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| COURT OF APPEALS, STATE OF COLORADO<br>2 East 14th Avenue, Suite 800<br>Denver, CO 80203 | |
| COLORADO CIVIL RIGHTS COMMISSION<br>DEPARTMENT OF REGULATORY AGENCIES<br>1560 Broadway, Suite 1050<br>Denver, CO 80202<br>Case No. 2013-0008 | |
| **RESPONDENTS-APPELLANTS:**<br>MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS,<br><br>**v.**<br><br>**COMPLAINANTS-APPELLEES:**<br>CHARLIE CRAIG and DAVID MULLINS | **▲COURT USE ONLY▲** |
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**BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE; BEND THE ARC: A JEWISH PARTNERSHIP FOR JUSTICE; CENTRAL CONFERENCE OF AMERICAN RABBIS; GLOBAL JUSTICE INSTITUTE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; JAPENESE AMERICAN CITIZENS LEAGUE; KESHET; METROPOLITAN COMMUNITY CHURCHES; MORE LIGHT PRESBYTERIANS; THE NATIONAL COUNCIL OF JEWISH WOMEN; NEHIRIM; PEOPLE FOR THE AMERICAN WAY FOUNDATION; RECONCILINGWORKS: LUTHERANS FOR FULL PARTICIPATION; RECONSTRUCTIONIST RABBINICAL COLLEGE AND JEWISH RECONSTRUCTIONIST COMMUNITIES; RELIGIOUS INSTITUTE, INC.; SIKH AMERICAN LEGAL DEFENSE AND EDUCATION FUND; T'RUAH: THE RABBINIC CALL FOR HUMAN RIGHTS; UNION FOR REFORM JUDAISM; WOMEN OF REFORM JUDAISM; AND WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM IN SUPPORT OF APPELLEES**

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## CERTIFICATE OF COMPLIANCE

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

1. The brief complies with C.A.R. 28(g).

   Choose one:

   X It contains 5,826 words.

   __ It does not exceed 30 pages.

2. The brief complies with C.A.R. 38(k).

   __ For the party raising the issue:

   It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

   X For the party responding to the issue:

   This brief contains a separate section concerning the standard of review at the beginning of the Argument.

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

/s/ Andrew C. Lillie
Andrew C. Lillie

*[Original Signature on file at the offices of Hogan Lovells US LLP]*

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Comes now *Amici Curiae* Anti-Defamation League; Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Global Justice Institute; Hadassah, The Women's Zionist Organization of America; Japanese American Citizens League; Keshet; Metropolitan Community Churches; More Light Presbyterians; Nehirim; People For the American Way Foundation; ReconcilingWorks: Lutherans For Full Participation; Reconstructionist Rabbinical College and Jewish Reconstructionist Communities; Religious Institute, Inc.; Sikh American Legal Defense and Education Fund; The National Council of Jewish Women; T'ruah: The Rabbinic Call for Human Rights; Union for Reform Judaism; Women of Reform Judaism; and Women's League for Conservative Judaism, and pursuant to C.A.R. 29 present this *amicus* brief in support of Complainants-Appellees.

## STATEMENT OF THE ISSUE PRESENTED AND INTEREST OF *AMICI CURIAE*

*Amici* submit this *amicus* brief to address the following issue:

> Whether the Colorado Civil Rights Commission and the Administrative Law Judge properly determined that a commercial bakery that operates as a place of public accommodation under Colorado's anti-discrimination law, C.R.S. § 24-34-601(2), cannot discriminate on the basis of customers' sexual orientation because of a baker's religious beliefs.

*Amicus curiae* Anti-Defamation League (ADL) was founded in 1913 to combat anti-Semitism and other forms of discrimination, to advance goodwill and mutual understanding among Americans of all creeds and races, and to secure justice and fair treatment to all. Today, ADL is one of the world's leading civil- and human-rights organizations combating anti-Semitism and all types of prejudice, discriminatory treatment, and hate. As part of its commitment to protecting the civil rights of all persons, ADL has filed *amicus* briefs in numerous cases urging the unconstitutionality or illegality of discriminatory practices or laws.[1]

*Amicus curiae* Bend the Arc: A Jewish Partnership for Justice is a national organization inspired by Jewish values and the steadfast belief that Jewish Americans, regardless of religious or institutional affiliations, are compelled to create justice and opportunity for Americans.

*Amicus curiae* The Global Justice Institute is the social justice arm of Metropolitan Community Churches. It is separately incorporated, though it

[1] *See, e.g., United States v. Windsor*, 133 S. Ct. 2675 (2013); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012); *Christian Legal Soc. v. Martinez*, 561 U.S. 661 (2010); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Romer v. Evans*, 517 U.S. 620 (1996).

originally began as a "ministry" of MCC. It does work in Asia, Pakistan, Eastern Europe, Latin America, the Caribbean, Canada, the United States, East Africa and South Africa on matters of social justice and public policy primarily in the LGBTI communities, but also along lines of intersection with other marginalized communities.

*Amicus curiae* Hadassah, The Women's Zionist Organization of America, founded in 1912, has over 330,000 Members, Associates, and supporters nationwide. In addition to Hadassah's mission of initiating and supporting pace-setting health care, education, and youth institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah vigorously condemns discrimination of any kind and, as a pillar of the Jewish community, understands the dangers of bigotry. Hadassah strongly supports the constitutional guarantees of religious liberty and equal protection, and rejects discrimination on the basis of sexual orientation.

*Amicus curiae* Japanese American Citizens League (JACL), founded in 1929, is the nation's largest and oldest Asian-American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. It vigilantly strives to uphold the human and civil rights of all persons. Since its inception, JACL has opposed the denial of equal protection of

the laws to minority groups. In 1967, JACL filed an *amicus* brief in *Loving v. Virginia*, urging the Supreme Court to strike down Virginia's anti-miscegenation laws, and contending that marriage is a basic civil right of all persons. In 1994, JACL became the first API non-gay national civil-rights organization, after the American Civil Liberties Union, to support marriage equality for same-sex couples, affirming marriage as a fundamental human right that should not be barred to same-sex couples. JACL continues to work actively to safeguard the civil rights of all Americans.

*Amicus curiae* Keshet is a national organization that works for the full equality and inclusion of lesbian, gay, bisexual, and transgender (LGBT) Jews in Jewish life. Led and supported by LGBT Jews and straight allies, Keshet cultivates the spirit and practice of inclusion in all parts of the Jewish community. Keshet is the only organization in the U.S. that works for LGBT inclusion in all facets of Jewish life—synagogues, Hebrew schools, day schools, youth groups, summer camps, social-service organizations, and other communal agencies. Through training, community organizing, and resource development, it partners with clergy, educators, and volunteers to equip them with the tools and knowledge they need to be effective agents of change.

*Amicus curiae* Metropolitan Community Churches (MCC) was founded in 1968 to combat the rejection of and discrimination against persons within religious life based upon their sexual orientation or gender identity. MCC has been at the vanguard of civil- and human-rights movements and addresses the important issues of racism, sexism, homophobia, ageism, and other forms of oppression. MCC is a movement that faithfully proclaims God's inclusive love for all people and proudly bears witness to the holy integration of spirituality and sexuality.

*Amicus curiae* More Light Presbyterians represents lesbian, gay, bisexual, and transgender people in the life, ministry, and witness of the Presbyterian Church (U.S.A.) and in society.

*Amicus curiae* National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "laws and policies that provide equal rights for same-sex couples." NCJW's principles state that "religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society" and "discrimination on the basis of race, gender, national

origin, ethnicity, religion, age, disability, marital status, sexual orientation, or gender identity must be eliminated." Consistent with NCJW's Principles and Resolutions, NCJW joins this brief.

*Amicus curiae* Nehirim is a national community of lesbian, gay, bisexual, and transgender (LGBT) Jews, partners, and allies. Nehirim's advocacy work centers on building a more just and inclusive world based on the teachings in the Jewish tradition.

*Amicus curiae* People For the American Way Foundation (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty, as well as American values like equality and opportunity for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle of the Free Exercise Clause of the Constitution as a shield for the exercise of religion, protecting individuals of all faiths. PFAWF is concerned, however, about efforts, such as in this case, to transform this important shield into a sword to attack the rights of third parties to be free from discrimination, and accordingly joins this brief.

*Amicus curiae* ReconcilingWorks: Lutherans For Full Participation organizes lesbian, gay, bisexual, and transgender individuals and their allies within the Lutheran communion and its ecumenical and global partners.

*Amicus curiae* Reconstructionist Rabbinical College and Jewish Reconstructionist Communities educates leaders, advances scholarship, and develops resources for contemporary Jewish life.

*Amicus curiae* Religious Institute, Inc. is a multi-faith organization whose thousands of supporters include clergy and other religious leaders from more than fifty faith traditions. The Religious Institute, Inc. partners with the leading mainstream and progressive religious institutions in the United States.

*Amicus curiae* the Sikh American Legal Defense and Education Fund was founded in 1996 and is the oldest Sikh American civil rights and educational organization. It empowers Sikh Americans through advocacy, education, and media relations. Sikh American Legal Defense and Education Fund's mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations.

*Amicus curiae* T'ruah: The Rabbinic Call for Human Rights is an organization led by rabbis from all denominations of Judaism that acts on the Jewish imperative to respect and protect the human rights of all people. Our

judges state that "[y]ou shall not judge unfairly; you shall show no partiality" (Deuteronomy 16:19). Jewish law has developed strict guidelines to ensure that courts function according to this principle. The rights and protections afforded by civil marriage are legal and not religious in nature. T'ruah: The Rabbinic Call for Human Rights believes it is important to state that people of faith are not of one mind opposing civil-marriage equality, and that many interpretations of religion actually support such equality. The Universal Declaration of Human Rights similarly guarantees to every person equal rights, without "distinction of any kind," and specifies that "men and women of full age * * * are entitled to equal rights as to marriage, during marriage and at its dissolution." While each rabbi or religious community must retain the right to determine acceptable guidelines for religious marriage, the state has an obligation to guarantee to same-sex couples the legal rights and protections that accompany civil marriage. Doing otherwise constitutes a violation of human rights, as well as the Jewish and American legal imperatives for equal protection under the law.

*Amici curiae* The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis (CCAR), whose membership includes more than 2,000 Reform rabbis, and Women of Reform Judaism, which represents more than 65,000

women in nearly 500 women's groups in North America and around the world, come to this issue rooted in their proud legacy of fighting for civil rights and social justice while defending both religious freedom and the separation of church and state.

*Amicus curiae* Women's League for Conservative Judaism (WLCJ) is the largest synagogue-based women's organization in the world. As an active arm of the Conservative/Masorti movement, WLCJ provides service to hundreds of affiliated women's groups in synagogues across North America and to thousands of women worldwide. WLCJ strongly supports full civil equality for gays and lesbians with all associated legal rights and obligations, both federal and state and rejects discrimination on the basis of sexual orientation.

*Amici* have a substantial interest in this case because it raises core questions about equality and constitutional rights. The religious justifications Appellants offer to deny service to Appellees in violation of Colorado's public accommodation law—if embraced by this Court—would threaten to invite and promote the very type of religious prejudice against which *amici* have long fought.

## STANDARD OF REVIEW

A reviewing court may reverse an agency determination only where it is "arbitrary or capricious, violative of constitutional rights, or constitutes an abuse of discretion." *McClellan v. Meyer*, 900 P.2d 24, 29 (Colo. 1995) (en banc); C.R.S. § 24-4-106(7), (11)(e).

## ARGUMENT

### I. Courts Have Consistently Rejected Religiously Motivated Discrimination—Appellants' Sole Justification For Violating Colorado's Anti-Discrimination Act—As An Exception to Generally Applicable Anti-Discrimination Laws.

Appellants sought below (and on appeal) to justify their violation of Colorado's Anti-Discrimination Act (CADA) based on Mr. Phillips's "sincerely held religious beliefs." Appellants' Br. 1. According to Appellants, selling Charlie Craig and David Mullins a cake for their wedding would "express messages contrary to [Mr. Phillips's] religious values." *Id.* at 4.

Religious beliefs, however, do not legitimize discrimination in this context, just as they do not in other contexts. The constitutional arguments Appellants offer to the Court rest entirely on the mistaken premise that religious beliefs excuse Appellants from complying with a neutral law of general applicability—here, Colorado's public-accommodation law. *See* C.R.S. § 24-34-601(2). But as the United States Supreme Court has recognized, "[n]ot all burdens on religion are

unconstitutional." *United States v. Lee*, 455 U.S. 252, 257 (1982); *see also Johnson v. Motor Vehicle Div., Dep't of Rev.*, 593 P.2d 1363 (Colo. 1979) (*en banc*) (rejecting a religious group's challenge to the Colorado DMV's requirement that driver's licenses include a photograph on federal and state constitutional free-exercise grounds). To the contrary, courts consistently have held that religion may be "burdened" to prevent unlawful discrimination in the name of religious freedom.

For example, in the seminal case, *Bob Jones University v. United States*, 461 U.S. 574 (1983), a private university that prohibited interracial dating and marriage on religious grounds challenged the Internal Revenue Service's disallowance of the university's tax-exempt status. In upholding the IRS's revocation of the school's tax exemption, and its corresponding right to receive tax-deductible charitable donations, the Court recognized that because "the Government has a fundamental, overriding interest in eradicating racial discrimination in education," *id.* at 604, the IRS's action withstood constitutional scrutiny, notwithstanding that the university's policy was motivated by religious belief. Likewise, Mr. Phillips's religious beliefs, no matter how sincerely he holds them, do not give him license to

discriminate in a manner that contravenes a Colorado law aimed at eradicating precisely the kind of discrimination that he practiced.[2]

*Bob Jones University* is part of the settled case law establishing that the Free Exercise Clause does not allow religious believers to thwart generally applicable anti-discrimination laws. The Supreme Court's rejection of the university's arguments provides yet another milestone in a long history of judicial and societal rejection of discrimination in the name of religion. *Amici* file this brief to provide that historical perspective. Just as history has not countenanced using the protections of the First Amendment's Free Exercise Clause to rationalize discriminating against minority groups, Appellants cannot rely on it, or

[2] *See, e.g.*, *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 61 (E.D. Pa. 1991) (holding that a hospital's free exercise rights were "not implicated" by the Age Discrimination and Employment Act prohibitions on age discrimination); *United States Dep't of Labor v. Shenandoah Baptist Church*, 707 F. Supp. 1450, 1460 (W.D. Va. 1989) (holding that a religious school's Free Exercise rights did not excuse it from violating the Fair Labor Standards Act when it discriminated against employees on the basis of sex); *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 37, 39 (D.C. 1987) (en banc) (holding that Georgetown University's free exercise rights did not excuse it from violating the D.C. Human Rights Act when it denied tangible benefits to student groups on the basis of sexual orientation); *State* ex rel. *McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844, 853 n.16 (Minn. 1985) (concluding that the Free Exercise Clause does not permit a private health club from applying membership criteria based on marital status and religious affiliation in violation of the Minnesota Human Rights Law).

Mr. Phillips's religious beliefs, to discriminate against Appellees in violation of Colorado's public accommodation law.

## II. Religious Disapproval Has Historically Been An Unsustainable Basis For Justifying Discrimination Against Minority Groups.

Those who discriminate against disadvantaged groups have long relied on arguments grounded in religion to justify their discrimination. Time and again, however, society has come to see such discrimination as a stain on the Nation's history and to view the religious justifications offered for it as wrong, both spiritually and philosophically.

### A. Many Forms Of Discrimination Against Minority Groups Were Initially Rationalized By Religious Disapproval.

Throughout American history, the pattern is clear: Pervasive discriminatory practices that now seem preposterous were defended—and, in many cases, extolled—in their day on grounds of religious disapproval.

1. Slavery provides a striking example. From the colonial period until the ratification of the Thirteenth Amendment, supporters of slavery frequently relied on scripture not only to deflect abolitionist concerns but also to insist that slavery was a moral *good*—a central part of God's plan. *See* W. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief & Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657, 666–67 (2010). Slavery supporters

prominently argued that " 'the Negro was a heathen and a barbarian, an outcast among the peoples of the earth, a descendant of Noah's son Ham, cursed by God himself and doomed to be a servant forever on account of an ancient sin.' " D. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law & Politics* 12 (1978) (quoting 2 G. Myrdal, *et al*., *An American Dilemma: The Negro Problem and Modern Democracy* 85 (1944)). A related theory held that "negroes were human but that unlike whites they were not created in the image of God and [were] one of several inferior races created by God after Adam." 6 J. Smith, *The Biblical & "Scientific" Defense of Slavery* xxv–xxvi (1993). Defenders of slavery also emphasized "that God's Chosen (Abraham, Isaac, and Jacob) owned slaves and that Leviticus required the Israelites to secure 'bondsmen' from among the 'heathen' surrounding Israel" that were to be "inherit[ed] * * * for a possession." Eskridge, *supra*, at 667.

This scriptural justification was not embraced by extremist sects alone. To the contrary, it represented the dominant viewpoint of nearly every major religious group in the United States during this period. In fact, when abolitionists began to challenge slavery, clergymen of all denominational stripes were among the institution's most ardent defenders. *Id.* at 669. And following Lincoln's Emancipation Proclamation, 96 religious leaders from 11 different denominations

issued a proclamation of their own entitled "An Address to Christians Throughout the World" demanding the preservation of slavery. *Id.*

The biblical defense of slavery gained currency within the judicial sphere as well. For example, in *Scott v. Emerson*, 15 Mo. 576 (Mo. 1852), the Missouri Supreme Court counseled:

> When the condition of our slaves is contrasted with the state of their miserable race in Africa; when their civilization, intelligence, and instruction in religious truths are considered * * * we are almost persuaded, that the introduction of slavery amongst us was, in the providence of God * * * a means of placing that unhappy race within the pale of civilized nations.

*Id.* at 587. Indeed, even the United States Supreme Court accepted a religiously rooted notion of African Americans as inferior, noting that that inferiority "was regarded as an axiom in morals as well as in politics, which no one thought of disputing[.]" *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

2. Nor did the Thirteenth Amendment put an end to religious justifications for African-American subjugation. Instead, those opposed to equal rights for former slaves simply modified their reading of scripture: If the Bible no longer could be read to condone slavery, it could at least be read to mandate segregation. Eskridge, *supra*, at 694. The theories of Reverend Benjamin Morgan Palmer, leader of the Southern Presbyterian Church, provide a telling example. Recall that, according to Biblical tradition, Africans descended from Ham. Palmer

theorized that because Ham's grandson Nimrod built the Tower of Babel, and God reacted by scattering the tower's builders " 'abroad from thence upon the face of all the earth,' " God would do the same thing again if Ham's current descendants challenged segregation: "[I]f arrogant descendants of Ham * * * sought to disrupt the divine plan for segregation of the races, the Lord would thwart those plans through divine dispersion that reaffirmed the original design." *Id.* at 669–70. Southern whites relied on this and other "modernized" interpretations of scripture to advocate a " 'right not to associate' with black people." *Id.* at 669.

Just as with slavery, these arguments gained widespread acceptance, including within the judiciary. In *West Chester & Philadelphia Railroad Co. v. Miles*, 55 Pa. 209 (Pa. 1867), the Pennsylvania Supreme Court opined that "following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix." *Id.* at 213. Thus the legal basis for segregation: "When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself[.]" *Id.* at 214. This passage was cited repeatedly by other courts as a basis for upholding Jim Crow laws. *See, e.g.*, *Berea College v. Commonwealth*, 29 Ky.

L. Rptr. 284 (Ky. 1906); *Bowie v. Birmingham Ry. & Elec. Co.*, 125 Ala. 397, 408–09 (1900); *State v. Gibson*, 36 Ind. 389 (1871).

3. Segregationist arguments grounded in religion were perhaps most ubiquitous in the struggle against interracial marriage. Seizing on the United States Supreme Court's pronouncement that marriage "ha[s] more to do with the morals and civilization of a people than any other institution," *Maynard v. Hill*, 125 U.S. 190, 205 (1888), opponents of interracial marriage relied on scripture to argue that marriage between the races was immoral and a contravention of God's word. They cited numerous biblical passages to justify their position, including Deuteronomy 7:3 (instructing the Israelites not to marry members of other tribes); Ezra 9:1–3 (discussing the "abominations" of marrying members of other nations); and Genesis 28:1 (describing Isaac's instruction to Jacob not to "take a wife of the daughters of Canaan," who were of African descent). *See* Eskridge, *supra*, at 673 n.79, 675.

Again, these beliefs found their way into scores of judicial opinions upholding bans on interracial marriage. In *Kinney v. Commonwealth*, 71 Va. 858 (1878), for example, the Virginia Supreme Court held that "[t]he purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization" all required that the races "be

kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion." *Id.* at 869. Likewise, in *Green v. State*, 51 Ala. 190 (1877), the Alabama Supreme Court wrote: "[S]urely there cannot be any tyranny or injustice in requiring both [blacks and whites] alike, to form this union with those of their own race only, whom God hath joined together by indelible peculiarities, which declare He has made the two races distinct." *Id.* at 195. *See, e.g.*, *Scott v. State*, 39 Ga. 321, 326 (1869); *Miles*, 55 Pa. at 213.

Perhaps most notoriously, in the mid-1960s a Virginia trial court held—in a decision later overturned by the United States Supreme Court—that Virginia's prohibition on interracial marriage fulfilled God's Word: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents." *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (citing trial court opinion). "And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Id.*

Such beliefs maintained a robust following well into the second half of the twentieth century. *See id.*; *see also State ex rel. Hawkins v. Board of Control*, 83 So. 2d 20, 27–28 (Fla. 1955) (noting that "segregation is not a new philosophy

generated by the states" but rather part of "God's plan"). Even as laws supporting segregation began to fall, the arguments for segregation continued to rely on religion as a justification, focusing on religious liberty and the associational freedom of white Christians not to associate with non-whites. *See* Eskridge, *supra*, at 672–74. After the United States Supreme Court struck down the "separate but equal" doctrine in *Brown v. Board of Education*, 347 U.S. 483 (1954), Southern churches created religious academies so white Christians would not be burdened by having to attend segregated schools. *See* U.S. Comm'n on Civil Rights, Discriminatory Religious Schools & Tax Exempt Status 1 (1982). When the Treasury Department removed those schools' tax-exempt designations, fundamentalists protested that the government was infringing on their religious liberty to run segregated schools as the Bible demanded. *See Tax Exempt Status of Private Schools: Hearing Before the Subcomm. on Taxation & Debt Mgmt. Generally of the S. Comm. on Fin.*, 96th Cong. 18 (1979). Bob Jones University made the same argument before the United States Supreme Court in defending its segregationist admissions policy as late as 1983. *See Bob Jones Univ.*, 461 U.S. at 602–03.

4. Similar arguments grounded in religion were advanced to support discrimination against women. *See* A. Padilla & J. Winrich., *Christianity,*

*Feminism & the Law*, 1 Colum. J. Gender & L. 67, 75–86 (1991). As one scholar noted: "There is assumed to be a literal scriptural foundation for a patriarchal family governance structure of husband as 'head' of the household," with his "wife as caregiver/homemaker and submissive or deferential to the husband's authority." L. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools & Sex Equality*, 69 Fordham L. Rev. 1617, 1643 (2001).

As with race, this belief structure influenced judicial decision-making. In *Bradwell v. Illinois*, 83 U.S. 130 (1873), for example, Justice Bradley opined that Illinois could deny women admission to the state bar because "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* at 141 (Bradley, J., concurring). That God Himself ordained women to be homemakers (not lawyers) provided the key justification for this view: "The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. * * * The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Id.*

### B. Such Justifications Have Been Abandoned And Opinions Upholding Them Are Viewed As Anachronistic Blemishes.

The discrimination against minority groups catalogued above has come to be universally repudiated. The United States Supreme Court rejected miscegenation laws in *Loving*. It rejected segregation in *Brown*. It has repudiated opinions upholding racially discriminatory laws driven by religious disapproval. *See, e.g.*, *South Carolina v. Regan*, 465 U.S. 367, 412 (1984) (referring to *Dred Scott* as one of three worst decisions in history). And the United States Supreme Court has, during the past four decades, rejected earlier, religion-driven views regarding the place of women in society. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), for example, the Court held that any test for determining the validity of gender-based classifications "must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724–25. And in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court, renouncing Justice Bradley's concurrence in *Bradwell*, noted the "long and unfortunate history of sex discrimination" in America. *Id.* at 684.

Tellingly, as societal support for the discriminatory practices discussed above has ebbed, the religious disapproval that undergirded that discrimination has *itself* receded. After the Civil War, clergymen modified their interpretation of scripture so that the Bible endorsed segregation instead of slavery. *See supra* at

14–16. Likewise, the 1960s witnessed all of the major Protestant denominations "abandon[ ] the racist renderings of the biblical stories about Noah, Ham, Canaan, Nimrod, Isaac, and Jacob" altogether. Eskridge, *supra*, at 681. And many religious groups have embraced the precise opposite of their old approach to women's rights issues. Many Protestant churches, for example, now ordain women and embrace gender-neutral policies, *see* C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 44 (2011), and have introduced programs to address discrimination against women within the church, *see* E. Wendorff, *Employment Discrimination & Clergywomen: Where the Law Has Feared to Tread*, 3 Cal. Rev. L. & Women's Stud. 135, 140 (1993).

This shift is just the latest incarnation of a recurring national dynamic: Religious justifications for discrimination vanishes as popular support for those forms of discrimination fade. Or, as Professor Eskridge put it, "[r]eligious doctrine on matters relating to race and sexuality has been relentlessly dynamic: the Word of God has changed constantly." Eskridge, *supra*, at 712.

## III. Religious Justifications For Discrimination, Including Based on Sexual Orientation, Have Shifted Over Time.

When it comes to Lesbian, Gay, Bisexual and Transgender (LGBT) rights and marriage equality, history is repeating itself yet again: Religious objections to

equal treatment of the LGBT community are dissipating quickly as societal attitudes fundamentally recalibrate.

### A. Religious Teachings On LGBT Rights And Marriage Equality Are Shifting.

1. Until recently, many religions vehemently opposed homosexuality and homosexual behavior—and the law followed suit. Between 1879 and 1961, most American states and the federal government adopted statutes criminalizing sodomy and imposing civil disabilities on gay people. Eskridge, *supra*, at 689. These laws were premised, at least in part, on the view that same-sex sodomy is a carnal sin and contrary to Biblical purity rules. *Id.* As one evangelical newspaper explained:

> Romans 1:18–32 shows that homosexuality is contrary to nature, and that it is part of the de-generation of man that guarantees ultimate disaster in this life and in the life to come. The Church had better make it plain that Christianity and homosexuality are incompatible even as it proclaims deliverance for the homosexual from his sinful habit through faith in Jesus Christ.

Editorial, *The Options of Modern Man*, 14 Christianity Today 132, 134 (1969).

Not all religious groups expressed such hostility toward homosexuality, of course. But among those that did, the anti-gay rhetoric and action only intensified as the gay-rights movement began to emerge. In 1965, "the Roman Catholic Church * * * almost single-handedly blocked sodomy reform in New York based

upon the Church's view that sodomy is a carnal sin." Eskridge, *supra*, at 690. In 1972, Mormon activists in Idaho convinced that state to reverse course and reinstate a sodomy ban it had just repealed. *Id.* at 692. In 1986, the President of the Southern Baptist Convention preached that "God Himself created AIDS to show His displeasure with homosexuality." *Id.* at 695. And two years later, Southern Baptists adopted a formal resolution condemning homosexuality as an "abomination in the eyes of God." *Id.* at 695–96.

2. But more recently—just as in the cases of integration, interracial marriage, and the like—religious teachings have shifted, some quite dramatically. *See generally* Eskridge, *supra*, at 689–700. In 1978—less than a decade after the Stonewall Riots ushered in the gay-rights movement—the Presbyterian Church issued a comprehensive statement concluding, after reexamining scripture, that the "Sin of Sodom" was rape (rather than gay sex) and that St. Paul's condemnations "refer to dissolute behaviors rather than to any and all homosexual relations." *Id.* at 700–01. By 1986, most mainstream Protestant denominations had decided that the Bible does not support criminal sanctions against consensual same-sex relations. *Id.* at 699.

Some religious denominations have gone much further. During the last three decades, most mainstream Protestant denominations, including the Unitarian

Universalist Association, the Presbyterian Church, the Quakers, the Episcopal Church, the United Methodist Church, the Evangelical Lutheran Church in America, the United Church of Christ, and the Disciples of Christ, have announced that LGBT people are entitled to equal treatment and have issued statements beseeching their members not to reject LGBT congregants. *Id.* at 699–700. During this same period, Unitarians, the United Church of Christ, and Reform, Reconstructionist and Conservative Jews began ordaining openly gay rabbis and ministers. *Id.* at 707. The Episcopal Church followed suit in 1989. *Id.*

Indeed, even some groups that previously resisted gay rights have embraced a more tolerant stance of late. In 1994, the Vatican issued a statement that LGBT persons "must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided." *Id.* And the Southern Baptist Convention has questioned the vehemence of its earlier condemnations. In 2009, the editor of the Baptist Standard asserted that expelling LGBT members from the church was not "redemptive" because it singles out one sin while turning a blind eye to others. *Id.* at 705–06.

3. To be sure, for the Catholic Church, Mormons, Southern Baptists, and some other groups, marriage equality has become "the new Maginot Line for homosexuality." *Id.* at 708. However, in general, religious condemnations of

same-sex marriage have waned in recent years. A number of groups, including the Union of American Hebrew Congregations (Reform Jews), the Unitarian Universalist Church, the United Church of Christ, the Quakers, and the Episcopal Church, now embrace marriage equality. *See* Human Rights Campaign, *Faith Positions*.[3]

Other groups have taken more incremental approaches. In 2004, the Presbyterian General Assembly passed a resolution indicating support for laws recognizing same-sex relationships. *See* Human Rights Campaign, *Stances of Faiths on LGBT Issues: Presbyterian Church (USA)*.[4] In 2009, the Evangelical Lutheran Church in America voted by a substantial majority to "commit to finding ways to allow congregations that choose to do so to recognize, support and hold publicly accountable, lifelong, monogamous, same-gender relationships." Human Rights Campaign, *Stances of Faiths on LGBT Issues: Evangelical Lutheran Church in America*.[5]

Of course, "the shift of religious discourse toward acceptance of gay people has continued at different paces for different denominations." Eskridge, *supra*, at

[3] *Available at* http://www.hrc.org/resources/entry/faith-positions (last viewed on Feb. 12, 2015).
[4] *Available at* http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-presbyterian-church-usa (last viewed on Feb. 12, 2015).
[5] *Available at* http://www.hrc.org/resources/entry/stances-of-faiths-on-lgbt-issues-evangelical-lutheran-church-in-america (last viewed on Feb. 12, 2015).

704–05. Change has not come overnight, but neither did it come overnight with slavery, segregation, interracial marriage, or women's rights. The bottom line is that "the tension between equal rights for gay people and liberty for religious people has been obliterated for a good many denominations and reduced for others," and "the evolution continues." *Id.* at 709.

### B. This Court Should Reject Appellants' Argument That Religious Disapproval Exempts Them From Complying With Colorado's Anti-Discrimination Act.

Appellants' arguments—like many of the religious-based arguments for discrimination offered in the past—"fail to take into account the cost to society and the hurt caused to persons who are denied service simply because of who they are." ALJ Decision at 4. That is why "for well over 100 years, Colorado has prohibited discrimination by businesses that offer goods and services to the public." *Id.* The Court should affirm Colorado's century-long policy of prohibiting discrimination against protected groups by all places of public accommodation—which includes Masterpiece Cakeshop, Inc. The Colorado Legislature added sexual orientation as a protected class to CADA in 2008, and Appellants' request for permission to violate CADA based on religious beliefs should be rejected.

## CONCLUSION

Based on the foregoing analysis, *amici curiae* respectfully request that this Court affirm the Colorado Civil Rights Commission's Final Agency Order.

February 13, 2015

Respectfully submitted,

*[Original Signature on file at the offices of Hogan Lovells US LLP]*

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I hereby certify that on this 13th day of February 2015, a true and correct copy of the foregoing was filed through ICCES and served electronically or via U.S. mail on the following as indicated below:

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