COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202	
CHARLIE CRAIG and DAVID MULLINS, **Complainants / Appellees,** **v.** **MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS,.** **Respondents / Appellants.**	**COURT USE ONLY**
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BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF COMPLAINANTS/APPELLEES	

SUMMARY OF ARGUMENT

Amici are professors of law at University of Denver Sturm College of Law, with expertise in constitutional law, civil rights law and clinical practice.[1] *Amici* support the Administrative Law Judge's decision that respondent, Jack C. Phillips, violated Colorado's public accommodation law by refusing to provide services for a gay couple's wedding on the basis of their sexual orientation and that the law does not violate respondent's right to free speech and free exercise of religion. This brief argues that religious justifications to discriminate are not new and have been rejected when applied to analogous cases of discrimination involving racial minorities and women. *Amici* believe that such justifications should also be rejected when advanced as the basis of discrimination against sexual minorities, because they create similar obstacles that have hindered equality for racial minorities and women.

I. HISTORICAL MOVEMENT TOWARDS EQUALITY FOR RACIAL MINORITIES AND WOMEN HAS LED TO THE REJECTION OF RELIGIOUS ARGUMENTS USED TO JUSTIFY DISCRIMINATION.

A. Racial Discrimination

Religious arguments similar to those now being used to justify discrimination against sexual minorities were first used in the ongoing battle over racial equality, before courts eventually rejected these arguments. Initially, legislatures and courts accepted and invoked religious views as a justification for racial discrimination. However, after the adoption of judicial and legislative protections for racial minorities and a growing awareness of the true meaning of equality, courts eventually rejected religion-based arguments that were used to

[1] These professors include Kris McDaniel-Miccio, Christopher N. Lasch, Paula R. Rhodes, Tom I. Romero, Michael R. Siebecker, and Catherine Smith.

justify anti-miscegenation laws, segregation, and slavery. Accordingly, courts have now ruled that religious beliefs cannot justify acts of racial discrimination that are prohibited by law.

More than a century ago, the Pennsylvania Supreme Court justified segregation and bans on interracial marriage as God's wishes, declaring that "[t]he natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures." *W. Chester & P. R. Co. v. Miles*, 55 Pa. 209, 213 (1867). The same words were used by the Virginia Supreme Court to uphold the state's anti-miscegenation law. *Naim v. Naim*, 197 Va. 80, 84 (1955), *vacated*, 350 U.S. 891 (1955). Subsequently, a Virginia trial court, defended the law, in part relying on religion, declaring:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. 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.

Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting the trial court) (internal citation and quotations omitted in the original). The Virginia Supreme Court again upheld the law, but this time, the U.S. Supreme Court rejected the religious argument and struck down the law as a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Loving*, 388 U.S. at 12.

In subsequent decades, the Supreme Court rejected religious justifications for discrimination, regardless of whether the religious belief is genuine. In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), the Court ruled that despite the fact that the university sponsors "genuinely believe[d] that the Bible forbids interracial dating and marriage," the university could not use this religious belief as a grounds to justify a school policy prohibiting interracial dating and marriage without losing its tax exemption status as a charitable

organization, because the government's interest in eradicating racial discrimination in education is compelling and outweighs any burden on their religious beliefs. *Id.* at 580, 604.

The invocation of religion was also misused early in the country's history to justify slavery, a practice that is now universally condemned. The Missouri Supreme Court in denying Dred Scott's freedom declared, "the introduction of slavery amongst us was, in the providence of God." *Scott v. Emerson*, 15 Mo. 576, 587 (1852). Jefferson Davis, when he was a Senator of Mississippi, proclaimed in a speech to the Senate that slavery "was established by decree of Almighty God, that it is sanctioned in the Bible, in both Testaments, from Genesis to Revelations." Jefferson Davis, Speech of Mr. Davis, of Mississippi, on the Subject of Slavery in the Territories, Delivered in the Senate of the United States (Feb. 13, 1850).

Even with the landmark shift towards greater equality in *Brown v. Board of Education*, 347 U.S. 483 (1954), opponents continued to resist integration with appeals to religion. A member of the Florida Supreme Court, which had ruled to delay desegregation, explained "when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man, but we are now advised that God's plan was in error and must be reversed." *State ex rel. Hawkins v. Bd. of Control*, 83 So.2d 20, 28 (Fla. 1955) (Terrell, J., concurring). These discredited religious arguments have unnecessarily prolonged inequality and indignity.

After the passage of the landmark Civil Rights Act of 1964, courts began to reject religious beliefs as a justification to discriminate. In a case where a restaurant owner refused to serve African-Americans because doing so violated his religious beliefs, the judiciary rejected

his defense and declared unequivocally that individuals can hold whatever beliefs they want but businesses cannot discriminate based on those beliefs:

> Undoubtedly defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.

Newman v. Piggie Park Enterprises, Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

Consistent with these decisions, the courts and nation no longer tolerate the use of religious beliefs to justify acts of racial discrimination that violate the law. Those claims are no more legitimate when targeted against laws that protect sexual minorities

B. Gender Discrimination

Similarly, religious justifications have also long been misused in efforts to justify gender discrimination. Initially, courts upheld laws that discriminated against women based on outdated and misplaced notions that relied on religious beliefs. However, as was the case with racial discrimination, after passage of the 1964 Civil Rights Act, courts rejected efforts to discriminate against women on the basis of religious beliefs.

As with racial discrimination, courts and societal leaders once were complicit in using religion to justify and support sex-based discrimination. In an opinion now roundly criticized, for example, the Supreme Court upheld a rule excluding women from practicing law in Illinois:

> The constitution of the family organization, which is founded in the divine ordinance. . . . 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.

Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). A prominent theologian, Charles Hodge, compared the defense of slavery to the necessary subordination of women, explaining "[if] our women are to be emancipated from subjection to the law which God has imposed upon them . . . we shall soon have a country over which . . . all order and all virtue would speedily be banished." JAMES MOORHEAD, PRINCETON SEMINARY IN AMERICAN RELIGION AND CULTURE 169 (2012) (quoting Charles Hodge, *West India Emancipation*, 10 BIBLICAL REPERTORY AND PRINCETON REV. 602, 603-4 (1838)). Even as the inclusion of women outside of family life progressed, the Supreme Court held that women can be exempt from jury duty because "[d]espite the enlightened emancipation of women from restrictions and protections of bygone years . . . woman is still regarded as the center of home and family life." *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961).

After the passage of the Civil Rights Acts of 1964, and a century after *Bradwell*, the Supreme Court in *Frontiero v. Richardson* acknowledged that as a result of the outdated notions, which originated from the religious beliefs expressed by Justice Bradley in *Bradwell*, "our statute books gradually became laden with gross, stereotype distinctions between the sexes." 411 U.S. 677, 685 (1973). Since then, courts have rejected outdated views of women that were once justified by religious beliefs, where such views deny women equal protection of the laws. For example, in one leading case, the Supreme Court overturned a ban on women at the Virginia Military Institute, which had been based on overgeneralizations about the physical strength and abilities of women:

> "Inherent differences" between men and women . . . remain cause for celebration, but not for denigration . . . or for artificial constraints on an individual's opportunity. . . . such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women. . . . A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections once ignored or excluded.

U.S. v. Virginia, 518 U.S. 515, 533-34, 557 (1996).

Following suit, lower courts have rejected religious arguments that supported the unequal treatment of women. A circuit court dismissed religious arguments put forth by a Christian school that paid head of household supplements to only male teachers based on their belief "that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family." *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990). More recently, courts have rejected claims by Christian schools that they are entitled to fire female teachers for becoming pregnant outside of marriage and engaging in premarital sex. *See, e.g.*, *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1317-18 (11th Cir. 2012) (noting that the school argued "there are consequences for disobeying the word of God"). In a similar case, a court declared, "it remains fundamental that religious motives may not be a mask for sex discrimination in the workplace." *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (denying summary judgment for the school and holding that the claim that the pregnant teacher was fired because she violated its religious teachings against premarital sex cannot be used as a pretext for pregnancy discrimination). Although true racial and gender equality has yet to be achieved, courts at least have held that religious arguments cannot justify discrimination that is contrary to established law.

II. THE COMMISSION SHOULD NOT ALLOW THE RESPONDENT HERE TO RESURRECT THE DISCREDITED NOTION THAT RELIGIOUS BELIEFS CAN TRUMP A LAW DESIGNED TO PROTECT AGAINST DISCRIMINATION

Colorado's expansion of its public accommodation law to protect sexual minorities is in keeping with the protection that is required to achieve greater equality and dignity for all those who suffer from discrimination. Just as courts rejected religious arguments that were used to justify discrimination against racial minorities and women, so too courts should not permit religious arguments to be used as justification to discriminate against a class that the state has chosen to protect and that the Supreme Court has recognized should be afforded equal protection and dignity. *Lawrence v. Texas*, 539 U.S. 558, 574-75 (2003); *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

Colorado, like many other states, has recognized the need to protect sexual minorities and amended its public accommodation law to prevent the exact incident in the present case:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

Colo. Rev. Stat. § 24-34-601(2). A "place of public accommodation" is "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public." *Id.*, at § 24-34-601(1). There is no religious exemption, because the law applies only to businesses that offer their commercial services to the public.

Even after courts rejected religious arguments when used to justify race and gender discrimination, they are again being resurrected to justify discrimination against sexual minorities; but this time courts have been quicker to reject such arguments. Less than thirty years ago, the Supreme Court ruled that same-sex intimacy was not protected and that morality was a rational basis for regulating conduct, which petitioner in that case asserted, "traditional

Judeo-Christian values proscribe." *Bowers v. Hardwick*, 478 U.S. 186, 196, 211 (1986) (Blackmun, J., dissenting), *overruled by Lawrence*, 539 U.S. 558 (2003). Less than two decades later, however, in *Lawrence v. Texas*, the Supreme Court overruled *Bowers*, citing Justice Steven's *Bowers* dissent that foresaw "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence*, 539 U.S. at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

In the context of employment and anti-gay behavior, courts have held that employees cannot act on their religious beliefs if they discriminate or harass co-workers. The Ninth Circuit has declared "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004) (holding that an employer was not required to accommodate religious beliefs under Title VII of the Civil Rights Act of 1964 by allowing an employee to display anti-gay Biblical material in his cubicle). Additionally, the Seventh Circuit also held that an employer does not have to accommodate an employee's religious belief if it harasses other workers. *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552, 553-54 (7th Cir. 2011) (finding that "employers need not relieve workers from complying with neutral workplace rules as a religious accommodation if it would create an undue hardship," which in this case were statements by the employee suggesting gays will "go to hell" and should not "be on earth").

Furthermore, courts and legislatures have clearly recognized the need to prevent discrimination in places of public accommodations based on sexual orientation. In a similar case to the case at hand, the New Mexico Supreme Court affirmed that wedding photographers who

refused to take photos of a lesbian wedding violated the state's public accommodation law that also prohibits discrimination based on sexual orientation. *Elane Photography LLC v. Willock*, 309 P.3d 53 (2013), *cert. denied*, 13-585, 2014 WL 1343625 (2014). Twenty other states have also adopted public accommodation laws prohibiting discrimination based on sexual orientation. *Non-Discrimination Laws: State by State Information – Map*, ACLU, https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map (last visited Apr. 5, 2014). As is the case with race and gender, anti-discrimination laws are necessary to assure both equality and dignity for sexual minorities.

In upholding the constitutionality of Title II to the Civil Rights Act of 1964, the Supreme Court cited to a Senate Report that identified this linkage between equality and dignity, indicating the need to redress "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Heart of Atlanta Motel, Inc. v. U. S.*, 379 U.S. 241, 291-92 (1964) (Goldberg, J., concurring, quoting S. Rep. No. 88-872, at 6829 (1964)). The Court noted:

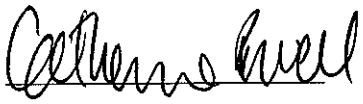
> Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.

Id. That statement is just as true for gay and lesbian people like the couple in this case, who experienced discrimination and humiliation in being refused service by a commercial business in front of their friends and family.

Courts now hold that discrimination in public accommodations will not be tolerated, even for religious reasons, because it would defy the purpose of the laws and the government's

compelling interest in equality and protecting one's dignity. In general, the Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-79 (1990) (ruling that a state law prohibiting the ingestion of peyote which respondents ingested for a religious ceremony was constitutional). Moreover, with regard to commercial activities, the Court has explained that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982) (holding that an Amish employer must pay social security taxes despite his claim that it violated his religious beliefs).

Lessons from the legal battle over racial and gender discriminations must be kept in mind when addressing discrimination based on sexual orientation. While courts initially accepted religious beliefs to justify discrimination – prolonging the era of discrimination under the law – courts now reject such arguments as applied to race, gender and most recently sexual orientation. This Commission should follow the rule that religious beliefs may not be used as a basis to justify discrimination, otherwise, as history has taught us, true equality cannot be achieved.



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CERTIFICATE OF SERVICE

I certify that on this 1st day of May, 2014, a true and correct copy of Respondents' Brief in Support of Appeal was filed with the Colorado Civil Rights Commission and served on the parties or their counsel as follows:

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