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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2014CA1351 Judges Taubman, Loeb, and Berger COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202; Case No. CR2013-0008	▲ **COURT USE ONLY** ▲
Petitioners MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, v. Respondents CHARLIE CRAIG and DAVID MULLINS.	
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PETITION FOR WRIT OF CERTIORARI

TO THE COLORADO COURT OF APPEALS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 53 including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) and 53(a).

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/s/ Nicolle H. Martin

Nicolle H. Martin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

***Cases*:**

***Statutes*:**

***Regulations*:**

***Constitutional Provisions*:**

***Other Authorities*:**

ISSUES PRESENTED FOR REVIEW

The Colorado Civil Rights Commission ruled that Jack Phillips engaged in sexual orientation discrimination barred by the Colorado Anti-Discrimination Act ("CADA") when he declined to use his artistic talents to create a cake celebrating a same-sex marriage. It did so despite his willingness to create any other cake for the customers and declining solely because creating it would violate his religious beliefs. In direct conflict, the Commission found no creed discrimination under CADA when three bakeries declined to design a cake celebrating a customer's religious beliefs about sex and marriage. The Commission acquitted these bakeries because they were willing, like Phillips, to create any other cake for the customer and declined because the order offended their beliefs. Yet the Commission ruled Phillips violated CADA, thereby compelling him to violate his conscience while allowing the other bakeries to exercise their right to decline to do so.

The questions presented are:

I. Does CADA require Phillips to create artistic expression that contravenes his religious beliefs about marriage?

II. Does applying CADA to force Phillips to create artistic expression that contravenes his religious beliefs about marriage violate his free speech rights under the United States and Colorado Constitutions?

III. Does applying CADA to force Phillips to create artistic expression that violates his religious beliefs about marriage infringe his free exercise rights under the United States and Colorado Constitutions?

OPINIONS BELOW

The Court of Appeals' decision is attached at Appendix ("App.") 1-67 and can be found at *Craig v. Masterpiece Cakeshop, Inc.*, __ P.3d __, No. 2015 COA 115 (Colo. App., August 13, 2015). The Administrative Law Judge's opinion and the Commission's order are attached at App. 68-80 and 81-83, respectively.

JURISDICTION

The Court of Appeals issued its decision on August 13, 2015. No petition for rehearing was filed. This Court granted an extension of time to seek certiorari through October 23, 2015.

STATEMENT OF THE CASE

Jack Phillips opened Masterpiece Cakeshop, Inc.[1] over 22 years ago to pursue his life's vocation—creating artistic cakes. App. 102, ¶ 6. Designing and creating specially commissioned cakes is a form of art and creative expression, the pinnacle of which is wedding cakes. App. 104, ¶ 28. Phillips pours himself into their design and creation, marshaling his time, energy, and creative and artistic talents to make a one-of-a-kind creation celebrating the couple's special day and reflecting his artistic interpretation of their special bond. App. 105-06, ¶¶ 37-44.

Phillips is also a Christian who strives to honor God in all aspects of his life,

[1] Hereinafter, Phillips and Masterpiece Cakeshop are referred to collectively as "Phillips."

including his business. App. 102, 106-08, ¶¶ 7-8, 49-61. From Masterpiece's inception, he has integrated his faith and work. App. 107, ¶¶ 50-57 (Phillips closes Masterpiece on Sundays, pays his employees well, and helps them with personal needs outside of work, all because of his religious beliefs). Phillips also honors God through his creative work by declining to use his artistic talents to design and create cakes that violate his religious beliefs. App. 107-08, ¶¶ 57-58, 62. This includes cakes with offensive written messages and cakes celebrating events or ideas that violate his beliefs, including cakes celebrating Halloween, anti-American or anti-family themes, atheism, racism, or indecency. App. 108, ¶¶ 61, 63-64. He also will not create cakes with hateful, vulgar, or profane messages, or sell any products containing alcohol. *Id*., ¶¶ 59, 61.

Consistent with this longtime practice, Phillips also will not create cakes celebrating any marriage that is contrary to biblical teaching. App. 103-04, ¶¶ 21, 25. As a Christian, Phillips believes that God ordained marriage as the sacred union between one man and one woman that exemplifies the relationship of Christ and His Church. App. 102-03, ¶¶ 10-15. And Phillips' religious convictions compel him to create cakes celebrating only marriages that are consistent with God's design. App. 103-04, ¶¶ 16-22, 25. For this reason, Phillips politely declined to design and create a cake celebrating Complainants' same-sex wedding,

App. 110, ¶ 78, but offered to make any other cake for them, *id*., ¶ 79.

Although Complainants easily obtained a free wedding cake with a rainbow design from another bakery, App. 112-13, they filed a charge of sexual orientation discrimination with the Civil Rights Division, App. 5, ¶ 6. The Commission found that Phillips violated CADA, rejected his constitutional defenses, and ordered him to: (1) create wedding cakes celebrating same-sex marriages if he creates similar cakes for one-man-one-woman marriages, (2) retrain his staff to do likewise, and (3) provide quarterly reports for two years documenting every order he does not fill for any reason. App. 68-83. Phillips sought review by the Court of Appeals, which affirmed the Commission's order. App. 65, ¶ 112. This Petition followed.

REASONS TO GRANT THE WRIT

I. This Court Should Determine Whether a Religious Objection to Creating Artistic Expression Celebrating Any Marriage That Is Not Between One Man and One Woman Should Be Equated to Sexual Orientation Discrimination Under CADA.

It was the duty of the Court of Appeals to adopt a reasonable interpretation of CADA that "avoid[s] constitutional conflict." *Town of Sheridan v. Valley Sanitation Dist.*, 137 Colo. 315, 321, 324 P.2d 1038, 1041 (1958). But it did the opposite. By equating an artist's conscience-driven, message-based objection to creating expressive items that offend his beliefs with person-based discrimination based on sexual orientation, App. 16-20, ¶¶ 30-35, the court places CADA in direct

conflict with the fundamental rights to free speech and free exercise of religion, and wrongly subordinates these rights to public accommodations law. The substantial statutory question concerning the scope of CADA, with its evident constitutional implications, warrants this Court's review.

This Court can avoid this unnecessary constitutional conflict by ruling that CADA's bar on sexual orientation discrimination does not require artists to create expressive items that violate their beliefs. And it should do so for at least the following four reasons.

First, CADA prohibits discrimination "*because of*" sexual orientation, C.R.S. § 24-34-601(2), *see* App. 87, a phrase commonly defined as "by reason of" or "on account of," Merriam Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/because%20of. Such language traditionally requires intentional discrimination, *i.e.*, that a decision maker undertake a "course of action … because of, not merely in spite of, [its] adverse effects upon an identifiable group." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272 (1993). The Commission recognizes this: its probable cause determination states that CADA requires a showing that the decision to decline business was "*primarily based* on the Charging Party's asserted protected group or status." App. 94.

Thus, CADA permits business owners to decline a customer's business for a broad number of reasons, ranging from the consequential (*i.e.*, "I don't have the requisite skill") to the trivial (*i.e.* "I don't like your bumper sticker"). The Complainants concede this, admitting below that "[b]usiness owners in all trades … have legal autonomy to be selective about which projects they will take on." Appellees' Am. Answer Br. 12 n.5. They also admit that businesses can decline projects if they "lack[] capacity," if "the parties cannot agree on a price," and even if "the design requested" violates a "tastefulness policy that applies to everyone's orders." *Id*. Since bakers can legally decline to create a wedding cake for such reasons, including petty ones, this Court should find that Phillips' constitutionally-protected desire to avoid creating artistic expression that violates his religious beliefs does not violate CADA either.

The Court of Appeals' contrary conclusion is a product of its improper and singular focus on the conduct of "same-sex marriage," rather than marriage. App. 16-20, ¶¶ 30-35. It held that Phillips is guilty of sexual orientation discrimination because only gays and lesbians engage in same-sex marriage. *Id*. But Phillips' religious beliefs prevent him from creating wedding cakes for *all* marriages outside of the union of one and one woman. App. 103-04, ¶¶ 21, 25. He is not specifically

focused on same-sex marriage. Because of this, the Court of Appeals was wrong to presume sexual orientation discrimination.

Second, the Commission upheld the Division's ruling that three bakeries did not discriminate based on creed when they refused a Christian customer's request for cakes that celebrated his religious beliefs about sex and marriage. App. 117-34. Despite "creed" being defined as "all aspects of religious beliefs, observances, and practices … [including] *the beliefs or teachings of a particular religion*," 3 C.C.R. 708-1:10.2(H) (emphasis added), App. 89, the Commission found no discrimination because (1) the bakeries were willing to create a cake for the customer for any other "event, celebration, or occasion," and (2) the bakeries declined the request because they objected to the message of the cake. App. 120.

The Commission correctly interpreted "creed" to avoid any conflict between CADA and the bakeries' right to decline to create artistic expression that violates their beliefs. In so doing, it implicitly recognized that the State's interest in prohibiting discrimination extends only to "acts of *invidious* discrimination." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984); *Cf. Manor Vail Condo. Ass'n v. Town of Vail*, 199 Colo. 62, 66 (1980) (defining "invidious discrimination" as a "wholly arbitrary act"), and that objecting to creating artistic expression that sends an unconscionable message is not invidious or arbitrary.

Yet the Commission and Court of Appeals ignored the crucial difference between invidious and general discrimination, thus creating a conflict between CADA's bar on sexual orientation discrimination and Phillips' constitutional rights. Worse, it does so despite Phillips' willingness, like the exonerated bakers, to create the Complainants any other cake and declining solely because of a conscience-based objection to creating the specific expressive item requested. These inconsistent interpretations of CADA's terms send mixed signals to Coloradans and create significant uncertainty concerning its scope. The proper interpretation of CADA is a substantial question that warrants this Court's review.

Third, Phillips' decision to decline to create a cake celebrating the Complainants' same-sex marriage is not anomalous, but accords with his longstanding policy of declining to use his talents to create any artistic expression that violates his religious beliefs, *see* Statement of the Case, *supra*, akin to the "tastefulness policy" Complainants endorse.

Fourth, at the time of Complainants' request, Colorado law recognized marriage as solely a union between one man and one woman. Colo. Const. art. II, § 31; C.R.S § 14-2-104 (1) & (2). The State cannot legitimately punish Phillips for following beliefs about marriage that reflected Colorado's own public policy at the time.

II. This Court Should Determine Whether CADA Violates Phillips' Free Speech Rights by Compelling His Artistic Expression.

The Court of Appeals' decision imperils one of our most precious constitutional freedoms—the right to be free from compelled speech. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can 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."); *see also Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991) (Colo. Const. art. II, § 10 "provides greater protection of free speech than does the First Amendment."). Besides contradicting free speech precedent, the Court of Appeals' ruling also has startling implications. If permitted to stand, it allows the State to use CADA, or other laws, to force its citizens to create, promote, or disseminate expression with which they disagree. Whether the Court of Appeals' decision conflicts with compelled speech precedent is a substantial question of law that warrants this Court's review.

The primary problem with the Court of Appeals' ruling is that it sidestepped the core free speech issue by incorrectly finding that Phillips' artistic creations do not "warrant First Amendment protection[]." App. 106, ¶ 45. It did so despite acknowledging that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First

Amendment speech protections may be implicated." App. 42, ¶ 71. Phillips' case presents just such a scenario.

Indeed, Phillips' design and creation of special-order cakes—like the unique creations of artists using other mediums—is constitutionally-protected expression. It is established that speech protections extend "beyond written or spoken words as mediums of expression," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 569 (1995), including artistic expression in mediums as diverse as wordless music, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989), nude dancing, *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000), theatre performance, *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975), painting, *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007), sculpture, *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996), and tattoos, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010).

Further, wedding cakes, as iconic symbols that celebrate a couples' union and love for one another, are uniquely expressive. *See Barnette*, 319 U.S. at 632 (recognizing that symbols are often used as a "short cut from mind to mind" to communicate "some system, idea, institution, or personality"). Throughout history, wedding cakes have communicated a message about the wedding or the newlyweds. App. 98-100 (summarizing several treatises that discuss the historical

use of wedding cakes to communicate requests for good fortune; blessings of wealth, fertility, happiness, longevity, and health; and purity and virginity). The modern three-tiered wedding cake symbolizes the three rings associated with marriage—the engagement ring, the wedding ring, and the eternity ring, *id*. at 100, and is an integral part of a customary ritual at the reception, where the married couple cuts the cake and feeds it to each other. A sheet cake, a pizza, or a salad would not communicate the same message.

Contrary to the Court of Appeals' ruling, Phillips' artistic creations are fully protected by the First Amendment and the question of whether CADA may coerce his expression is squarely presented here. Moreover, under the Complainants' interpretation of CADA, which was adopted by the Court of Appeals, every artists' conscience is at risk. *See* App. 136-37 (confirming that "a fine art painter [who] advertises to the public that … she will make oil paintings on commission" would violate CADA if she declines a customer request to create a painting "that celebrates gay marriages").

The Court of Appeals also evaded the core compelled speech issue by improperly asking whether third-party observers would think that Phillips conveys a celebratory message about same-sex marriage by designing and creating Complainants' wedding cake. App. 37, ¶ 64. This approach directly contradicts

Wooley v. Maynard, 430 U.S. 705, 714-15 (1977), where the Court found a compelled-speech violation even though no one thought the Wooleys supported the state motto merely because it was featured on their standard license plates. *Id.* at 715.

The Court of Appeals' ruling also conflicts with *Hurley*, which admonished that First Amendment protection is not "confined to expressions conveying a 'particularized message.'" 515 U.S. at 569. Indeed, "Arnold Schöenberg's atonal compositions, Lewis Carroll's nonsense verse, and Jackson Pollock's abstract paintings—regardless of their meaning, or lack thereof—are 'unquestionably shielded' as expressions of the creators' perceptions and ideas." *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015); *Hurley*, 515 U.S. at 569 (same). Put simply, a reasonable observer's perceptions, or misperceptions, of an artists' expression do not change the message an artist intends to convey. And here, it is undisputed that Phillips' wedding cakes "communicate[] that a wedding has occurred, a marriage has begun, and the couple should be celebrated," App. 106, ¶ 46, and that it violates Phillips' religious beliefs to convey this message about any marriage that conflicts with biblical teaching, App. 103, ¶ 21.

The Court of Appeals also found that Phillips undercut the free speech protections otherwise accorded his work by "charg[ing] for [his] goods and

services." App. 38, ¶ 66. Yet it is firmly established that the protection against compelled speech is "enjoyed by business corporations generally," *Hurley*, 505 U.S. at 574, and that "a speaker's rights are not lost merely because compensation is received." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc*., 487 U.S. 781, 801 (1988).

The Court of Appeals also erred in finding that Phillips' placement of a disclaimer stating that he is following CADA would resolve his concerns over endorsing messages with which he disagreed. App. 43, ¶ 72. But the ability to disclaim coerced messages does not undo the compelled-expression violation. As the Supreme Court stated in *Hurley*, free speech would be an empty guarantee if the "government could require speakers to affirm in one breath that which they deny in the next." 515 U.S. at 575-76 (quoting *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16 (1986).

In a similar vein, the Court of Appeals wrongly disconnected Phillips' expression from the act of creating it, and concluded that the act of creation was mere conduct that CADA could compel. App. 34-36, ¶¶ 60-62. "[T]he Supreme Court … has [not] drawn a distinction between the process of creating a form of *pure* speech … and the product of these processes … in terms of the First Amendment protection afforded." *Anderson v. City of Hermosa Beach*, 621 F.3d

1051, 1061 (9th Cir. 2010). Hence, "the process of expression through a medium" and "the expression itself" are both entitled to full First Amendment protection. *Id*. This principle applies to cake artistry just as much as it applies to painting, sculpting, tattooing, composing, and other forms of artistic expression.

If the Court of Appeals' analysis were correct, the government could coerce all manner of speech. Consider a law that requires all homeowners and businesses to fly a confederate flag to honor Southern heritage. Under the Court of Appeal's approach, the government could defeat a compelled-speech claim by asserting that the law coerces only conduct (*i.e.*, hanging the flag, raising it up the flagpole, etc.) not expression. It could also successfully argue that a simple disclaimer stating that the objector is merely following the law overcomes any compelled-speech concerns. But a disclaimer saying "I am just following the law" solves nothing because "[t]he constitutional harm of compelled speech—being forced to speak rather than to remain silent—"has already occurred. *Cressman*, 719 F.3d at 1151.

The Commission compounded its compelled speech violation by requiring Phillips to provide "comprehensive staff training" on CADA. App. 82. This mandate will necessarily require Phillips to engage in unwanted expression and is plainly intended to subvert his desire to operate his business according to his religious convictions. This kind of state action is palpably repugnant to our

constitutional liberties.

The Court of Appeals' endorsement of the Commission's inconsistent rulings—exonerating three bakeries of creed discrimination while punishing Phillips for sexual orientation discrimination—makes its error-filled compelled speech ruling even more problematic. App. 23-24, n.8. In effect, the Commission's interpretation of CADA means that bakers who favor man-woman marriage must create artistic expression contrary to their beliefs, but bakers who favor same-sex marriage do not have to do so. This is blatant content and viewpoint discrimination that the First Amendment forbids. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (striking down law that regulated views on only certain disfavored subjects, including race, color, creed, and gender, as viewpoint discriminatory).

Worse, the Commission's viewpoint discrimination flows from religious bias, which was openly displayed when one Commissioner stated that "[f]reedom of religion" is a "despicable piece[] of rhetoric" that slave owners, Nazis, and now Phillips have used to justify "hurt[ing] others." App. 116. Such clear-cut religious hostility from a State official is barred by the free speech and free exercise

protections of the United States and Colorado Constitutions.

III. This Court Should Determine Whether CADA Violates Phillips' Federal and State Free Exercise Rights by Compelling Him To Create Artistic Expression that Violates His Sincerely Held Religious Beliefs.

The Court of Appeals' mistaken interpretation of the Free Exercise Clause of the First Amendment to the United States Constitution presents a substantial question that warrants this Court's review. App. 47-57. Under *Employment Division v. Smith*, 494 U.S. 872, 877 (1990), federal free exercise protections apply if (1) a law lacks neutrality or general applicability and burdens religious exercise, (2) imposes special disabilities on the basis of religious views, (3) compels affirmation of a repugnant belief, or (4) infringes on two or more fundamental rights.

Applying CADA to compel Phillips to create artistic expression that contravenes his religious beliefs violates his free exercise rights in all four ways. CADA burdens Phillips' religious beliefs by applying significant pressure on him to violate them and use his artistic talents to design and create cakes that he believes dishonor God. CADA also lacks neutrality and general applicability in that it (1) contains several broad exemptions[2] and (2) bars only a few categories of

[2] *See* C.R.S. § 24-34-601(3) (exempting places of public accommodation that "restrict admission … to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or

discrimination but permits Phillips or any other baker to decline to create cakes for a myriad of secular reasons. *See* § I, *supra*. That Phillips could decline for innumerable nonreligious reasons, but not for religious reasons, demonstrates that the Commission applies CADA in manner that targets religion, lacks general applicability, and imposes special disabilities based on Phillips' religious views. The Commission's open hostility to his religious beliefs and exoneration of the three bakeries accused of creed discrimination further confirm these free exercise infirmities. App. 116.

Determining the protection the Colorado Constitution accords religious freedom is of the utmost importance, and that question is squarely presented as well. Despite the fact that "[n]o Colorado appellate decision ha[d] held that the Colorado Constitution's religion provisions are merely coextensive with the Religion Clauses of the First Amendment," *Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 2013 WL 791140 ¶ 61 (Colo. App. 2013), the Court of Appeals held precisely that and applied *Smith* in its article II, Section 4 analysis. App. 60.

Yet this Court has observed that while the federal and state free exercise provisions "embody similar values," courts must account for "the specific 'text and

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accommodations of such place of public accommodation"); *see also* C.R.S. § § 24-34-601(1) (exempting "a church, synagogue, mosque, or other place that is principally used for religious purposes").

purpose' of our state constitutional provision." *Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 670-71 (Colo. 1982). The Court of Appeals failed to do so.

CONCLUSION

This Court should grant the petition.

Respectfully submitted this 23rd day of October, 2015.

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of October, 2015, a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS** was filed with the Colorado Supreme Court via ICCES and served via ICCES, on the Colorado Civil Rights Commission and the parties and/or their counsel of record as follows:

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