that the Company had a policy of refusing to sell baked goods

for weddings of same-sex couples. Pet. App. 65a.[2] Phillips did not ask for, and Mullins and Craig did not offer, any details about the design of the cake. Phillips was unwilling to make any cake for the wedding because they were a same-sex couple, and therefore any further discussion would have been fruitless. Pet. App. 65a. As the Administrative Law Judge in the Colorado administrative proceedings found, "[f]or all Phillips knew at the time, [Mullins and Craig] might have wanted a nondescript cake that would have been suitable for consumption at any wedding." Pet. App. 75a.

II. PROCEDURAL HISTORY

Mullins and Craig filed charges of discrimination with the Colorado Civil Rights Division ("Division"). Pet. App. 5a. The Division conducted an investigation and found probable cause to determine that the Company denied Mullins and Craig full and equal enjoyment of a place of public accommodation in violation of the Colorado Anti-Discrimination Act ("Act"), Colo. Rev. Stat. § 24-34-601(2). Pet. App. 5a.

Based on that finding, the Colorado Attorney General's Office filed a formal complaint with the Office of Administrative Courts alleging that the Company violated the Act by refusing to serve Mullins and Craig. Pet. App. 5a-6a. The parties briefed and argued cross-motions for summary judgment before an Administrative Law Judge ("ALJ"). Pet. App. 63a-64a. The ALJ denied the

[2] Earlier the same year, the Company had refused to fill a cupcake order for a lesbian couple because it was for their commitment ceremony. Supp. App. 5a.

Company's motion for summary judgment and granted Mullins and Craig's cross-motion. Pet. App. 6a. The Company appealed the ALJ's order to Respondent Colorado Civil Rights Commission ("Commission"), which affirmed the ALJ's decision in full. Pet. App. 57a.

The Company then appealed to the Colorado Court of Appeals, which also affirmed, finding that the Company's refusal to serve Mullins and Craig constituted discrimination because of sexual orientation, and that the First Amendment does not exempt businesses open to the public from anti-discrimination laws. Pet. App. 1a-53a. The Company argued that its action did not constitute discrimination under Colorado law because it was willing to provide other baked goods to Mullins and Craig, and refused only to provide a wedding cake because of its opposition to marriage for same-sex couples. Addressing that state law question, the court found that because same-sex marriage is closely correlated with Mullins and Craig's sexual orientation, the Company's act constituted sexual orientation discrimination under Colorado law. The fact that the Company was ostensibly willing to provide other goods to the couple did not cure its discriminatory refusal to provide a wedding cake, a good it otherwise offered to the general public. Pet. App. 15a-20a. The Company does not seek review of that determination.

The court of appeals then turned to the Company's speech claim. The court reasoned that the Act does not target speech, but the conduct of discrimination, and does not require the Company to express any particular message, but merely to treat

same-sex couples the same as opposite-sex couples. Pet. App. 29a. Moreover, it concluded that a reasonable observer would not view the Company's provision of a cake to a customer in compliance with a non-discrimination mandate as endorsing marriage for same-sex couples. Pet. App. 29a-30a.

The court of appeals similarly rejected the Company's free exercise claim, finding that the Act was a neutral law of general applicability and did not target any particular religion. As such, the court held, the fact that the Company objected on religious grounds to compliance with the Act's non-discrimination mandate presented no free exercise issue.

The Colorado Supreme Court denied the Company's request for further review. Pet. App. 54a-55a.

REASONS FOR DENYING THE PETITION

I. THE COLORADO COURT OF APPEALS' REASONING IS CONSISTENT WITH THIS COURT'S COMPELLED SPEECH PRECEDENT AND CONFLICTS WITH NO COURT OF APPEALS DECISIONS.

The Company asserts that the Colorado Court of Appeals' rejection of its compelled speech claim is inconsistent with this Court's precedent and implicates conflicts in the circuits. In fact, the decision is fully consistent with this Court's compelled speech decisions and the asserted conflicts are either non-existent or immaterial to the result here. The Company thus offers no credible basis for review by this Court.

A. The Colorado Court Of Appeals Decision Is Consistent With This Court's Compelled Speech Jurisprudence Because The Act Permissibly Regulates Conduct—Specifically, Discrimination By Commercial Businesses—Rather Than Speech.

Colorado's anti-discrimination law is a content- and viewpoint-neutral regulation of business conduct, not a law that targets speech. It applies to all businesses that offer goods or services to the general public, and merely requires that they not discriminate against their customers on the basis of race, sex, sexual orientation and several other protected characteristics. The Act does not require the Company to affirm its support for the anti-discrimination goals of the Act, for any of the groups protected against discrimination by the Act, or for the marriages of same-sex couples. The court below correctly rejected the Company's claim that the right to free speech entitles it to discriminate in violation of the Act. The Company provides no basis for this Court to review this straightforward application of settled law. Sup. Ct. R. 10 ("A petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

This Court's compelled speech decisions have consistently differentiated between laws that target speech or alter the message of private expressive associations, and laws that regulate commercial business practices without regard to content or viewpoint. *Compare Boy Scouts of Am. v. Dale*, 530

U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), *with Cohen v. Cowles Media*, 501 U.S. 663 (1991); *Arcara v. Cloud Books*, 478 U.S. 697 (1986); *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Relations*, 413 U.S. 376 (1973). This case presents the latter. Colorado's anti-discrimination law does not compel speech, it merely requires public accommodations in the state to provide equal treatment to protected groups.

"Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992). Thus, "[t]he Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring).

The Company's argument to the contrary ignores this Court's decision in *Rumsfeld v. Forum for Academic and Institutional. Rights, Inc.*, 547 U.S. 47 (2006). There, as here, an entity sought to avoid a non-discrimination mandate by asserting that complying with the law would compel it to express a message of which it disapproved. *Rumsfeld* involved a challenge to the Solomon Amendment, which required law schools to provide equal access to military recruiters and non-military recruiters alike. 547 U.S. at 54. At the time, the federal government's "Don't Ask, Don't Tell" policy forbade lesbians and gay men from serving openly in the military. *Id.* at

52 & n.1. A coalition of law schools argued that the Solomon Amendment violated their First Amendment rights by requiring them to endorse the military recruiters' message that gay people should not serve in the armed forces by allowing the recruiters access to campus. *Id.* at 52. This Court rejected the law schools' free speech claim, stressing that the Solomon Amendment did "not dictate the content of the [law schools'] speech at all." *Id.* at 62.

The Solomon Amendment, the Court found, "regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* at 60 (emphasis in original). "Congress, for example, can prohibit employers from discriminating on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id.* at 62. The Court acknowledged that the schools' assistance to recruiters "often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer's behalf . . . ." *Id.* at 61. But the Court found that this was "a far cry" from being required to pledge allegiance to the flag or bear a state motto on one's license plate, citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977). *Id.* at 62. The *Rumsfeld* Court explained that "[t]he Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only 'compelled' if, and to the extent, the school provides such speech for other recruiters." *Id.* The same is true here. The Company

need not sell wedding cakes to anyone, but it may not discriminate based on protected characteristics by selling wedding cakes to opposite-sex couples while refusing to sell them to same-sex couples.

Rumsfeld also forecloses the Company's argument that the Act unconstitutionally requires it to promote an unwanted message endorsing same-sex marriage by providing a wedding cake to same-sex couples. The law schools in *Rumsfeld* likewise argued 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." 547 U.S. at 64-65. This Court dismissed the law schools' concerns as unwarranted, observing that even "high school students 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." *Id.* at 65. The same is true of consumers in Colorado. No reasonable observer would understand the Company's provision of a cake to a gay couple as an expression of its approval of the customer's marriage, as opposed to its compliance with a non-discrimination mandate. Moreover, the unchallenged requirement that the Company post a notice stating that the Act prohibits discrimination because of protected characteristics, including sexual orientation, eliminates any plausible risk of confusion. CCRC Rule 20.1.[3]

[3] If the Company is concerned that customers might mistakenly interpret its provision of wedding cakes on an equal basis to mean something other than mere compliance with the Act, even in the face of the required notice required, the Company is free

Without even citing *Rumsfeld* or attempting to distinguish it, the Company argues that "the government made me do it" is not an answer to the asserted free speech violation but the source of the problem, and that the Colorado Court of Appeals decision turns the compelled speech doctrine "on its head." Pet. 11, 16. That argument, which *Rumsfeld* necessarily rejects, conflates two separate lines of cases. True, "the government made me do it" is no response to laws that involve government-mandated messages, such as the state motto "Live Free or Die." But this case does not involve a government-mandated message. It involves a content- and viewpoint-neutral regulation of business conduct, and "the government made me do it" is highly relevant to whether anyone would reasonably understand the Company's compliance with a requirement not to discriminate against gay and lesbian customers as an expression of its own viewpoint. *See Rumsfeld*, 547 U.S. at 64-65.

Applying the same distinction between laws that target speech and laws that impose generally applicable regulations of a business's conduct, other state courts and administrative tribunals have consistently ruled that enforcing a non-discrimination law against a business does not violate the First Amendment simply because the

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to post its own notice saying that it does not support or endorse customers' events for which it provides baked goods. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (requiring shopping mall to permit literature distribution on premises is not compelled speech, in part because mall owner can easily post disclaimers noting that materials distributed do not reflect its views).

business objects to providing goods and services—even goods and services of an expressive or artistic nature—to same-sex couples on the same terms as it provides them to opposite-sex couples. *See Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (photographer), *cert. denied*, 134 S.Ct. 1787 (2014); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (App. Div. 3d Dep't 2016) (wedding venue); *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Wash. Super. Ct., Benton Cty. Feb. 18, 2015) (flower shop), *appeal pending*, No. 91615-2 (Wash.); *Bernstein v. Ocean Grove Camp Meeting Ass'n,* No. CRT 614509, at 13 (N.J. Div. Civil Rights Oct. 22, 2012), *available at* http://perma.cc/G5VF-ZS2M (wedding venue); *see also Brush & Nib Studio LC v. City of Phoenix*, No. CV2016-052251 (Ariz. Super. Ct. Maricopa Cty. Sept. 19, 2016) (rejecting stationer's free speech claim under state constitution). *See also Hishon*, 467 U.S. at 78 (rejecting law firm's argument that enforcing Title VII's prohibition against sex discrimination against its exclusion of women from partnership infringed the firm's free expression rights).

Under the Company's theory, any business could claim a safe harbor from any commercial regulation simply by claiming that it believes complying with the law would send a message with which it disagrees. That would eviscerate the Government's ability to regulate almost any aspect of commercial transactions, from wage and hour laws to health and safety codes to anti-discrimination protections. The First Amendment does not require that result. "[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that

activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Hurley, 515 U.S. 557, is not to the contrary, despite the Company's misplaced reliance on it. The question in *Hurley* was whether the organizers of Boston's St. Patrick's Day parade could be compelled to include in the parade a contingent of marchers carrying what the organizers deemed a dissonant message about lesbian and gay rights. Because the parade in *Hurley* was organized by a private association for expressive purposes, the Court held that the state's requirement that the parade include a gay and lesbian group bearing its banner over the objection of the parade organizers violated the First Amendment. This case, by contrast, does not involve a private expressive event but a business that provides goods and services to the public. That distinction is critical and central to the holding in *Hurley*. The "focal point" of anti-discrimination legislation, as the *Hurley* Court noted, is "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Id.* at 572. When applied in that context, such laws, including Colorado's ban on sexual orientation discrimination, "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Id.* at 572. That is the essence of the ruling below, and it is fully consistent with *Hurley*.

B. This Case Is Not An Appropriate Vehicle For Resolving Whatever Differences May Exist Among The Circuits For Determining Expressive Conduct.

The Company argues that there is a conflict among the circuits regarding the standard for determining whether conduct is sufficiently expressive to warrant First Amendment protection. But resolution of any such conflict would not affect the result here because the Colorado Court of Appeals applied the standard favored by the Company. Moreover, even if the Company's conduct were expressive, it could still be regulated under *United States v. O'Brien*, 391 U.S. 367 (1968).

This Court has recognized that some conduct may be "sufficiently imbued with elements of communication to fall within the scope" of the First Amendment's protections for speech. *Spence v. Washington*, 418 U.S. 405, 409 (1974) (displaying United States flag with peace symbol affixed); *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (publicly burning United States flag). To determine whether conduct is sufficiently expressive to fall under this doctrine, courts consider the *Spence-Johnson* factors. The Colorado Court of Appeals articulated the factors as follows: "In deciding whether conduct is 'inherently expressive,' we ask [1] whether 'an intent to convey a particularized message was present, and [2] whether the likelihood was great that the message would be understood by those who viewed it.' The message need not be 'narrow,' or 'succinctly articulable.'" Pet. App. 26a (brackets and citations omitted, bracketed material added).

The Company maintains that the Colorado Court of Appeals' articulation of the *Spence-Johnson* factors "closely resembles that of the Second and Sixth Circuits," which require a "particularized message," and differs from the more lenient factors announced by the Third and Eleventh Circuits, which do not require a particularized message, but only "some sort of message." Pet. 24; *see Tenafly Eruv Ass'nv. Borough of Tenafly*, 309 F.3d 144, 160 (3rd Cir. 2002) (message the speaker intends to convey need not be specific); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (same).

Although the Company submits that baking and selling wedding cakes "would be far more likely" to be deemed expressive under the latter standards, Pet. 25, it is difficult to see how, if at all, the standard applied by the Colorado Court of Appeals differs from the one the Company seeks. The Colorado Court of Appeals expressly recognized that the message "need not be 'narrow,' or 'succinctly articulable.'" Pet. App. 26a (internal quotation marks omitted), a standard indistinguishable from the Third and Eleventh Circuits' tests. The Company implicitly acknowledges that the Colorado Court of Appeals recited the more inclusive standard but dismisses that fact as mere "lip service." Pet. 24. But it offers no reason not to take the Colorado Court of Appeals at its word, and the most it complains about here is the application of a given standard to a particular set of facts, not any real disagreement about what the standard should be.

Moreover, this is not a case in which the different articulations of the standard for determining expressive conduct would have any impact on the outcome. The conduct that the Company seeks to define as expressive is the process of creating unique wedding cakes. But the Act does not regulate the process of designing or baking cakes, it merely prohibits the discriminatory refusal to provide goods and services to gay and lesbian customers on the same terms as others. The Company remains free to make whatever aesthetic judgments it chooses with respect to cake design. The Company's refusal to make wedding cakes for same-sex couples is not an aesthetic judgment; it is a decision to deny service based on a characteristic protected by Colorado's non-discrimination law. That couldn't be clearer than here where, as the record shows, the Company did not even discuss the kind or design of wedding cake that Mullins and Craig wanted. The Company's decision to deny them service was based solely and simply on the fact that they were a same-sex couple.[4]

Even if a commercial bakery's sale of wedding cakes to the general public were deemed to be expressive conduct, enforcement of the Act against the Company would not violate the First Amendment because any burdens on speech are incidental to the

[4] The Company argues that providing a cake to Mullins and Craig for their wedding would have conveyed a message of support for same-sex marriages. But as discussed above, here, as in *Rumsfeld*, the Company's compliance with the law by serving same-sex couples on the same terms as heterosexual couples would not communicate *any* message attributable to the Company. *See* pp. 9-10 *supra*.

law's generally applicable regulation of conduct. This Court has said that the government may regulate expressive conduct if the law,

> is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. The Act easily satisfies this standard. "[A]cts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent." *Roberts,* 468 U.S. at 628. Anti-discrimination laws such as the Act are thus "well within the State's usual power to enact." *Hurley*, 515 U.S. at 572. The Act "does not, on its face, target speech or discriminate on the basis of its content," *id.*, and the State's interest in prohibiting discrimination in public accommodations is unrelated to the communicative value, if any, of baking and selling wedding cakes to the public. Furthermore, as explained below in Part II, the Act, in prohibiting discrimination, furthers not merely an important or substantial governmental interest, but a compelling one, and it is precisely tailored to further that interest. Thus, it survives constitutional scrutiny under *O'Brien* even if the Act places an incidental burden on expressive conduct.

Finally, the position articulated by the Company has enormous implications for

government's ability to enforce non-discrimination laws and all regulations of business. The Company suggests that the exemption it is seeking from the Act would be cabined to only those businesses that sell goods and services that involve expression or artistry. But that describes countless businesses. For example, hair salons, tailors, restaurants, architecture firms, florists, jewelers, theaters, and dance schools use artistic skills when serving customers or clients. That these businesses make artistic and creative choices does not insulate them from public accommodations laws when they offer goods or services for hire to the general public. *See, e.g., Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 429 (4th Cir. 2006) (applying anti-discrimination law to beauty salon providing hair styling and "makeup artistry"); *Elane Photography*, 309 P.3d at 66.

C. The Decision Below Does Not Conflict With Circuit Court Opinions Striking Down Zoning Restrictions On Tattoo Parlors.

Still searching for a conflict, the Company contends that the ruling below is inconsistent with decisions from the Ninth and Eleventh Circuits involving zoning restrictions on tattoo parlors. It is not. The circuit court decisions to which the Company points each involved a law that targeted what the court found to be a form of pure speech (tattoos) and that prohibited businesses from engaging in a particular form of speech (the process of tattooing) in certain neighborhoods. Pet. 18-22 (citing *Buehrle v. City of Key West*, 813 F.3d 973, 975 (11th Cir. 2015), and *Anderson v. City of Hermosa*

Beach, 621 F.3d 1051, 1055 (9th Cir. 2010)). In other words, the regulations at issue both targeted and forbade protected First Amendment activity. Ordinances that target and restrict particular forms of speech bear no resemblance to a content- and viewpoint-neutral state law prohibiting discrimination by places of public accommodation. Even assuming that custom wedding cakes were a form of pure speech, the Act would not trigger the analysis applied in *Buehrle* and *Anderson* because it does not target custom wedding cakes or prohibit anyone from engaging in cake decorating. The Act does not even mention custom wedding cakes. If *Buehrle* and *Anderson* were controlling here, no state could constitutionally apply an anti-discrimination law to a tattoo parlor or any other business activity that is expressive. *Buehrle* and *Anderson* say no such thing, and there is no conflict.

II. THE COLORADO COURT OF APPEALS' REJECTION OF THE COMPANY'S FREE EXERCISE CLAIM IS CONSISTENT WITH THIS COURT'S PRECEDENT AND POSES NO CONFLICT WITH ANY CIRCUIT COURT.

The Company also offers no persuasive reason to grant review of its free exercise claim. The Colorado Court of Appeals' decision followed this Court's well-established rule that a neutral law of general applicability does not violate the free exercise clause. There is no conflict in the lower courts on that question. To the contrary, it has been clear since *Emp't Division v. Smith*, 494 U.S. 872, 885 (1990), that "the right of free exercise does not relieve an individual of the obligation to comply with

a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879. Such laws are constitutionally permissible so long as they are rationally related to a legitimate government interest. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Applying *Smith*, the decision below is clearly correct. The Act is a neutral and generally applicable prohibition on discrimination that serves a plainly legitimate state interest. Indeed, the Act would survive even heightened scrutiny since the state's interest in eradicating discrimination is not merely legitimate, but compelling.

As this Court recognized more than thirty years ago, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982). This principle applies no less when the statute regulating commercial enterprises is a non-discrimination law. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n. 5 (1968) (characterizing restaurant's free exercise defense to its unlawful refusal to serve African American customers as "patently frivolous").

A. The Act Is A Neutral And Generally Applicable Prohibition Against Discrimination.

The court below was manifestly correct in holding that the Act is a neutral law of general

applicability. Pet. App. 40a-45a. It protects everyone in Colorado from discrimination because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. Colo. Rev. Stat. § 24-34-601(2)(a). And, it does not target religiously motivated conduct. To the contrary, the Act is indifferent as to why a business owner might discriminate on the basis of one of the protected characteristics.

The Company urged the state court to find that the Act's narrow exemptions for religious organizations and single-sex schools transform it into a law targeting religion, but the Colorado Court of Appeals properly rejected that argument. Pet. App. 42a-44a. Exemptions for religious organizations are aimed at accommodating, not targeting, religious freedom. *Elane Photography*, 309 P.3d at 75. Nor does the Act's exemption for single-sex institutions where the admissions restriction has "a bona fide relationship" to the goods or services, *see* Colo. Rev. Stat. § 24-34-601(3), Pet. App. 94a-95a, target religion or mean that the Act is not generally applicable. *See Elane Photography*, 309 P.3d at 74.

The Company argues that *Smith* does not apply because the Colorado Civil Rights Division found no probable cause to proceed on three charges of discrimination filed by an unrelated party, William Jack, against different bakeries and involving different facts. *Compare* Pet. App 252a-253a (Pet. for Writ. of Cert. to Colo. Sup. Ct.) *with* Pet. 27-30. But the Civil Rights Division's resolution of distinct claims not before this Court provides no evidence that the law is not generally applicable.

Jack alleged that three different bakeries discriminated against him because of his religion by refusing to fill his orders for cakes bearing derogatory messages about gay people. Pet. App. 297a-325a. The Division found that the bakeries in question did not discriminate against Jack because of his Christian religion, and, in fact, had made many cakes with Christian themes for other customers. Pet. App. 302a, 311a, 322a. It concluded that the bakeries rejected Jack's orders because they disapproved of the offensive messages he requested, or did not have the capacity to serve him, and not because of any protected classification. Pet App. 303a, 311a, 321a. Nothing in Colorado law prohibits denying service for those reasons.

The Company's suggestion that the Division's findings of no probable cause as to Jack's complaints amount to a system of "exemptions" for other bakeries from the Act is wrong. As noted above, the Act contains only two exemptions, neither of which applies to commercial bakeries. *See* Colo. Rev. Stat. § 24-34-601. Nor did the Division create new, de facto "exemptions" for any of the bakeries visited by Jack. Rather, the Division investigated each of Jack's allegations and determined as a factual matter that his complaints were not substantiated because none of the bakeries engaged in discriminatory conduct that violated the Act. Pet. App. 305a, 313a-314a, 323a-324a.

The Company mischaracterizes the Act as an edict forcing it (and every other bakery in Colorado) to make any cake requested on demand. But that is not what the Act requires. The Act does not compel the Company to sell custom cakes (or any cakes) at

all. Nor does the Act prohibit the Company from refusing to sell cakes for any reason not explicitly prohibited by law. No "exception" is required to conclude, for example, that "[a]n African-American baker may decline to create a custom cake celebrating the racist ideals of a member of the Aryan Nation," Pet. 31, because membership in an organization such as the Aryan Nation is not a protected characteristic under the Act. All the Act requires is that any goods and services the Company chooses to sell must be offered to all customers regardless of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. Colo. Rev. Stat. § 24-34-601(2)(a).

The Company's contention that the decision below conflicts with circuit court rulings applying *Smith* is equally mistaken. The cited decisions merely applied the *Smith* standard to various government policies and determined that the policies at issue involved (or might involve) individualized exemptions suggesting that they were not generally applicable. *See* Pet. 30-32 (citing *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (triable issue of fact as to whether policy requiring counseling students to counsel every patient assigned to them involved individualized exemptions); *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (policy requiring male police officers to shave their beards involved individualized exemptions); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (triable issue of fact as to whether policy requiring acting students to perform every acting exercise as written involved individualized exemptions)). That the Colorado Court of Appeals applied the same standard to a different law and

reached a different result does not mean that there is any conflict. And that circuit courts allowed other challenges to other laws to proceed under the Free Exercise Clause does not alter the conclusion that the Act in this case is neutral and generally applicable.

B. The Act Satisfies Rational Basis Review And Indeed Would Satisfy Even Strict Scrutiny.

Because the Act is neutral and generally applicable, it need only serve a legitimate state interest. The Act easily satisfies that standard. This Court has recognized that the government interest in combating discrimination is not merely legitimate, but compelling, and that anti-discrimination laws are the least restrictive means of achieving that purpose. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (rejecting religious university's Free Exercise challenge to anti-discrimination policy of the Internal Revenue Service); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) (rejecting church-operated school's Free Exercise defense to discrimination prohibited by the Fair Labor Standards Act); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (rejecting religious school's Free Exercise defense to discrimination prohibited by Title VII); *EEOC v. Miss. Coll.*, 626 F.2d 477, 488-89 (5th Cir. 1980) (same).

"[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent." *Roberts*, 468 U.S. at 628. Discrimination "both deprives persons

of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Id.* at 625. Anti-discrimination laws ensure equal access to the "transactions and endeavors that constitute ordinary civic life in a free society," *Romer v. Evans*, 517 U.S. 620, 631 (1996), and are "precisely tailored" to achieve the goal of equal opportunity. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

Contrary to the Company's suggestion, Pet. 6, the relevant inquiry is not whether a customer denied services for discriminatory reasons is able to obtain goods or services elsewhere. To frame the inquiry that way both misunderstands the nature of the government interest at stake and trivializes the profound dignitary harm that people experience when they are turned away from a business because of who they are. *See Roberts*, 468 U.S. at 625 (recognizing "personal harms" caused by discrimination); *Heart of Atl. Motel v. United States*, 379 U.S. 241, 250 (1964) (noting that denial of equal access to public accommodations causes "deprivation of personal dignity"). It is no answer to say that Mullins and Craig could shop somewhere else for their wedding cake, just as it was no answer in 1966 to say that African-American customers could eat at another restaurant. *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). The issue is not access to baked goods; it is full inclusion and participation in civic life.

Importantly, the exemption from anti-discrimination law that the Company argues for is not limited to custom wedding cakes or to discrimination based on sexual orientation. The implications of the Company's claim, if it were accepted, are staggering. People hold religious beliefs about a wide variety of things, including racial and religious segregation and the role of women in society. If religious motivation exempted businesses from anti-discrimination laws, government would be powerless to protect all Americans from the harms of invidious discrimination. Landlords could refuse to rent to interracial couples, employers could refuse to hire women or pay them less than men, and a bus line could refuse to drive women to work, to name just a few examples. All civil rights laws would be vulnerable to such claims where the discrimination was motivated by religion.

The Company's request for an exemption here echoes the free exercise claims lodged against an earlier generation of civil rights laws that prohibited discrimination based on race and sex. *See, e.g.*, *Bob Jones Univ.*, 461 U.S. 574 (rejecting religious university's Free Exercise challenge to race discrimination prohibited by Internal Revenue Service policy); *Dole*, 899 F.2d at 1392 (rejecting church-operated school's Free Exercise defense to sex discrimination prohibited by the Fair Labor Standards Act). Time and again, this Court and others have rejected such free exercise challenges and found that sincerely held religious beliefs do not entitle businesses to discriminate in violation of the law. The Colorado Court of Appeals did no more.

CONCLUSION

The petition for certiorari should be denied.

Respectfully Submitted,

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Date: November 28, 2016

SUPPLEMENTAL
APPENDIX

Division of Civil Rights
Steven Chavez
Director of Division of Civil Rights

John W. Hickenlooper
Governor

Barbara J. Kelley
Executive Director

Charge No. P20130008X

Charlie Craig
[redacted]

Charging Party

Masterpiece Cakeshop
3355 S. Wadsworth Blvd.
Lakewood, CO 80227

Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is sufficient evidence to support the Charging Party's claim of denial of full and equal enjoyment of a place of public accommodation based on his sexual orientation. As such, a **Probable Cause** determination hereby is issued.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about July 19, 2012, the Respondent, a place of public accommodation, denied him the full and equal enjoyment of a place of accommodation on the basis of his sexual orientation (gay). The Respondent avers that its standard business practice is to deny service to same-sex couples based on religious beliefs.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive

for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery that provides cakes and baked goods to the public, and operates within the state of Colorado.

The Charging Party states that on or about July 19, 2012, he visited the Respondent's place of business for the purpose of ordering a wedding cake with his significant other, David Mullins ("Mullins"), and his mother Deborah Munn ("Munn"). The Charging Party and his partner planned to travel to Massachusetts to marry and intended to have a wedding reception in Denver upon their return. The

Charging Party and his significant other were attended to by the Respondent's Owner, Jack Phillips ("Phillips"). The Charging Party asserts that while viewing photos of the available wedding cakes, he informed the owner that the cake was for him and his significant other. The Charging Party states that in response, Phillips replied that his standard business practice is to deny service to same-sex couples based on his religious beliefs. The Charging Party states that based on Phillips response and refusal to provide service, the group left the Respondent's place of business.

The Charging Party states that on July 20, 2012, in an effort to obtain more information as to why her son was refused service, Munn telephoned Phillips. During this telephone conversation, Phillips stated that "because he is a Christian, he was opposed to making cakes for same-sex weddings for any same-sex couples."

The record reflects that Phillips subsequently commented to various news organizations, that he had turned approximately six same-sex couples away for this same reason. The Respondent has not argued that it is a business that is principally used for religious purposes.

Respondent Owner Jack Phillips ("Phillips") states that on July 19, 2012, the Charging Party, Mullins, and Munn visited his bakery and stated that they wished to purchase a wedding cake. Phillips asserts that he informed the Charging Party that he does not create wedding cakes for same-sex weddings. According to Phillips, this interaction lasted no more than 20 seconds. Phillips states that the Charging Party, Mullins, and Munn

subsequently exited the Respondent's place of business. The Respondents avers that on July 20, 2012, during a conversation with Munn, he informed her that he refused to create a wedding cake for her son based on his religious beliefs and because Colorado does not recognize same-sex marriages.

The Respondent states that the aforementioned situation has occurred on approximately five or six past occasions. The Respondent contends that in those situations, he advised potential customers that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. Respondent owner Phillips adds that he told the Charging Party and his partner that he could create birthday cakes, shower cakes, or any other cakes for them. The Respondent asserts that this decision rested in part based on the fact that the state of Colorado does not recognize same sex marriages.

In an affidavit provided by the Charging Party during the Division's investigation, Stephanie Schmalz ("S. Schmalz") states that on January 16, 2012, she and her partner Jeanine Schmalz ("J. Schmalz") visited the Respondent's place of business to purchase cupcakes for their family commitment ceremony. S. Schmalz states that when she confirmed that the cupcakes were to be part of a celebration for her and her partner, the Respondent's female representative stated that she would not be able to place the order because "the Respondent had a policy of not selling baked goods to same-sex couples for this type of event." Following her departure from the Respondent's place of business, S. Schmalz telephoned the Respondent to clarify its

policies. During this telephone conversation, S. Schmalz learned that the female representative was an owner of the business and that it was the Respondent's stated policy not to provide cakes or other baked goods to same-sex couples for wedding-type celebrations.

S. Schmalz subsequently posted a review on the website Yelp describing her experiences with the Respondent. An individual identifying himself as "Jack P. of Masterpiece Cakeshop" posted a reply to Schmalz's review, in which he stated that "...a wedding for [gays and lesbians] is something that, so far, not even the State of Colorado will allow" and did not dispute that he refuses to serve gay and lesbian couples planning weddings or commitment celebrations.

S. Schmalz states that after learning of the Respondent's policy, she later contacted the Respondent's place of business and spoke to Phillips. During this conversation, S. Schmalz claimed to be a dog breeder and stated that she planned to host a "dog wedding" between one of her dogs and a neighbor's dog. Phillips did not object to preparing a cake for S. Schmalz's "dog wedding."

In an affidavit provided by the Charging Party during the Division's investigation, [redacted] states that on May 19, 2012, she visited the Respondent's place of business with her partner, [redacted] to look at cakes for their planned commitment ceremony. [redacted] states that upon learning that the cake would be for the two women, the Respondent's female representative stated that the Respondent would be unable to provide a cake

because "according to the company, [redacted] and [redacted] were doing something 'illegal.'"

In an affidavit provided by the Charging Party during the Division's investigation, Katie Allen ("Allen") and Alison Sandlin ("Sandlin") state that on August 6, 2005, they visited the Respondent's place of business to taste cakes for their planned commitment ceremony. Allen states that upon learning of the women's intent to wed one another, the Respondent's female representative stated, "We can't do it then" and explained that the Respondent had established a policy of not taking cake orders for same-sex weddings, "because the owners believed in the word of Jesus."

Allen and Sandlin state that they later spoke directly with Phillips. During this conversation, Phillips stated that "he is not willing to make a cake for a same-sex commitment ceremony, just as he would not be willing to make a pedophile cake."

Discriminatory Denial of Full and Equal Enjoyment of Services - Sexua1 Orientation (gay)

To prevail on a claim of discriminatory denial of full and equal enjoyment of services, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought goods, services, benefits or privileges from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied a type of service usually offered by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his sexual orientation. The Charging Party visited the Respondent's place of business for the purpose of ordering a wedding cake for his wedding reception. The evidence indicates that the Charging Party and his partner were otherwise qualified to receive services or goods from the Respondent's bakery. During this visit, the Respondent informed the Charging Party that his standard business practice is to deny baking wedding cakes to same-sex couples based on his religious beliefs. The evidence shows that on multiple occasions, the Respondent turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. The Respondent's representatives stated that it would be unable to provide a cake because "according to the company, [the potential same-sex customers] were doing something 'illegal,'" and "because the owners believed in the word of Jesus." The Respondent indicates it will bake other goods for same sex couples such as birthday cakes, shower cakes or any other type of cake, but not a wedding cake. As such, the evidence shows that the Respondent refused to allow the Charging Party and his partner to patronize its business in order to purchase a wedding cake under circumstances that give rise to an inference of unlawful discrimination based on the Charging Party's sexual orientation.

Based on the evidence contained above, I determine that the Respondent has violated C.R.S. 24- 34-402, as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(II), as re-enacted, the Parties hereby are ordered by the Director to proceed to attempt amicable resolution of these charges by compulsory mediation . The Parties will be contacted by the agency to schedule this process.

On Behalf of the Colorado Civil Rights Division

Jennifer McNuar 3/5/2013

Steven Chavez, Director
or Authorized Designee

Date

CERTIFICATE OF MAILING

This is to certify that on March 7, 2013 a true and exact copy of the Closing Action of the above-referenced charge was deposited in the United States mail, postage prepaid, addressed to the parties listed below.

CCRD#
P20130008X

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