Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203 Certiorari to Colorado Court of Appeals Case No. 21CA1142 Opinion by Judge Schutz Dunn and Grove, JJ., concur District Court, City and County of Denver Case No. 2019CV32214 Opinion by Judge A. Bruce Jones	
Petitioners Masterpiece Cakeshop, Inc. and Jack Phillips v. **Respondent** Autumn Scardina	
Attorneys for Amici Curiae Matthew J. Douglas (Atty. Reg. No. 26017) Arnold & Porter Kaye Scholer LLP 1144 Fifteenth Street, Suite 3100 Denver, CO 80202 (303) 863-2315 *matthew.douglas@arnoldporter.com* Alex J. Luchenitser* Kalli A. Joslin* Americans United for Separation of Church and State 1310 L Street NW, Suite 200 Washington, DC 20005 (202) 466-7306 *luchenitser@au.org* *joslin@au.org* * Admission *pro hac vice* pending	Supreme Court Case No. 2023SC116
BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE, INTERFAITH ALLIANCE, METHODIST FEDERATION FOR SOCIAL ACTION, NATIONAL COUNCIL OF JEWISH WOMEN, AND SIKH COALITION IN SUPPORT OF RESPONDENT	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

(i) The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d) because, excluding the parts of the brief exempted by C.A.R. 28(g)(1), it contains 4,642 words (less than the 4,750 word limit).

(ii) The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

(iii) I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

s/ Kalli A. Joslin

s/ Matthew J. Douglas

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IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Amici are religious and civil-rights organizations that are united in respecting the important but distinct roles of religion and government in our nation. *Amici* represent diverse faiths and beliefs while sharing a commitment to ensuring that LGBTQ+ people remain free from officially sanctioned discrimination. They believe that the right to exercise religion freely is precious and should never be misused to undermine that principle or otherwise cause harm. *Amici* also recognize and oppose the threat to religious freedom that would result if the Constitution were understood to require religious exemptions from antidiscrimination laws.

The *amici* are:

- Americans United for Separation of Church and State.
- Bend the Arc: A Jewish Partnership for Justice.
- Interfaith Alliance.
- Methodist Federation for Social Action.
- National Council of Jewish Women.
- Sikh Coalition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Colorado Anti-Discrimination Act requires that public accommodations serve all people regardless of their sexual orientation, gender identity, and gender expression—including transgender status. CADA thereby ensures that when LGBTQ+ people seek to buy goods and services on the same terms as everyone else, they do not suffer the stigma and degradation associated with discrimination.

In a nation defined by its religious pluralism, the many and varied beliefs among our people make it inevitable that secular laws—including CADA—will at times offend some people's religious sensibilities. But while religion and religious practices may not be specially disfavored, there is no Free Exercise Clause violation when a law that regulates conduct for valid secular purposes and in a nondiscriminatory manner incidentally burdens some religious exercise. That is exactly the kind of law that CADA is.

Exempting businesses from the law so that they may refuse service to LGBTQ+ people based on the businesses' religious views would undermine, not advance, religious freedom. The arguments that Petitioners Masterpiece Cakeshop, Inc. and baker Jack Phillips

(collectively "the Bakery") have made for such an exemption would also, if accepted, permit businesses to rely on their religious beliefs to deny service to people of the "wrong" religion—or race, or gender, or any other protected characteristic. Far from promoting religious freedom, a ruling in the Bakery's favor would thus hamstring Colorado's ability to ensure that its residents may live as equal members of their community regardless of faith or belief.

Both the trial court and the court of appeals were correct in rejecting the Bakery's misplaced and misguided Free Exercise Clause arguments (*see Scardina v. Masterpiece Cakeshop, Inc.*, 528 P.3d 926, 942–43 (Colo. App. 2023)), which the Bakery reasserts here (*see* Opening Br. at 39–42). This Court should also reject those arguments and affirm the rulings below.[1]

ARGUMENT

I. The Free Exercise Clause does not require the exemption that the Bakery seeks.

Religious freedom is a value of the highest order. But the constitutional guarantee of religious freedom is not an entitlement to

[1] Because the record in this case is not publicly available, citations to lower-court decisions in this case refer only to publicly available information and not to their corresponding location in the record.

"general immunity from secular laws." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). The Free Exercise Clause is not, and never has been, a free pass to violate the law. And it in no way compels Colorado to exempt the Bakery from the state's prohibition against discrimination based on sexual orientation, gender identity, or gender expression in public accommodations.

A. The public-accommodations law does not trigger strict scrutiny.

Though government cannot regulate a religious practice *because* it is religious (*see, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–33 (1993)), religion-based disagreement with the law does not excuse noncompliance. "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)). And that would "open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind," from drug laws to traffic laws. *Id.* at 888–89.

The U.S. Supreme Court has therefore held that laws that apply generally and are neutral with respect to religion do not trigger heightened scrutiny, even if they "ha[ve] the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531; *accord Smith*, 494 U.S. at 878–79. Accordingly, religious and philosophical objections "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 631 (2018). In Ms. Scardina's case, the Bakery cannot properly rely on religious motivations to excuse noncompliance with CADA's prohibition on transgender-status discrimination.

1. The neutrality requirement means that a law must not "restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. Discriminatory intent may be apparent on the face of a law, or it may be revealed through the law's practical effects, as when legal requirements have been "gerrymandered with care to proscribe" religious conduct *qua* religious conduct. *See id.* at 533–34, 542. But neutrality is not undermined just because a law affects a claimant's

religious exercise. Rather, to trigger strict scrutiny the claimant must show that the government has targeted specific religious conduct or beliefs for maltreatment. *See id.*

General applicability is the closely related requirement that the "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. Government thus may not burden religious conduct while affording more favorable treatment to nonreligious conduct that is as detrimental to the underlying governmental interests. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Nor may the government utilize "a mechanism for individualized exemptions" to favor requests for secular exceptions over religious ones. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) (quoting *Smith*, 494 U.S. at 884).

For example, in *Tandon*, a COVID-19-related public-health law was held not to be neutral and generally applicable because it severely restricted in-home religious gatherings while exempting nonreligious gatherings that posed greater or equal risks of transmission of COVID-19. *See* 141 S. Ct. at 1296–97. So if CADA prohibited religiously

motivated denials of service but permitted nonreligious denials that equally interfered with the law's purpose of eradicating discrimination in public accommodations based on sexual orientation, gender identity, and gender expression, heightened scrutiny would apply.

But CADA does no such thing. As the Colorado Court of Appeals has already held, "CADA is a neutral law of general applicability." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 292 (Colo. App. 2015), *rev'd on other grounds sub nom. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018). The Tenth Circuit recently reaffirmed this holding, rejecting a free-exercise challenge to CADA in *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *rev'd on other grounds*, 600 U.S. 570 (2023). That court found "no examples where Colorado permitted 'secular-speakers' to discriminate against LGBT consumers." *Id.* at 1186. The plaintiff religious business in that case therefore "fail[ed] to show that Colorado 'permit[s] secular conduct that undermines the government's asserted interests *in a similar way*.'" *Id.* (quoting *Fulton*, 593 U.S. at 534) (emphasis in *303 Creative*).[2]

[2] Though the U.S. Supreme Court reversed the Tenth Circuit on free-speech grounds in *303 Creative*, the Court did not grant certiorari on the

2. CADA's neutrality and general applicability are not undermined by the Bakery's arguments regarding a so-called "offensiveness" rule, alleged disparate adjudication, or the provision in C.R.S. § 24-34-601 regarding single-sex public accommodations.

First, the Bakery argues that the Colorado Civil Rights Division has, through its decisions, created a *de facto* exemption from CADA that allows bakers to refuse to bake cakes that would contain messages that are offensive to them. *See* Opening Br. at 39–40. But no such exemption exists, and the Bakery misrepresents the nature of the three Division adjudications on which its "offensiveness" argument relies. In those adjudications, three bakers refused to make cakes that "included 'wording and images [the baker] deemed derogatory,'" "featured 'language and images [the baker] deemed hateful,'" or "displayed a message the baker 'deemed as discriminatory.'" *Masterpiece Cakeshop*, 584 U.S. at 636. The Division concluded that the bakers' refusal to create these cakes for a customer did not violate CADA because the bakers "refused to create cakes for anyone, regardless of creed, where a

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free-exercise issue and left the Tenth Circuit's holding on that issue undisturbed. *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (mem.).

customer requests derogatory language or imagery." *Scardina*, 528 P.3d at 938. In so holding, the Division simply acknowledged the unremarkable fact that CADA prohibits only status-based discrimination. The bakers plainly did not discriminate based on the customer's religious status because they would not have baked those cakes for anyone. No violation of CADA occurred because there was no discrimination against a class protected by CADA, and the Division did not create any exemption from any prohibition in CADA.

Here, on the other hand, the Bakery agreed to make Ms. Scardina's requested cake *until* she revealed that she selected her requested colors to represent her gender identity. Findings of Fact and Conclusions of Law, *Scardina v. Masterpiece Cakeshop, Inc.*, No. 19CV32214, at ¶ 18 (Colo. Dist. Ct. June 15, 2021). The Bakery further maintained not only that it would "make *the same cake* requested by Ms. Scardina for other customers" (*id.* at ¶ 21 (emphasis added)), but also that it would even have made the requested cake for Ms. Scardina herself had she not then revealed her reason for requesting those colors (*id.* at ¶ 18). This differs in all relevant respects from a cake that the Bakery would refuse to make for anyone.

The Bakery also argues that its baker was subjected to unfair treatment because Ms. Scardina's suit was not dismissed for lack of jurisdiction and because the trial court took account of the baker's objection to using feminine pronouns to refer to Ms. Scardina. *See* Opening Br. at 41–42. But in doing so, the Bakery ignores the Colorado Court of Appeals' analysis easily distinguishing the jurisdictional cases. *See Scardina*, 528 P.3d at 933–34. And the Bakery wholly fails to demonstrate how the trial court's pronoun-informed credibility determination rises to the level of "clear and impermissible hostility" to religion prohibited by *Masterpiece Cakeshop*. *Cf.* 584 U.S. at 634 (finding such hostility where commissioner called religious beliefs "despicable" and compared invocation thereof to "defenses of slavery and the Holocaust").

Finally, the Bakery argues in passing that C.R.S. § 24-34-601 is not generally applicable because it provides in its subsection (3) that "it is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public

accommodation." *See* Opening Br. at 41. But this provision is irrelevant because it is not an exemption from the prohibitions at issue in this case. Rather, it is an exemption from CADA's prohibition against discrimination based on "sex," which CADA enumerates separately from the prohibitions that the Bakery challenges here—the ones against discrimination based on sexual orientation, gender identity, and gender expression. *See* C.R.S. § 24-34-601(2); C.R.S. § 24-34-301(7) (West 2019).

The fact that a law may affect some religiously motivated conduct is an unavoidable result of how law operates in a religiously diverse society. *See Smith*, 494 U.S. at 878–80, 888–90; *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."). Such incidental effects do not amount to religious targeting or render a law non-neutral. *See Lukumi*, 508 U.S. at 535.

* * * * *

Colorado seeks to eradicate discrimination based on sexual orientation, gender identity, and gender expression in the marketplace

by equally and absolutely prohibiting all public accommodations from engaging in it. The Bakery does not plausibly allege that Colorado has singled out for unfavorable treatment those public accommodations that refuse to serve LGBTQ+ people for religious reasons while allowing others to refuse to serve them for nonreligious reasons. Neither does the Bakery plausibly allege that Colorado has in any other respect treated it worse than similarly situated covered entities. Nor does the Bakery identify any secular exemptions from the public-accommodations law's bar against discrimination based on sexual orientation, gender identity, and gender expression. And there is no whiff of religious animus, either on the law's face or in its application. Neither *Tandon*, nor *Fulton*, nor any other authority supports application of heightened scrutiny under these circumstances.

Because CADA is neutral and generally applicable and evinces no disfavor or animus toward any religion, it is subject only to rational-basis review. *See People v. Ray*, 417 P.3d 939, 941 (Colo. App. 2018) (citing *Smith*, 494 U.S. at 879). And the statute more than satisfies this test—for, as we next explain, it would satisfy even strict scrutiny if that were the applicable test under the Free Exercise Clause.

B. The public-accommodations law would satisfy even strict scrutiny.

1. Free-exercise jurisprudence makes clear that while the rights to believe (or not) and to practice one's faith (or not) are sacrosanct, they do not entail a right to impose one's own beliefs on others.

Even prior to *Smith*, when strict scrutiny was the default test for free-exercise claims (*see Sherbert v. Verner*, 374 U.S. 398, 403 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 214–15 (1972)), the Supreme Court repeatedly rejected claims for religious exemptions that would have imposed harms or burdens on others. In *United States v. Lee*, for example, the Court rejected an Amish employer's request for an exemption from paying social-security taxes partly because the exemption would have "operate[d] to impose the employer's religious faith on the employees." 455 U.S. 252, 261 (1982). In *Braunfeld v. Brown*, the Court declined to grant an exemption from Sunday-closing laws partly because it would have provided Jewish businesses with "an economic advantage over their competitors who must remain closed on that day." 366 U.S. 599, 608–09 (1961) (plurality opinion). And in *Prince v. Massachusetts*, the Court denied an exemption from child-labor laws that would have allowed minors to distribute religious literature,

because parents are not free "to make martyrs of their children." 321 U.S. 158, 170 (1944).

In contrast, the Court recognized a Seventh-Day Adventist's right to an exemption from a restriction on unemployment benefits in *Sherbert* because the exemption would not have "serve[d] to abridge any other person's religious liberties." 374 U.S. at 409. And the Court partially exempted Amish parents from state compulsory-education laws in *Yoder* only after the parents demonstrated the "adequacy of their alternative mode of continuing informal vocational education" to meet their children's educational needs. 406 U.S. at 235.

2. Turning to the first component of strict scrutiny, CADA's prohibition against discrimination by public accommodations based on sexual orientation, gender identity, and gender expression serves not just a legitimate governmental interest but a compelling one, preventing the harms that would result from depriving, among others, LGBTQ+ Colorado residents and visitors of fair and free access to goods and services in the marketplace. The Supreme Court explained in *Roberts v. U.S. Jaycees* that "eliminating discrimination and assuring . . . citizens equal access to publicly available goods and services . . .

plainly serves compelling state interests of the highest order." 468 U.S. 609, 624 (1984). Similarly, in *Fulton*, the Court recognized that the government's interest in preventing sexual-orientation discrimination "is a weighty one, for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.'" 593 U.S. at 542 (quoting *Masterpiece Cakeshop*, 584 U.S. at 631); *see also 303 Creative*, 600 U.S. at 590–91. To be sure, the Court ultimately concluded in *Fulton* that a city did not have a compelling interest in denying a foster-care agency a religious exemption from an antidiscrimination rule in a city contract because the contract permitted secular exemptions from the same rule on a discretionary basis. *See Fulton*, 593 U.S. at 542. But CADA does not allow any secular exemptions from its ban on discrimination because of sexual orientation, gender identity, and gender expression by public accommodations.

Instead, as applied here, CADA uniformly ensures that discrimination is not a barrier to LGBTQ+ consumers "acquiring whatever products and services [one] choose[s] on the same terms and conditions as are offered to" everyone else. *Masterpiece Cakeshop*, 584

U.S. at 632. And in doing so, it protects LGBTQ+ people "from a number of serious social and personal harms," including deprivation "of their individual dignity." *Roberts*, 468 U.S. at 625. Granting a religious exemption here would license the Bakery, and by extension all other public accommodations, to discriminate against customers because of their sexual orientation, gender identity, or gender expression if the business asserts a religious reason for doing so. LGBTQ+ people would then suffer the social, psychological, and economic harms that CADA was designed to prevent.[3]

3. CADA is narrowly tailored to achieving that end, because prohibiting the discrimination sought to be eradicated "abridges no more [activity] than is necessary to accomplish that purpose." *Id.* at 629; *cf. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 594 (6th Cir. 2018) ("[E]nforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace."), *aff'd sub nom. Bostock v. Clayton*

[3] It is also worth noting that *Fulton* was not a public-accommodations case. The Court concluded that, under the facts presented, a government-contracted child-placement agency did not fall within the scope of Philadelphia's public-accommodations ordinance. *Fulton*, 593 U.S. at 538–40.

County, 590 U.S. 644 (2020). Colorado need not substitute the alternatives the Bakery proposes (*see* Opening Br. 42–43), for they would "not be as effective" in achieving the state's objective to eradicate discrimination on the bases of sexual orientation, gender identity, and gender expression. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004).

The Bakery insists that it refused Ms. Scardina service not because of her transgender status but because of the message her requested cake allegedly conveyed, contending that Colorado could achieve its goals less restrictively by "interpret[ing] its law to allow message-based objections." Opening Br. at 42. But the Supreme Court has "declined to distinguish between status and conduct in this context," because the two are so closely linked. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010); *accord Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").[4]

[4] Each of the Bakery's other proposed alternatives (*see* Opening Br. 42–43) suffer from the same fundamental flaw. None would be as effective in eliminating discrimination based on sexual orientation, gender identity, and gender expression in public accommodations.

Nor is it relevant that there may be other bakers who would be willing to serve Ms. Scardina. Even assuming that there are comparable bakeries elsewhere in Colorado, telling a person suffering the pain and humiliation of discrimination to "just go someplace else" is no remedy for the grave stigmatic harms that discrimination inflicts. "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring). Antidiscrimination laws "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *See id.* at 250 (majority opinion) (quoting S. Rep. No. 88-872, at 16–17 (1964)).

That some (or even most) bakeries in Colorado might create Ms. Scardina's requested cake would do nothing to alleviate the "serious stigma" (*Masterpiece Cakeshop*, 584 U.S. at 634) of living in a community in which businesses can publicly bar their doors to transgender people. Were the requested exemption granted, transgender people would awaken each day knowing that, wherever

they go, they might be turned away from public accommodations that deem them unfit and unworthy to be served, and that they would have no legal recourse if the denials are explained in religious terms.

Allowing discrimination by public accommodations also inflicts economic harms well beyond the standalone discriminatory event. *See* Christy Mallory et al., Williams Inst., *The Impact of Stigma and Discrimination Against LGBT People in Texas* 56–57 (2017), https://bit.ly/3LQWkfE; *see also id.* at 56 (explaining that "state economies benefit from more inclusive legal and social environments"); *see also Heart of Atlanta*, 379 U.S. at 252–53, 257. Must transgender people carry around a Green Book to find establishments that will serve them? *Cf.* Brent Staples, *Traveling While Black: The Green Book's Black History*, N.Y. Times (Jan. 25, 2019), https://nyti.ms/3aaPiAB. And must Colorado allow businesses to force them to do so, at so great a cost to the state, its economy, and the dignity and well-being of its residents and visitors?

Put simply, "acts of invidious discrimination in the distribution of publicly available goods [and] services . . . cause unique evils" (*Roberts*, 468 U.S. at 628), which Colorado has chosen to exorcise. To accept the

Bakery's arguments would instead give official imprimatur to those acts. It would deny transgender people the fundamental American promise of equality for all and diminish their standing in society. The Constitution does not require government to impose such grave harms in the name of religious accommodation.

II. Antidiscrimination laws protect religious freedom.

This case entails more than the weighing of religious objections against secular rights and interests. For public-accommodations laws like Colorado's also protect religion and its exercise. Public-accommodations laws advance strong governmental interests in preventing discrimination of all kinds, including *religious* discrimination, in the provision of goods and services, thereby ensuring that all people may believe and worship according to their conscience, without fear that they will be denied equal treatment in the public marketplace. The religious freedom of all is therefore threatened, not served, by efforts to misuse the First Amendment to license discrimination.

Though the Bakery repeatedly asserts that its objection is to Ms. Scardina's message, rather than her identity, the drastic revision of

free-exercise law that this lawsuit seeks could not be so cabined. For in our pluralistic society, there is an almost limitless variety of religious motivations, interests, and potential objections. What is more, many religious adherents view themselves as guided by religion in everything they do. *See, e.g.*, *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001). The baker, Jack Phillips, is a case in point: "[h]e believes everything he does should glorify God, which affects the cakes Phillips creates *and how he treats others*." Opening Br. at 5 (emphasis added).

Meanwhile, antidiscrimination laws "protect[ ] against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). If this Court were to interpret the Free Exercise Clause to license violations of these laws whenever one has a religion-based desire not to obey them, all manner of discrimination would become permissible: Anyone could be denied service in a restaurant, hotel, shop, or other public establishment, for no reason other than that they are LGBTQ+—or Black, or Jewish, or have a disability—and the proprietor states a religious reason for barring the doors to them. *Cf., e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per

curiam) (restaurant owner's refusal to serve Black patrons was based on belief that federal public-accommodations law "contravenes the will of God").

That these harms could extend to religious minorities is not merely theoretical. The case law shows—and the experiences of *amici* and our members confirm—that disfavor toward, unequal treatment of, and denials of service to members of minority faiths and nonbelievers are all too common. Moreover, religious minorities are also often members of other disfavored groups, such as the LGBTQ+ community. *See* Kerith J. Conron et al., Williams Inst., *Religiosity Among LGBT Adults in the US* 2 (2020), https://bit.ly/3HzlzUa. And religious discrimination in particular is often premised on the discriminator's religious views.

In *Paletz v. Adaya*, No. B247184, 2014 WL 7402324 (Cal. Ct. App. Dec. 29, 2014), for example, a hotel owner closed a poolside event after learning that it was hosted by a Jewish group. The hotelier told an employee, "I don't want any [f—ing] Jews in the pool" (*id.* at *2 (alteration in original)); said that her family would cut off funding to the hotel if they learned of the gathering (*id.* at *4); and directed hotel staff

to remove the Jewish guests from the property (*id.* at *2). In *Khedr v. IHOP Restaurants, LLC*, 197 F. Supp. 3d 384 (D. Conn. 2016), a restaurant refused service to a Muslim family because of their faith. The father recounted: "The restaurant manager started to look at us up and down with anger, hate, and dirty looks because my wife was wearing a veil, as per our religion of Islam." *Id.* at 385. In front of the family's twelve-year-old child, the manager told his staff "not to serve 'these people' any food." *Id.* And in *Fatihah v. Neal*, the owners of a gun range posted a sign declaring the facility a "MUSLIM FREE ESTABLISHMENT," armed themselves with handguns when a Muslim man wanted to use the range, and accused him of wanting to murder them because "'[his] Sharia law' required" it. *See* Compl. ¶¶ 24, 32, 34, No. 16-cv-58 (E.D. Okla. Feb. 17, 2016), ECF No. 3.

It follows that if the Free Exercise Clause were construed to grant businesses a license to violate antidiscrimination laws whenever they profess a religious motivation, religious discrimination would receive governmental sanction and could become commonplace.

For example, suppose that a couple had children that, in the opinion of a business owner, should not exist because the parents are of

different faiths or were married within a faith that the merchant's religion rejects. Might the children be denied a birthday cake or a party celebrating a bar or bat mitzvah or a first communion? May a restaurant turn away a Muslim woman who wears a hijab, because the owner's religion forbids associating with members of other faiths? May a grocer refuse to sell food to an unmarried pregnant woman because his religion tells him that he would be facilitating someone else's living in sin? And what about a recently widowed Catholic whose Protestant spouse wanted a Protestant funeral? May a Protestant funeral director bar the widow from the memorial, leaving her unable to say goodbye in a way that respects her beloved's faith?

If the Free Exercise Clause licenses religion-motivated denials of service to transgender customers, as the Bakery contends, then it also sanctions all other religion-motivated denials, including exclusions based on a customer's faith. One could be refused employment, thrown out of a hotel, or barred from purchasing a hamburger just for being of the "wrong" religion. And no state or local authority or law could do anything to remedy the situation. Such a system would devastate religious freedom, not protect it.

CONCLUSION

For the foregoing reasons, the opinion of the Colorado Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing motion was filed using the Court's CM/ECF system on February 27, 2024, and that the following parties were notified accordingly:

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