No. 16-111

In The Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.,
and JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF OF *AMICI CURIAE* ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; CHRISTIAN LIFE COMMISSION OF THE MISSOURI BAPTIST CONVENTION; JOHN PAUL THE GREAT CATHOLIC UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; SPRING ARBOR UNIVERSITY; WILLIAM JESSUP UNIVERSITY; AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS; JEWS FOR RELIGIOUS LIBERTY; AND IMAM OMAR AHMED SHAHIN IN SUPPORT OF PETITIONERS

MICHAEL K. WHITEHEAD
Counsel of Record
WHITEHEAD LAW FIRM, LLC
1100 Main Street, Suite 2600
Kansas City, Missouri 64105
(816) 398-8967
Mike@TheWhiteheadFirm.com
Counsel for Amici Curiae Religious Organizations

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae comprise a diverse group of religious ministry organizations from various faith groups, Christians, Muslims and Jews, including denominational entities, religious colleges and universities, legal associations and individuals.

All *amici curiae* are deeply concerned about free speech and free exercise for their institutions, staff, students and members. These freedoms are critical to their religious mission to impart core beliefs about the faith, including sexuality and marriage.

Additional information about each of the *amici curiae* is provided in the Appendix.

SUMMARY OF ARGUMENT

In announcing a new constitutional right to same-sex marriage, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), promised that religious believers and organizations would remain secure in their constitutional right to believe, teach and live out their sincere religious convictions that marriage is between a man and

[1] No one other than *amici curiae* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing under Sup. Ct. R. 37.3. Blanket consents have been filed with the Clerk by Petitioners on July 20, 2017, and by Respondent Commission on July 26, 2017. Counsel for individual Respondents have consented by letter to counsel for *amici curiae*, August 29, 2017.

woman, and that same-sex marriage should not be condoned. The promise was unmistakable and unambiguous:

> Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held – and continues to be held – in good faith by reasonable and sincere people here and throughout the world. *Id.*, 2594
>
> Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. *Id*., 2602
>
> It must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. *Id*., 2607

Jack Phillips, a Christian who is a cake artist,[2] has come to ask this Court to honor the promise of *Obergefell*. *Id.*

Same-sex marriage has led to numerous conflicts with religious freedom, just as informed observers long predicted.[3] Your *amici* join with Jack in asking this Court to give "proper protection" to his "decent and honorable" religious beliefs about God's design for marriage and Jack's design for custom wedding cakes celebrating marriage. Your *amici* seek this protection for all people of faith, and people of no faith. Pluralism, not the dominance of one faction over another, was *Obergefell*'s promise. *Id.*

Petitioner[4] challenges the use of the Colorado Anti-Discrimination Act ("CADA") to compel him to use his artistry to design and create a custom wedding cake to celebrate a same-sex marriage, against his will

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[2] *See* images at masterpiececakes.com/wedding-cakes/ (last accessed 9/5/2017). These illustrate Jack's artistry in "painting" wedding cakes.

[3] *See, e.g.*, Douglas Laycock, Afterward, *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* 189 (Douglas Laycock et al., 2000) ("All six contributors – religious and secular, left, center, and right – agree that *same-sex* marriage is a threat to religious liberty.").

[4] "Petitioner" usually refers to Jack Phillips, the individual, though his business, Masterpiece Cakeshop, Ltd., is also a Petitioner. The Free Exercise Clause protects Phillips and his closely held family business. As this Court recently explained, affirming Masterpiece's free exercise rights "protects the religious liberty of the humans who own and control" that family-owned company, which in this case is Jack and his wife. *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2768 (2014).

and contrary to his religious convictions. *See* Pet. Br. at 14-16 (summarizing free speech and free exercise claims). We endorse his well-reasoned arguments for reversal. The constitutional doctrines he invokes must be rigorously applied to allow a healthy pluralism on the contentious and consequential topic of marriage. But in addition to those arguments, this Court should also reverse the decision below because free exercise precludes States from imposing a *de facto* religious test and penalties on a person's pursuit of his chosen occupation or vocation.

Your *amici* represent several faith groups and individuals, some with fundamentally divergent beliefs about the identity and nature of God, yet with similar views of "divine calling" to both sacred and secular occupations.

Free exercise rights extend to secular vocations as well as sacred. Most church members and college students will work in the secular marketplace rather than vocational ministry, yet they often feel "called" to their occupations. Their goal is to integrate work and witness. If told they cannot witness to the truth through their work, or worse, that they must affirm a message that is false, they must resist. Their "conscience is captive to the Word of God" and they will not "recant."[5] If the government demands otherwise, they will leave their businesses before they will dishonor God and His

[5] Similar words were uttered by a young German law student-turned-monk, almost 500 years ago. Bruce L. Shelley, *Church History in Plain Language* 238, 242 (2nd ed. 1995) Martin Luther added that to go against conscience was neither honest nor safe. *Id*.

call on their lives. "We must obey God rather than men." Acts 5:29 They believe they would be complicit if they approved in their business what God has disapproved in His Word.

The decision below imposes a *de facto* religious test on cake artists like Petitioner, effectively barring from this craft those who hold his religious beliefs about marriage. Others whose religious beliefs welcome same-sex marriage, or are indifferent toward it, can pursue their craft without government interference. But those like Jack who sincerely believe that marriage is a sacred union of man and woman face a terrible choice. Either they obey the State, which compels them to use their talents to design and create a customized cake that celebrates a same-sex marriage despite their contrary religious beliefs – and disobey God's "divine precepts" (*id.*, at 2607) – or they disobey the State and face crushing state penalties and litigation costs.[6] The only difference between those outcomes is a person's religious beliefs about marriage.

Colorado's application of CADA revives an oppressive practice condemned by the Constitution – the application of legal compulsion to force a person to

[6] According to the administrative law judge's initial decision, "the fines and imprisonment provided for by § 24-34-602, C.R.S. may only be imposed in a proceeding before a civil or criminal court, and are not available in this administrative proceeding." Pet. App. 63a. Petitioners remain at risk for criminal penalties if there were future violations, and thus have been forced to stop the wedding cake business. Phillips would leave the business rather than flout God's law.

express and affirm ideas or beliefs antithetical to his religious faith as a condition of pursuing his occupation. No American should have to satisfy a government official that he holds the "right" beliefs to keep his business or to practice his profession.

It is no response that religious people are free to believe anything they want about marriage outside the commercial sphere, if government may coerce them inside it, to engage in expressive conduct that contradicts and violates those beliefs.

While it is true that government has compelling reasons for narrowly circumscribing conduct based on invidious racist beliefs, the same is not true of religious beliefs about traditional marriage, which, as this Court expressly recognized in *Obergefell*, are "based on decent and honorable religious or philosophical premises" that are central to the lives of decent and honorable people. 135 S. Ct. at 2607. Those religious beliefs, which for Petitioner are an integral part of his status and personal identity as a Christian, cannot be divorced from the expressive conduct that gives those beliefs meaning. *Cf. Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (in some contexts homosexual status and sexual conduct cannot be separated). If government may coerce Petitioner to design and create custom cakes celebrating an event contrary to "divine precepts," then government may effectively exclude others who hold such beliefs from the wedding industry. That is a religious test.

Reversal is necessary, as well, to deter what appears to be a growing trend by state and local authorities to enact laws that have the effect of imposing *de facto* religious tests excluding political adversaries from the occupations of their choice, including wedding vendors, physicians, counselors, pharmacists, and even lawyers and judges. Reversal offers a chance to honor the promise of *Obergefell*, *supra.*

ARGUMENT

I. Free Exercise Of Religion By Secular Vocations In The Marketplace Should Be No Less Protected Than Sacred Vocations In The Ministry.

A. Many faiths teach that secular vocations are callings to integrate work and witness.

Houses of worship and religious colleges have as their core mission to teach the "divine precepts" to members and students, and *Obergefell* promised those rights would continue to be protected for these religious institutions, *supra*, at 2607. *Amici* appear in this case because they are deeply concerned that this promise be kept, for their institutions and those they serve.

Religious liberty does not belong only to the church, mosque or synagogue. Free exercise of religion extends to individuals and businesses in the marketplace as well. It extends to those in secular vocations in for-profit businesses as well as those in vocational

ministry, employed by a church or non-profit religious organization.

This Court recently protected the statutory free exercise rights of the Green family, (who are Southern Baptists) and the Hahn family (who are Mennonites), owners of successful closely held for-profit corporations, Hobby Lobby Stores, Inc. and Conestoga Wood Specialties. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Court's opinion reviewed the history of free exercise claims by merchants in for-profit trades, incorporated or not, in which religious adherents sought protection of the free exercise of their religion. The government disputed that for-profit corporations could "exercise religion" apart from the human beings who operated it, to which the Court retorted that corporations could do nothing apart from those human beings. *Id.*, at 2768.

Indeed, some of the country's largest businesses participate in the marketplace, yet still engage in religiously motivated practices, such as closing on Sunday (Chick-fil-A, Inc.), printing Bible references on products (In-N-Out Burger), publishing Bibles and other Christian media (Tyndale House Publishers, Inc.), providing financial advice based on the Bible (Lampo Group, Inc.), producing and selling kosher foods (Empire Kosher), offering financial products consistent with Islamic teachings about usury (LARIBA American Finance House), placing Bibles and the Book of Mormon in all its hotel rooms (Marriott, Inc.), employing chaplains to provide spiritual counseling to

employees (Tyson Foods, Inc.), and taking out full-page newspaper ads to evangelize (Hobby Lobby, Inc.).

Christian, Jewish, and Muslim teachers have all emphasized that one's faith should be fully integrated in every aspect of one's life. A true believer is called to live out his faith – including fundamental beliefs about sex, marriage, and the family – at all times and places, including his workplace. To do otherwise is sinful and incurs divine disapproval. In their theology of work, some would reject the clergy-laity distinction or the secular-sacred divide and teach that all believers are called to work and to glorify God in their work and spiritual witness. Many would say God calls and equips some to be clergy (*e.g.*, 1 Samuel 3) and some to be craftsmen (*e.g.*, Exodus 31).

For example, in Exodus 31, God tells Moses that He has called Bezalel and Oholiah, and gifted them "in all kinds of craftsmanship to make artistic designs for work in gold, in silver, and in bronze . . . " to "make all I have commanded you."

The Apostle Paul, who sometimes made tents for a living, exhorted Christian laborers in Colossians 3:23-24, "Whatever you do, do your work heartily, as for the Lord rather than for men, knowing that from the Lord you will receive the reward of the inheritance. It is the Lord Christ whom you serve."

Similarly, "Islam regards it as meaningless to live life without putting [one's] faith into action and practice," and proclaims that living the central tenets of the faith "weaves [believers'] everyday activities and their

beliefs into a single cloth of religious devotion." Oxford Islamic Information Centre, *Five Pillars of Islam*. *See* tinyurl.com/yaab2chh (last accessed Sep. 2, 2017).

Martin Luther affirmed that "even the most mundane stations are places in which Christians ought to live out their faith." Marc Kolden, *Luther on Vocation*, 3 *Word & World* 382 (Oct. 1, 2001).

John Calvin likewise "regarded vocation as a calling into the everyday world. The idea of a calling or vocation is first and foremost about being called by God, to serve Him within his world." Alister McGrath, *Calvin and the Christian Calling*, 1999 *First Things* 94 (July 1999).

Contemporary evangelical teachers continue to emphasize this doctrine. Business author Hugh Whelchel quotes theologian Carl F. H. Henry on work: "According to the Scriptural perspective, work becomes a waystation of spiritual witness and service, a daily traveled bridge between theology and social ethics. In other words, work for the believer is a sacred stewardship, and in fulfilling his job he will either accredit or violate the Christian witness." Hugh Whelchel, *How Then Should We Work? Rediscovering the Biblical Doctrine of Work*, 4 (2012).

It is a central tenet of Judaism that, throughout one's daily life, one should accept and act upon the great multitude of opportunities to improve one's thoughts and behavior. Talmud, Makkos. These opportunities are "mitzvot," or commandments, which constitute civil and criminal rules that govern virtually all

aspects of the believer's life, personal and commercial. For example:

- A Jewish merchant cannot sell a cheeseburger to any customer, Jewish or Gentile, because of a mitzvah against deriving any profit from a cooked mixture of dairy and meat. *Why Not Milk & Meat?*, Aish.com.
- A Jewish baker is restricted from providing services to a formal wedding that occurs on the Sabbath or select holy days. Menachem Posner, *What is Shabbat?,* Chabbad.org; Exodus 16:26-30.

The Southern Baptist Convention's doctrinal statement, *Baptist Faith and Message*, 2000 ("BFM") teaches laymen and clergy to "make the will of Christ supreme in our own lives and in human society" to "oppose racism, . . . all forms of sexual immorality, including adultery, homosexuality, and pornography. . . ." and to "bring industry, government, and society" under the sway of biblical truth. (Article 15) *See* www.sbc.net/bfm2000/bfm2000.asp (last accessed: Aug. 30, 2017).

BFM, Article 17, on Religious Liberty, says: "God alone is Lord of the conscience. . . . The state has no right to impose penalties for religious opinions of any kind." *Id*.

In sum, for millions of believers, "freedom to embrace religion as a way of life . . . is a key substantive good." Miroslav Volf, *Flourishing: Why We Need Religion in a Globalized World* 113 (2015).

B. Many faiths do not condone same-sex marriage.

Islamic officials have recently affirmed that the Qur'an clearly prohibits same-sex marriage. *Islamic Perspective on Same-Sex Marriage*, (July 7, 2015). *See* tinyurl.com/y7f54dq9 (last accessed Sep. 5, 2017).

Orthodox Judaism does not condone homosexual relationships, including same-sex marriage. Rabbi Tzvi HershWeinreb, *Orthodox response to Same-Sex Marriage* (June 5, 2006). *See* tinyurl.com/ycb8w268 (last accessed Sep. 5, 2017).

Jesus Christ stated that marriage is rooted in creation and is a sacred, lifelong bond between one man and one woman. Matthew 19:4-6. This has been the traditional orthodox view of the Christian church from its beginning.

The *Baptist Faith and Message*, Article 18, on the Family, says marriage is uniting one man and one woman in covenant commitment for a lifetime, revealing the union of Christ and His church. *Supra.*

See also "*The Nashville Statement*," a contemporary "Christian Manifesto on human sexuality," released on August 29, 2017. *Amicus* ERLC was a lead organizer and signer. The statement is framed in terms of what signers affirm and what they deny, showing that religious exercise is sometimes expressed by a refusal. Article 1 affirms that God designed marriage to be the union of man and woman, to signify covenant

love between Christ and the Church. Article 10 denies that same-sex marriage can be approved morally, according to the Bible. *See* cbmw.org/nashville-statement (last accessed Sep. 5, 2017).

C. Many faiths teach the principle of moral complicity.

Another principle that is common to many faiths is moral complicity. In a concurring opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, Case No. 12-6294 (10th Cir. 2013), Justice (then Judge) Gorsuch wrote: "All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. . . . Understanding that is the key to understanding this case." This Court later agreed, and declined to tell plaintiffs their moral thinking was flawed, in *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 at 2778 (2014)

Understanding the principle of moral complicity may also be the key to understanding this case, and why your *amici* support Petitioner's right of conscience in this matter.

II. Colorado Law, As Applied To Petitioners, Operates As A *De Facto* Religious Test For Cake Artists – A *Per Se* Violation Of The Free Exercise Clause.

A. Laws imposing a *de facto* religious test on pursuing one's chosen occupation are a *per se* violation of the Free Exercise Clause.

Religious tests were well known to the founding generation as a means of persecution to enforce conformity with official orthodoxy.[7]

English law of the seventeenth and eighteenth centuries contained a battery of statutes that confined eligibility for public office, service as a military officer, or enrollment at the universities of Oxford and Cambridge to subjects at least nominally affiliated with the established church. The Test Act of 1673 dictated, for instance, that anyone seeking "civil, military, academic, or municipal office" was required to "swear an oath against belief in transubstantiation," a Catholic religious doctrine, and to take communion as prescribed by the Church of England.[8] Laws like this "had

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[7] *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 Univ. Ill. L. Rev. 839, 873-74 ("excluding Catholics from professions was a time-honored means of persecution, well-known to the Founders").

[8] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2176 (2003) (citation omitted).

the obvious effect of excluding Catholics and nearly all other non-Anglicans from holding public office."[9]

Regrettably, test oaths also figured in early American experience. "Even after Independence, every state other than Virginia restricted the right to hold office on religious grounds."[10] As of 1789, "New York required officeholders to take an oath disavowing allegiance to a foreign prince – in other words, the Pope – in all ecclesiastical and civil matters. . . ."[11] Other states required office holders to take an oath affirming their belief in Christianity.[12]

Chief Justice Roberts, writing for the Court last term, quoted H.M. Brackenridge in an 1818 speech before the Maryland Legislature, urging adoption of a bill to end that state's disqualification of Jews from public office. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) (Slip op. 13.) The Court compared the vice of that religious test to the equally odious modern-day discrimination by a state government against persons because of religious identity. *Id.* Both are rooted in the same evil of state persecution of conscience to exclude or marginalize citizens.

But the Constitution repudiated this official test by categorically declaring that "no religious test shall

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[9] Note, *An Originalist Analysis of the No Religious Test Clause*, 120 Harv. L. Rev. 1649, 1651 (2007).

[10] McConnell, *Establishment and Disestablishment at the Founding*, 44 Wm. & Mary L. Rev. at 2178.

[11] *Id.* at 1652.

[12] *See id.*

ever be required as a qualification to any office or public trust under the United States." *See* U.S. CONST. art. VI. This clause met with criticism from state convention delegates during ratification. They "believed that free government worked best when those holding positions of public trust were committed to moral principles" and the constitutional ban on religious tests "arguably broke the connection between government service and religion and morality."[13] But influential voices condemned the use of religious tests. Baptist pastor Isaac Backus argued that "the imposing of religious tests hath been the greatest engine of tyranny in the world."[14] James Iredell (among the first members of this Court) exclaimed that "[e]very person in the least conversant in the history of mankind, knows what dreadful mischiefs have been committed by religious persecutions. Under the color of religious tests, the utmost cruelties have been exercised."[15]

Oliver Ellsworth, later Chief Justice of the United States, published a series of influential essays that elaborated on the nature of religious tests. He began

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[13] Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm. & Mary Bill of Rights J. 73, 102-03 (2005) (footnotes omitted).

[14] 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 148 (Jonathan Elliott ed., 1836).

[15] 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 192 (Jonathan Elliott ed., 1836).

his analysis by identifying the elements of a religious test:

> A religious test is an act to be done, or profession to be made, relating to religion (such as partaking of the sacrament according to certain rites and forms, or declaring one's belief of certain doctrines,) for the purpose of determining whether his religious opinions are such, that he is admissable to a publick office.[16]

Ellsworth then explained that "the sole purpose and effect" of the Constitution's ban on religious tests is "to exclude persecution, and to secure you the important right of religious liberty." *Id.* at 168. Answering critics, Ellsworth put his finger on the real source of protection for those concerned about virtue in public office. "If we mean to have those appointed to public offices, who are sincere friends to religion, we, the people who appoint them, must take care to choose such characters, and not rely upon such cob-web barriers as test laws are." *Id.* at 170.

Article VI's ban on official religious tests is an extension of religious freedom protected by the First Amendment, as this Court's precedents emphasize.[17]

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[16] The Landholder VII, *The Connecticut Courant*, No. 1195, Dec. 17, 1787, *reprinted in* Essays on the Constitution of the United States 169 (Paul Leicester Ford ed., 1892).

[17] To be clear, your *amici* do not argue that Article VI applies to a private citizen like Jack Phillips. Rather, we argue that the principles underlying Article VI are the same principles underlying the First Amendment, protecting the right of citizens in

Girouard v. United States, 328 U.S. 61 (1946), held that a Canadian applicant for citizenship could not be denied for refusing to swear an oath to take up arms in the Nation's defense contrary to his religious beliefs. *See id.* at 70. Rather than narrowly asking whether Article VI governed the issue, the Court framed the dispute in sweeping terms:

> The struggle for religious liberty has, through the centuries, been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that, in the domain of conscience, there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Id. at 68. In concluding that Congress did not intend to exclude an alien from citizenship because of his conscientious objection to combat service, the Court noted that "[t]he test oath is abhorrent to our tradition." *Id.* at 69.

Repugnance toward test oaths also decided *Torcaso v. Watkins*, 367 U.S. 488 (1961). At issue was whether Maryland could enforce a religious test that would bar an atheist from serving as a notary public. After citing Article VI the Court acknowledged that the

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private occupations to be free from government discrimination and persecution due to their religion.

First Amendment "controls our decision." *Id.* at 492. By transgressing free exercise, Maryland's religious test was held to be invalid.

Girouard and *Torcaso* establish that religious tests violate the Free Exercise Clause, whether or not Article VI applies to a case. It is equally clear that a law with a *de facto* religious test is not "a neutral, generally applicable law." *Employment Div. v. Smith*, 494 U.S. 872, 880 (1990). Pet. Br. 38-48. Such laws do not come within the general rule of *Smith* that bars a religious believer from a free exercise claim. *De facto* religious test laws must satisfy the compelling interest test because, rather than being religiously neutral, they seek to "impose special disabilities on the basis of religious views or religious status." *Id.* at 877 (citations omitted). In fact, religious tests are a form of religious persecution, which the First Amendment absolutely forbids on "[t]he principle that government may not enact laws that suppress religious belief or practice." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). This "fundamental nonpersecution principle of the First Amendment" applies when a law "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532.[18]

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[18] To the extent that the Court views CADA, as applied, to be a neutral, generally applicable law, in spite of the *de facto* religious test (Pet. Br. 38-48), or views *Smith* as barring Phillips' free exercise claims, then your *amici* urge the Court to reconsider *Smith* and the scope of that rule. Pet. Br. 48, n.8. *Amicus* Jews for Religious Liberty strongly believe that, to the extent the Court

As a well-recognized departure from this principle, *de facto* religious tests are a *per se* violation of the Free Exercise Clause. They are "abhorrent to our tradition," *Girouard*, 328 U.S. at 69, because they depart from the constitutional standard – that "government, in its various processes and proceedings, imposes no religious tests on its citizens, sorts none of them by faith, and permits no exclusion based on belief." *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1845 (2014) (Kagan, J., dissenting).

Nor must a religious test be overt in order to cross the constitutional line. "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Lukumi*, 508 U.S. at 534. The First Amendment forbids "mechanisms, overt or disguised,

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rejects the argument that CADA has been discriminatorily applied in a manner that targets religious conduct, and rejects the Petitioners' hybrid-rights claim, *Smith* must be reversed and cannot merely be avoided with other factual distinctions. *Smith* has long been criticized by Justices of this Court as unduly restrictive of the free exercise of religion. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559-80 (1993) (Souter, J., concurring in part and in the judgment, concurring in the judgment). A Free Exercise Clause that does not preclude the state from compelling Phillips to design and deliver a custom cake to celebrate a same-sex wedding that his faith teaches is wrong "based on decent and honorable religious . . . premises" is illusory. *Obergefell*, 135 S. Ct. at 2602. In short, if *Smith* allows the state to force Phillips to use his artistry to create a custom cake to celebrate a same-sex wedding service "against his will," it should be overruled. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

designed to persecute or oppress a religion or its practices." *Id*. at 547.

A covert mechanism of persecution occurs when the government erects a *de facto* religious test for pursuing a private occupation. Disguised as a general law, in application it has the effect of excluding a class of religious people from an occupation – or at least to severely burden the pursuit of that occupation – because of a religiously-motivated refusal to perform an act required by law. Consider, for example:

- A law requiring all licensed butchers to do custom butchering, including pork products, for the convenience of the public, would operate as a *de facto* religious test that excludes Jewish butchers.
- A law requiring all convenience stores to sell alcohol would operate as a religious test that excludes Muslim and Mormon owners.
- A law requiring all licensed surgeons at hospitals to perform elective abortions would operate as a *de facto* religious test that excludes Catholic and evangelical surgeons.

These subtle means could drive citizens from their occupations, or preclude them from entering in the first place, because of their religion – a burden on religious exercise that the Court has described as "onerous." *See Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct.

2751, 2781 n.37 (2014). Such burdens on religious exercise are all the more severe when a law is applied to disfavor particular religious beliefs or practices. When so applied, a religious test serves its historically noxious purposes – to deter and punish religious dissent.

Constitutional text and history, as well as fundamental First Amendment principles, confirm that religious tests and penalties on the pursuit of an occupation or profession are a *per se* violation of the Free Exercise Clause.

B. Colorado law imposes a constitutionally forbidden *de facto* religious test for cake artists that compels them to design custom wedding cakes celebrating same-sex marriage despite sincere religious objections.

Petitioner's challenge to the application of CADA centers on a statute prohibiting discrimination because of sexual orientation in a place of public accommodation. *See* C.R.S. § 24-34-601 (2016). To clarify one common misunderstanding, Jack Phillips did not refuse to serve Charlie Craig and David Mullins because of their sexual orientation. Phillips made a point of telling them that "he would be happy to make and sell them any other baked goods." Pet. App. 4a. He declined their request to design and create a custom wedding cake, as he explained, "because of his religious beliefs." *Id*. Phillips later elaborated on those beliefs, saying

that "he would displease God by creating cakes for same-sex marriages." *Id*. at 5a.

The Colorado Court of Appeals refused to credit the distinction that Phillips drew between creating a custom cake for a same-sex marriage and serving other baked goods to gay customers like Craig and Mullins. Instead, the court concluded that same-sex marriage is "closely correlated" with the status of being gay and that "conduct cannot be divorced from status." *Id*. at 15a, 17a. The court thus equated a good-faith refusal to create a custom wedding cake with anti-gay bigotry. Concluding that Phillips violated Colorado law, the court below affirmed the Civil Rights Commission's order requiring Masterpiece Cakeshop to "(1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with [Colorado law]; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with [Colorado law] and documenting all patrons who are denied service and the reasons for the denial." *Id.* at 6a.

Colorado's application of CADA erects a *de facto* religious test. Like a law compelling all restaurants to "remain open on Saturdays, to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants)" Colorado's application of CADA excludes certain religious believers from "owning" affected businesses. *See Burwell*, 134 S. Ct. at 2781 n.37. The State has effectively posted a sign declaring "Evangelicals Need Not Apply."

The Colorado Court of Appeals denied that Phillips was exercising his religion when he declined to create a custom wedding cake. Pet. App. 34a. We agree with Petitioner that this misses the point of compelled-speech analysis, which should have focused on whether "the wedding cake itself constitutes . . . expression." Pet. Br. at 29. But if this Court looks at the respectful decline to create, it is clearly religious exercise to say no and to explain why he must say no. *Thomas v. Review Board*, 450 U.S. 707 (1981), resolves that question. If the First Amendment protects a steel worker from losing unemployment benefits because of his conscientious objection to making tank turrets, *see id.* at 720, the same principle of religious freedom should protect a cake artist from losing some or all of his business and being stigmatized as a "discriminator" because of his conscientious objection to designing a custom cake to celebrate a same-sex marriage.

There is no real question that Petitioner's religious objection to celebrating a same-sex marriage is an "exercise of religion" protected by the First Amendment. Nor can the State rebut Petitioner's challenge by contending that applying Colorado law imposes no burden on religious exercise because Phillips's Christian faith does not compel him to be a cake artist. *Torcaso* handily disposed of that argument. "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." 367 U.S. at 495-96. *See* above, Section I of this

brief regarding the belief in "divine calling" to one's work.

The court below brushed off the grave First Amendment implications of insisting that Petitioner could simply divorce his Christian beliefs from his conduct as a professional cake artist. *See* Pet. App. 45a ("Masterpiece remains free to continue espousing its religious beliefs, including its opposition to same-sex marriage. However, if it wishes to operate as a public accommodation and conduct business within the State of Colorado, [state law] prohibits it from picking and choosing customers based on their sexual orientation"). In reality, Petitioner's status as a Christian with profound beliefs about traditional marriage cannot reasonably be distinguished from his refusal to engage in expressive conduct affirming Respondents' same-sex marriage. Inasmuch as Colorado mandates such expressive conduct, it has imposed a *de facto* religious test that violates the First Amendment guarantee of "the free exercise of religion."

C. Key facts in this case avoid the risk of unintended consequences in other cases.

Even a principle as firmly rooted in the First Amendment as the prohibition on *de facto* occupational religious tests must contain meaningful limits. Several facts in this case ensure that a rule which protects Jack from the application of CADA need not produce unintended and intolerable results in other cases.

First, Petitioner's precise objection is directed at marriage, an institution uniquely imbued with central religious significance. Few commercial transactions involve an event of such religious significance as marriage. There is no danger that shielding Petitioner from Colorado's *de facto* religious test will excuse large numbers of religious believers from obeying the state's public accommodations law.

Second, Petitioner's religious objections are limited to same-sex marriage and have no relation to the unique issues of race, racism or interracial marriage. Comparisons between Petitioner's measured objection to celebrating same-sex marriage and someone else's racist beliefs or opposition to interracial marriage should be discarded as unfair and offensive. Glib analogies with racial discrimination ignore the fact that racism is uniquely "odious" in our society. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Centuries of black slavery, a bloody civil war, three constitutional amendments, the rise and fall of Jim Crow, and the Civil Rights movement underscore the imperative to eradicate every trace of racial mistreatment. But as this Court assured the Nation in *Obergefell*, disagreements over the nature of marriage are morally and legally different. The traditional religious belief that marriage is between a man and a woman is honorable, not invidious. The tens of millions of Americans who hold such beliefs are honorable, enlightened and decent, not benighted bigots. And there is no national imperative to discourage, much less punish, the exercise of such beliefs. Relieving Jack from a *de facto* religious

test under CADA in this context will not undermine the Nation's commitment to equality in the wholly different context of race.

Third, a wedding cake is the iconic centerpiece of a celebration of one of life's most important events and most fulfilling relationships: marriage. Jack custom designs each cake to express and reflect God's design for marriage as a union of a man and woman. God has imbued the event and relationship with such biblical and spiritual significance, it is unique. *See* Pet. Br. 5-8. The symbolic and expressive character of a wedding cake immediately distinguishes these facts from a hypothetical religious proprietor who refuses to serve a burger and fries because of a patron's protected status. Confusing what Jack does at Masterpiece Cakeshop with what might happen at Bozo's Burger Shack is worse than failing to "tell the difference between a yarmulke and a cowboy hat."[19] Protecting Jack from CADA's religious test will not prevent CADA's application outside the wedding industry.

Fourth, this case does not involve the bare refusal to serve a customer because of his protected status. Giving Phillips free exercise protection from CADA's religious test will not open the door to "bare refusal" cases. That is because there are no cases in the country where a wedding vendor has sued or been sued to

[19] Michael Stokes Paulsen, *How Yale Law School Trivializes Religious Devotion*, 27 Seton Hall L. Rev. 1259, 1263 (1997) (attributing the phrase to Professor Fred Gedicks).

defend a bare refusal to serve LGBT customers.[20] There is no LGBT analog here to the *Piggie Park* case, where an owner refused to serve "barbecue meat and hash" to African-American customers because of religious opposition to racial integration. *See Newman v. Piggie Park Enterprises, Inc.*, 256 F.Supp. 941, 944, 946 (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). As law-and-religion scholar Douglas Laycock has explained, the free exercise claim of conscientious objectors like Phillips "rests on the view that marriage is inherently religious. They refuse to facilitate, validate, or recognize a relationship that, in their view, falsely mimics a religious relationship but is religiously prohibited."[21] Few such claims have arisen – "a handful in a country of 300 million people."[22] Relieving Phillips from CADA's religious test would not give bigots of whatever stripe "a license to discriminate," nor materially undermine nondiscrimination norms.

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[20] Laycock, *Culture Wars*, 2014 Univ. Ill. L. Rev. at 849 ("The refusal of some small businesses to assist with same-sex weddings does not entail any claim of a right to refuse to serve gays and lesbians as individuals.") (footnote omitted); Andrew Koppelmann, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 643 (2015) ("the people who objected to the law at issue were asked directly to facilitate same-sex relationships").

[21] Laycock, *Culture Wars*, 2014 Univ. Ill. L. Rev. at 849.

[22] Koppelmann, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. at 643.

Fifth, the penalty imposed by the State for declining to produce the requested custom wedding cake is extra-ordinary – enough to drive Petitioner out of the occupation of his choice for over 40 years. Although the First Amendment does not require proof that a claimant has suffered a substantial penalty before he is entitled to constitutional protection, Phillips could make that showing if required for prudential reasons. The administrative order affirmed by the court below has the undoubted effect of penalizing Phillips for his religious beliefs. The mandate decreed by the Colorado Civil Rights Commission requires Phillips "(1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with [CADA]; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with [CADA] and documenting all patrons who are denied service and the reasons for the denial." Pet. App. 6a. The mandatory remedial measures will compel Phillips to violate his religious beliefs continually. That these penalties are nonmonetary, unlike the crushing assessments in similar cases, *see Arlene's Flowers, Inc. v. State of Washington*, No. 17-108, at Pet. App. 67a, Pet. 13 (describing the award of actual damages in undetermined amount along with attorneys' fees and costs "expected to total hundreds of thousands of dollars"), does not detract from the reality that Colorado has burdened Petitioner's religious exercise substantially. Petitioner has lost 40% of his business – his family income – and decreased his staff from ten to four. Additionally, by decreeing that if he designs cakes for any

wedding he must design cakes for same-sex weddings, the State has forced Phillips out of the wedding cake business for now. He will close his wedding business rather than disobey God.

Sixth, and by contrast, Respondents Craig and Mullins suffered no material harm from Petitioner's refusal to make a custom wedding cake for them. They have admitted that a nearby cake shop made them a rainbow-layered wedding cake for free. *See* Pet. App. 289a. Any dignitary harms that they assert must be weighed alongside dignitary harms to Phillips. Although "there is a dignitary harm in being refused service because of perceived immorality," that harm "cannot be a compelling interest that justifies suppressing someone else's individual rights."[23] Requiring Petitioner to create custom wedding cakes for same-sex marriages carries its own dignitary harms. Colorado's mandate asks Phillips "to do serious wrong that will torment [his] conscience for a long time after, perhaps forever." *Id.* And the State has effectively branded him a bigot and rendered him something of an outcast, seriously harming his reputation in the community.

Stigmatizing Jack Phillips was not merely a by-product of ruling against him. A member of the Colorado Civil Rights Commission publicly excoriated Phillips's "decent and honorable" religious beliefs, *Obergefell*, 135 S. Ct. at 2602, by equating his simple

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[23] Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to Nejaime and Siegel*, 125 Yale L.J. Forum 369, 376 (2016).

request not to be forced to violate his religion with some of the worst atrocities in human history:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be – I mean, we – we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others.

Pet. App. 293a-294a (Statement of Commissioner Heidi Hess).

Professor Laycock rightly says that the hardships borne by Phillips are "among the harms religious liberty is intended to prevent, and an expressive harm on the other side cannot justify inflicting such harms." *Id.* at 378a. The severe and material harm to Petitioner's business and reputation, the absence of any material harm to the gay claimants, and the presence of comparable dignitary harms on both sides sets this case apart from instances when a denial of service, no matter how rooted in religious grounds, seriously burdens the members of a protected class. The familiar strict-scrutiny standard would take such burdens into account when determining whether the State has a compelling interest in enforcing a non-discrimination norm despite the resulting burden on religious exercise.

Exempting cake artists from laws that impose a *de facto* religious test on the pursuit of one's chosen occupation is not a boundless principle. At least six factors ensure that application of that principle in this case will not undermine competing constitutional values or lead to intolerable results in other cases.

III. Reversal Is Needed To Discourage A Growing Trend Toward Imposing *De Facto* Religious Tests On The Pursuit Of An Occupation.

Colorado's denial of Petitioner's constitutional rights does not stand alone. Other states have imposed a *de facto* religious test on wedding vendors whose religious convictions prevent them from assisting in the celebration of a same-sex wedding. *See* Petition for Writ of Certiorari, *State of Washington v. Arlene's Flowers, Inc.*, No. 17-108, at Pet. App. 40a (filed July 14, 2017) ("[W]e reject Stutzman's claim that [Washington law], as applied to her, triggers strict scrutiny under the free exercise clause of the First Amendment."); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 75 (N.M. 2013) ("We hold that [the state public accommodations statute] is a neutral law of general applicability, and as such it does not offend the Free Exercise Clause of the First Amendment.").

But the troubling trend of religious tests is not confined to a few wedding vendors. Such assaults on religious freedom have affected multiple occupations across the country. A counseling student has been

expelled from her graduate program for refusing to advise same-sex couples about their intimate relationships. *See Ward v. Polite*, 667 F.3d 727, 731 (6th Cir. 2012). Pharmacists have been compelled to deliver morning-after contraceptives despite their religious objections, even though the state stipulated that referring patients to a nearby pharmacy occurs for a variety of non-religious reasons and did "not pose a threat to timely access to lawfully prescribed medications." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1074 (9th Cir. 2015) (internal quotation marks removed). A local magistrate has been formally censured for merely expressing her religious views on same-sex marriage. *See* Petition for Certiorari, *Neely v. Wyoming Comm'n on Judicial Conduct and Ethics*, No. 17-195 (filed Aug. 4, 2017).[24] Each of these cases involved a *de facto* religious test – a legal mandate penalizing or excluding a person from her chosen occupation because of religious belief or expression.

The decision below is, in short, part of a growing trend toward imposing *de facto* religious tests on the

[24] The trend is international. Trinity Western University, a private Christian university and its new law school graduates have been denied accreditation by the "bar" because students are required to sign a "community covenant" that does not recognize same-sex marriage. Following the trend, two bar societies have treated the code of conduct as a vice, not a virtue, and have barred Christian students from the legal profession by this *de facto* religious test. Canada's Supreme Court has agreed to hear the appeal on November 30, 2017. *Trinity Western University, et al. v. Law Society of Upper Canada*, Case No. 37209 and *Law Society of British Columbia v. Trinity Western University, et al.* Case No. 37318 (Supreme Court of Canada, 2017).

lawful pursuit of an occupation. Religious proscriptions of this type are a notorious affront to the free exercise of religion, understood as "the right to express [religious] beliefs and to establish one's religious (or nonreligious) self-definition in the . . . economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) (emphasis added). Colorado's extreme application of an otherwise reasonable requirement of equal access to public accommodations emerges from a vein of illiberal thought that condemns religious dissent from the orthodoxy of the day. *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 Univ. Ill. L. Rev. 839, 872-73. Dissent is penalized or crushed not to ensure the delivery of needed services, but to drive certain believers, along with their ideas and expression, out of their chosen professions and the commercial sphere. This is done to punish those who express "objectionable" thoughts and to drive such thoughts and words out of public discourse, so that vulnerable groups need never encounter religious disapproval.

Reversal is called for, then, not only to vindicate Petitioner's rights, but to thwart the trend that directly threatens religious pluralism in the marketplace and the academy.

CONCLUSION

When government knows that its policy is primarily opposed on religious grounds, it knows that religious objectors will be the primary targets of enforcement. Compelling a religious proprietor to use his artistry to celebrate the government-approved message or go out of business is a *de facto* religious test that threatens to exclude or expel him from his vocation. This the First Amendment forbids.

This Court should reverse the judgment of the Colorado Court of Appeals, and grant the relief requested by Petitioners, thereby giving substance to the promise of *Obergefell*, *supra*.

Respectfully submitted,

MICHAEL K. WHITEHEAD
Counsel of Record
WHITEHEAD LAW FIRM, LLC
1100 Main Street, Suite 2600
Kansas City, Missouri 64105
(816) 398-8967
Mike@TheWhiteheadFirm.com
Counsel for Amici Curiae
Religious Organizations

September 7, 2017

Appendix

List of *Amici Curiae*

The **Ethics and Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 50,000 churches and 15.8 million members. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience under God in the practice of their faith.

Missouri Baptist Convention Christian Life Commission ("CLC") is the religious liberty and public policy entity of the Missouri Baptist Convention, comprised of nearly 2,000 local churches with about a half million members, affiliated with the Southern Baptist Convention. Missouri Baptists include Christians in many vocations, sacred and secular, who are concerned about religious freedom in the marketplace as well as the ministry.

John Paul the Great Catholic University ("JP Catholic") is a nonprofit institution of higher education with a Catholic identity rooted in the purpose of proclaiming the Gospel, overcoming every separation between faith and life, and being a witness to the world on the Church's teaching on the sanctity of human life, marriage, family, and the right ordering of public life. JP Catholic desires to form students who will integrate their religious and professional lives as creators and

innovators at the intersection of media, business, and theology.

Oklahoma Wesleyan University is a nonprofit institution of higher education committed to the truth of Christ and the truth of Scripture as a guide for all of life. As an evangelical Christian university of The Wesleyan Church, Oklahoma Wesleyan University is a place of serious study, honest questions, and critical engagement, all in the context of a liberal arts community that honors the Primacy of Jesus Christ, the Priority of Scripture, the Pursuit of Truth, and the Practice of Wisdom.

Spring Arbor University ("SAU") is a nonprofit institution of higher education affiliated with the application of the liberal arts, total commitment to Jesus Christ as the perspective for learning, and critical participation in the contemporary world. SAU is committed to the pursuit of all truth as God's truth, the development of Christian character, and the living integration of faith and learning. SAU seeks to form students for effective, redemptive participation in society and culture.

William Jessup University ("WJU") is a nonprofit institution of higher education that partners with the Church to educate transformational leaders for the glory of God. As a Christ-centered learning community rooted in the historic Christian faith, WJU desires to produce graduates whose personal and professional lives are shaped by a biblical worldview, and who will

help redeem world culture by providing notable servant leadership by enriching family, church and community life, and by serving with distinction in their chosen career.

The American Association of Christian Schools ("AACS") is the oldest national non-denominational Christian school association in America. Founded in 1972, the AACS is a nonprofit federation of thirty-eight state and regional associations that work in harmony with the national association in providing teacher certification, school improvement, accreditation and many other member services. The AACS is a service organization that exists to provide policy insight, to promote high-quality Christian educational programs, to provide related institutional and personnel services to its constituency. All these services are designed to encourage the overall goal of producing Christ-like young people who will live as good citizens in many diverse vocational occupations.

Jews for Religious Liberty is an unincorporated cross-denominational group of lawyers, rabbis, and communal professionals who practice Judaism and are committed to defending religious liberty. *Amicus*'s members have each written extensively on the role of religion in public life. Representing members of the legal profession, and as adherents of a minority religion, *amicus* has a unique interest in ensuring that Free Exercise jurisprudence enables the flourishing of religious viewpoints and practices in the United States, including for communities of traditional faith.

Imam Omar Ahmed Shahin is a Fellow of the Graduate Theological Foundation, Director of Islamic Studies, and Ibn Taymiyya Professor of Islamic Law. Omar Shahin serves on the Board of Trustees for the North American Imam Federation, a consortium of 587 Imam members that supports the Imam's sacred mission.