STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17TH Street, Suite 1300 Denver, Colorado 80202	
Complainants: CHARLIE CRAIG and DAVID MULLINS v. **Respondents:** MASTERPIECE CAKESHOP, INC. and any successor entity, and JACK C. PHILLIPS	▲ **COURT USE ONLY** ▲ **CASE NUMBER** 2013 CR 0008 2013 CV 0009
Amanda Goad, New York State #4362448 American Civil Liberties Union Foundation LGBT & AIDS Project 125 Broad Street, 18th Fl. New York, NY 10004 Telephone: (212) 549-2627 Sara Rich, #36904 Mark Silverstein #26979 American Civil Liberties Union Foundation of Colorado 303 E. 17th Avenue, Suite 350 Denver, CO 80203 Telephone: (303) 777-5482 Paula Greisen, #19784 Dana Menzel, #34008 King & Greisen, LLC 1670 York St. Denver, CO 80206 Phone: (303) 298-9879	

COMPLAINANTS' RESPONSE IN OPPOSITION TO RESPONDENTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY BRIEF IN SUPPORT OF COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Complainants David Mullins and Charlie Craig, by and through counsel, respectfully request that the Court grant their motion for summary judgment and deny the cross-motion for summary judgment filed by Respondents Masterpiece Cakeshop, Inc. and Jack Phillips. Complainants submit this reply brief in further support of their motion for summary judgment, combined with their opposition to Respondents' cross-motion for summary judgment, in accordance with C.R.C.P. 56, the Court's order dated October 2, 2013 and the Rules of Practice of the Office of Administrative Courts.

COMPLAINANTS' RESPONSE TO RESPONDENTS' STATEMENT OF UNDISPUTED FACTS ("RESP'S SOUF")

1-21. Complainants do not dispute any of the facts stated in paragraphs 1-21 of Resp's SOUF.

22-28. Complainants do not dispute any of the facts stated in paragraphs 22-28 of Resp's SOUF, and note that these paragraphs mirror statements in Complainants' Statement of Undisputed Facts (Compl's SOUF) recounting the interactions between the parties in July 2012, illustrating that there exists no genuine issue of material fact in this case.

29. Complainants do not dispute this statement but note that Complainant Mullins exclaimed his frustration with Respondents' discriminatory decision to refuse them service before exiting the shop.

30-31. Complainants do not dispute any of the facts stated in paragraphs 30 and 31 of Resp's SOUF, and note that these paragraphs mirror statements in Complainants' Statement of Undisputed Facts (Compl's SOUF) recounting the interactions between the parties in July 2012, illustrating that there exists no genuine issue of material fact in this case.

32. Complainants do not dispute any of the facts stated in paragraph 32 of Resp's SOUF.

33. Complainants do not dispute any of the facts stated in paragraph 33 of Resp's SOUF, and note that this paragraph mirror statements in Complainants' Statement of Undisputed Facts (Compl's SOUF) recounting the interactions between the parties in July 2012, illustrating that there exists no genuine issue of material fact in this case.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED TO COMPLAINANTS.

The record shows that Complainants visited Respondent Masterpiece Cakeshop for the purpose of shopping for and potentially purchasing a cake for their wedding reception, but Respondent Phillips then informed them that Respondents would not sell Complainants the type of item they sought to purchase, solely because they were a same-sex couple who planned to marry each other and not an opposite-sex couple who planned to marry each other. Despite Respondents' protestations to the contrary, the undisputed facts of this case establish that Respondents refused service to Complainants because they are a gay couple, in violation of the Colorado Anti-Discrimination Act ("CADA").

A. RESPONDENTS DISCRIMINATED AGAINST COMPLAINANTS BECAUSE OF THEIR SEXUAL ORIENTATION.

Respondent Phillips admits that Masterpiece Cakeshop is in the business of selling, among other things, wedding cakes, and that on July 19, 2012, he sat down at the "cake consulting table" in the shop with prospective customers who had expressed interest in purchasing a wedding cake. Resp. SOUF, ¶¶ 22-23; Compl. SOUF ¶ 3. He further admits that once Complainants Mullins and Craig explained that they wanted to purchase a cake for "our wedding," Phillips informed them that he was not willing to produce a wedding cake for their family. Resp. SOUF at ¶ 24. In other words, all Phillips needed to know to make his decision to deny Complainants service was that Complainants were two men planning to marry each other.

Respondent Phillips has also admitted that it is the policy of Masterpiece Cakeshop to categorically refuse to sell wedding cakes for same-sex couples. *Id.* at ¶¶ 26, 31. This is clearly discrimination "because of" sexual orientation. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013) (under New Mexico public accommodations law, photography studio illegally discriminated "because of...sexual orientation" because "[i]t provides wedding photography services to heterosexual couples, but it refuses to work with homosexual couples under equivalent circumstances.").

Respondent Phillips claims that he did not discriminate against Complainants "because of" their sexual orientation in that he would also deny service to a heterosexual individual who sought to order a cake that he knew to be intended for use at the wedding of her gay friends. Resp. Br. 8, n.2. While not at issue here, this hypothetical does not help Respondents' cause. Refusing to fill an order, for a type of product the business sells to other customers, based on the purchaser's intent to gift that product to gay friends getting married, would mean discriminating against the purchaser for his association with gay people, and thus would also violate C.R.S. § 24-34-601. *See, e.g., Barrett v. Whirlpool Corp.*, 556 F.3d 502, 515 (6th Cir. 2009) (employer violated federal Civil Rights Act by penalizing white employees for their association with and advocacy for black co-workers); *see also Elane Photography*, *supra* at 62 (finding that "it does not help" photography studio's defense to argue that "it would have turned away heterosexual customers if the customers asked for photographs in a context that endorsed same sex marriage," such as a film shoot involving a fictional wedding).

Respondents also contend that they are not liable under CADA because they lacked the "required intent to discriminate". Resp. Br. 7. But the statute does not require a showing of "animus," "bigotry," or "malice" for Complainants to prevail on claims of public

accommodations discrimination. C.R.S. § 24-34-601 *et seq.; see also Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring) ("Prejudice, we are beginning to understand, rises not from malice or hostile animus alone."); *cf. TWA v. Thurston*, 469 U.S. 111 (1985) (defendant employer's policy imposing adverse treatment on pilots over age 60 was discrimination "based on age" that violated the Age Discrimination in Employment Act, but did not trigger additional penalties as a "willful" violation based on statutory section that imposed specific intent requirement).

There is no case law in Colorado which holds that the "because of" language in C.R.S. § 24-34-601(2) requires a showing of intent. In fact, the Colorado Supreme Court has found similar language in the Colorado employment discrimination statute, 24-34-401(2) to be satisfied when the employment practice at issue had a disparate impact on women. *Colorado Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1363 (Colo. 1988) (The failure to provide insurance coverage for pregnancy discrimination while providing male employees coverage for all conditions constitutes discriminatory conduct on the basis of sex.) [1]

Even assuming *arguendo* that Section 24-34-601(2) does require a showing of intent, Colorado law is clear that intent to discriminate "need not be proven by direct evidence, but may be inferred from the circumstances." *Cunningham v. Department of Highways*, 823 P.2d 1377 (Colo. Ct. App. 1991). In this case, Respondent Phillips concedes that his reason for turning away Complainants as prospective wedding cake customers was the fact that they wanted the cake for a same-sex wedding. Resp. SOUF, ¶ 27. That constitutes an admission of

[1] The United States Supreme Court has followed a similar analysis when reviewing employment discrimination cases. See *Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Comm'n*, 462 U.S. 669, 682-83, 77 L. Ed. 2d 89, 103 S. Ct. 2622 (1983) (employment practice is discriminatory when it results in treatment which would be different but for that person's sex); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 56 U.S.L.W. 4922, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1988) (superceded by statute on other grounds) (disparate impact analysis is applicable to subjective and objective criteria used in hiring and promotion decisions).

discrimination because of sexual orientation. Respondent Phillips cannot salvage his policy of refusing to sell wedding cakes for same-sex couples by claiming it is "not motivated by any type of animus toward, or bigotry against, gay people." Resp. Br. 9.

Respondents mischaracterize Colorado precedent regarding the standard Complainants must meet to demonstrate that they suffered illegal discrimination "because of" their protected class status. In *Bodaghi v. Department of Natural Resources*, 995 P.2d 288 (Colo. 2000, en banc), the Colorado Supreme Court found that a state agency violated the employment discrimination provision of CADA by intentionally discriminating against an Iranian-American employee because of his national origin. *See* C.R.S. § 24-34-402(1)(a) (employment provision including same "because of" language as the public accommodations provision). The Court deemed evidence in the administrative record, none of which reflected overt negativity toward the plaintiff's national origin or toward Iranians generally, adequate to support a finding of intentional and illegal discrimination, notwithstanding the employer's attempts to articulate non-discriminatory performance-based reasons for its adverse treatment of the plaintiff. *Bodaghi* at 303-04; *see also Colorado Civil Rights Comm'n v. Big O Tires*, 940 P.2d 397, 402 (Colo. 1997) (holding that record supported finding of intentional employment discrimination on the basis of race, in case where plaintiff demonstrated disparate treatment in disciplinary process but offered no direct evidence of intent to discriminate against her as an African-American). Here, the undisputed evidence is that Respondents have an explicit policy of disparate treatment based on sexual orientation – by refusing wedding cake services to same-sex couples. Although Respondents contend that this policy is not facially discriminatory on the basis of sexual orientation, further inquiry into the subjective intent behind their policy is not necessary to resolve this case.

Respondents' claim that their admitted refusal to take wedding cake orders for the weddings of same-sex couples does not constitute illegal discrimination resembles arguments rejected by the United States Supreme Court in past cases interpreting anti-discrimination laws. In *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707-08 (1978), the Court held that an employer's requirement that female employees make greater pension contributions than males constituted intentional discrimination in violation of the federal Civil Rights Act, notwithstanding the defendant's argument that such a policy was intended to foster equity (as data showed that female employees enjoyed longer lifespans). Similarly, in *Bragdon v. Abbott*, 524 U.S. 624, 648-55 (1998), the Court considered whether a dentist's refusal to treat an HIV-positive woman violated the public accommodations discrimination provision of the Americans with Disabilities Act. It held the decision to constitute intentional discrimination, noting that the dentist's "belief that a significant risk [of contracting HIV from the patient] existed, even if maintained in good faith, would not relieve him from liability." *Id.* at 649.

Respondents rely heavily on *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), but to no avail. In *Bray*, the Court assessed whether the defendant organization's efforts to organize protest activities at abortion clinics rendered it a conspiracy subject to tort liability under the following Federal statutory provision:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws...

Id. at 267, quoting 42 U.S.C. § 1985(3). Prior caselaw held that one of the required elements plaintiffs must prove to prevail on this claim was that "class-based, invidiously discriminatory animus [lay] behind the conspirators' action." *Bray,* 506 U.S. at 268, quoting *Griffin v.*

Breckenridge, 403 U.S. 88, 102 (1971). The *Bray* Court rejected plaintiffs' claims for two reasons: the lack of specific evidence of intentional animus against women, and its determination that "the disfavoring of abortion ...is not *ipso facto* discrimination against women." 506 U.S. at 272-75. As an initial matter, the present case substantially differs from *Bray* in that Complainants do not allege a conspiracy, or any other basis for tort liability, and accordingly have no obligation to show "class-based, invidiously discriminatory animus."

But in addition, the *Bray* Court's analysis of whether discrimination against women could be inferred from the facts of that case actually supports a finding that refusing wedding cake sales to same-sex couples planning to marry is discrimination against gay people.

> Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews. But opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women.

Id. at 270. Here, Respondents' policy of refusing to sell cakes for the weddings of gay and lesbian couples is akin to such an impermissible tax on yarmulkes, since same-sex weddings are "engaged in exclusively or predominantly" by gay people. *See also Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2990 (2010) ("Our decisions have declined to distinguish between status and conduct" in identifying and assessing discrimination against gay people). The *Bray* Court also went on to note the involvement of many women on the anti-abortion side of the relevant policy debate and in defendants' activities specifically, as part of its basis for deeming efforts to oppose abortion to be distinct from tortious activities rooted in "class-based" anti-woman bias. 506 U.S. at 269-71. Here, in contrast, Complainants need only prove that they

were individually subjected to discriminatory treatment, not that Respondents were motivated by a "class-based" discriminatory goal.

Respondents also argue that their policy of denying all same-sex couples the opportunity to purchase wedding cakes is not sexual orientation discrimination because the institution of marriage is not "inextricably tied to being gay in Colorado." Resp. Br. 10-11. But Respondents mischaracterize the "inextricable tie" that renders their policy illegal. Of course it is not the case that every gay individual in Colorado is or wishes to be married or that every same-sex couple in Colorado is or wishes to be married, particularly given the present requirement that Colorado same-sex couples must travel out of state in order to obtain a marriage license. However, Coloradans who marry members of the same sex are gay, lesbian, or bisexual, and weddings are celebrations of the very relationships that distinguish gay, lesbian, and bisexual people from heterosexuals. *See Elane Photography*, supra at 61 (refusing to photograph same-sex commitment ceremonies was illegal because "[t]o allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the [public accommodations statute]"). In other words, same-sex marriage, is, by its very nature, "inextricably tied" to sexual orientation. Accordingly, a policy of denying wedding cakes to couples of the same sex who plan to marry or celebrate their relationship has the effect of denying a service to, and only to, people of particular sexual orientations, and violates CADA.

B. Respondents' Professed Willingness to Sell Other Baked Goods to Complainants Does Not Cure the Illegal Discrimination At Issue Here.

Respondent Phillips contends that he would be pleased to sell cookies, brownies, or a cake for a non-wedding occasion such as a birthday to Complainants and to other openly gay customers. Resp. SOUF ¶ 33; Affidavit of Jack Phillips ("Phillips Aff."), ¶ 87. Assuming this is

true, it has no bearing on the illegality of Respondents' policy and practice of denying same-sex couples the ability to order cakes for their weddings[2] – a service that Respondents admit their business provides for opposite-sex couples. Exh. 2; Phillips Aff., ¶¶ 45, 48. As the New Mexico Supreme Court observed in *Elane Photography*, the basic principle behind public accommodations discrimination laws is that businesses holding themselves out as open to the public must make their full range of goods and services available on an equitable basis to all customers without imposing restrictions based on any protected status. 309 P.3d at 62 ("For example, if a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers… Therefore, Elane Photography's willingness to offer some services to Willock does not cure its refusal to provide other services that it offered to the general public.") Refusing to sell wedding cakes is discrimination, whether or not the offending business makes other baked goods available on a nondiscriminatory basis.[3]

Historically, courts have treated restrictions on the ability of some customers to access particular goods or services as violating public accommodations discrimination laws, if such restrictions are based on membership in protected classes. *See generally, e.g., Robinson v. Power Pizza, Inc.*, 993 F. Supp. 1462 (M.D. Fla. 1998) (granting injunction against restaurant that refused to deliver orders to predominantly African-American neighborhood and rejecting its policy of delivering orders from residents of that neighborhood at intermediate "drop off sites" as failing to abate policy of racial discrimination by a public accommodation in violation of federal law); *Harvey v. NYRAC*, 813 F. Supp. 206 (E.D.N.Y. 1993) (denying summary judgment to

---

[2] As discussed *supra* at p. 3, Respondents' policy of refusing to sell cakes for the weddings of gay and lesbian Coloradans is illegal regardless of whether the person attempting to place the order is gay. Conversely, Respondent Phillips' claim that he would happily sell a wedding cake to a gay person for use in a heterosexual wedding is irrelevant even if true. Resp. Br. 8, n.2.

[3] By way of illustration, a bakery that willingly sold birthday and graduation cakes, cookies, and/or brownies to African-American customers would nonetheless be discriminating because of race and violating Colorado law if it refused to sell wedding cakes to or for interracial couples.

defendant rental car purveyor where plaintiff alleged that because of her race she was not permitted to rent a "luxury" vehicle, in violation of New York anti-discrimination statutes, but was offered the opportunity to rent a different car model instead). By denying Complainants the opportunity to sample or purchase the type of item they wanted, Respondents violated C.R.S. 24-34-601, and Respondents' purported willingness to sell other items to Complainants does not cure this violation.

C. RESPONDENTS MISAPPREHEND COLORADO LAW ON SAME-SEX RELATIONSHIPS AND ITS RELEVANCE.

Respondents' also argue that their policy and practice of refusing to sell wedding cakes for same-sex couples are justified because of Colorado's constitutional and statutory provisions restricting civil marriage in Colorado to heterosexual couples. This assertion is similarly misguided.

Laws governing the issuance and recognition of marriage licenses in Colorado do not constrain gay Coloradans' right to participate equally in the market for retail goods and services, which the Colorado Legislature specifically affirmed when it added sexual orientation to CADA.[4] Nor do the eligibility standards for civil marriage impact all Coloradans' right (connected to constitutionally protected freedoms of association and expression) to throw parties celebrating their love, commitment to one another, and family relationships.[5] The record here

[4] The Colorado Civil Union Act, passed a few months after the incident of discrimination giving rise to this case, affirmed that the public policy of the state of Colorado is to treat gay couples and families with equal dignity and respect. *See* C.R.S. § 14-15-101 *et seq.* In the Civil Union Act, the legislature explained that one of its purposes was to "protect individuals who are or may become partners in a civil union against discrimination in employment, housing, and in places of public accommodation." C.R.S. § 14-15-102.

[5] Neither Complainants nor Counsel for the Complaint are asking Respondents to respect or recognize Complainants' marriage in any way or to treat them as married for any purpose, nor were Complainants seeking any such recognition when they approached Respondents seeking to purchase a cake in July 2012. Respondents' effort to draw support from Missouri case law regarding a man's ineligibility for financial benefits as the surviving domestic partner of another man is thus unavailing.

indicates Respondents have refused service both to gay Coloradans who were planning to marry legally in another jurisdiction around the same time, and to a couple who sought to order cupcakes and serve them at a "family commitment ceremony" not tied to a formally sanctioned wedding. *See* Compl. SOUF ¶ 5; Exh. D, pps. 2-4. In both instances, the conduct to which Respondents object is entirely legal and the refusal of service violates CADA.[6]

II. RESPONDENTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE RESPONDENTS DO NOT HAVE A CONSTITUTIONAL RIGHT TO VIOLATE CADA.

A. ENFORCEMENT OF CADA DOES NOT VIOLATE RESPONDENT PHILLIPS' CONSTITUTIONAL RIGHT TO FREE EXERCISE OF RELIGION.[7]

Respondent Phillips makes the claim that the religious exercise clauses of the Colorado and United States Constitutions entitle him to thwart the purposes of CADA and to discriminate against fellow Coloradans based on their sexual orientation. *See* Resp.'s Br. at 35-44. In essence, Respondent claims that simply because his religion defines marriage as between a man and a woman, he and his for-profit secular business are above the law and are permitted to discriminate against same-sex couples in Colorado. While religious freedom is one of our most cherished liberties, it is not unlimited and cannot be used to harm others. Respondent's claim fails as a matter of law and must be rejected.

In *Employment Division v. Smith*, 494 U.S. 872, 885 (1990), the Supreme Court held that the Free Exercise Clause is not offended by a neutral law of general applicability. The Court explained, "the right of free exercise does not relieve an individual of the obligation to comply

---

[6] As another illustration, a bakery that routinely sold Christmas cookies but refused to take orders for Hanukkah cookies would likely run afoul of the religious discrimination provision of CADA (even if it was willing to fill orders for items commemorating Purim, Sukkot, and other Jewish holidays). The bakery would not have a valid defense based on Colorado's recognition of Christmas but not Hanukkah as a legal holiday. C.R.S. § 24-11-101.

[7] It appears that the free exercise defense is asserted on behalf of Respondent Phillips alone. If Respondent Masterpiece Cakeshop, Inc. were to attempt to claim a free exercise violation resulting from enforcement of CADA, that claim would fail for all of the reasons stated *infra*.

with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* Though that law may have "the incidental effect of burdening a particular religious practice" it "need not be justified by a compelling governmental interest." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993); *see also Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 697-98 (10th Cir. 1998) ("a law (or policy) that is neutral and of general applicability need not be justified by a compelling governmental interest even if that law incidentally burdens a particular religious practice or belief.") (citing *Lukumi Babalu*, 508 U.S. at 531; *U.S. v. Meyers*, 95 F.3d 1475, 1481 (10th Cir. 1996), *cert. denied*, 522 U.S. 1006 (1997)). Thus "a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). As explained *infra pps. 21-22*, Colorado has not just a legitimate interest, but a compelling one, in eradicating discrimination, and thus CADA undoubtedly survives rational basis review.

There are still two kinds of claims that may trigger strict scrutiny under the Free Exercise Clause, and Respondent argues that both apply in this case. Under the first exception, laws that are not neutral and generally applicable, but target religious exercise, are invalid unless they satisfy strict scrutiny. *Lukumi Babalu*, 508 U.S at 546; *see also* Resp.'s Br. at 40-42. Under the second exception, so-called "hybrid claims" involving free exercise and another constitutional right can also trigger some version of strict scrutiny. *See Smith*, 494 U.S. at 881-82; *see also* Resp.'s Br. at 42. This case does not actually involve either exception, and therefore strict scrutiny is inappropriate.

1. CADA Is A Neutral Law Of General Applicability And Should Not Be Subject To Strict Scrutiny.

Smith's requirements that laws be neutral and generally applicable are "interrelated." *Lukumi Babalu*, 508 U.S. at 531. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United*, 451 F.3d at 649-50 (citing *Lukumi Babalu*, 508 U.S. at 533). Similarly, a law is generally applicable unless it selectively "impose[s] burdens only on conduct motivated by religious belief." *Lukumi Babalu*, 508 U.S. at 543. Here, there can be no serious question that CADA satisfies both requirements.

First, CADA is neutral because it was passed with the important and salutary purpose of protecting all Colorado residents and visitors from discrimination based on a wide range of protected characteristics, including sexual orientation. Specifically, "places of public accommodations" are barred from discriminating against "a person, directly or indirectly . . . because of . . . sexual orientation," among other protected characteristics. C.R.S. § 24-34-601. CADA applies to all such discrimination, regardless of the motive or reasoning underlying the discrimination.

Second, CADA is generally applicable because it does not target conduct motivated by religious belief. That Respondent happens to have violated CADA because of his religious beliefs does not mean that CADA is aimed at targeting his religious exercise. To the contrary, CADA is indifferent as to why a business or business owner might discriminate and the Free Exercise Clause does not provide Respondent any refuge. As the Supreme Court explained in *Smith*, "[w]e have 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." *Smith*, 494 U.S. at 878-879.

Respondent goes on to argue that CADA's exemption for houses of worship fatally undermines its general applicability under *Smith*. Resp.'s Br. at 40. This is a curious argument, since the exemption for houses of worship was aimed at *accommodating* religious freedom, not targeting it. Indeed, this exemption only demonstrates how the legislature went out of its way to ensure that CADA would not target religious freedom. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 410 (E.D. Pa. 2013) *aff'd sub nom. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013) ("The fact that exemptions were made for religious employers does not indicate that the regulations seek to burden religion. Instead, it shows that the government made efforts to accommodate religious beliefs, which counsels in favor of the regulations' neutrality."); *see generally Corp. of Presiding Bishop of Church of Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-38 (1987) (discussing purposes and effects of religious exemptions to nondiscrimination laws).

Respondent further argues that CADA's narrow exemption for public accommodations that restrict admission to individuals of one sex "if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation" also threatens the law's general applicability. C.R.S. § 24-34-601(3); *see also* Resp.'s Br. at 41. This argument is of no avail. Narrow exemptions like this are common in public accommodations statutes and are aimed at permitting specialized institutions such as single-sex health clubs, schools, or medical facilities, to provide a service that is unique to one sex. *See generally* David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 Colum. J. of Gender and Law 51, 93 n.176 (2011). They neither target religion, nor suggest that the law is not generally applicable.

Both the provision allowing sex segregation in limited circumstances and the provision exempting houses of worship clearly advance CADA's overall goals of eradicating discrimination and ensuring equal access to public accommodations for all Coloradans. In contrast, an exemption for Respondent would directly conflict with the purposes of CADA. Were Respondent's reasoning accepted, any law that contained an exemption for a secular purpose—no matter how reasonable or tailored—would automatically be subject to strict scrutiny. Such a rule would cause the exception to swallow the entire rule. But federal courts, including the Tenth Circuit, have expressly declined on several occasions to create such a *per se* rule. *See Grace United*, 451 F.3d at 651 ("Grace United seems to be asking us to adopt a *per se* rule requiring that any ... regulation which permits any secular exception satisfy a strict scrutiny test to survive a free exercise challenge. Consistent with the majority of our sister circuits, however, we have already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption.") (citing *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004)).

Even taken together, the statute's narrow exemptions are insufficient to trigger strict scrutiny under *Smith* and *Lukumi Babalu*. CADA, a comprehensive antidiscrimination law whose only exemptions further its purposes of preventing discrimination and ensuring minorities' full participation in society, is both neutral and generally applicable, and thus should not be subjected to a strict scrutiny standard.

2. RESPONDENT'S CLAIMS DO NOT INVOLVE HYBRID RIGHTS AND THUS DO NOT TRIGGER STRICT SCRUTINY.

Respondent Phillips next argues that strict scrutiny is proper because his religious exercise claim involves hybrid rights. *See* Resp.'s Br. at 42. At the outset, "[t]he hybrid rights doctrine is controversial. It has been characterized as mere dicta not binding on lower courts,

criticized as illogical, and dismissed as untenable." *Grace United*, 451 F.3d at 656 (citing *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993)). Although courts, including the Tenth Circuit, are skeptical of the hybrid rights exception, the Tenth Circuit does recognize the exception, but only "where the plaintiff establishes a 'fair probability, or a likelihood,' of success on the companion claim." *Axson-Flynn*, 356 F.3d at 1295. S*ee also Swanson*, 135 F.3d at 699 ("[W]e believe that simply raising such a [hybrid-rights] claim is not a talisman that automatically leads to the application of the compelling-interest test. We must examine the claimed infringements on the party's claimed rights to determine whether either the claimed rights or the claimed infringements are genuine.").

Respondents have utterly failed to "present[] a colorable independent constitutional claim" under the Free Speech or Takings Clauses and therefore his claims do not trigger the hybrid rights exception. *Grace United*, 451 F.3d at 656. As explained, *supra* pps. 24-34, Respondents' free speech claim fails because enforcement of CADA targets commercial conduct, not inherently expressive activity, and does not trigger Constitutional protections against compelled speech.

Respondent Philips's takings claim is equally specious, supported by no case law, and based solely on the bare assertion that if he must comply with CADA, he will be "forced, by the Government, to cease designing and creating wedding cakes altogether. . . . This . . . amounts to a taking of Jack's property." Resp.'s Br. at 42. A taking occurs when the government transfers private property to the state. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env. Protect'n*, 130 S. Ct. 2592, 2601 (2010). A regulatory taking "'aims to identify regulatory actions that are functionally equivalent to the classic taking.'" *Id.* (quoting *Lingle v. Chevron U.S.A. Inc.*, 544

U.S. 528, 539 (2005)). The Supreme Court has identified several factors relevant to evaluating regulatory takings.

> Primary among those factors are 'the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' In addition, the 'character of the government action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good'—may be relevant in discerning whether a taking has occurred.

Lingle, 544 U.S. at 538-39 (quoting *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Here, it is nonsensical to argue that enforcing CADA amounts to a regulatory taking. Importantly—and perhaps obviously—CADA imposes no costs on Respondent's business and any adverse impact would arises only from Respondent's voluntary refusal to comply with CADA and his hypothetical future decision to cease or curtail business operations rather than to serve all customers equally. Because neither his free speech nor his takings claim is viable, Respondent has failed to present a hybrid rights claim.

3. CADA Does Not Substantially Burden Respondents Free Exercise Rights.

Prohibiting Respondent—who has made the voluntary decision to open a secular, for-profit bakery that serves the general public—from discriminating against customers on the basis of sexual orientation does not substantially burden Respondent's religious exercise.

"An inconsequential or de minimis burden on religious practice does not rise to . . . [the] level" of substantial. *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir. 2008); *see also Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012) (explaining that a substantial burden "must have more than a minimal impact on religious exercise") (citation omitted); *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. Of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) ("a

substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise") (internal quotation marks and citations omitted); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("substantial burden requires something more than an incidental effect on religious exercise").[8] Similarly, laws "'which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs' do not constitute substantial burdens on the exercise of religion." *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) (quoting *Lyng v. Nw. Indian Cemetry Prot. Ass'n*, 485 U.S. 439, 450-51 (1988)). Thus, a substantial burden on religion does not arise from "any incidental effect of a government program which may have some tendency to coerce individuals into acting contrary to their religious beliefs," but rather, occurs only in those cases where government puts "substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Washington v. Klem*, 497 F.3d 272, 279-80 (3d Cir. 2007).

Here, CADA does not force Respondent Phillips to support, endorse, or participate in a same-sex wedding. All that CADA requires is that when Respondent is operating his business he, like all other business owners in the state, must treat all Coloradans who enter his business with dignity and respect. This does not amount to a substantial burden on religious exercise. As one court explained in rejecting the claim of a restaurant owner religiously opposed to "any integration of the races whatever,"

> 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

[8] *Kaemmerling* and other cases cited herein were decided under statutes that prohibit government-imposed "substantial burdens" on religion, including the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc(a)(1) (2013), and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1 (2013), just as the Supreme Court's pre-*Smith* free exercise cases did. Therefore, such cases are instructive when determining what amounts to a "substantial burden" on religious exercise.

> 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 Enters., 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). This Court should likewise reject Respondent's claim of a license to discriminate. Respondent Phillips remains entirely free to continue believing that the Bible limits marriage to between a man and a woman, to display political signs opposing marriage equality laws, to espouse his religious beliefs regarding marriage, and to continue opposing same-sex marriage in his personal life. What he cannot do is pick and choose which customers he will serve based on sexual orientation while operating a business subject to Colorado law.

Moreover, any alleged burden on Respondent's religious exercise applies to his commercial activities as a baker. *See Swanner*, 874 P.2d at 283. As the Supreme Court has explained, "[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).

That Respondent Phillips views his baking as a service to God does not alter the analysis. *See, e.g.*, Resp.'s SOUF ¶ 21. Complainants do not question the sincerity of Respondent's religious beliefs or the fervor with which he holds them. But the subjective inquiry as to whether a religious belief is sincerely held is separate and apart from the objective, legal question as to whether his religious exercise is substantially burdened by CADA. *See, e.g., Kaemmerling*, 553 F.3d at 679 (court "accept[s] as true the factual allegations that [the plaintiff's] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his

religious exercise is substantially burdened . . ."); *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (even if plaintiffs' beliefs were sincerely held, "it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden"), *abrogated on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997). The objective facts in this case demonstrate that CADA imposes, at most, only an incidental burden on Respondent's religious exercise.

4. CADA SURVIVES STRICT SCRUTINY ANALYSIS.

While strict scrutiny does not apply for the reasons set forth above, and the Colorado courts have not ruled on whether the Colorado Constitution requires strict scrutiny for religious exercise claims, CADA nonetheless satisfies even that higher level of review.

Even assuming *arguendo* that CADA would be subject to a strict scrutiny analysis, the law would nonetheless survive strict scrutiny because it furthers a "compelling state interest" and is "narrowly tailored" to that interest. *Lukumi Babalu*, 546 U.S. at 430-31. The Supreme Court has held that a wide range of government interests are sufficiently compelling as to deny a religious exemption. *See, e.g., Goldman v. Weinberg*, 475 U.S. 503, 510 (1986) (holding that military's interest in "uniformity" was sufficiently compelling to deny religious exemption to Jewish serviceman who wanted to wear a yarmulke); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (state's interest in "improving the health, safety, morals and general well-being of citizens" was sufficiently compelling to deny religious exemption to Jewish storeowners from Sunday closing law); *Lee*, 455 U.S. at 260 ("broad public interest in maintaining a sound tax system" justified denial of religious exemption from social security tax); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("interests of society to protect the welfare of children"

were sufficiently compelling to enforce child labor laws against Jehovah's Witnesses distributing religious pamphlets on street).

In light of these precedents, there can be little question that Colorado, like other states, has "a compelling interest in eradicating discrimination in all forms."[9] *EEOC v. Miss. Coll.*, 626 F.2d 477, 489 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) abrogated on other grounds ; *see also Russell v. Belmont Coll.*, 554 F. Supp. 667, 677 (M.D. Tenn. 1987) ("this nation has a strong public policy against discrimination ... in all forms"); *Swanner*, 874 P.2d at 282 (Alaska 1994) (noting that state has an interest in "preventing acts of discrimination based on irrelevant characteristics"); *cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) ("Th[e] governmental interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious exercise."). *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984)(Minnesota's anti-discrimination laws reflect the "[s]tate's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" and "plainly serves compelling state interests of the highest order.")

The United States Supreme Court has recognized the "serious and personal harms" that result from discrimination, which "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Id.* at 625; *see also Bd. of Dirs. Of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) ("public accommodations laws plainly serv[e] compelling state interests of the highest order")(internal

[9] Contrary to what Respondent argues, the relevant inquiry is not whether Colorado has a compelling interest in forcing Respondent to bake a wedding cake for Complainants. Resp.'s Br. at 43. Respondent's characterization trivializes the profound dignitary harm that people—including Complainants Craig and Mullins—experience when they are turned away because of who they are. The government interest in this case is no more about forcing Respondent to bake a cake for Complainants than *Newman* was about forcing the Piggie Park restaurant owners to serve barbecue to African-Americans.

quotation marks omitted); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 ("the Court has recognized the State's 'compelling interest' in combating invidious discrimination")(citations omitted); *Swanner v. Anchorage Equal Rights Commision*, 874 P.2d 274 at 282-83 (1994) (noting that in addition to ensuring access, public accommodations laws serve the independent and important government purpose of protecting minority group members from hurtful incidents of discrimination).

By implementing the Colorado Anti-Discrimination statutes, Colorado has clearly sought to eradicate discriminatory practices that have plagued our country. In fact, it has been illegal in Colorado to discriminate on the basis of sexual orientation since 2008. 2008 Colo. Legis. Serv. Ch. 341 (S.B. 08-200) (West).[10] CADA prohibits discrimination on the basis of sexual orientation (among other protected characteristics) in employment, housing, in places of public accommodations, advertising, consumer credit transactions, labor organizing, employment on public works, and in automobile insurance, to name a few. *Id.* This broad commitment to ensuring that all Coloradans are treated with dignity and respect "vindicate[s] 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964).

Further, uniform enforcement of antidiscrimination laws is the "least restrictive means" of achieving the state's interest in protecting Colorado from the social harms of discrimination. *Lukumi Babalu*, 508 U.S. at 578. CADA recognizes that all discrimination, regardless of its motivation, is a social evil that must be prohibited in all forms. Even if one person is turned away because of who they are, all of society suffers, as the state's interest in eradicating discrimination "does not involve a numerical cutoff below which the harm is insignificant." *Swanner,* 874 P.2d

[10] As discussed *infra* pps. 10-11, the state's current restriction of marriage to opposite-sex couples does not undermine this commitment.

at 282. Whether same-sex couples can purchase a wedding cake from other bakeries is simply beside the point. As the Alaska Supreme Court noted in a housing discrimination case:

> The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing . . . discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination. . . . [T]his interest will clearly suffer if an exemption is granted to accommodate the religious practice at issue.

Id. at 283 (citations and quotations omitted).

Importantly, Respondent's call for a religious exemption here would not be limited to a refusal to bake cakes for same-sex weddings. Were Respondent exempted from CADA in this instance, there is no reason he, or another business owner, would not be similarly permitted to discriminate because of their religious beliefs.[11] If today, Respondent can refuse to bake a wedding cake for a same-sex couple, tomorrow a Jewish restaurant owner could refuse to serve Muslim patrons, the next day a Catholic bus driver could refuse to drive a woman to a pharmacy to pick up contraceptives. The state surely has a compelling interest in ensuring that claims of religious freedom for one cannot be used to oppress others.

Fortunately, courts have denied arguments similar to Respondent's and rejected claims that religious freedom entitles individuals or businesses to discriminate against women, *see, e.g.*,

---

[11] The Supreme Court has also recognized that the Free Exercise Clause does not entitle claimants to exemptions that would harm others. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (in exempting claimant from state unemployment benefits policy, noting that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties."); *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (in excusing students from reciting the Pledge of Allegiance for religious reasons, noting that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so"); *Lee*, 455 U.S. at 261 ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."). This is consistent with the understanding of religious liberty at the founding. "As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace." Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chi.L.Rev. 1109, 1145 (1990) (citation omitted).

Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1392 (4th Cir. 1990) (religiously affiliated school must pay married male and female teachers equally, even though the school believed the "Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family,"); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (school cannot offer unequal health benefits to female employees even though it holds a similar "head of household" religious tenet); or against people of minority faiths, *see, e.g.*, *Fields v. City of Tulsa*, No. 11-cv-115GKF-TLW, 2011 WL 5911241 (N.D. Okla. Nov. 28, 2011) (Christian police officer who challenged discipline for refusing to obey orders in connection with community policing event hosted by Islamic Society would likely not prevail on religious freedom claim); or against racial minorities, *see, e.g.*, *Bob Jones Univ.*, 461 U.S. at 583 n.6 (1983) (college that prohibited interracial dating not entitled to tax-exempt status); *Brown v. Dade Christian Schs., Inc.*, 556 F.2d 310, 311 (5th Cir. 1977) (rejecting Free Exercise claim by school that refused to admit African-American students based on a "sincerely held . . . religious belief that socialization of the races would lead to racial intermarriage"); *Newman*, 256 F. Supp. at 944 (restaurant could not refuse to serve African-Americans even though restaurant chain's owner's religion opposed racial integration). Religious freedom is a shield, not a sword, and this Court should reject Respondent's attempt to use religion to discriminate.

B. ENFORCEMENT OF CADA DOES NOT VIOLATE RESPONDENTS' CONSTITUTIONAL RIGHT TO FREE EXPRESSION.

Respondent Phillips' claim that holding him liable under the public accommodations discrimination statute would infringe his constitutional right to free expression must fail. [12] Anti-discrimination protections, including the Colorado statute at issue here, regulate conduct, not

[12] It appears that the free expression claim is asserted solely on behalf of Respondent Phillips. If Respondent Masterpiece Cakeshop, Inc. were to assert a free expression defense, it would fail for the same reasons discussed *infra*.

speech. When a retail business opens its doors to the public, it elects to provide goods and services on an equitable basis in accordance with applicable law, and neither the business nor its proprietor is engaging in constitutionally protected speech by taking and filling customers' orders. The statutory prohibition on a commercial business like Masterpiece Cakeshop denying the full enjoyment of its goods or services to anyone based on membership in a protected class does not require Respondent Phillips to communicate a government message against his will or to incorporate elements he disagrees with into his own inherently expressive activity. Accordingly, there is no First Amendment violation associated with enforcing Colorado's nondiscrimination law against a public accommodation that refuses to accommodate members of the public based on their membership in a protected class.

1. RESPONDENT PHILLIPS' WORK AS A COMMERCIAL BAKER IS NOT CONSTITUTIONALLY PROTECTED SPEECH.

Respondent Phillips contends that his work as a baker of wedding cakes should be immune from regulation under Colorado's anti-discrimination laws because he contributes "unique artistic talent" to the design and creation of each cake and because wedding cakes are "communicative" in nature. Resp. Br. 18, 16. But these claims elide the important distinction between an individual's own First Amendment-protected speech and commercial activity performed on behalf of clients.

Many entities covered by Colorado's public accommodation law provide services that include a component of design, creativity, or artistry. *See* C.R.S. 24-34-601(1) (defining "place of public accommodation" to include, among other things, "any business offering wholesale or retail sales to the public"). Complainants do not contest that bakers sometimes contribute creative talent and design skills in filling orders for their customers – but the same could be said of hairdressers, software developers, architects, house painters, restaurateurs, tailors, and a wide

variety of other professionals who offer goods or services to the public and thus are public accommodations properly subject to Colorado's nondiscrimination protections. The fact that performing a particular service or creating a particular good entails creativity and design does not render that work constitutionally protected "speech" on the part of the service provider.[13] *See O'Brien v. United States*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.") Regardless of how much artistry or passion goes into a particular project, work performed on behalf of a client is categorically distinct from creative projects undertaken of one's own accord, and is not entitled to the same forms of protection.

Respondent Phillips' effort to characterize wedding cakes as *uniquely* expressive in nature is unavailing. Just as many goods and services made available to the public by public accommodations entail elements of creativity and expression, many customers solicit goods and services from such businesses that are specifically intended to convey messages or commemorate particular occasions. The fact that a customer expresses a desire to secure a particular good or service for a particular occasion does not change a business owner's obligation to make goods and services available on an equitable basis.[14] *See Elane Photography*, supra (commercial

[13] Business owners, regardless of the nature of their trade, of course have autonomy in the marketplace to be selective about which projects they will take on, and can legitimately reject a prospective customer if, for example, the business lacks the capacity to fulfill the customer's desired project scope and timeline, or if the parties cannot agree on a price. The only reasons business owners may *not* reject customers are those prohibited by law – in other words, based on protected class status.

[14] Respondents attempt to characterize the particular wedding cake Complainants ultimately obtained from another vendor, after they were denied service at Masterpiece Cakeshop, as conveying a political message offensive to Respondents. Resp. Br. 24. However, the undisputed facts of this case show that Respondent Phillips denied service to Complainants based only on the fact that they were two men marrying each other, before the consultation had progressed to any talk of the design elements Complainants wished to incorporate into their wedding cake. Resp. SOUF ¶¶ 22-29. What the Respondents chose to communicate through their cake after they were the victims of illegal discrimination at Masterpiece Cakeshop has no bearing on how they would have asked Respondent Phillips to construct their cake had he not turned them away.

photography studio violated public accommodations statute by refusing to photograph event because it was the commitment ceremony of two women). The fact that weddings have particular emotional, cultural, and spiritual significance for many people illustrates that discrimination in the provision of wedding-related services is hurtful to prospective customers and important to address through enforcement of anti-discrimination laws, not that anti-discrimination laws should be disregarded in all circumstances connected with weddings.

Courts in several states confronting similar arguments have observed that the messages conveyed by commercial projects entailing design, artistry, and/or expression are those of the customer, not those of the business or its owner. *See, e.g., Elane Photography,* supra at 68-69 (rejecting photography studio's argument that its taking of photographs for hire at event could be perceived as its or its' owners approval of marriage by same-sex couples, justified its refusal to photograph two women's commitment ceremony); *Nathanson v. Massachusetts Comm'n Against Discrimination*, 2003 WL 22480688, *6 - *24 (Mass. Super. 2003) (attorney was subject to Massachusetts public accommodations law and could not legally refuse service to a prospective client based on gender; First Amendment defense failed because an attorney speaking on behalf of a client "operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself.") It would be entirely illogical for customers to pay for the generation and promulgation of a *service provider's* chosen message; instead, patrons pay for goods and services that often entail the expression of their *own* messages. *See generally Hishon v. King & Spalding*, 467 U.S. 69, 71-78 (1984) (rejecting law firm's claim that application of federal law against employment discrimination to its partner selection process "would infringe its constitutional rights of expression or association" because "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association

protected by the First Amendment, but it has never been accorded affirmative constitutional protections.") Thus, anti-discrimination laws appropriately regulate service providers' conduct in fulfilling the wishes and, in some cases, conveying the messages of clients, rather than any aspect of service providers' own expressive activities.

2. THE COMPELLED SPEECH DOCTRINE DOES NOT APPLY.

Respondent Phillips also argues that holding him liable for a violation of Colorado's public accommodations statute would violate his First Amendment right to free expression by compelling him to speak. Resp. Br. 27. However, the compelled speech doctrine applies only in limited circumstances not present here: when government forces citizens to express its own specific message, or when government forces citizens to incorporate undesired elements into their own constitutionally protected expressive activities. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). Enforcement of the law against sexual orientation discrimination that covers retail businesses in Colorado fits neither of these descriptions, and is entirely permissible under the First Amendment.

Respondent Phillips cites a number of cases in which a government entity's efforts to require display or communication of its own message by unwilling private citizens have been held unconstitutional. The Supreme Court's seminal case on this issue was *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), holding that West Virginia infringed public school students' First Amendment rights by requiring them to recite the Pledge of Allegiance, thus requiring them literally to speak not only a specific message chosen by the government, but one that entailed "affirmation of a belief and an attitude of mind." *Id.* at 633. The *Barnette* Court observed that the First Amendment does not allow a state to "prescribe what shall be orthodox in politics,

nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *Id.* at 642.

Several times since *Barnette*, the Supreme Court has struck down statutes that explicitly required private entities to engage in speech with prescribed content or viewpoint. *See, e.g.*, *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986) (California law requiring utility to include copies of a particular environmentalist publication with bills sent to customers); *Wooley v. Maynard*, 430 U.S. 705 (1977) (New Hampshire requirement that license plates display "Live Free or Die" slogan); *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (Florida law compelling newspapers to print responses from political candidates who had been criticized in editorials); *see also Cressman v. Thompson*, 719 F.3d 1139 (2013) (denying Oklahoma's motion to dismiss a case similar to *Wooley* that challenged the state's requirement to display a particular image on standard license plates). None of these cases support Respondent's claims here.

In *Barnette* and *Wooley*, the constitutional violation stemmed from government's selection of a specific message that private entities or individuals were required to affirm or publicly promote. *See Wooley*, 430 U.S. at 715 (rejecting New Hampshire's attempt to require citizens to "use their private property as a 'mobile billboard' for the State's ideological message.") In *Miami Herald* and *Pacific Gas & Electric,* government entities imposed speech on private entities by dictating the speaker and viewpoints. In contrast, Colorado's nondiscrimination statute does not require any private entity to espouse a specific government message, or to relay expression on particular viewpoints from particular third parties. Respondents' objections to the messages they feel are conveyed by cakes ordered for same-sex couples' weddings, and to the legal requirement that a baker choosing to sell wedding cakes do

so without regard for the sexual orientation of the couple marrying, does not somehow convert the broadly applicable CADA into a specific mandate that businesses or individuals communicate a particular message or viewpoint. *See also Rumsfeld, supra,* 547 U.S. at 61-62 (rejecting law schools' argument that statute requiring them to permit military recruiting on campus violated the compelled speech doctrine, even though it effectively required schools to send e-mails and post flyers bearing a particular message they found objectionable, because "[t]he compelled speech to which the law schools point is plainly incidental to the [statute]'s regulation of conduct").

A second line of constitutional precedent holds that private speakers cannot be compelled by government action to incorporate unwanted elements into their messages. Respondents argue that this doctrine also applies to the present case, but are incorrect. Service providers like bakers are paid to convey their customers' messages, and the fruits of their labors in commercial contexts are not expressions of their own viewpoint and messages that would be entitled to protection from outside incursions.

As stated in *Elane Photography*:

> The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation. In fact, it has suggested that public accommodation laws are generally constitutional. See *Hurley*, 515 U.S. at 572 ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments . . .[T]he focal point of [such statues is] rather on the act of discrimination against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.")

Elane Photography, supra at 65-66.

Although Respondents rely heavily on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), they mischaracterize its holding. *Hurley* arose

from the efforts of the plaintiff organization ("GLIB") to march as a formally recognized unit in a South Boston St. Patrick's Day parade. The parade organizers sought to exclude GLIB from registration and participation in the parade. GLIB sued alleging that their exclusion from parade participation violated the Massachusetts public accommodations nondiscrimination statute, but the Supreme Court ultimately found that the parade organizers had a First Amendment right to exclude them. The Court held that the very purpose of the parade, put on by a nonprofit group, was to convey its organizers' own message: "[W]e use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way...every participating unit affects the message conveyed by the private organizers..." *Id.* at 567-72. The *Hurley* Court also noted that the "expressive character of both the parade and the marching GLIB contingent" was important to assessing the situation, and contrasted the facts of the *Hurley* case with the apparent objective of the relevant statute:

> On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference.

Id. at 578. Finally, the *Hurley* Court discussed the "likelihood of misattribution" as a factor contributing to its decision in favor of the defendant parade organizers, noting that "each [parade] unit's expression is perceived by spectators as part of the whole" and that there exists no "customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants..." *Id.* at 577 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (requiring shopping mall to permit distribution of literature on premises does not constitute compelled speech, in part because mall owner can easily post disclaimer signs noting that the flyers distributed do not reflect its views)).

The present case more closely resembles "what the old common law promised" than the circumstances of *Hurley*. The fact that a commercial bakery engages in cake design does not render its commercial activity "expressive" in character, nor is conveying a message to the public the central purpose and function of a commercial bakery. Regardless of what Respondents now claim about the expressive and religious motivations for their business endeavor, it strains credulity to say that their body of work in the commercial bakery trade either makes or is perceived by observers as making a "collective point." *See* Resp. Exh. 3 (depicting wide variety of cakes produced by Masterpiece Cakeshop in different styles and for different occasions).[15] Similarly, observers are extremely unlikely to believe that the proprietors of a commercial bakery personally share in every message conveyed explicitly or implicitly by the items they produce for customers, including cakes inscribed with well wishes to individuals on the occasions of their birthdays, graduations, weddings, and other life events, messages associated with celebration of holidays in various faiths, and more. *See id.*[16] Accordingly, *Hurley* does not support Respondents' claim that enforcement of CADA in this context is a First Amendment violation.

Finally, even if CADA were viewed as burdening Respondents' First Amendment rights, the statute and its application in this case would pass constitutional muster. CADA makes no reference to speech or expression. C.R.S. 24-34-101 *et seq.* It neither targets expressive activities for regulation, nor exempts businesses whose work entails an expressive or creative

[15] Resp. Exh. 4 appears to show additional examples of the diversity of baked goods Masterpiece Cakeshop has produced, but was not introduced or identified in Respondent Phillips' affidavit.

[16] If such misattribution were a serious concern, Respondents would be free to post signs in their store and notices on their website clarifying that the business and its owners do not necessarily share in all the sentiments written on or conveyed by the cakes they sell. They could also, as discussed *supra* p. 19, post language communicating their political or religious beliefs pertaining to the issue of marriage by same-sex couples, so long as they did not run afoul of C.R.S. 24-34-601(2) by indicating a reluctance to serve all prospective customers of their business on equal terms.

aspect. The statute does not warrant First Amendment strict scrutiny because it applies to all businesses engaged in wholesale or retail trade with the public in Colorado, regardless of the nature of the business or whether it involves an expressive component, and any burden on expressive activity is incidental at most. The Supreme Court articulated the applicable distinction when it held that a county sheriff's closure of an adult bookstore on public nuisance grounds did not burden the owners' First Amendment rights and that prior case law applying heightened scrutiny to laws that do burden free expression had "no relevance" to the challenged public nuisance statute:

> ...[W]e have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place...or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity...

Arcara v. Cloud Books, 478 U.S. 697, 706 (1986). A "government regulation [affecting individual conduct with both speech and non-speech elements] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien,* 391 U.S. at 377.

Laws against sexual orientation discrimination in public accommodations are within states' constitutional power to enact, and serve to further compelling government interests in ensuring minority groups' ability to access goods and services and participate fully in society. CADA's purpose is unrelated to burdening free expression. Its burdens on free expression is incidental at most, and confined to the extent necessary to fulfill the goal of ensuring equal

access, given the broad range of establishments, goods, and services covered. For all of these reasons, Respondents cannot demonstrate that enforcing CADA in conjunction with their refusal to sell Complainants a wedding cake would violate their First Amendment rights to free expression.

CONCLUSION

For all these reasons, and the reasons set forth in Complainants' initial memorandum of law, Complainants' motion for summary judgment should be granted, and Respondents' cross-motion for summary judgment should be denied.

DATED this 12th day of November, 2013.

Respectfully submitted,
KING & GREISEN, LLP

Paula Greisen, #19784
Dana Menzel, #34008
King & Greisen, LLC
1670 York Street
Denver, CO 80206

Amanda Goad, pro hac vice
American Civil Liberties Union Foundation
LGBT & AIDS Project
125 Broad Street, 18th Fl.
New York, NY 10004
Telephone: (212) 549-2627
Telephone: (303) 298-9879

Sara Rich, #36904
Mark Silverstein #26979
American Civil Liberties Union Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203
Telephone: (303) 777-5482

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2013, a true and correct copy of the **COMPLAINANTS' RESPONSE IN OPPOSITION TO RESPONDENTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY BRIEF IN SUPPORT OF COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT** was served via email and/or U.S. Mail, postage paid, on the following:

Complainants:

David Mullins
Charlie Craig
1401 E. Girard Pl., # 9-135
Lakewood, CO 80113

Attorneys for Complainants Charlie Craig and David Mullins:

Amanda Goad, New York State #4362448
American Civil Liberties Union Foundation
LGBT & AIDS Project
125 Broad Street, 18th Fl.
New York, NY 10004

Sara Rich, #36904
American Civil Liberties Union
Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203

Attorneys for Respondents Masterpiece Cakeshop, Inc. and Jack Phillips:

Nicolle H. Martin, #28737 (via email)
7175 W. Jefferson Avenue, Suite 4000
Lakewood, Colorado 80235

Michael J. Norton #6430
Alliance Defending Freedom (via email)
7951 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111

Natalie L. Decker, #28596
The Law Office of Natlie L. Decker, LLC (via email)
26 W. Dry Creek Cr., Suite 600
Littleton, CO 80120

Counsel in Support of the Complaint:

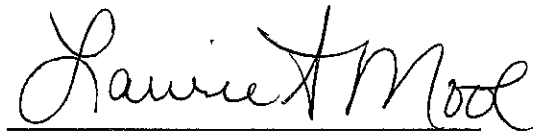
Charmaine CheugRose
Assistant Attorney General
Business and Licensing Section
Office of the Attorney General

1300 Broadway, 10th Floor
Denver, CO 80203

Stacy L. Worthington
Senior Assistant Attorney General
Civil Litigation & Employment Law Section
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Office of Administrative Courts:

Office of Administrative Courts
633 17th Street, Suite 1300
Denver, CO 80202



Laurie A. Mool, paralegal