

COLORADO COURT OF APPEALS,
STATE OF COLORADO
2 East 14th Avenue, Suite 300
Denver, CO 80203

COLORADO CIVIL RIGHTS COMMISSION
DEPARTMENT OF REGULATORY AGENCIES
1560 Broadway, Suite 1050
Denver, CO 80202
Case No. 2013-0008

RESPONDENTS-APPELLANTS:

MASTERPIECE CAKESHOP, INC., and any
successor entity, AND JACK C. PHILLIPS,
v.

PETITIONERS-APPELLEES:

CHARLIE CRAIG AND DAVID MULLINS.

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Case No.: 2014CA1351

**BRIEF OF *AMICUS CURIAE* NATIONAL CENTER FOR LESBIAN RIGHTS IN
SUPPORT OF APPELLEES**

CERTIFICATE OF COMPLIANCE

I hereby certify that this 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:

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

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s/ Thomas W. Stoever, Jr. _____

Thomas W. Stoever, Jr., Atty. No. 25434

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INTEREST OF THE *AMICUS*

The National Center for Lesbian Rights (“NCLR”) is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people (“LGBT”) and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in public accommodations through legislation, policy, and litigation, and represents LGBT people in public accommodations and other cases in courts throughout the country.

SUMMARY OF THE ARGUMENT AND INTRODUCTION

Appellants Masterpiece Cakeshop, Inc. and Jack C. Phillips (collectively “Masterpiece Cakeshop”) suggest that this Court should reverse the Colorado Civil Rights Commission’s Final Agency Order because the appellees, David Mullins and Charlie Craig, a same-sex couple seeking to order a cake for their wedding who were refused service by Masterpiece Cakeshop because of their sexual orientation, could purchase a wedding cake elsewhere. Masterpiece Cakeshop describes the State’s interest in the case as the “marginal interest in ensuring that people may obtain artistically designed wedding cakes celebrating same-sex marriage,” Opening Br. at 36, and notes that Mullins and Craig “easily obtained a free wedding cake with a rainbow design from one of the many bakeries in the area.” *Id.* at 5.

These arguments ignore the core purposes of anti-discrimination laws, the serious harms to personal dignity and wellbeing caused by discrimination, and the State’s compelling interests in eradicating discrimination in the public marketplace. As the United States Supreme Court has made clear, anti-discrimination laws are intended to uphold the dignity of all citizens, including persons denied service for a discriminatory reason by a single establishment. Indeed, some of the most poignant images from the civil rights movement of the

1960s were those of African-American citizens being denied service at lunch counters, restaurants, hotels, and other businesses purportedly open to the public. Whether or not those citizens could receive services elsewhere was irrelevant.

In addition, research has shown that discrimination can have far-reaching effects on a person's physical and psychological health. As this research has found, experiencing discrimination inflicts a uniquely harmful type of injury, independent of any injury caused by the denial of an opportunity or service, with negative ramifications that may reverberate throughout the duration of a person's life. Such injuries exact a serious toll on the health and wellbeing of individuals and our society as a whole.

By urging this Court to hold that no unlawful discrimination has occurred because Mullins and Craig could buy a wedding cake from another store, Masterpiece Cakeshop misses the point and the purpose of anti-discrimination laws—and disregards the serious harms to individuals and to society as a whole caused by permitting businesses to engage in discriminatory refusals of service, regardless of whether access to those services is available somewhere else. This Court should affirm the order of the Colorado Commission on Civil Rights.

ARGUMENT

A. Colorado’s Public Accommodations Laws Were Enacted To Protect Personal Dignity, Foster Participation in Civic Society, and Provide Equal Opportunities.

Masterpiece Cakeshop’s argument that Mullins and Craig could purchase a wedding cake from another shop disregards the core purposes of public accommodations laws, which do not just ensure that individuals can receive services, but protect personal dignity, foster participation in civic society, and provide equal opportunities to members of historically disadvantaged groups.

For example, early federal laws barring discrimination by public accommodations focused on the negative psychological and social impacts of that discrimination, rather than on the mere denial of services. When the Senate Commerce Committee reviewed the Civil Rights Act of 1964, the committee found that “[d]iscrimination 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.” Senate Commerce Committee Report on the Civil Rights Act of 1964, S. Rep. No. 872, at 16 (1964). Similarly, the United States Supreme Court has explained that public accommodations laws do not focus on “mere economics,” *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring); rather,

they “vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’” *Id.* at 250 (1964) (citing S. Rep. No. 872 at 16-17). Public accommodations laws also serve to “eliminate the unfairness, humiliation, and insult” of discrimination “in facilities which purport to serve the general public.” *Rousseve v. Shape Spa for Health & Beauty, Inc.*, 516 F.2d 64, 67 (5th Cir. 1975); *see also Crosswaith v. Bergin*, 35 P.2d 848, 848 (Colo. 1934) (finding that a restaurant’s insistence that an African-American customer eat separately from his white companions “was undoubtedly the kind of discrimination” targeted by Colorado’s public accommodations act).

Public accommodations laws “protect[] the State’s citizenry from a number of serious social and personal harms” by ensuring that members of historically disadvantaged groups can participate as full members of civic society. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). Because discrimination “forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities,” discrimination in public spheres “both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.” *Id.*; *see also Romer v. Evans*, 517 U.S. 620, 631 (1996) (describing the anti-discrimination protections removed by Colorado’s Amendment 2, including public accommodations provisions, as “protections

against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”). Selective enforcement of anti-discrimination laws—permitting some businesses to discriminate because a person may purchase the same item or service from another business—thus would defeat a core purpose of the laws by permitting virtually any business at any time to treat a class of persons as second-class citizens, so long as there are at least some other businesses that do not discriminate. Indeed, if adopted by courts in the past, such a rule would have permitted many forms of racial segregation to continue virtually unabated—for example, by permitting restaurants and lunch counters to exclude African-American patrons so long as they could be seated at other establishments. Such a result is unthinkable and underscores the dangerous and far-reaching implications of the position Masterpiece Cakeshop proposes.

Finally, public accommodations laws “advance the goal of equal opportunity, a value that is central to American constitutionalism.” Lauren J. Rosenblum, *Equal Access or Free Speech: The Constitutionality of Public Accommodations Laws*, 72 N.Y.U. L. Rev. 1243, 1249 (1997). “The enactment of a public accommodations statute is one highly effective way in which a state can attempt to level society’s playing fields, thus enabling each of its citizens to fulfill his potential.” *Id.*; see also *Roberts*, 468 U.S. at 625 (noting the “stigmatizing

injury, and the denial of equal opportunities that accompanies it” when people experience discrimination in the public sphere). The nation’s highest court has repeatedly recognized this goal of eradicating discrimination as a “compelling” interest “of the highest order.” *Roberts*, 468 U.S. at 628 (finding that Minnesota’s “compelling interest in eradicating discrimination” against women justified application of the state’s anti-discrimination law despite a possible impact on associational freedom); *Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). Just as in the civil rights era, whether an individual can receive service elsewhere is irrelevant.

In sum, Masterpiece Cakeshop’s argument disregards the core purposes of Colorado’s public accommodations laws—to protect the equality and dignity of members of disadvantaged groups and to allow them to participate fully in civic society. Whether Mullins and Craig could purchase a wedding cake elsewhere is irrelevant. Colorado prohibits discrimination by businesses because discrimination is toxic and damaging, and because it stigmatizes and injures individuals, thus undermining the shared values of equal dignity and equal citizenship. The State recognized this principle during the civil rights era and continues to recognize this principle today. By suggesting that the State has an interest in prohibiting discrimination only if the victim cannot obtain services elsewhere, Masterpiece

Cakeshop presents a radical—and unsupported—view of the law that ignores the State’s compelling interest in eradicating discrimination.¹

B. Discrimination Causes Serious Physical, Psychological, and Social Harms.

In addition to undermining personal equality and dignity, and preventing historically marginalized groups from participating fully in civic society, discrimination causes serious physical, psychological, and social harms to individuals, including LGBT people.

Leading medical and mental health authorities, such as the American Psychological Association and the federal Centers for Disease Control and Prevention (“CDC”), have found that discrimination based on sexual orientation and gender identity “detrimentally affect[s] psychological, physical, social, and economic well-being.” *See* American Psychological Association, *Sexual Orientation & Marriage* (July 28 & 30, 2004),

<http://www.apa.org/about/policy/marriage.aspx>; Centers for Disease Control and

¹ Masterpiece Cakeshop’s position also disregards the clear language of Colorado’s laws, which contain no exception for an otherwise unlawful refusal of service simply because the person could obtain the service elsewhere. *See* Colo. Rev. Stat. Ann. § 24-34-601 (West). If a law is clear, a court may not read an exception into a statute that does not already exist. *See, e.g., Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007) (en banc). The court’s role is to apply the statute “as written,” not how they—or any other party—might have written it. *See, e.g., Gen. Elec. Co. v. Niemet*, 866 P.2d 1361, 1364 (Colo. 1994) (en banc).

Prevention, *Stigma and Discrimination* (March 3, 2011),

<http://www.cdc.gov/msmhealth/stigma-and-discrimination.htm>.

Research has found that “[p]rejudice-related stressful life events have a unique deleterious impact on health that persists above and beyond the effect of stressful life events unrelated to prejudice.” David M. Frost et al., *Minority Stress and Physical Health Among Sexual Minority Individuals*, 38 *J. of Behavioral Med.* 1, 1 (2015). In other words, being exposed to an act of discrimination causes unique and serious harms that go well beyond the mere denial of an opportunity or service, and that may have a lasting negative impact on a person’s long-term health and wellbeing.

The stress caused by discrimination based on a person’s sexual orientation or gender identity can lead to serious health risks, including increased risk for cancer, cardiovascular disease, and diabetes; higher rates of asthma, allergies, osteoarthritis, and chronic gastro-intestinal problems; and an earlier onset of disabilities. David J. Lick et al., *Minority Stress and Physical Health Among Sexual Minorities*, 8 *Perspectives on Psychological Science* 521 (Sept. 2013); *see also* Kerith J. Conron et al., *A Population-Based Study of Sexual Orientation Identity and Gender Differences in Adult Health*, 100 *Am. J. of Pub. Health* 1953 (Oct. 2010); Karen I. Fredriksen-Goldsen et al., *Physical and Mental Health of*

Transgender Older Adults: An At-risk and Underserved Population, 54 Gerontologist 488 (2014); Massachusetts Department of Public Health, *The Health of Lesbian, Gay, Bisexual, and Transgender (LGBT) Persons in Massachusetts* (2009).

Stigma and discrimination can lead to serious psychological harms as well. Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychological Bulletin 674 (Sept. 2003). Individuals who are targeted because of their sexual orientation or gender identity suffer significantly increased mental health problems, including higher rates of substance abuse, affective disorders such as depression and anxiety, and even suicide. *Id.*; Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 Am. J. of Pub. Health 943 (May 2013).

Experiences of stigma and discrimination “can significantly lower the self-esteem of stigmatized individuals, leading to social withdrawal, decreased expectation for oneself, avoidance of attempts at high achievement, and angry resentment.” Brief of Amici Curiae American Anthropological Association et al. Supporting Plaintiffs-Appellees and Urging Affirmance at 9, *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (No. 10-16696).

Moreover, once an individual has experienced discrimination, even ostensibly minor events “can be evocative of past and present feelings of social disapproval, rejection, and disrespect.” Brief of Amici Curiae American Anthropological Association, *supra*, at 8-9. Thus, victims of discrimination may continue to experience many residual mental health problems, including “sleep disturbances and nightmares, headaches, diarrhea, uncontrollable crying, agitation and restlessness, increased use of drugs, and deterioration in personal relationship.” Linda Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 *Journal of Interpersonal Violence* 366 (1990).

In sum, a robust body of research shows that acts of discrimination do more than deprive individuals of particular services—they also cause serious harms to health and wellbeing, at great cost to the individuals directly affected and to society as a whole. These findings bolster the State’s compelling interest in eradicating discrimination based on personal characteristics such as race, religion, gender, sexual orientation, and gender identity. They also show that, contrary to Masterpiece Cakeshop’s suggestion, discrimination causes serious harms even when a person can obtain services elsewhere. No public accommodation should receive a “free pass” to discriminate, even under purportedly limited

circumstances, because the harms inflicted by that discrimination reverberate more broadly and in ways that are demeaning of human dignity and health.

CONCLUSION

For the reasons stated above, the Court should affirm the ruling of the Colorado Civil Rights Commission finding that Masterpiece Cakeshop unlawfully discriminated against Mullins and Craig by refusing to sell them a wedding cake.

DATED this 13th day of February, 2015.

Respectfully submitted,

s/ Thomas W. Stoever, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015, a true and correct copy of the **BRIEF OF AMICUS CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF APPELLEES** was filed using the Court's ICCES electronic filing system and/or was served via U.S. Mail, postage paid, on the following:

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