Case No. 19-1413

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

303 CREATIVE LLC and **LORIE SMITH**
Plaintiffs-Appellees,

v.

AUBREY ELENIS, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Colorado
Before the Honorable Chief Judge Marcia S. Krieger
Case No. 1:16-cv-02372-MSK

BRIEF FOR *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., IN SUPPORT OF DEFENDANTS-APPELLANTS, AFFIRM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), *amicus curiae* Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") certifies that it is a non-profit corporation. It has no parent corporation, no publicly held corporation has an ownership interest in it, and it does not issue any stock.

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STATEMENT OF INTEREST

Amicus Curiae Lambda Legal Defense and Education Fund, Inc. ("*Amicus*" or "Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people through impact litigation and other advocacy. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (representing LGBT *amici* in case affirming longstanding precedents); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015) (representing plaintiff couples in cases recognizing same-sex couples' freedom to marry); *Lawrence v. Texas*, 539 U.S. 558, 561 (2003) (representing plaintiffs in case invalidating state laws banning same-sex intimacy). Lambda Legal has represented same-sex couples in many cases of sexual orientation discrimination involving assertions that neutral statutes, rules, or policies regulating businesses, professional services, and other public accommodations infringed religious freedom. *Cervelli v. Aloha Bed & Breakfast*, 142 Hawai`i 177 (Haw. Intermed. Ct. App. 2018), *cert. denied*, 139 S. Ct. 1319, 203 L. Ed. 2d 600 (2019) (concerning lodging); *Zawadski v. Brewer Funeral Services, Inc.*, Circuit Ct., Pearl River Cty., Mississippi, Case No. 55CI1-17-cv-00019-CM (2017), https://tinyurl.com/yakwvsx4 (funeral services); *N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 189 P.3d 959 (Cal. 2008) (medical care); *see also* Motion to Intervene on Behalf of Proposed

Intervenor-Appellees Lee Stafford and Jared Ellars, *Odgaard v. Iowa Civil Rights Comm'n*, No. 14-0738 (Iowa Sup. Ct., Jul. 8, 2014) (representing same-sex couple in a case filed by owners of art gallery and event space who refused rental to same-sex couple for wedding reception, seeking to bypass state civil rights agency's investigation of couple's discrimination complaint), https://tinyurl.com/yab6blyy.

Similarly, Lambda Legal has appeared as *amicus curiae* in many cases in which religious beliefs were asserted to justify discrimination against same-sex couples. *E.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1719; *State v. Arlene's Flowers, Inc.*, 193 Wash. 2d 469 (2019), *cert. pending*, No. 19-333 (filed Sept. 11, 2019); *Klein v. Oregon Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017), *review den.*, 434 P.3d 25 (Or. 2018), *cert. granted, jmt. vacated, remanded*, 139 S. Ct. 2713 (2019); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016).

Because this appeal addresses similar issues and is likely to affect hundreds of thousands of LGBT people in Colorado, *Amicus* has a particular interest in assisting the Court.

SUMMARY OF THE ARGUMENT

This case concerns a claim of a right to engage in sexual orientation discrimination asserted by a for-profit design and marketing business and its owner who intend to make money designing wedding websites for the general public. Although Appellants 303 Creative LLC and its owner Lorie Smith ("Appellants")

have never made such a website for anyone, let alone been asked to create one for a same-sex couple, Smith would like to refuse service to same-sex couples in the future and post a notice declaring her intention to turn such couples away, in violation of the Colorado Anti-Discrimination Act ("CADA"), Colo. Rev. Stat. Ann. § 24-34-601 *et seq*. (West 2014). *Amicus Curiae* Lambda Legal submits this brief in support of the State of Colorado, and agrees with the key points of Colorado's Brief. In particular, *Amicus* agrees that Appellants lack standing to challenge CADA, have failed to show that being required to comply with CADA unconstitutionally abridges Smith's equal protection right, alleged right to "personal autonomy," her free speech rights, or her free exercise rights, or that CADA is unlawfully overbroad or vague in violation of her due process rights.

However, even if this Court were to disagree and hold that Appellants have demonstrated standing and present a ripe dispute for adjudication, all of Appellants' claims nevertheless fail on the merits. *Amicus* writes separately to provide more information about why, under any level of scrutiny, the State of Colorado's interest in protecting LGBT people from discrimination is compelling. This brief describes the recurrent resistance to civil rights by some who have invoked religious freedom to justify discrimination, and the consistent, appropriate conclusion by courts across many decades that such arguments must fail. With information specific to Colorado, together with other evidence of discrimination

nationwide, *Amicus* also shows why effective nondiscrimination rules are necessary now to protect LGBT people from being turned away by public accommodations. In challenges to laws such as CADA, there should be no doubt that the government's interest in enforcement is compelling, and that there is no narrower way of stopping discrimination than by banning discrimination.

Accordingly, if this Court were to reach the merits, *Amicus* urges the Court to rule consistently with the many other courts that recently have addressed this issue and firmly have rejected business owners' arguments for refusing wedding-related services to same-sex couples, while providing those services to different-sex couples. For this Court to disagree and allow religion-based, discriminatory exemptions from Colorado's law would ignore the settled wisdom not only of these cases but of the Supreme Court's recent analysis in *Masterpiece Cakeshop*. As *Masterpiece* observes:

> It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. . . . [W]hile … religious and philosophical objections [to particular customers] are protected, it is a general rule that such 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.

138 S. Ct. at 1727. For this proposition, the Court cited its own *Newman v. Piggie Park Enterprises* decision of half a century ago, which not only rejected religion as

a defense for unlawful race discrimination in public accommodations but deemed that defense "patently frivolous." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968). *Accord* 193 Wash. 2d 469 (2019), *cert. pending*, No. 19-333 (filed Sept. 11, 2019) (rejecting religious freedom defense and recognizing, "[t]his case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches.").

Amicus urges the Court also to be guided by the Supreme Court's observation that creating new, antigay exceptions to civil rights laws for wedding-celebration contexts risks many businesses that sell related goods and services refusing them "for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations." *Id*. at 1727. The consequences would be terrible not just for this minority population but for everyone who may need the protection of similar laws in the future. *Amicus* urges the Court to affirm the District Court's decision.

ARGUMENT

I. Across Generations of Equality Struggles, Courts Repeatedly Have Confirmed That Religious Objections Do Not Thwart Society's Compelling Interest in a Non-Discriminatory Marketplace.

In the United States, differing religious beliefs about family life and gender roles often have generated disputes in the context of public accommodations, as

well as in education, employment, medical services, and other settings. Although some forms of religiously motivated discrimination have receded, history finds successive generations asking anew whether protections for religious liberty provide exemptions from laws protecting others' liberty and right to participate equally in civic life. Courts have provided a consistent, necessary answer to that question: Religious beliefs do not entitle any of us to exemptions from generally applicable civil rights laws protecting all of us from harm. Indeed, the U.S. Supreme Court has described free exercise defenses to antidiscrimination laws as "so patently frivolous that a denial of counsel fees to the [plaintiffs] would be manifestly inequitable." *Newman*, 390 U.S. at 403 n.5. By citing *Piggie Park* in *Masterpiece Cakeshop*, 138 S. Ct. at 1727, the Court reaffirmed that there is to be consistent application of the principle that religious beliefs do not excuse unlawful discrimination by public accommodations, regardless of whether the discrimination is based on race or sexual orientation.

Piggie Park's clarity and forcefulness on this point might be expected today, given the legal and social consensus against race discrimination that has evolved since then. But the federal law was still new in 1968. And en route to the current national consensus that our civil rights laws serve essential public interests, such laws repeatedly faced religion-based objections. Some Christian schools excluded students who supported interracial dating, based on the view that "mixing of the

races is . . . a violation of God's command." *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983). Some employers objected on religious grounds to their employees' interracial friendships. *See, e.g.*, *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (holding that religious freedom did not excuse employer's violation of Civil Rights Act by firing white clerk due to her friendship with a black man). Some white restaurant owners refused to serve black customers, citing religious objections to "integration of the races." *See, e.g.*, *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941, 944–45 (D.S.C. 1966) (rejecting barbeque restaurant owner's religious defense of race discrimination), *rev'd* in part on other grounds, 377 F.2d 433 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968). And, famously, religion was invoked to justify laws against interracial marriage. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (invalidating state interracial marriage ban where trial judge had opined that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents" and therefore "did not intend for the races to mix").

Likewise, as women entered the workplace, some who objected on religious grounds sought exemptions from nondiscrimination laws. Despite the longstanding traditions on which such claims often were premised, courts recognized that accommodating such objections would vitiate the anti-discrimination protections on which workers are entitled to depend. *See, e.g.*, *Dole v. Shenandoah Baptist*

Church, 899 F.2d 1389, 1397–99 (4th Cir. 1990) (holding employer's free exercise rights did not justify violation of Fair Labor Standards Act's equal pay requirement); *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1367–69 (9th Cir. 1986) (rejecting religious school's argument that its free exercise rights excused unequal benefits for female employees); *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (holding employer's refusal to hire women bus drivers due to religious objection of Hasidic male bus riders was improper). Similarly, after some governments enacted fair housing laws that protected unmarried couples, landlords unsuccessfully sought exemptions on the belief that they themselves would be complicit in their tenants' sin if they were to provide a residence in which tenants might commit fornication. *See, e.g.*, *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909, 928–29 (Cal. 1996) (rejecting religion-based defense because anti-discrimination requirements did not impose substantial burden, as landlord's religion did not require investing in rental apartments); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279–80 (Alaska 1994) (same). Thus, across generations, the question already has been asked and answered with reassuring regularity.

Courts consistently have recognized the public's need for peaceful co-existence in the marketplace, which requires ensuring that all members of society can receive equal treatment, regardless of discriminatory beliefs any given business

owner may have about particular groups of people. Today, these principles are tested once again, as LGBT people seek full participation in American life. There is growing understanding that sexual orientation is a personal characteristic bearing no relevance to one's ability to contribute to society, including one's ability to form a loving relationship and build a family. *Obergefell*, 135 S. Ct. at 2591–92; *United States v. Windsor*, 570 U.S. 744, 133 S. Ct. 2675, 2689-90 (2013). And yet, many people's pervasive and fervent religious objections to treating LGBT people as equals or interacting with LGBT people in commercial contexts still prompt widespread harassment and discrimination. *See, e.g.*, Brief *Amici Curiae* of Lambda Legal, *et al*., in *Masterpiece Cakeshop*, Supreme Ct. Case No. 16-111, 2017 WL 5127317 (filed Oct. 30, 2017) (presenting dozens of examples of anti-LGBT discrimination by public accommodations, many with explicit religious motives); Complaint, *Oliver v. The Barbershop*, No. CIVDS1608233, San Bernardino Cty. Super. Ct., California (filed May 25, 2016) (for religious reasons, barber wrongly considered plaintiff female and refuses to cut women's hair, seeing hair as women's "glory"), https://tinyurl.com/y8ggm2gd; Answering Brief of Plaintiffs-Appellees, *Cervelli v. Aloha Bed & Breakfast*, No. CAAP-13-0000806, Haw. Intermed. Ct. of App., 2013 WL 11238552 (Nov. 27, 2013) (explaining refusal to provide lodging to lesbian couple, proprietor said same-sex relationships are "detestable" and "defile our land"); *Klein*, 410 P.3d at 1058 (explaining

business's refusal to produce wedding cake for lesbian couple, owner said same-sex relationships are "an abomination"); *Bodett v. CoxCom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (supervisor religiously harassed lesbian subordinate); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (anti-gay proselytizing was intended to upset coworkers); *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (anti-gay proselytizing by visiting nurse to home-bound AIDS patient); *North Coast Women's Care Medical Group, Inc.*, 189 P.3d at 967 (physicians' religion-based refusal of treatment to lesbian patient).

As laws and company policies have begun to offer protections against this discrimination, some who object now are asking courts to allow the religious exemptions that have been denied in the past. For the most part, this past principle has held true and the equality needs of third parties have remained a constraint on religion-based conduct in commercial contexts. *See, e.g.*, *Cervelli*, 142 Hawai`i at 177 (rejecting religious defense); *North Coast Women's Care Medical Group*, 189 P.3d at 970 (same); *Bodett*, 366 F.3d at 736 (rejecting religious accommodation claim); *Peterson*, 358 F.3d at 599 (same); *Knight*, 275 F.3d at 156 (same). But religious objections to equal treatment of LGBT people by those engaged in commerce remains a problem, and refusals of wedding-related services have become a vehicle of choice for those who seek a different rule of law. *See, e.g.*, *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719 (cake); *State v. Arlene's Flowers*, 193

Wash.2d at 531 (flowers); *Klein*, 410 P.3d at 1056 (cake); *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017), *aff'd in part, rev'd in part and remanded sub nom. Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019) (videography); *Gifford*, 23 N.Y.S.3d at 422 (facility rental); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied* 134 S. Ct. 1787 (2014) (photography); *see also* generally Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 Cal. L. Rev. 1169, 1189-92 (2012).

303 Creative's request for permission to deny services to same-sex couples is simply the latest example of a demand to change decades-old precedents. And the answer must remain the same. As in the wedding-vendor cases decided by many other courts, the exemption 303 Creative seeks would mark a sea change—opening the door to denials of goods and services, housing, employment, and other unequal treatment for LGBT people, persons living with HIV, and anyone else whose family life or minority status is disfavored by a business owner's religious convictions. As the U.S. Supreme Court has recognized, our laws and traditions have "afford[ed] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence*, 539 U.S. at 574 (citation omitted). The Court's explanation of the "respect the Constitution demands for the autonomy of the person in making

these choices," *id.*, makes clear that the "person" whose autonomy is protected is the individual himself or herself—not those offering goods or services in the marketplace. This must remain the rule. Religion must not be made into a sword for invidious deprivations of basic human rights.

Given our nation's history, many Americans now do recognize that being told "we don't serve your kind here" is discrimination that not only inflicts immediate dignitary harm on those rejected, but also stigmatizes the entire disparaged group and corrodes our civil society. This is as true for LGBT people today as it always has been for those targeted and denied equal treatment in public life based on others' religious or personal judgments. Public accommodations nondiscrimination laws exist to eliminate this harmful conduct. Without enforcement of such laws, as *Masterpiece* instructs, religion-based service refusals will lead to "community-wide stigma inconsistent with the history and dynamics of civil rights laws." 138 S. Ct. at 1727.

II. The State's Interest in Ending Discrimination Against LGBT People, Regardless of the Motivations For That Discrimination, Is Compelling.

Colorado has a substantial LGBT population. According to an analysis of Gallup data by UCLA's Williams Institute, 4.6% of Colorado's population identifies as LGBT, about 25% of whom are adults above the age of 25 raising children. *LGBT Demographic Data Interactive* (Williams Institute, UCLA School of Law, January 2019), https://tinyurl.com/ybt7m5qs. Treatment of same-sex

couples, and of LGBT people generally, in Colorado has not always been kind. Researchers at the Williams Institute have documented the history of discrimination against LGBT Coloradans, reporting substantial discrimination by government actors as well as the general public. Brad Sears, *et al*., *Colorado – Sexual Orientation and Gender Identity Law and Documentation of Discrimination* in *State Appendices* to *Documenting Discrimination in State Employment*, 118-31 (Williams Institute, Sept. 2009) (documenting public sector employment discrimination based on sexual orientation and gender identity in Colorado, as part of 15-chapter study reporting widespread, unconstitutional discrimination by state governments against LGBT people), https://tinyurl.com/y6wjsoyf ("*Documenting Discrimination*").

Documenting Discrimination reports that the State of Colorado surveyed the law on sexual orientation discrimination in Colorado as of 1992 for the purpose of informing voters in connection with that year's ballot measures, including Amendment 2 to the Colorado Constitution, which proposed to prohibit the enactment or enforcement of nondiscrimination protections for gay, lesbian and bisexual Coloradans. *Id.* at 1. According to the State's survey, the cities of Aspen, Boulder and Denver had "determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations." *Id.* at 2 (citing

Colorado General Assembly, *Legislative Counsel Report on Ballot Proposals*, *An Analysis of 1992 Ballot Proposals,* Research Publ. No. 369, 9-12 (1992)).

Despite the information provided to Colorado voters, they famously passed Amendment 2, Colo. Const. art. II, § 30b, in 1992, intentionally thwarting the municipal ordinances Aspen, Boulder and Denver had adopted to ban such discrimination. Although the U.S. Supreme Court held Amendment 2 unconstitutional as a violation of Equal Protection and Due Process, *Romer v. Evans*, 517 U.S. 620 (1996), Colorado voters again changed their constitution to deny lesbian, gay and bisexual Coloradans equality under state law, approving Amendment 43 in 2006 to exclude same-sex couples from the freedom to marry. Colo. Const. art. II, amend. 43; *see Brinkman v. Long*, No. 13-CV-32572, 2014 WL 3408024, at *21 (Colo. Dist. Ct. July 09, 2014) (holding Amendment 43 unconstitutional).

In addition to the prejudice directed against LGBT Coloradans through the political process over the years, the requests Lambda Legal has received from people in Colorado for assistance with diverse discrimination problems is further evidence of a troublingly hostile climate. Lambda Legal's Help Desk maintains an electronic database in which these requests are recorded. A search of the database finds that the Help Desk received 620 such calls between January 1, 2014 and December 31, 2019, with the requests coming from all parts of the state—from

Boulder, Aurora, and Lakewood to Fort Collins in the North, to Colorado Springs, Durango and Pueblo in the South, to Gunnison and Olathe in the West, with by far the greatest number from Metro Denver. The requests concerned problems ranging from being kicked out of homeless shelters and domestic violence support groups for being LGBT to being beaten by police for displaying rainbow flags to other diverse forms of harassment and violence. Many concerned discrimination by public accommodations, such as denial of use of public services. Lambda Legal protects the confidentiality of those who request legal assistance, but *Amicus* can provide some additional details if it would assist the Court.

In *Masterpiece Cakeshop*, Lambda Legal performed a similar review of its Help Desk database nationally and presented a representative sampling of the public accommodations discrimination problems about which LGBT people had requested assistance, as well as the practical and emotional impacts of that treatment. *Lambda Legal Masterpiece Cakeshop Amici Brief*, *supra*, 2017 WL 5127317. To compile this sampling, Lambda Legal reviewed more than a thousand reports from across the country received during the prior five-year period. The results confirm and detail the pervasive, harmful discrimination against LGBT people in the United States in public accommodations alone, reaching from cradle (infertility care, midwifery services, and childbirth classes) to grave (funeral services), and nearly everything in between. The sampling makes vivid that

discrimination against LGBT people occurs throughout public life, often without warning and in places where most people would not expect to be denied service or treated as a second-class citizen. *See also* Brief of Amici Curiae Ilan H. Meyer, Ph.D, et al., Who Study the LGB Population in Support of Respondents, *Masterpiece Cakeshop, Ltd.*, Supreme Ct. No. 16-111, 2017 WL 5036301 (filed Oct. 30, 2017).

Researchers at UCLA report similar findings after studying complaints filed in state agencies in the District of Columbia and the twenty-one states, including Colorado, that expressly prohibit sexual orientation and/or gender identity discrimination in public accommodations. Christy Mallory & Brad Sears, *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008-2014*, 7 (Williams Institute, 2016), https://tinyurl.com/y8hc62c4. They found that, as of 2016, the rate of anti-LGBT discrimination complaints were similar to but exceeded the rates of race discrimination[1] and other forms of sex-based discrimination in public accommodations. LGBT people of color and those

[1] Of course, many LGBT people are people of color. A UCLA Williams Institute analysis of Census data quantifies this obvious fact, finding for example that among same-sex couples raising children, 28% are non-white. Gary J. Gates, *Same-sex couples in Census 2010: Race and Ethnicity*, 3 (Williams Institute, 2012), https://tinyurl.com/ybtkym49.

with disabilities suffer even higher rates of discrimination than others within the LGBT community. Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, Center for American Progress (May 2, 2017), https://tinyurl.com/y7t6mad6.

The Colorado legislature's addition of sexual orientation and gender identity protections to CADA in 2008 was a significant improvement for LGBT Coloradans. But the events at issue in this case are part of a larger, persistent pattern of business proprietors in Colorado and many other states claiming religious rights to defy nondiscrimination laws, with refusal of wedding-related goods and services inflicting particular humiliation and reinforcing stigma for same-sex couples. This discrimination did not begin when same-sex couples gained the opportunity to marry. Rather, LGBT people have been encountering refusals of services based on proprietors' religious objections for years and in diverse settings unrelated to marriage. For example, a same-sex couple was refused vacation lodging at the Aloha Bed & Breakfast, despite Hawaii's nondiscrimination law, due to the owner's religious objection to hosting lesbians. *Cervelli*, 142 Hawai`i at 177. In California, a barbershop refused a haircut based on the barber's perception and religiously based condemnation of the would-be customer's gender expression. *Oliver v. The Barbershop,* San Bernardino Cty. Super. Ct., No. CIVDS1608233; Julie Zauzmer, *Barber refuses to cut transgender*

Army veteran's hair, citing religious views, Wash. Post (March 15, 2016), https://tinyurl.com/ycue5n36. In Illinois, a gay couple planning their civil union (not marriage) reception was turned down by two establishments that routinely host all manner of events. One not only refused the couple but berated them with religiously condemning emails. ACLU-Illinois, *Mattoon Couple Challenge Denial of Services at Two Illinois Bed and Breakfast Facilities*, (Nov. 2, 2011), https://tinyurl.com/y9muwyn8. And in California, a woman was refused standard infertility treatment because her physicians objected on religious grounds to treating her the same as other patients because she was in a relationship with another woman. *North Coast Women's Care*, 189 P.3d at 959. *See generally* NeJaime, *Marriage Inequality*, *supra*, 100 Cal. L. Rev. at 1189-92.

Amicus sounds alarm bells here not just because everyone should have equal access to the full range of goods, services, housing, jobs, and other opportunities offered generally to the public, but because discriminatory refusals of generally available opportunities exacerbate the stress from social exclusion and stigma that can lead to serious health problems, including depression, anxiety, substance use disorders, and suicide attempts. *See, e.g.*, Jennifer Kates, *et al*., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender (LGBT) Individuals in the U.S.* **(**Kaiser Family Foundation, May 3, 2018), https://tinyurl.com/y3ll6f6t; U.S. Office of Disease Prevention & Health

Promotion, *Lesbian, Gay, Bisexual, and Transgender Health* (last visited Apr. 24, 2020), https://tinyurl.com/z4q9mzs. *See generally* Ilan Meyer & David Frost, *Minority Stress and the Health of Sexual Minorities*, Handbook of Psychology and Sexual Orientation, 252-66 (Patterson & D'Augelli, eds., 2013), https://tinyurl.com/ydht87or; Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (Nat'l Acads. Press 2011), https://tinyurl.com/ug72d7j; Mark Hatzenbuehler, *et al.*, *Stigma As a Fundamental Cause of Population Health Inequalities*, 103 Am. J. Pub. Health 813, 813 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3682466/.

Similarly, discrimination can breed more dangerous discrimination if deemed socially acceptable. *See* Christian Crandall, *et al*., *Social norms and the expression and suppression of prejudice: The struggle for internalization*, 82 J. Personality & Soc. Psych. 359, 359–78 (2002), https://www.ncbi.nlm.nih.gov/pubmed/11902622 (examining effect of group norms on individual opinions). This is because "[s]tate-sanctioned condemnation of a group of citizens . . . sends the clear message that this group is not entitled to the freedom from physical violence provided other citizens." Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by 'Unenforced' Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 126 (2000); *see also* Charlene L. Smith, *Undo Two: An Essay Regarding Colorado's*

Anti-Lesbian and Gay Amendment 2, 32 Washburn L.J. 367, 369-70 (1993) (documenting a three-fold increase in anti-gay violence after Colorado Amendment 2 was passed). When unchecked, those biases and segregationist tendencies harm society as a whole as well the targeted groups. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L.J. 1278, 1300–02 (2011) (emphasizing Court's role in warding off divisive threats to a cohesive society).

Moreover, religious reinforcement of anti-LGBT bias often increases the negative effects on mental health. *See* Ilan Meyer, *et al*., *The Role of Help-Seeking in Preventing Suicide Attempts among Lesbians, Gay Men, and Bisexuals*, 45 J. Suicide & Life-Threatening Behavior 1 (2014) (research shows anti-gay messages from religious leaders increase severe mental health reactions), https://www.ncbi .nlm.nih.gov/pmc/articles/PMC4871112/; Edward J. Alessi, *et al*., *Prejudice Events and Traumatic Stress Among Heterosexuals and Lesbians, Gay Men, and Bisexuals*, 22 J. of Aggression, Maltreatment & Trauma 510, 510-26 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3885323/; *see also* Maurice N. Gattis, *et al*., *Discrimination and Depressive Symptoms Among Sexual Minority Youth: Is Gay-Affirming Religious Affiliation a Protective Factor?*, 43(8) Arch. Sex. Behav. 1589-99 (Nov. 2014), https://www.ncbi.nlm.nih.gov/pubmed/ 25119387 (finding harmful effects of discrimination among sexual minority youth

affiliated with religious denominations that endorsed marriage equality were significantly less than those among peers affiliated with denominations opposing marriage equality).

Conversely, sexual orientation nondiscrimination laws help reduce stresses resulting from anti-LGB stigma and discrimination and, thus, positively address existing health disparities. *Ilan H. Meyer et al. Masterpiece Cakeshop Amici Brief, supra*, 2017 WL 5036301 (citing Mark Hatzenbuehler, *et al*., *State Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 Am. J. Pub. Health 2275 (2009)).

If Colorado's laws can be made hollow by religious carve-outs, many of the approximately 265,000 LGBT people living in Colorado will be much more vulnerable to discrimination.[2] 303 Creative's quest for a religious exemption for commercial activity poses a potentially devastating threat with distressing historical echoes. *See generally* David Cruz, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. Rev. 1176, 1221 (1994) (desired exemptions "would undermine the egalitarian public order that such laws seek to establish, creating precisely the access and

[2] According to the U.S. Census, Colorado's population in 2019 was 5,758,736. https://www.census.gov/data/tables.html. According to the Williams Institute's analysis of Gallup's national survey data, 4.6% of people in Colorado self-identify as LGBT. LGBT Demographic Data Interactive (Jan. 2019), https://tinyurl.com/ybt7m5qs.

dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws."). Given the history and continuing reality of anti-LGBT bias in Colorado and nationwide, it should be beyond question that CADA serves compelling public interests and must remain effectively enforceable.

III. This Court Should Not Recognize Any Religious Exemption From The State's Essential Nondiscrimination Law.

The Supreme Court unequivocally has held that non-discrimination laws "serve[] compelling state interests of the highest order." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (enforcing Minnesota public accommodations law). In the context of public accommodations, specifically, the U.S. Supreme Court also has acknowledged the "moral and social wrong" of discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964). Public accommodations non-discrimination laws "eliminate [the] evil" of businesses serving only those "as they see fit," which demeans both the individual and society as a whole. *Id.* at 259. As is true for other socially vulnerable minorities, perpetuating discrimination against LGBT people through the denial of public accommodations humiliates and reinforces stigma. If 303 Creative were allowed to refuse its services to same-sex couples, despite providing those same services to different-sex couples, it would result in precisely the sort of "exclusion that . . . demeans [and] stigmatizes." *Obergefell* at 2602; *see also* Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J.

2516, 2574–78 (2015), https://tinyurl.com/tkyjjhl (discussing how complicity-based conscience claims harm the parties targeted and excluded by those claims).

Despite our history, the social science findings, and many forceful court decisions, some people with passionate convictions—including anti-LGBT advocates in particular—continue to assert religious beliefs in cases such as this one to excuse invidious discrimination. Given the immense demographic diversity and religious pluralism of our nation, the law must remain crystal clear: each person's religious liberty ends where legally prohibited harm to another begins. That well-settled principle of American law must apply equally with regard to all invocations of religious belief, whether urged to justify racial, gender, marital status, or religious discrimination, or discrimination based on sexual orientation. Religious liberty cannot shield invidious deprivations of another's basic rights. Our shared pledge calling for "liberty and justice for all" demands it. Many business owners hold religious and other beliefs that guide their lives. Permitting those engaged in commerce to apply religion to refuse service contrary to public accommodation laws would embolden other businesses to do the same and would subvert the compelling state interests served by CADA.

303 Creative offers no limiting principle and, indeed, there is none. Religious critiques of marriage for same-sex couples can be leveled just as easily at interracial and interfaith marriage, at heterosexual cohabitation, at divorce, at

contraception, sterilization, and infertility care, at unwed motherhood, and at innumerable other personal decisions about family life. Moreover, the "go elsewhere" approach that 303 Creative defends will not and has not stayed confined to discrimination based on family relationships or decisions. The notion that business owners sin, are forced to celebrate "sinful" behavior, or are prevented from promoting their faith when they simply engage in a commercial transaction with a "sinful" customer, could apply just as well to transactions about any goods or services, housing, or employment.

In sum, granting 303 Creative's demand for an exemption from CADA would eviscerate bedrock doctrine that has been reaffirmed consistently over time. The settled approach permits and encourages a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation while ensuring equal opportunity for everyone in the public marketplace. The proposed alternative would transform that marketplace into segregated dominions within which each business owner with religious convictions "become[s] a law unto himself," *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (internal citation omitted), and would force members of minority groups to suffer the harms and indignities of being required to go from shop to shop searching for places where they will not be treated as pariahs.

CADA provides critically needed protections against ostracism and other discriminatory treatment in public life. Colorado enacted and has updated these statutes to protect vulnerable members of our diverse society from discrimination regardless of others' religious reasons for wanting to refuse them things of value offered to everyone else. Despite this country's long history recognizing that religious exemptions to civil rights laws will largely nullify such laws, 303 Creative nonetheless asks this Court for permission to single out LGBT people and same-sex couples for rejection, humiliation, and stigma while operating the business. As the District Court properly recognized, the answer must be "no."

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Lambda Legal Defense and Education Fund, Inc. respectfully asks the Court to affirm the September 26, 2019 decision of the District Court.

Respectfully submitted this 29th day of April, 2020.

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Dated: April 29, 2020 Respectfully submitted,

By: /s/ *Jamie A. Gliksberg*
Jamie A. Gliksberg

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Respectfully submitted,

By: /s/ *Jamie A. Gliksberg*
Jamie A. Gliksberg

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I hereby certify that on April 29, 2020, I electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will automatically serve all counsel of record.

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/s/ Jamie A. Gliksberg_____
Jamie A. Gliksberg