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APPENDIX

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DATE FILED: August 13, 2015
CASE NUMBER: 2014CA1351

Court of Appeals No. 14CA1351
Colorado Civil Rights Commission CR 2013-0008

Charlie Craig and David Mullins,

Petitioners-Appellees,

v.

Masterpiece Cakeshop, Inc., and any successor entity, and Jack C. Phillips,

Respondents-Appellants,

and

Colorado Civil Rights Commission,

Appellee.

ORDER AFFIRMED

Division I
Opinion by JUDGE TAUBMAN
Loeb, C.J., and Berger, J., concur

Announced August 13, 2015

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¶ 1 This case juxtaposes the rights of complainants, Charlie Craig and David Mullins, under Colorado's public accommodations law to obtain a wedding cake to celebrate their same-sex marriage against the rights of respondents, Masterpiece Cakeshop, Inc., and its owner, Jack C. Phillips, who contend that requiring them to provide such a wedding cake violates their constitutional rights to freedom of speech and the free exercise of religion.

¶ 2 This appeal arises from an administrative decision by appellee, the Colorado Civil Rights Commission (Commission), which upheld the decision of an administrative law judge (ALJ), who ruled in favor of Craig and Mullins and against Masterpiece and Phillips on cross-motions for summary judgment. For the reasons discussed below, we affirm the Commission's decision.

I. Background

¶ 3 In July 2012, Craig and Mullins visited Masterpiece, a bakery in Lakewood, Colorado, and requested that Phillips design and create a cake to celebrate their same-sex wedding. Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but advising

Craig and Mullins that he would be happy to make and sell them any other baked goods. Craig and Mullins promptly left Masterpiece without discussing with Phillips any details of their wedding cake. The following day, Craig's mother, Deborah Munn, called Phillips, who advised her that Masterpiece did not make wedding cakes for same-sex weddings because of his religious beliefs and because Colorado did not recognize same-sex marriages.

¶ 4 The ALJ found that Phillips has been a Christian for approximately thirty-five years and believes in Jesus Christ as his Lord and savior. Phillips believes that decorating cakes is a form of art, that he can honor God through his artistic talents, and that he would displease God by creating cakes for same-sex marriages.

¶ 5 Craig and Mullins had planned to marry in Massachusetts, where same-sex marriages were legal, and later celebrate with friends in Colorado, which at that time did not recognize same-sex marriages.[1] *See* Colo. Const. art. 2, § 31; § 14-2-104(1)(b), C.R.S.

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[1] On June 26, 2015, the United States Supreme Court announced *Obergefell v. Hodges*, 576 U.S. ___, ___, 135 S. Ct. 2584, 2604 (2015), reaffirming that the "right to marry is a fundamental right inherent in the liberty of the person" and holding that the Due Process and Equal Protection Clauses of the Fourteenth

2014.

¶ 6 Craig and Mullins later filed charges of discrimination with the Colorado Civil Rights Division (Division), alleging discrimination based on sexual orientation under the Colorado Anti-Discrimination Act (CADA), §§ 24-34-301 to -804, C.R.S. 2014. After an investigation, the Division issued a notice of determination finding probable cause to credit the allegations of discrimination. Craig and Mullins then filed a formal complaint with the Office of Administrative Courts alleging that Masterpiece had discriminated against them in a place of public accommodation because of their sexual orientation in violation of section 24-34-601(2), C.R.S. 2014.

¶ 7 The parties did not dispute any material facts. Masterpiece and Phillips admitted that the bakery is a place of public accommodation and that they refused to sell Craig and Mullins a cake because of their intent to engage in a same-sex marriage

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Amendment guarantee same-sex couples a fundamental right to marry. Colorado has recognized same-sex marriages since October 7, 2014, when, based on other litigation, then Colorado Attorney General John Suthers instructed all sixty-four county clerks in Colorado to begin issuing same-sex marriage licenses. *See* Jordan Steffen & Jesse Paul, *Colorado Supreme Court, Suthers Clear Way for Same-Sex Licenses*, Denver Post, Oct. 7, 2014, *available at* http://perma.cc/7N7G-4LD3.

ceremony. After the parties filed cross-motions for summary judgment, the ALJ issued a lengthy written order finding in favor of Craig and Mullins.

¶ 8 The ALJ's order was affirmed by the Commission. The Commission's final cease and desist order required that Masterpiece (1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.

¶ 9 Masterpiece and Phillips now appeal the Commission's order.

II. Motion to Dismiss

¶ 10 At the outset, Phillips and Masterpiece contend that the ALJ and the Commission erred in denying two motions to dismiss which they filed pursuant to C.R.C.P. 12(b)(1), (2), and (5). We disagree.

A. Standard of Review

¶ 11 We review the ALJ's ruling on a C.R.C.P. 12(b) motion to dismiss de novo. § 24-4-106(7), C.R.S. 2014; *Bly v. Story*, 241 P.3d

529, 533 (Colo. 2010); *Tidwell ex rel. Tidwell v. City & Cnty. of Denver*, 83 P.3d 75, 81 (Colo. 2003).[2]

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[2] Section 24-4-106(7), C.R.S. 2014, outlines the scope of judicial review of agency action and provides:

> If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.

B. First Motion to Dismiss — Lack of Jurisdiction Over Phillips

¶ 12 Phillips filed a motion to dismiss pursuant to C.R.C.P. 12(b) alleging that the Commission lacked jurisdiction to adjudicate the charges against him.[3] Specifically, he claimed that it lacked jurisdiction because Mullins named only "Masterpiece Cakeshop," and not Phillips personally, as the respondent in the initial charge of discrimination filed with the Commission.

¶ 13 The ALJ, applying the relation back doctrine of C.R.C.P. 15(c), denied the motion. He concluded that adding Phillips as a respondent to the formal complaint was permissible for several reasons. First, he noted that both the charge of discrimination and the formal complaint alleged identical conduct. He further noted that Phillips was aware from the beginning of the litigation that he was the person whose conduct was at issue. Finally, the ALJ found that Phillips should have known that, but for Mullins' oversight in

[3] In his procedural order, the ALJ notified the parties of his deadline for "filing all motions pursuant to Rule 12, Colorado Rules of Civil Procedure," and the parties proceeded as if the rules of civil procedure applied. Section 24-34-306(5), C.R.S. 2014, provides that "discovery procedures may be used by the commission and the parties under the same circumstances and in the same manner as is provided by the Colorado rules of civil procedure."

not naming Phillips, he would have been named as a respondent in the charge of discrimination. We agree with the ALJ.

¶ 14 Although no Colorado appellate court has previously addressed this issue, we conclude that the omission of a party's name from a CADA charging document should be considered under the relation back doctrine.

¶ 15 C.R.C.P. 15(c), which is nearly identical to Fed. R. Civ. P. 15(c)(1)(C), contains three requirements which, if met, allow for a claim in an amended complaint against a new party to relate back to the filing of the original: (1) the claim must have arisen out of the same transaction or conduct set forth in the original complaint; (2) the new party must have received notice of the action within the period provided by law for commencing the action; and (3) the new party must have known or reasonably should have known that, "but for a mistake concerning the identity of the proper party, the action would have been brought against him." *See S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1237 (Colo. 2011); *Lavarato v. Branney*, 210 P.3d 485, 489 (Colo. App. 2009). "Many courts have liberally construed [Fed. R. Civ. P. 15(c)(1)(C)] to find

that amendments simply adding or dropping parties, as well as amendments that actually substitute defendants, fall within the ambit of the rule." 6 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1498.2 (3d ed. 1998); *see also Goodman v. Praxair, Inc.*, 494 F.3d 458, 468 (4th Cir. 2007).

¶ 16 Courts interpreting Fed. R. Civ. P. 15(c)(1)(C) have concluded that the pertinent question when amending any claim to add a new party is whether the party to be added, when viewed from the standpoint of a reasonably prudent person, should have expected that the original complaint might be altered to add the new party. *See Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("The linchpin is notice, and notice within the limitations period."); 6 Wright & Miller at § 1498.3 ("Relation back will be refused only if the court finds that there is no reason why the party to be added should have understood that it was not named due to mistake.").

¶ 17 Here, the ALJ properly found that the three requirements for application of the relation back doctrine were satisfied. First, the claim against Phillips arose out of the same transaction as the original complaint against Masterpiece. Second, Phillips received

timely notice of the original charge filed against Masterpiece. Indeed, he responded to it on behalf of Masterpiece. Third, Phillips knew or reasonably should have known that the original complaint should have named him as a respondent. The charging document frequently referred to Phillips by name and identified him as the owner of Masterpiece Cakeshop and the person who told Craig and Mullins that his standard business practice was to refuse to make wedding cakes for same-sex weddings. Consequently, Phillips suffered no prejudice from not being named in the original complaint.

¶ 18 Based on these findings, we conclude that the ALJ did not err in applying C.R.C.P. 15(c)'s "relation back" rule. Accordingly, we conclude that the ALJ did not err when he denied Phillips' motion to dismiss.

C. Second Motion to Dismiss — Public Accommodation Charges

¶ 19 Phillips and Masterpiece jointly filed the second motion to dismiss. They alleged that the Commission lacked jurisdiction and failed to state a claim in its notice of determination as required by section 24-34-306(2)(b)(II), C.R.S. 2014. We disagree.

¶ 20 Section 24-34-306(2)(b)(II) provides: "If the director or the director's designee determines that probable cause exists, the director or the director's designee shall serve the respondent with written notice stating with specificity the legal authority and jurisdiction of the commission and the matters of fact and law asserted."

¶ 21 The Division's letter of probable cause determination erroneously referenced section 24-34-402, C.R.S. 2014, the employment practices section of CADA, and not section 24-34-601(2), the public accommodations section under which Craig and Mullins filed their complaint. According to Phillips and Masterpiece, this erroneous citation violated section 24-34-306(2)(b)(II)'s requirement that respondents be notified "with specificity" of the "legal authority and jurisdiction of the commission."

¶ 22 The ALJ denied the second motion to dismiss. He concluded that Masterpiece and Phillips could not have been misled by the error, because "[t]here is no dispute that this case does not involve

either an allegation or evidence of discriminatory employment practices." Again, we agree with the ALJ.

¶ 23 The charge of discrimination and the notice of determination correctly referenced section 24-34-601, the public accommodations section of CADA, several times. Further, the director's designee who drafted the notice of determination with the incorrect citation signed an affidavit explaining that the reference to section 24-34-402 was a typographical error, and that the reference should have been to section 24-34-601. Because Masterpiece and Phillips could not have been misled about the legal basis for the Commission's findings, we perceive no error in the Commission's refusal to dismiss the charges against Masterpiece and Phillips because of a typographical error. *See Andersen v. Lindenbaum*, 160 P.3d 237, 238 (Colo. 2007) (typographical error in letter constitutes reasonable explanation for incorrect date later attested to in deposition).

¶ 24 Accordingly, we conclude that the ALJ did not err when he denied Phillips' and Masterpiece's second motion to dismiss.[4]

[4] Having affirmed the denials of the motions to dismiss, we now

III. CADA Violation

¶ 25 Masterpiece contends that the ALJ erred in concluding that its refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation. Specifically, Masterpiece asserts that its refusal to create the cake was "because of" its opposition to same-sex marriage, not because of its opposition to their sexual orientation. We conclude that the act of same-sex marriage is closely correlated to Craig's and Mullins' sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece's refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation, in violation of CADA.

A. Standard of Review

¶ 26 Whether Masterpiece violated CADA is a question of law reviewed de novo. § 24-4-106(7).

B. Applicable Law

¶ 27 Section 24-34-601(2)(a), C.R.S. 2014, reads, as relevant here:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a

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refer to Masterpiece and Phillips collectively as "Masterpiece" in this opinion.

> group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .[5]

¶ 28 In *Tesmer v. Colorado High School Activities Association*, 140 P.3d 249, 254 (Colo. App. 2006), a division of this court concluded that to prevail on a discrimination claim under CADA, plaintiffs must prove that, "but for" their membership in an enumerated class, they would not have been denied the full privileges of a place of public accommodation. The division explained that plaintiffs need not establish that their membership in the enumerated class was the "sole" cause of the denial of services. *Id.* Rather, it is sufficient that they show that the discriminatory action was based in whole or in part on their membership in the protected class. *Id.*

¶ 29 Further, a "place of public accommodation" is "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale

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[5] CADA also bars discrimination in places of public accommodation on the basis of disability, race, creed, color, sex, marital status, national origin, and ancestry. § 24-34-601(2)(a), C.R.S. 2014.

or retail sales to the public." § 24-34-601(1). Finally, CADA defines "sexual orientation" as "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof." § 24-34-301(7), C.R.S. 2014.

C. Analysis

¶ 30 Masterpiece asserts that it did not decline to make Craig's and Mullins' wedding cake "because of" their sexual orientation. It argues that it does not object to or refuse to serve patrons because of their sexual orientation, and that it assured Craig and Mullins that it would design and create any other bakery product for them, just not a wedding cake. Masterpiece asserts that its decision was solely "because of" Craig's and Mullins' intended conduct — entering into marriage with a same-sex partner — and the celebratory message about same-sex marriage that baking a wedding cake would convey. Therefore, because its refusal to serve Craig and Mullins was not "because of" their sexual orientation, Masterpiece contends that it did not violate CADA. We disagree.

¶ 31 Masterpiece argues that the ALJ made two incorrect presumptions. First, it contends that the ALJ incorrectly presumed that opposing same-sex marriage is tantamount to opposing the rights of gays, lesbians, and bisexuals to the equal enjoyment of public accommodations. Second, it contends that the ALJ incorrectly presumed that only gay, lesbian, and bisexual couples engage in same-sex marriage.

¶ 32 Masterpiece thus distinguishes between discrimination based on a person's status and discrimination based on conduct closely correlated with that status. However, the United States Supreme Court has recognized that such distinctions are generally inappropriate. *See Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 689 (2010) ("[The Christian Legal Society] contends that it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.' . . . Our decisions have declined to distinguish between status and conduct in this context."); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by

the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583 (O'Connor, J., concurring in the judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is . . . directed toward gay persons as a class."); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (concluding that prohibiting admission to students married to someone of a different race was a form of racial discrimination, although the ban restricted conduct).

¶ 33 Further, in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), the Supreme Court equated laws precluding same-sex marriage to discrimination on the basis of sexual orientation. *Id.* at ___, 135 S. Ct. at 2604 (observing that the "denial to same-sex couples of the right to marry" is a "disability on gays and lesbians" which "serves to disrespect and subordinate them"). The Court stated: "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever

their *sexual orientation*." *Id.* at ___, 135 S. Ct. at 2599 (emphasis added). "Were the Court to stay its hand . . . it still would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* at ___, 135 S. Ct. at 2606.

¶ 34 In these decisions, the Supreme Court recognized that, in some cases, conduct cannot be divorced from status. This is so when the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status. We conclude that the act of same-sex marriage constitutes such conduct because it is "engaged in exclusively or predominantly" by gays, lesbians, and bisexuals. Masterpiece's distinction, therefore, is one without a difference. But for their sexual orientation, Craig and Mullins would not have sought to enter into a same-sex marriage, and but for their intent to do so, Masterpiece would not have denied them its services.

¶ 35 In *Elane Photography, LLC v. Willock*, the New Mexico Supreme Court rejected a similar argument raised by a wedding photographer. 309 P.3d 53, 60-64 (N.M. 2013). The court concluded that by prohibiting discrimination on the basis of sexual

orientation, New Mexico's antidiscrimination law similarly protects "conduct that is inextricably tied to sexual orientation," including the act of same-sex marriage. *Id.* at 62. The court observed that "[o]therwise, we would interpret [the New Mexico public accommodations law] as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation." *Id.* We agree with the reasoning of the New Mexico Supreme Court.[6]

¶ 36 Masterpiece relies on *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), which declined to equate opposition to voluntary abortion with discrimination against women. *Id.* at 269-70. As in *Bray*, it asks us to decline to equate opposition to same-sex marriage with discrimination against gays, lesbians, and bisexuals. Masterpiece's reliance on *Bray* is misplaced.

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[6] An Oregon ALJ reached a similar conclusion when addressing an Oregon bakery's argument that its refusal to create a wedding cake for a same-sex couple was not on account of the couple's sexual orientation, but rather the bakery's objection to participation in the event for which the cake would be prepared — a same-sex wedding ceremony. *In the Matter of Klein*, Nos. 44-14 & 45-15, 2015 WL 4503460, at *52 (Or. Comm'r of Labor & Indus. July 2, 2015) ("In conclusion, the forum holds that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation.").

¶ 37 *Bray* considered whether the defendants, several organizations that coordinated antiabortion demonstrations, could be subject to tort liability under 42 U.S.C. § 1985(3) (1988).[7] Established precedent required that plaintiffs in section 1985(3) actions prove that "some . . . class-based, invidiously discriminatory animus [lay] behind the [defendant's] actions." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). However, CADA requires no such showing of "animus." *See Tesmer*, 140 P.3d at 253 (plaintiffs need only prove that "but for" their membership in an enumerated class they would not have been denied the full privileges of a place of public accommodation).

¶ 38 Further, Masterpiece admits that it refused to serve Craig and Mullins "because of" its opposition to persons entering into same-sex marriages, conduct which we conclude is closely correlated with sexual orientation. Therefore, even if we assume that CADA requires plaintiffs to establish an intent to discriminate, as in section 1985(3) action, the ALJ reasonably could have inferred from

[7] That law creates a private cause of action for parties seeking remedies against public and private parties who conspired to interfere with their civil rights.

Masterpiece's conduct an intent to discriminate against Craig and Mullins "because of" their sexual orientation.

¶ 39 We also note that although the *Bray* Court held that opposition to voluntary abortion did not equate to discrimination against women, it observed that "[s]ome 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." 506 U.S. at 270. The Court provided, by way of example, that "[a] tax on wearing yarmulkes is a tax on Jews." *Id.* Likewise, discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation.

¶ 40 We reject Masterpiece's related argument that its willingness to sell birthday cakes, cookies, and other non-wedding cake products to gay and lesbian customers establishes that it did not violate CADA. Masterpiece's potential compliance with CADA in this respect does not permit it to refuse services to Craig and Mullins that it otherwise offers to the general public. *See Elane*

Photography, 309 P.3d at 62 ("[I]f 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. . . . Elane Photography's willingness to offer some services to [a woman entering a same-sex marriage] does not cure its refusal to provide other services that it offered to the general public.").[8]

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[8] This case is distinguishable from the Colorado Civil Rights Division's recent findings that Azucar Bakery, Le Bakery Sensual, and Gateaux, Ltd., in Denver did not discriminate against a Christian patron on the basis of his creed when it refused his requests to create two bible-shaped cakes inscribed with derogatory messages about gays, including "Homosexuality is a detestable sin. Leviticus 18:2." *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 25, 2015), *available at* http://perma.cc/5K6D-VV8U; *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015), *available at* http://perma.cc/35BW-9C2N; *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015), *available at* http://perma.cc/JN4U-NE6V. The Division found that the bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message. Importantly, there was no evidence that the bakeries based their decisions on the patron's religion, and evidence had established that all three regularly created cakes with Christian themes. Conversely, Masterpiece admits that its decision to refuse Craig's and Mullins' requested wedding cake was because of its opposition to same-sex marriage which, based on Supreme Court precedent, we conclude is tantamount to discrimination on the basis of sexual orientation.

For the same reason, this case is distinguishable from a Kentucky trial court's decision that a T-shirt printing company did

¶ 41 Finally, Masterpiece argues that the ALJ wrongly presumed that only same-sex couples engage in same-sex marriage. In support, it references the case of two heterosexual New Zealanders who married in connection with a radio talk show contest. However, as the *Bray* court explained, we do not distinguish between conduct and status where the targeted conduct is engaged in "predominantly by a particular class of people." 506 U.S. at 270. An isolated example of two heterosexual men marrying does not

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not violate Lexington-Fayette County's public accommodations ordinance when it refused to print T-shirts celebrating premarital romantic and sexual relationships among gays and lesbians. *See Hands on Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm'n*, No. 14-CI-04474, slip op. at 9 (Fayette Cir. Ct. Apr. 27, 2015), *available at* http://perma.cc/75FY-Z77D. There, evidence established that the T-shirt printer treated homosexual and heterosexual groups alike. *Id.* Specifically, in the previous three years, the printer had declined several orders for T-shirts promoting premarital romantic and sexual relationships between heterosexual individuals, including those portraying strip clubs and sexually explicit videos. *Id.* Although the print shop, like Masterpiece, based its refusal on its opposition to a particular conduct — premarital sexual relationships — such conduct is not "exclusively or predominantly" engaged in by a particular class of people protected by a public accommodations statute. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Opposition to premarital romantic and sexual relationships, unlike opposition to same-sex marriage, is not tantamount to discrimination on the basis of sexual orientation.

persuade us that same-sex marriage is not predominantly, and almost exclusively, engaged in by gays, lesbians, and bisexuals.

¶ 42 Therefore, we conclude that the ALJ did not err by concluding that Masterpiece refused to create a wedding cake for Craig and Mullins "because of" their sexual orientation. CADA prohibits places of public accommodations from basing their refusal to serve customers on their sexual orientation, and Masterpiece violated Colorado's public accommodations law by refusing to create a wedding cake for Craig's and Mullins' same-sex wedding celebration.

¶ 43 Having concluded that Masterpiece violated CADA, we next consider whether the Commission's application of the law under these circumstances violated Masterpiece's rights to freedom of speech and free exercise of religion protected by the United States and Colorado Constitutions.

IV. Compelled Expressive Conduct and Symbolic Speech

¶ 44 Masterpiece contends that the Commission's cease and desist order compels speech in violation of the First Amendment by requiring it to create wedding cakes for same-sex weddings.

Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission's order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs.

¶ 45 We disagree. We conclude that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections.

A. Standard of Review

¶ 46 Whether the Commission's order unconstitutionally infringes on Masterpiece's right to the freedom of expression protected by the First Amendment is a question of law that we review de novo. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 270-71 (Colo. 1997).

B. Applicable Law

¶ 47 The First Amendment of the United States Constitution prohibits laws "abridging the freedom of speech." U.S. Const.

amend. I; *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. ___, ___, 131 S. Ct. 2343, 2347 (2011); *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't*, 220 P.3d 544, 551 (Colo. 2009) ("The guarantees of the First Amendment are applicable to the states through the Due Process Clause of the Fourteenth Amendment."). Article II, section 10 of the Colorado Constitution, which provides greater protection of free speech than does the First Amendment, *see Lewis*, 941 P.2d at 271, provides that "[n]o law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject."[9]

¶ 48 The freedom of speech protected by the First Amendment includes the "right to refrain from speaking" and prohibits the government from telling people what they must say. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (hereafter *FAIR*); *In re Hickenlooper*, 2013 CO 62, ¶ 23. This

[9] Although Masterpiece observes that the Colorado Constitution provides greater liberty of speech than the United States Constitution, it does not distinguish the two, and its argument relies almost exclusively on federal First Amendment case law. Therefore, we will not distinguish the First Amendment and article II, section 10 as applied to Masterpiece's freedom of speech claim.

compelled speech doctrine, on which Masterpiece relies, was first articulated by the Supreme Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), and has been applied in two lines of cases.

¶ 49 The first line of cases prohibits the government from requiring that an individual "speak the government's message." *FAIR*, 547 U.S. at 63; *see also Wooley*, 430 U.S. at 715-17 (holding that New Hampshire could not require individuals to have its slogan "Live Free or Die" on their license plates); *Barnette*, 319 U.S. at 642 (holding that West Virginia could not require students to salute the American flag and recite the Pledge of Allegiance).

¶ 50 These cases establish that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" by forcing individuals to publicly disseminate its own ideological message. *Barnette*, 319 U.S. at 642. The government also cannot require "the dissemination of an ideological message by displaying it on [an individual's] private property in a manner and for the express purpose that it be observed and read by the public." *Wooley*, 430 U.S. at 713; *Barnette*, 319 U.S. at 642

(observing that the state cannot "invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

¶ 51 The second line of compelled speech cases establishes that the government may not require an individual "to host or accommodate another speaker's message." *FAIR*, 547 U.S. at 63. For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974), the Supreme Court invalidated a Florida law which provided that, if a local newspaper criticized a candidate for public office, the candidate could demand that the newspaper publish his or her reply to the criticism free of charge. Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 4 (1986), the Supreme Court struck down a California Public Utilities Commission regulation that permitted third-party intervenors in ratemaking proceedings to include messages in the utility's billing envelopes, which it distributed to customers. These cases establish that the government may not commandeer a private speaker's means of accessing its audience by requiring that the speaker disseminate a third-party's message.

¶ 52 The Supreme Court has also recognized that some forms of conduct are symbolic speech and deserve First Amendment protections. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that the public burning of draft cards during anti-war protest is a form of expressive conduct). However, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), the Supreme Court has rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *FAIR*, 547 U.S. at 65-66 (some internal quotation marks omitted). Rather, First Amendment protections extend only to conduct that is "inherently expressive." *Id.*

¶ 53 In deciding whether conduct is "inherently expressive," we ask whether "'[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The message need not be "narrow," or

"succinctly articulable." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). The Supreme Court has recognized expressive conduct in several cases. *See, e.g.*, *id.* (marching in a parade in support of gay and lesbian rights); *United States v. Eichman*, 496 U.S. 310, 312-19 (1990) (burning of the American flag in protest of government policies); *Johnson*, 491 U.S. at 399 (burning of the American flag in protest of Reagan administration and various corporate policies); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43 (1977) (wearing of a swastika in a parade); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (wearing an armband in protest of war).

¶ 54 However, other decisions have declined to recognize certain conduct as expressive. *See Carrigan*, 564 U.S. at ___, 131 S. Ct. at 2350 (legislators' act of voting not expressive because it "symbolizes nothing" about their reasoning); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 437-38 (9th Cir. 2008) (wearing of nondescript school uniform did not convey particularized message of uniformity).

¶ 55 Masterpiece's contentions involve claims of compelled expressive conduct. In such cases, the threshold question is whether the compelled conduct is sufficiently expressive to trigger First Amendment protections. *See Jacobs*, 526 F.3d at 437-38 (threshold question in plaintiff's claim that school uniform policy constituted compelled expressive conduct is whether the wearing of a uniform conveys symbolic messages and therefore was expressive). The party asserting that conduct is expressive bears the burden of demonstrating that the First Amendment applies and the party must advance more than a mere "plausible contention" that its conduct is expressive. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

¶ 56 Finally, a conclusion that the Commission's order compels expressive conduct does not necessarily mean that the order is unconstitutional. If it does compel such conduct, the question is then whether the government has sufficient justification for regulating the conduct. The Supreme Court has recognized that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in

regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. In other words, the government can regulate communicative conduct if it has an important interest unrelated to the suppression of the message and if the impact on the communication is no more than necessary to achieve the government's purpose. *Id.*; *see also Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 567-68 (1991); *Johnson*, 491 U.S. at 407.

C. Analysis

¶ 57 Masterpiece contends that wedding cakes inherently communicate a celebratory message about marriage and that, by forcing it to make cakes for same-sex weddings, the Commission's cease and desist order unconstitutionally compels it to express a celebratory message about same-sex marriage that it does not support. We disagree.

¶ 58 The ALJ rejected Masterpiece's argument that preparing a wedding cake for same-sex weddings necessarily involves expressive conduct. He recognized that baking and creating a wedding cake involves skill and artistry, but nonetheless concluded that, because

Phillips refused to prepare a cake for Craig and Mullins before any discussion of the cake's design, the ALJ could not determine whether Craig's and Mullins' desired wedding cake would constitute symbolic speech subject to First Amendment protections.

¶ 59 Masterpiece argues that the ALJ wrongly considered whether the "conduct" of creating a cake is expressive, and not whether the product of that conduct, the wedding cake itself, constitutes symbolic expression. It asserts that the ALJ wrongly employed the test for expressive conduct instead of that for compelled speech. However, Masterpiece's argument mistakenly presumes that the legal doctrines involving compelled speech and expressive conduct are mutually exclusive. As noted, because the First Amendment only protects conduct that conveys a message, the threshold question in cases involving expressive conduct — or as here, compelled expressive conduct — is whether the conduct in question is sufficiently expressive so as to trigger First Amendment protections. *See Jacobs*, 526 F.3d at 437-38.

¶ 60 We begin by identifying the compelled conduct in question. As noted, the Commission's order requires that Masterpiece "cease and

desist from discriminating against [Craig and Mullins] and other same-sex couples by refusing to sell them wedding cakes or any product [it] would sell to heterosexual couples." Therefore, the compelled conduct is the Colorado government's mandate that Masterpiece comport with CADA by not basing its decision to serve a potential client, at least in part, on the client's sexual orientation. This includes a requirement that Masterpiece sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner.

¶ 61 Next, we ask whether, by comporting with CADA and ceasing to discriminate against potential customers on the basis of their sexual orientation, Masterpiece conveys a particularized message celebrating same-sex marriage, and whether the likelihood is great that a reasonable observer would both understand the message and attribute that message to Masterpiece. *See Spence*, 418 U.S. at 410-11.

¶ 62 We conclude that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be

understood by those who view it. We further conclude that, to the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.

¶ 63 First, Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally. In *FAIR*, several law schools challenged a federal law that denied funding to institutions of higher education that either prohibit or prevent military recruiters from accessing their campuses. 547 U.S. at 64-65. The law schools argued that, by forcing them to treat military and nonmilitary recruiters alike, the law compelled them to send "the message that they see nothing wrong with the military's policies [regarding gays in the military], when they do." *Id.* The Court rejected this argument, observing that students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." *Id.* at 65; *see also Rosenberg v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841-42 (1995); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76-78 (1980).

¶ 64 As in *FAIR*, we conclude that, because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct. Rather, we conclude that a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs.

¶ 65 The *Elane Photography* court distinguished *Wooley* and *Barnette*, and similarly concluded that New Mexico's public accommodations law did not compel the photographer to convey any particularized message, but rather "only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation." 309 P.3d at 64. It concluded that "[r]easonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events." *Id.* at 69. We are

persuaded by this reasoning and similarly conclude that CADA does not compel expressive conduct.[10]

¶ 66 We do not suggest that Masterpiece's status as a for-profit bakery strips it of its First Amendment speech protections. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (recognizing that corporations have free speech rights and holding that government cannot suppress speech on the basis of the speaker's corporate identity). However, we must consider the allegedly expressive conduct within "the context in which it occurred." *Johnson*, 491 U.S. at 405. The public recognizes that, as a for-profit bakery, Masterpiece charges its customers for its goods and services. The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will

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[10] The Oregon Bureau of Labor and Industry and the New Jersey Division of Civil Rights reached similar conclusions in related cases. *See Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 6145-09, at 13 (N.J. Div. Civil Rights Oct. 22, 2012), *available at* http://perma.cc/G5VF-ZS2M ("Because there was no message inherent in renting the Pavilion, there was no credible threat to Respondent's ability to express its views."); *In the Matter of Klein*, 2015 WL 4503460, at *72 ("[T]hat Respondents bake a wedding cake for Complainants is not 'compelled speech' that violates the free speech clause of the First Amendment to the U.S. Constitution.").

believe that it supports the message expressed in its finished product. Nothing in the record supports the conclusion that a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an endorsement of same-sex marriage, rather than a reflection of its desire to conduct business in accordance with Colorado's public accommodations law. *See FAIR*, 547 U.S. at 64-65.

¶ 67 For the same reason, this case also differs from *Hurley*, on which Masterpiece relies. There, the Supreme Court concluded that Massachusetts' public accommodations statute could not require parade organizers to include among the marchers in a St. Patrick's Day parade a group imparting a message the organizers did not wish to convey. 515 U.S. at 559. Central to the Court's conclusion was the "inherent expressiveness of marching to make a point," and its observation that a "parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Id.* at 568, 577. The Court concluded that spectators would likely attribute each

marcher's message to the parade organizers as a whole. *Id.* at 576-77.

¶ 68 In contrast, it is unlikely that the public would understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a celebratory message about same-sex marriage. *See Elane Photography*, 309 P.3d at 68 ("While photography may be expressive, the operation of a photography business is not."); *see also Rosenberg*, 515 U.S. at 841-42 (observers not likely to mistake views of university-supported religious newspaper with those of the university); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 655 (1994) (cable viewers likely would not assume that the broadcasts carried on a cable system convey ideas or messages endorsed by the cable operators); *PruneYard*, 447 U.S. at 81 (observers not likely to attribute speakers' message to owner of shopping center); *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at *6-*7 (Mass. Super. Ct. Sept. 16, 2003) (rejecting attorney's First Amendment compelled speech defense because she "operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself").

¶ 69 By selling a wedding cake to a same-sex couple, Masterpiece does not necessarily lead an observer to conclude that the bakery supports its customer's conduct. The public has no way of knowing the reasons supporting Masterpiece's decision to serve or decline to serve a same-sex couple. Someone observing that a commercial bakery created a wedding cake for a straight couple or that it did not create one for a gay couple would have no way of deciphering whether the bakery's conduct took place because of its views on same-sex marriage or for some other reason.

¶ 70 We also find the Supreme Court's holding in *Carrigan* instructive. 564 U.S. at ___, 131 S. Ct. at 2346. There, the Court concluded that legislators do not have a personal, First Amendment right to vote in the legislative body in which they serve, and that restrictions on legislators' voting imposed by a law requiring recusal in instances of conflicts of interest are not restrictions on their protected speech. *Id.* The Court rejected the argument that the act of voting was expressive conduct subject to First Amendment protections. *Id.* Although the Court recognized that voting "discloses . . . that the legislator wishes (for whatever reason) that

the proposition on the floor be adopted," it "symbolizes nothing" and is not "an act of communication" because it does not convey the legislator's reasons for the vote. *Id.* at __, 131 S. Ct. at 2350.

¶ 71 We recognize 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. However, we need not reach this issue. We note, again, that Phillips denied Craig's and Mullins' request without any discussion regarding the wedding cake's design or any possible written inscriptions.

¶ 72 Finally, CADA does not preclude Masterpiece from expressing its views on same-sex marriage — including its religious opposition to it — and the bakery remains free to disassociate itself from its customers' viewpoints. We recognize that section 24-34-601(2)(a) of CADA prohibits Masterpiece from displaying or disseminating a notice stating that it will refuse to provide its services based on a customer's desire to engage in same-sex marriage or indicating that those engaging in same-sex marriage are unwelcome at the

bakery.[11] However, CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA. Masterpiece could also post or otherwise disseminate a message indicating that CADA requires it not to discriminate on the basis of sexual orientation and other protected characteristics. Such a message would likely have the effect of disassociating Masterpiece from its customers' conduct. *See PruneYard*, 447 U.S. at 87 ("[S]igns, for example could disclaim

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[11] Section 24-34-601(2)(a) reads:

> It is discriminatory practice and unlawful for a [place of public accommodation] . . . to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.

any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.").

¶ 73 Therefore, we conclude that the Commission's order requiring Masterpiece not to discriminate against potential customers because of their sexual orientation does not force it to engage in compelled expressive conduct in violation of the First Amendment. Accordingly, because we conclude that the compelled conduct here is not expressive, the State need not show that it has an important interest in enforcing CADA.

V. First Amendment and Article II, Section 4 — Free Exercise of Religion

¶ 74 Next, Masterpiece contends that the Commission's order unconstitutionally infringes on its right to the free exercise of religion guaranteed by the First Amendment of the United States Constitution and article II, section 4 of the Colorado Constitution. We conclude that CADA is a neutral law of general applicability and, therefore, offends neither the First Amendment nor article II, section 4.

A. Standard of Review

¶ 75 Whether the Commission's order unconstitutionally infringes on Masterpiece's free exercise rights, protected by the First Amendment and article II, section 4, is a question of law that we review de novo. § 24-4-106.

B. Applicable Law

¶ 76 The Free Exercise Clause of the First Amendment provides: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend I. The First Amendment is binding on the States through incorporation by the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). Article II, section 4 of the Colorado Constitution provides: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed."

¶ 77 "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990), *superseded on other grounds by statute as stated in Holt v. Hobbs*, 574 U.S. __, 135 S. Ct. 853 (2015); *see also Van Osdol v. Vogt*, 908 P.2d 1122, 1126 (Colo. 1996). Free exercise of religion also involves

the "performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877.

¶ 78 Before the Supreme Court's decision in *Smith*, the Court consistently used a balancing test to determine whether a challenged government action violated the Free Exercise Clause of the First Amendment. *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). That test considered whether the challenged government action imposed a substantial burden on the practice of religion, and, if so, whether that burden was justified by a compelling government interest. *Sherbert*, 374 U.S. at 403.

¶ 79 In *Smith*, the Court disavowed *Sherbert*'s balancing test and concluded that the Free Exercise Clause "does not relieve an individual of the obligation to comply 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)." *Smith*, 494 U.S. at 879 (internal quotation marks omitted). The Court held that neutral laws of general applicability need only be rationally related to a legitimate governmental interest in order to

survive a constitutional challenge. *Id.* As a general rule, such laws do not offend the Free Exercise Clause.[12]

¶ 80 However, if a law burdens a religious practice and is not neutral or not generally applicable, it "must be justified by a compelling government interest" and must be narrowly tailored to advance that interest. *Smith*, 494 U.S. at 883; *Van Osdol*, 908 P.2d at 1126.

C. Analysis

1. First Amendment Free Exercise

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[12] In the wake of *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), which restored the *Sherbert* balancing test and provides that if government action substantially burdens a person's exercise of religion, the person is entitled to an exemption from the rule unless the government can demonstrate that the application of the burden to the person is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb-1(b) (1994). In *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), *superseded by statute as stated in Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. __, 134 S. Ct. 2751 (2014), the Supreme Court held that RFRA was unconstitutional as applied to the states. Colorado has not enacted a similar law, although many states have. *See* 2 W. Cole Durham et al., *Religious Organizations and the Law* § 10:53 (2015) (observing that sixteen states — Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Louisiana, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia — have passed versions of RFRA to restore pre-*Smith* scrutiny to their own laws that burden religious exercise).

¶ 81 Masterpiece contends that its claim is not governed by *Smith*'s rational basis exception to general strict scrutiny review of free exercise claims for two reasons: (1) CADA is not "neutral and generally applicable" and (2) its claim is a "hybrid" that implicates both its free exercise and free expression rights.[13] Again, we

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[13] The parties do not address whether for-profit entities like Masterpiece Cakeshop have free exercise rights under the First Amendment and article II, section 4 of the Colorado Constitution. Citing the Tenth Circuit's opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013), the ALJ noted that "closely held for-profit business entities like Masterpiece Cakeshop also enjoy a First Amendment right to free exercise of religion." That decision was later affirmed by the Supreme Court. *See Burwell*, 573 U.S. at ___, 134 S. Ct. at 2758.

However, both the Tenth Circuit and the Supreme Court held only that RFRA's reference to "persons" includes for-profit corporations like Hobby Lobby, and therefore that federal regulations restricting the activities of closely held for-profit corporation like Hobby Lobby must comply with RFRA. *See id.* at ___, 134 S. Ct. at 2775 ("[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA."); *Hobby Lobby*, 723 F.3d at 1137 ("[W]e conclude that . . . Hobby Lobby and Mardel . . . qualify as "persons" under RFRA."). Because RFRA does not apply to state laws infringing on religious freedoms, *City of Boerne*, 521 U.S. at 532, it is unclear whether Masterpiece (as opposed to Phillips) enjoys First Amendment free exercise rights. Further, because Colorado appellate courts have not addressed the issue, it is similarly unclear whether Masterpiece has free exercise rights under article II, section 4.

Regardless, because the parties do not address this issue — and because our conclusion does not require us to do so — we will

disagree.

¶ 82 First, we address Masterpiece's contention that CADA is not neutral and not generally applicable. A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law is not generally applicable when it imposes burdens on religiously motivated conduct while permitting exceptions for secular conduct or for favored religions. *Id.* at 543. The Supreme Court has explained that an improper intent to discriminate can be inferred where a law is a "religious gerrymander[]" that burdens religious conduct while exempting similar secular activity. *Id.* at 534. If a law is either not neutral or not generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-32.

¶ 83 The Court has found only one law to be neither neutral nor generally applicable. In *Church of Lukumi*, the Court considered the constitutionality of a municipal ordinance prohibiting ritual animal

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assume, without deciding, that Masterpiece has free exercise rights under both the First Amendment and article II, section 4.

sacrifice. *Id.* at 534. The law applied to any individual or group that "kills, slaughters, or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animals is to be consumed." *Id.* at 527 (internal quotation marks omitted).

¶ 84 Considering that the ordinance's terms such as "sacrifice" and "ritual" could be either secular or religious, the Court nevertheless concluded that the law was not neutral because its purpose was to impede certain practices of the Santeria religion. *Id.* at 534. The Court further concluded that the law was not generally applicable because it exempted the killing of animals for several secular purposes, including the killing of animals in secular slaughterhouses, hunting, fishing, euthanasia of unwanted animals, and extermination of pests, *id.* at 526-28, 536, 543-44, as well as the killing of animals by some religions, including at kosher slaughterhouses, *id.* at 536-37.

a. Neutral Law of General Applicability

¶ 85 Masterpiece contends that, like the law in *Church of Lukumi*, CADA is neither neutral nor generally applicable. First, it argues that CADA is not generally applicable because it provides

exemptions for "places principally used for religious purposes" such as churches, synagogues, and mosques, *see* § 24-34-601(1), as well as places that restrict admission to one gender because of a bona fide relationship to its services, *see* § 24-34-601(3). Second, it argues that the law is not neutral because it exempts "places principally used for religious purposes," but not Masterpiece.

¶ 86 We conclude that CADA is generally applicable, notwithstanding its exemptions. A law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct. *See Church of Lukumi*, 508 U.S. at 542-43 ("[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."). CADA does not discriminate on the basis of religion; rather, it exempts certain public accommodations that are "principally used for religious purposes." § 24-34-601(1).

¶ 87 In this regard, CADA does not impede the free exercise of religion. Rather, its exemption for "places principally used for

religious purposes" reflects an attempt by the General Assembly to reduce legal burdens on religious organizations and comport with the free exercise doctrine. Such exemptions are commonplace throughout Colorado law, *e.g.*, § 24-34-402(7) (exempting religious organizations and associations from employment discrimination laws); § 24-34-502(3), C.R.S. 2014 (exempting religious organizations and institutions from several requirements of housing discrimination laws), and, in some cases, are constitutionally mandated. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. ___, ___, 132 S. Ct. 694, 705-06 (2012) (holding that the First Amendment prohibits application of employment discrimination laws to disputes between religious organizations and their ministers).

¶ 88 Further, CADA is generally applicable because it does not exempt secular conduct from its reach. *Church of Lukumi*, 508 U.S. at 543 (Laws are not generally applicable when they "impose burdens" "in a selective manner."). In this respect, CADA's exemption for places that restrict admission to one gender because of a bona fide relationship to its services does not discriminate on

the basis of religion. On its face, it applies equally to religious and nonreligious conduct, and therefore is generally applicable.

¶ 89 Second, we conclude that CADA is neutral. Masterpiece asserts that CADA is not neutral because, although it exempts "places primarily used for religious purposes," Masterpiece is not exempt. However, Masterpiece does not contend that its bakery is primarily used for religious purposes. CADA forbids all discrimination based on sexual orientation regardless of its motivation. Further, the existence of an exemption for religious entities undermines Masterpiece's contention that the law discriminates against its conduct because of its religious character. *See Priests for Life v. Dep't of Health & Human Servs.*, 772 F.3d 229, 268 (D.C. Cir. 2014) ("[T]he existence of an exemption for religious employers substantially undermines contentions that government is hostile towards such employers' religion.").

¶ 90 Finally, we reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation. As one court

observed in addressing a similar free exercise challenge to the 1964 Civil Rights Act:

> Undoubtedly defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This Court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishment 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).[14] Likewise, Masterpiece remains free to continue

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[14] At least two state supreme courts have rejected free exercise challenges to public accommodations laws in the commercial context, concluding that such laws are neutral and generally applicable. *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 279-80 (Alaska 1994) (Free Exercise Clause does not allow landlord to discriminate against unmarried couples in violation of public accommodations statute); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 967 (Cal. 2008) ("[T]he First Amendment's right to the free exercise of religion does not exempt defendant physicians here from conforming their conduct to the Act's antidiscrimination requirements even if compliance poses an incidental conflict with

espousing its religious beliefs, including its opposition to same-sex marriage. However, if it wishes to operate as a public accommodation and conduct business within the State of Colorado, CADA prohibits it from picking and choosing customers based on their sexual orientation.

¶ 91 Therefore, we conclude that CADA was not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct. Accordingly, CADA is a neutral law of general applicability.

b. "Hybrid" Rights Claim

¶ 92 Next, we address Masterpiece's contention that its claim is not governed by *Smith*'s rational basis standard and that strict scrutiny review applies because its contention is a "hybrid" of both free exercise rights and free expression rights.

¶ 93 In *Smith*, the Supreme Court distinguished its holding from earlier cases applying strict scrutiny to laws infringing free exercise rights, explaining that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally

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defendants' religious beliefs.").

applicable law to religiously motivated actions have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881. Masterpiece argues that this language created an exception for "hybrid-rights" claims, holding that a party can still establish a violation of the Free Exercise Clause, even where the challenged law is neutral and generally applicable, by showing that the claim comprises both the right to free exercise of religion and an independent constitutional right. *Id.*

¶ 94 We note that Colorado's appellate courts have not applied the "hybrid-rights" exception, and several decisions have cast doubt on its validity. *See, e.g., Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006) ("The hybrid rights doctrine is controversial. It has been characterized as mere *dicta* not binding on lower courts, criticized as illogical, and dismissed as untenable." (citations omitted)). Regardless, having concluded above that the Commission's order does not implicate Masterpiece's freedom of expression, even if we assume the "hybrid-rights" exception exists, it would not apply here.

¶ 95 Accordingly, we hold that CADA is a neutral law of general applicability, and does not offend the Free Exercise Clause of the First Amendment.

2. Article II, Section 4 Free Exercise of Religion

¶ 96 Masterpiece argues that, although neutral laws of general applicability do not violate the First Amendment, *Smith*, 494 U.S. at 879, the Free Exercise Clause of the Colorado Constitution requires that we review such laws under heightened, strict scrutiny. We disagree.

¶ 97 Masterpiece gives two reasons supporting this assertion. First, it argues that Colorado appellate courts uniformly apply strict scrutiny to laws infringing fundamental rights. *See, e.g., In re Parental Rights Concerning C.M.*, 74 P.3d 342, 344 (Colo. App. 2002) ("A legislative enactment that infringes on a fundamental right is constitutionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible."). Second, it argues that the Colorado Constitution provides broader protections for individual rights than the United States Constitution. *See, e.g.*, *Lewis*, 941 P.2d at 271 (Colorado

Constitution provides greater free speech protection than the United States Constitution); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo. 1991) ("Consistent with the United States Constitution, we may find that our state constitution guarantees greater protections of [free speech rights] than [are] guaranteed by the First Amendment.").

¶ 98 We recognize that, with regard to some individual rights, the Colorado Constitution has been interpreted more broadly than the United States Constitution, and that we apply strict scrutiny to many infringements of fundamental rights. However, the Colorado Supreme Court has also recognized that article II, section 4 embodies "the same values of free exercise and governmental non-involvement secured by the religious clauses of the First Amendment." *Ams. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1081-82 (Colo. 1982); *see also Conrad v. City & Cnty. of Denver*, 656 P.2d 662, 670-71 (Colo. 1982) ("Because the federal and state constitutional provisions embody similar values, we look to the body of law that has been developed in the federal courts with respect to the meaning and application of

the First Amendment for useful guidance."); *Young Life v. Div. of Emp't & Training*, 650 P.2d 515, 526 (Colo. 1982) ("Article II, Section 4 echoes the principle of constitutional neutrality underscoring the First Amendment.").

¶ 99 Colorado appellate courts have consistently analyzed similar free exercise claims under the United States and Colorado Constitutions, and have regularly relied on federal precedent in interpreting article II, section 4. *See, e.g.*, *Ams. United*, 648 P.2d at 1072; *Conrad*, 656 P.2d at 670; *Young Life*, 650 P.2d at 526; *People in Interest of D.L.E.*, 645 P.2d 271, 275-76 (Colo. 1982); *Johnson v. Motor Vehicle Div.*, 197 Colo. 455, 458, 593 P.2d 1363, 1364 (1979); *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 416, 509 P.2d 1250, 1253 (1973); *Zavilla v. Masse*, 112 Colo. 183, 187, 147 P.2d 823, 825 (1944); *In re Marriage of McSoud*, 131 P.3d 1208, 1215 (Colo. App. 2006); *In the Interest of E.L.M.C.*, 100 P.3d 546, 563 (Colo. App. 2004); *see also* Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions*, 7 U. St. Thomas J. L. & Pub. Pol'y 103, 116-17 (2013) (observing that "a claim or defense that would not prevail under the Free Exercise

Clause of the First Amendment would not likely prevail under article II, section 4, either"). Finally, the Colorado Supreme Court has never indicated that an alternative analysis should apply.

¶ 100 Given the consistency with which article II, section 4 has been interpreted using First Amendment case law — and in the absence of Colorado Supreme Court precedent suggesting otherwise — we hesitate to depart from First Amendment precedent in analyzing Masterpiece's claims. Therefore, we see no reason why *Smith*'s holding — that neutral laws of general applicability do not offend the Free Exercise Clause — is not equally applicable to claims under article II, section 4, and we reject Masterpiece's contention that the Colorado Constitution requires the application of a heightened scrutiny test.

3. Rational Basis Review

¶ 101 Having concluded that CADA is neutral and generally applicable, we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation. The Supreme Court has consistently recognized that states have a compelling interest in eliminating such

discrimination and that statutes like CADA further that interest. *See Hurley*, 515 U.S. at 572 (Public accommodation laws "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 . . . ."); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987) (government had a compelling interest in eliminating discrimination against women in places of public accommodation); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (same); *Bob Jones Univ.*, 461 U.S. at 604 (government had a compelling interest in eliminating racial discrimination in private education).

¶ 102 Without CADA, businesses could discriminate against potential patrons based on their sexual orientation. Such discrimination in places of public accommodation has measurable adverse economic effects. *See* Mich. Dep't of Civil Rights, Report on LGBT Inclusion Under Michigan Law with Recommendations for Action 74-90 (Jan. 28, 2013), *available at* http://perma.cc/Q6UL-L3JR (detailing the negative economic effects of anti-gay, lesbian, bisexual, and transgender discrimination in places of public

accommodation). CADA creates a hospitable environment for all consumers by preventing discrimination on the basis of certain characteristics, including sexual orientation. In doing so, it prevents the economic and social balkanization prevalent when businesses decide to serve only their own "kind," and ensures that the goods and services provided by public accommodations are available to all of the state's citizens.

¶ 103 Therefore, CADA's proscription of sexual orientation discrimination by places of public accommodation is a reasonable regulation that does not offend the Free Exercise Clauses of the First Amendment and article II, section 4.

VI. Discovery Requests and Protective Order

¶ 104 We also disagree with Masterpiece's contention that the ALJ abused his discretion by denying it discovery as to the type of wedding cake Craig and Mullins intended to order and details of their wedding ceremony. *See* § 24-4-106(7); *DCP Midstream v. Anadarko Petroleum Corp.*, 2013 CO 36, ¶ 24, 303 P.3d 1187, 1192 (rulings on motions to compel discovery reviewed for an abuse of discretion).

¶ 105 We agree with the ALJ's conclusion that these subjects were not relevant in resolving the essential issues at trial. The only issues before the ALJ were (1) whether Masterpiece violated CADA by categorically refusing to serve Craig and Mullins because of its opposition to same-sex marriage and, if so, (2) whether CADA, as applied to Masterpiece, violated its rights to freedom of expression and free exercise of religion. Evidence pertaining to Craig's and Mullins' wedding ceremony — including the nature of the cake they served — had no bearing on the legality of Masterpiece's conduct. The decision to categorically deny service to Craig and Mullins was based only on their request for a wedding cake and Masterpiece's own beliefs about same-sex marriage. Because Craig and Mullins never conveyed any details of their desired cake to Masterpiece, evidence about their wedding cake and details of their wedding ceremony were not relevant.

¶ 106 Accordingly, we conclude that the ALJ did not abuse his discretion by denying Masterpiece's requested discovery.

VII. Commission's Cease and Desist Order

¶ 107 Finally, we reject Masterpiece's contention that the Commission's cease and desist order exceeded the scope of its statutory authority. Where the Commission finds that CADA has been violated, section 24-34-306(9) provides that it "shall issue and cause to be served upon the respondent an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such action as it may order" in accordance with the provisions of CADA. *See also* § 24-34-305(c)(I), C.R.S. 2014 (The Commission is empowered to eliminate discriminatory practices by "formulat[ing] plans for the elimination of those practices by educational or other means.").

¶ 108 Masterpiece argues that the Commission does not have the authority to issue a cease and desist order applicable to unidentified parties, but rather, it may only issue orders with respect to the specific complaint or alleged discriminatory conduct in each proceeding. We disagree with Masterpiece's reading of the statute.

¶ 109 First, individual remedies are "merely secondary and incidental" to CADA's primary purpose of eradicating discriminatory

practices. *Connors v. City of Colorado Springs*, 962 P.2d 294, 298 (Colo. App. 1997); *see also Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 69 (Colo. 1995) (observing that providing remedies for individual employees under CADA's employment discrimination provisions is merely secondary and incidental to its primary purpose of eradicating discrimination by employers); *Agnello v. Adolph Coors Co.*, 689 P.2d 1162, 1165 (Colo. App. 1984) (same).

¶ 110 Further, Masterpiece admitted that its refusal to provide a wedding cake for Craig and Mullins was pursuant to the company's policy to decline orders for wedding cakes for same-sex weddings and marriage ceremonies. The record reflects that Masterpiece refused to make wedding cakes for several other same-sex couples. In this respect, the Commission's order was aimed at the specific "discriminatory or unfair practice" involved in Craig's and Mullins' complaint. § 24-34-306(9).

¶ 111 Accordingly, we conclude that the Commission's cease and desist order did not exceed the scope of its powers.

VIII. Conclusion

¶ 112 The Commission's order is affirmed.

CHIEF JUDGE LOEB and JUDGE BERGER concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(l), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 23, 2014

Notice to self-represented parties*: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at http://www.cobar.org/index.cfm/ID/21607.*

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
CHARLIE CRAIG and DAVID MULLINS, Complainants, VS. **MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS,** Respondents.	▲ COURT USE ONLY ▲ **CASE NUMBER:** **CR 2013-0008**

INITIAL DECISION
GRANTING COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT
AND DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

Complainants allege that Respondents discriminated against them due to their sexual orientation by refusing to sell them a wedding cake in violation of Colorado's anti-discrimination law. The material facts are not in dispute and both parties filed motions for summary judgment. Following extensive briefing by both sides, oral argument was held before Administrative Law Judge (ALJ) Robert Spencer at the Office of Administrative Courts on December 4, 2013. Complainants were represented by Paula Greisen, Esq., and Dana Menzel, Esq., King & Greisen, LLC; Amanda Goad, Esq., American Civil Liberties Union Foundation LGBT & AIDS Project; and Sara Rich, Esq., and Mark Silverstein, Esq., American Civil Liberties Union Foundation of Colorado. Respondents were represented by Nicolle H. Martin, Esq.; Natalie L. Decker, Esq., The Law Office of Natalie L. Decker, LLC; and Michael J. Norton, Esq., Alliance Defending Freedom. Counsel in Support of the Complaint was Stacy L. Worthington, Senior Assistant Attorney General.

Case Summary

Complainants, a gay couple, allege that on July 19, 2012, Jack C. Phillips, owner of Masterpiece Cakeshop, Inc., refused to sell them a wedding cake because of their sexual orientation. Complainants filed charges of discrimination with the Colorado Civil Rights Commission, which in turn found probable cause to credit the allegations of discrimination. On May 31, 2013, Counsel in Support of the Complaint filed a Formal Complaint with the Office of Administrative Courts alleging that Respondents discriminated against Complainants in a place of public accommodation due to sexual orientation, in violation of § 24-34-601(2), C.R.S. Counsel in Support of the Complaint seeks an order directing Respondents to cease and desist from further discrimination,

as well as other administrative remedies.[1]

Hearing began on September 26, 2013 and was continued until December 4, 2013 to give the parties time to complete discovery and fully brief cross-motions for summary judgment. Complainants and Counsel in Support of the Complaint contend that because there is no dispute that Masterpiece Cakeshop is a place of public accommodation, or that Respondents refused to sell Complainants a wedding cake for their same-sex wedding, that Respondents violated § 24-34-601(2) as a matter of law. Respondents do not dispute that they refused to sell Complainants a cake for their same-sex wedding, but contend that their refusal was based solely upon a deeply held religious conviction that marriage is only between a man and a woman, and was not due to bias against Complainants' sexual orientation. Therefore, Respondents' conduct did not violate the public accommodation statute which only prohibits discrimination "because of . . . sexual orientation." Furthermore, Respondents contend that application of the law to them under the circumstances of this case would violate their rights of free speech and free exercise of religion, as guaranteed by the First Amendment of the U.S. Constitution and Article II, sections 4 and 10 of the Colorado Constitution.

Because it appeared that the essential facts were not in dispute and that the case could be resolved as a matter of law, the ALJ vacated the merits hearing of December 4, 2013 in favor of a hearing upon the cross-motions for summary judgment. For the reasons explained below, the ALJ now grants Complainants' motion for summary judgment and denies Respondents' motion.

Findings of Fact

The following facts are undisputed:

1. Phillips owns and operates a bakery located in Lakewood, Colorado known as Masterpiece Cakeshop, Inc. Phillips and Masterpiece Cakeshop are collectively referred to herein as Respondents.

2. Masterpiece Cakeshop is a place of public accommodation within the meaning of § 24-34-601(1), C.R.S.

3. Among other baked products, Respondents create and sell wedding cakes.

4. On July 19, 2012, Complainants Charlie Craig and David Mullins entered Masterpiece Cakeshop in the company of Mr. Craig's mother, Deborah Munn.

5. Complainants sat down with Phillips at the cake consulting table. They introduced themselves as "David" and "Charlie" and said that they wanted a wedding cake for "our wedding."

6. Phillips informed Complainants that he does not create wedding cakes for same-sex weddings. Phillips told the men, "I'll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings."

7. Complainants immediately got up and left the store without further

[1] The fines and imprisonment provided for by § 24-34-602, C.R.S. may only be imposed in a proceeding before a civil or criminal court, and are not available in this administrative proceeding.

discussion with Phillips.

8. The whole conversation between Phillips and Complainants was very brief, with no discussion between the parties about what the cake would look like.

9. The next day, Ms. Munn called Masterpiece Cakeshop and spoke with Phillips. Phillips advised Ms. Munn that he does not create wedding cakes for same-sex weddings because of his religious beliefs, and because Colorado does not recognize same-sex marriages.

10. Colorado law does not recognize same-sex marriage. Colo. Const. art. II, § 31 ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state"); § 14-2-104(1), C.R.S. ("[A] marriage is valid in this state if: . . . It is only between one man and one woman.")

11. Phillips has been a Christian for approximately 35 years, and believes in Jesus Christ as his Lord and savior. As a Christian, Phillips' main goal in life is to be obedient to Jesus and His teachings in all aspects of his life.

12. Phillips believes that the Bible is the inspired word of God, that its accounts are literally true, and that its commands are binding on him.

13. Phillips believes that God created Adam and Eve, and that God's intention for marriage is the union of one man and one woman. Phillips relies upon Bible passages such as Mark 10:6-9 (NIV) ("[F]rom the beginning of creation, God made them male and female, for this reason, a man will leave his father and mother and be united with his wife and the two will become one flesh. So they are no longer two, but one. Therefore, what God has joined together, let not man separate.")

14. Phillips also believes that the Bible commands him to avoid doing anything that would displease God, and not to encourage sin in any way.

15. Phillips believes that decorating cakes is a form of art and creative expression, and that he can honor God through his artistic talents.

16. Phillips believes that if he uses his artistic talents to participate in same-sex weddings by creating a wedding cake, he will be displeasing God and acting contrary to the teachings of the Bible.

Discussion

Standard for Summary Judgment

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. C.R.C.P. 56(c); *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 570 (Colo. 2008). A genuine issue of material fact is one which, if resolved, will affect the outcome of the case. *City of Aurora v. ACJ P'ship*, 209 P.3d 1076, 1082 (Colo. 2009).

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when,

as a matter of law, based on undisputed facts, one party could not prevail. *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 548 (Colo. 2006). However, summary judgment is a drastic remedy and should be granted only upon a clear showing that there is no genuine issue as to any material fact. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007). Even where it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate. *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791, 795 (Colo. 1993).

The fact that the parties have filed cross-motions does not decrease either party's burden of proof. When a trial court is presented with cross-motions for summary judgment, it must consider each motion separately, review the record, and determine whether a genuine dispute as to any fact material to that motion exists. If there are genuine disputes regarding facts material to both motions, the court must deny both motions. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1340 (Colo. 1988).

Having carefully reviewed the parties' cross-motions, together with the documentation supporting those motions, the ALJ concludes that the undisputed facts are sufficient to resolve both motions.

Colorado Public Accommodation Law

At first blush, it may seem reasonable that a private business should be able to refuse service to anyone it chooses. This view, however, fails to take into account the cost to society and the hurt caused to persons who are denied service simply because of who they are. Thus, for well over 100 years, Colorado has prohibited discrimination by businesses that offer goods and services to the public.[2] The most recent version of the public accommodation law, which was amended in 2008 to add sexual orientation as a protected class, reads in pertinent part:

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

Section 24-34-601(2), C.R.S. (emphasis added).

A "place of public accommodation" means "any place of business engaged in any sales to the public, including but not limited to any business offering wholesale or retail sales to the public." Section 24-34-601(1), C.R.S. "Sexual orientation" means "orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person's perception thereof." Section 24-34-301(7), C.R.S. "Person" includes individuals as well as business and governmental entities. Section 24-34-301(5), C.R.S.

There is no dispute that Respondents are "persons" and that Masterpiece Cakeshop is a "place of public accommodation" within the meaning of the law. There is also no dispute that Respondents refused to provide a cake to Complainants for their

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[2] *See* § 1, ch. 61, Laws of 1895, providing that "all persons" shall be entitled to the "equal enjoyment" of "places of public accommodation and amusement."

same-sex wedding. Respondents, however, argue that the refusal does not violate § 24-34-601(2) because it was due to their objection to same-sex weddings, not because of Complainants' sexual orientation. Respondents deny that they hold any animus toward homosexuals or gay couples, and would willingly provide other types of baked goods to Complainants or any other gay customer. On the other hand, Respondents would refuse to provide a wedding cake to a heterosexual customer if it was for a same-sex wedding. The ALJ rejects Respondents' argument as a distinction without a difference.

The salient feature distinguishing same-sex weddings from heterosexual ones is the sexual orientation of its participants. Only same-sex couples engage in same-sex weddings. Therefore, it makes little sense to argue that refusal to provide a cake to a same-sex couple for use at their wedding is not "because of" their sexual orientation.

Respondents' reliance on *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) is misplaced. In *Bray,* a group of abortion clinics alleged that anti-abortionist demonstrators violated federal law by conspiring to deprive women seeking abortions of the right to interstate travel. In rejecting this challenge, the Supreme Court held that opposition to abortion was not the equivalent of animus to women in general. *Id.* at 269. To represent unlawful class discrimination, the discrimination must focus upon women "*by reason of their sex.*" *Id.* at 270 (emphasis in original). Because the demonstrators were motivated by legitimate factors other than the sex of the participants, the requisite discriminatory animus was absent. That, however, is not the case here. In this case, Respondents' objection to same-sex marriage is inextricably tied to the sexual orientation of the parties involved, and therefore disfavor of the parties' sexual orientation may be presumed. Justice Scalia, the author of the majority opinion in *Bray,* recognized that "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." *Id.* at 270. Similarly, the ALJ concludes that discrimination against same-sex weddings is the equivalent of discrimination due to sexual orientation.[3]

If Respondents' argument was correct, it would allow a business that served all races to nonetheless refuse to serve an interracial couple because of the business owner's bias against interracial marriage. That argument, however, was rejected 30 years ago in *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1983). In *Bob Jones*, the Supreme Court held that the IRS properly revoked the university's tax-exempt status because the university denied admission to interracial couples even though it otherwise admitted all races. According to the Court, its prior decisions "firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination." *Id.* at 605. This holding was extended to discrimination on the basis of sexual orientation in *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, ___ U.S. ___, 130 S.Ct.

[3] In a case similar to this one but involving a photographer's religiously motivated refusal to photograph a same-sex wedding, the New Mexico Supreme Court stated that, "To allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the [state public accommodation law]." *Elane Photography, LLC v. Willock,* 2013 N.M. Lexis 284 at p. 4, 309 P.3d 53 (N.M. 2013).

2971, 2990 (2010). In rejecting the Chapter's argument that denying membership to students who engaged in "unrepentant homosexual conduct" did not violate the university's policy against discrimination due to sexual orientation, the Court observed, "Our decisions have declined to distinguish between status and conduct in this context." *Id.*

Nor is the ALJ persuaded by Respondents' argument that they should not be compelled to recognize same-sex marriages because Colorado does not do so. Although Respondents are correct that Colorado does not recognize same-sex marriage, that fact does not excuse discrimination based upon sexual orientation. At oral argument, Respondents candidly acknowledged that they would also refuse to provide a cake to a same-sex couple for a commitment ceremony or a civil union, neither of which is forbidden by Colorado law.[4] Because Respondents' objection goes beyond just the act of "marriage," and extends to any union of a same-sex couple, it is apparent that Respondents' real objection is to the couple's sexual orientation and not simply their marriage. Of course, nothing in § 24-34-601(2) compels Respondents to recognize the legality of a same-sex wedding or to endorse such weddings. The law simply requires that Respondents and other actors in the marketplace serve same-sex couples in exactly the same way they would serve heterosexual ones.

Having rejected Respondents' arguments to the contrary, the ALJ concludes that the undisputed facts establish that Respondents violated the terms of § 24-34-601(2) by discriminating against Complainants because of their sexual orientation.

Constitutionality of Application

To say that Respondents' conduct violates the letter of § 24-34-601(2) does not resolve the case if, as Respondents assert, application of that law violates their constitutional right to free speech or free exercise of religion. Although the ALJ has no jurisdiction to declare a state law unconstitutional, the ALJ does have authority to evaluate whether a state law has been unconstitutionally applied in a particular case. *Horrell v. Dep't of Admin.,* 861 P.2d 1194, 1204 n. 4 (1993) (although the state personnel board has no authority to determine whether legislative acts are constitutional on their face, the board "may evaluate whether an otherwise constitutional statute has been unconstitutionally applied with respect to a particular personnel action"); *Pepper v. Indus. Claim Appeals Office,* 131 P.3d 1137, 1146 (Colo. 2005). The ALJ will, therefore, address Respondents' arguments that application of § 24-34-601(2) to them violates their rights of free speech and free exercise of religion.[5]

Free Speech

The state and federal constitutions guarantee broad protection of free speech. The First Amendment of the United States Constitution bars congress from making any

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[4] As the result of passage of SB 03-011, effective May 1, 2013, civil unions are now specifically recognized in Colorado.

[5] Corporations like Masterpiece Cakeshop have free speech rights. *Citizens United v. Federal Election Comm'n,* 558 U.S. 310 (2010). In addition, at least in the Tenth Circuit, closely held for-profit business entities like Masterpiece Cakeshop also enjoy a First Amendment right to free exercise of religion. *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114, 1137 (10th Cir. 2013).

law "abridging the freedom of speech, or of the press," and the Fourteenth Amendment applies that protection to the states. Article II, § 10 of the Colorado Constitution states that, "No law shall be passed impairing the freedom of speech." Free speech holds "high rank . . . in the constellation of freedoms guaranteed by both the United States Constitution and our state constitution." *Bock v. Westminster Mall Co.*, 819 P.2d 55, 57 (Colo. 1991). The guarantee of free speech applies not only to words, but also to other mediums of expression, such as art, music, and expressive conduct. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) ("the Constitution looks beyond written or spoken words as mediums of expression . . . symbolism is a primitive but effective way of communicating ideas.")

Respondents argue that compelling them to prepare a cake for a same-sex wedding is equivalent to forcing them to "speak" in favor of same-sex weddings – something they are unwilling to do. Indeed, the right to free speech means that the government may not compel an individual to communicate by word or deed an unwanted message or expression. *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) (compelling a student to pledge allegiance to the flag "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control"); *Wooley v. Maynard,* 430 U.S. 705, 715 (1977) (compelling a motorist to display the state's motto, "Live Free of Die," on his license plate forces him "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.")

The ALJ, however, rejects Respondents' argument that preparing a wedding cake is necessarily a medium of expression amounting to protected "speech," or that compelling Respondents to treat same-sex and heterosexual couples equally is the equivalent of forcing Respondents to adhere to "an ideological point of view." There is no doubt that decorating a wedding cake involves considerable skill and artistry. However, the finished product does not necessarily qualify as "speech," as would saluting a flag, marching in a parade, or displaying a motto. *United States v. O'Brien,* 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.")[6] The undisputed evidence is that Phillips categorically refused to prepare a cake for Complainants' same-sex wedding before there was any discussion about what that cake would look like. Phillips was not asked to apply any message or symbol to the cake, or to construct the cake in any fashion that could be reasonably understood as advocating same-sex marriage. After being refused, Complainants immediately left the shop. For all Phillips knew at the time, Complainants might have wanted a nondescript cake that would have been suitable for consumption at any wedding.[7] Therefore, Respondents' claim that they refused to provide a cake because it would convey a message supporting same-sex marriage is specious. The act of preparing a cake is simply not "speech" warranting First

[6] Upholding O'Brien's conviction for burning his draft card.

[7] Respondents point out that the cake Complainants ultimately obtained from another bakery had a filling with rainbow colors. However, even if that fact could reasonably be interpreted as the baker's expression of support for gay marriage, which the ALJ doubts, the fact remains that Phillips categorically refused to bake a cake for Complainants without any idea of what Complainants wanted that cake to look like.

Amendment protection.[8]

Furthermore, even if Respondents could make a legitimate claim that § 24-34-601(2) impacts their right to free speech, such impact is plainly incidental to the state's legitimate regulation of discriminatory conduct and thus is permissible. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Supreme Court rejected the argument that withholding federal funding from schools that denied access to military recruiters violated the schools' right to protest the military's sexual orientation policies. In the Court's opinion, any impact upon the schools' right of free speech was "plainly incidental" to the government's right to regulate objectionable conduct. "The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct, and 'it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld, supra.* "Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Id.*

Similarly, compelling a bakery that sells wedding cakes to heterosexual couples to also sell wedding cakes to same-sex couples is incidental to the state's right to prohibit discrimination on the basis of sexual orientation, and is not the same as forcing a person to pledge allegiance to the government or to display a motto with which they disagree. To say otherwise trivializes the right to free speech.

This case is also distinguishable from cases like *Barnette* and *Wooley* because in those cases the individuals' exercise of free speech (refusal to salute the flag and refusal to display the state's motto) did not conflict with the rights of others. This is an important distinction. As noted in *Barnette*, "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin." *Barnette*, 319 U.S. at 630. Here, the refusal to provide a wedding cake to Complainants directly harms Complainants' right to be free of discrimination in the marketplace. It is the state's prerogative to minimize that harm by determining where Respondents' rights end and Complainants' rights begin.

Finally, Respondents argue that if they are compelled to make a cake for a same-sex wedding, then a black baker could not refuse to make a cake bearing a white-

[8] The ALJ also rejects Respondents' argument that § 24-34-601(2), C.R.S. bars them from "correcting the record" by publicly disavowing support for same-sex marriage. The relevant portion of § 24-34-601(2) only bars businesses from publishing notice that individuals will be denied service or are unwelcome because of their disability, race, creed, sex, sexual orientation, marital status, national origin, or ancestry. Nothing in § 24-34-601(2) prevents Respondents from posting a notice that the design of their products is not an intended to be an endorsement of anyone's political or social views.

supremacist message for a member of the Aryan Nation; and an Islamic baker could not refuse to make a cake denigrating the Koran for the Westboro Baptist Church. However, neither of these fanciful hypothetical situations proves Respondents' point. In both cases, it is the explicit, unmistakable, offensive message that the bakers are asked to put on the cake that gives rise to the bakers' free speech right to refuse. That, however, is not the case here, where Respondents refused to bake any cake for Complainants regardless of what was written on it or what it looked like. Respondents have no free speech right to refuse because they were only asked to bake a cake, not make a speech.

Although Respondents cite *Bock v. Westminster Mall Co., supra,* for the proposition that Colorado's constitution provides greater protection than does the First Amendment, Respondents cite no Colorado case, and the ALJ is aware of none, that would extend protection to the conduct at issue in this case.

For all these reasons the ALJ concludes that application of § 24-34-601(2) to Respondents does not violate their federal or state constitutional rights to free speech.

Free Exercise of Religion

The state and federal constitutions also guarantee broad protection for the free exercise of religion. The First Amendment bars congress from making any law "respecting an establishment of religion or prohibiting the free exercise thereof," and the Fourteenth Amendment applies that protection to the states. Article II, § 4 of the Colorado Constitution states that, "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity on account of his opinions concerning religion." The door of these rights "stands tightly closed against any governmental regulation of religious beliefs as such." *Sherbert v. Verner,* 374 U.S. 398, 402 (1963).

The question presented by this case, however, does not involve an effort by the government to regulate what Respondents *believe*. Rather, it involves the state's regulation of *conduct*; specifically, Respondents' refusal to make a wedding cake for a same-sex marriage due to a religious conviction that same-sex marriage is abhorrent to God. Whether regulation of conduct is permissible depends very much upon the facts of the case.

The types of conduct the United States Supreme Court has found to be beyond government control typically involve activities fundamental to the individual's religious belief, that do not adversely affect the rights of others, and that are not outweighed by the state's legitimate interests in promoting health, safety and general welfare. Examples include the Amish community's religious objection to public school education beyond the eighth grade, where the evidence was compelling that Amish children received an effective education within their community, and that requiring public school education would threaten the very existence of the Amish community, *Wisconsin v. Yoder,* 406 U.S. 205 (1972); a Jewish employee's right to refuse Saturday employment without risking loss of unemployment benefits, *Sherbert v. Verner, supra;* and a religious sect's right to engage in religious soliciting without being required to have a license,

Cantwell v. Connecticut, 310 U.S. 296 (1940).

On the other hand, the Supreme Court has held that "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare." *Wisconsin v. Yoder,* 406 U.S. at 220. To excuse all religiously-motivated conduct from state control would "permit every citizen to become a law unto himself." *Employment Division v. Smith,* 494 U.S. 872, 879 (1990). Thus, for example, the Court has upheld a law prohibiting religious-based polygamy, *Reynolds v. United States,* 98 U.S. 145 (1879); upheld a law restricting religious-based child labor, *Prince v. Massachusetts,* 321 U.S. 158 (1944); upheld a Sunday closing law that adversely affected Jewish businesses, *Braunfeld v. Brown,* 366 U.S. 599 (1961); upheld the government's right to collect Social Security taxes from an Amish employer despite claims that it violated his religious principles, *United States v. Lee,* 455 U.S. 252 (1982); and upheld denial of unemployment compensation to persons who were fired for the religious use of peyote, *Employment Division v. Smith, supra.*

As a general rule, when the Court has held religious-based conduct to be free from regulation, "the conduct at issue in those cases was not prohibited by law," *Employment Division v. Smith,* 494 U.S. at 876; the freedom asserted did not bring the appellees "into collision with rights asserted by any other individual," *Braunfeld v. Brown,* 366 U.S. at 604 ("It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin"); and the regulation did not involve an incidental burden upon a commercial activity. *United States v. Lee,* 455 U.S. at 261 ("When 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.")

Respondents' refusal to provide a cake for Complainants' same-sex wedding is distinctly the type of conduct that the Supreme Court has repeatedly found subject to legitimate regulation. Such discrimination is against the law (§ 24-34-601. C.R.S.); it adversely affects the rights of Complainants to be free from discrimination in the marketplace; and the impact upon Respondents is incidental to the state's legitimate regulation of commercial activity. Respondents therefore have no valid claim that barring them from discriminating against same-sex customers violates their right to free exercise of religion. Conceptually, Respondents' refusal to serve a same-sex couple due to religious objection to same-sex weddings is no different from refusing to serve a biracial couple because of religious objection to biracial marriage. However, that argument was struck down long ago in *Bob Jones Univ. v. United States, supra.*

Respondents nonetheless argue that, because § 24-34-601(2) limits their religious freedom, its application to them must meet the strict scrutiny of being narrowly drawn to meet a compelling governmental interest. The ALJ does not agree. In *Employment Division v. Smith, supra,* the Court announced the standard applicable to cases such as this one; namely, that "the right of free exercise does not relieve an individual of the obligation to comply 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)." *Employment Division v. Smith,* 494 U.S. at 879.[9] This standard is followed in the Tenth Circuit, *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 649 (10th Cir. 2006) (a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge).

Only if a law is not neutral and of general applicability must it meet strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993) (because a city ordinance outlawing rituals of animal sacrifice was adopted to prevent church's performance of religious animal sacrifice, it was not neutral and of general applicability and therefore had to be narrowly drawn to meet a compelling governmental interest). *Town of Foxfield v. Archdiocese of Denver,* 148 P.3d 339 (Colo. App. 2006) is an example of how this test has been applied in Colorado. In *Town of Foxfield*, the court of appeals held that a parking ordinance was subject to strict scrutiny because it was not of general applicability in that it could only be enforced after receipt of three citizen complaints, and was not neutral because there was ample evidence that it had been passed specifically in response to protests by the church's neighbors. *Id.* at 346.

Section 24-34-601(2) is a valid law that is both neutral and of general applicability; therefore, it need only be rationally related to a legitimate government interest, and need not meet the strict scrutiny test. There is no dispute that it is a valid law. *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.")[10] Colorado's public accommodation law is also neutral and of general applicability because it is not aimed at restricting the activities of any particular group of individuals or businesses, nor is it aimed at restricting any religious practice. Any restriction of religious practice that results from application of the law is incidental to its focus upon preventing discrimination in the marketplace. Unlike *Church of Lukumi Babalu Aye* and *Town of Foxfield,* the law is not targeted to restrict religious activities in general or Respondents' activities in particular. Therefore, § 24-34-601(2) is not subject to strict scrutiny and Respondents are not free to ignore its restrictions even though it may incidentally conflict with their religiously-driven conduct.

Respondents contend that § 24-34-601 is not a law of general applicability because it provides for several exceptions. Where a state's facially neutral rule contains a "system" of individualized exceptions, the state may not refuse to extend that system of exceptions to cases of "religious hardship" without compelling reason. *Smith*, 494 U.S. at 881-82. But, the only exception in § 24-34-601 that has anything to do with religious practice is that for churches or other places "principally used for religious purposes." Section 24-34-601(1). It cannot reasonably be argued that this exception is targeted to restrict religious-based activities. To the contrary, the exemption for

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[9] Respondents have not cited the ALJ to any Colorado law that requires a higher standard. Although Congress made an attempt to legislatively overrule *Smith* when it passed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1(a), the Supreme Court has held that RFRA cannot be constitutionally applied to the states. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). Colorado has not adopted a state version of RFRA, and no Colorado case imposes a higher standard than *Smith.*

[10] Of course, the ALJ has no jurisdiction to declare CADA facially unconstitutional in any event.

churches and other places used primarily for religious purposes underscores the legislature's respect for religious freedom.[11] *Conestoga Wood Specialties Corp. v. Sebelius,* 917 F.Supp.2d 394, 410 (E.D. Pa. 2013) (the fact that exemptions were made for religious employers "shows that the government made efforts to accommodate religious beliefs, which counsels in favor of the regulations' neutrality"), *aff'd* 724 F.3d 377 (3rd Cir. 2013).

The only other exception in § 24-34-601 is a secular one for places providing public accommodations to one sex, where the restriction has a bona fide relationship to the good or service being provided; such as a women's health clinic. Section 24-34-601(3). The Tenth Circuit, however, has joined other circuits in refusing to interpret *Smith* as standing for the proposition that a narrow secular exception automatically exempts all religiously motivated activity. *Grace United,* 451 F.3d at 651 ("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.") The ALJ likewise declines to do so.

Respondents argue that § 24-34-601(2) must nevertheless meet the strict scrutiny test because the Supreme Court has historically applied strict scrutiny to "hybrid" situations involving not only the free exercise of religion but also other constitutional rights such as freedom of speech. *Smith,* 494 U.S. at 881-82. Respondents contend that this case is a hybrid situation because the public accommodation law not only restricts their free exercise of religion, but also restricts their freedom of speech and amounts to an unconstitutional "taking" of their property without just compensation in violation of the Fifth and Fourteenth Amendments. Therefore, they say, application of the law to them must be justified by a compelling governmental interest, which cannot be shown.

The mere incantation of other constitutional rights is not sufficient to create a hybrid claim. *See Axson-Flynn v. Johnson*, 356 F.3d. 1277, 1295 (10th Cir. 2004) (requiring a showing of "'fair probability, or a likelihood,' of success on the companion claim.") As discussed above, Respondents have not demonstrated that § 24-34-601(2) violates their rights of free speech; and, there is no evidence that the law takes or impairs any of Respondents' property or harms Respondents' business in any way. On the contrary, to the extent that the law prohibits Respondents from discriminating on the basis of sexual orientation, compliance with the law would likely increase their business by not alienating the gay community. If, on the other hand, Respondents choose to stop making wedding cakes altogether to avoid future violations of the law; that is a matter of personal choice and not a result compelled by the state. Because Respondents have not shown a likelihood of success in a hybrid claim, strict scrutiny does not apply.

Summary

The undisputed facts show that Respondents discriminated against Complainants because of their sexual orientation by refusing to sell them a wedding cake for their same-sex marriage, in violation of § 24-34-601(2), C.R.S. Moreover,

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[11] In fact, such an exception may be constitutionally required. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* ___ U.S. ___, 132 S.Ct. 694, 705-06 (2012).

application of this law to Respondents does not violate their right to free speech or unduly abridge their right to free exercise of religion. Accordingly, Complainants' motion for summary judgment is GRANTED and Respondents' motion for summary judgment is DENIED.

Initial Decision

Respondents violated § 24-34-601(2), C.R.S. substantially as alleged in the Formal Complaint. In accordance with §§ 24-34-306(9) and 605, C.R.S., Respondents are ordered to:

(1) Cease and desist from discriminating against Complainants and other same-sex couples by refusing to sell them wedding cakes or any other product Respondents would provide to heterosexual couples; and

(2) Take such other corrective action as is deemed appropriate by the Commission, and make such reports of compliance to the Commission as the Commission shall require.

Done and Signed
December 6, 2013

ROBERT N. SPENCER
Administrative Law Judge

Hearing digitally recorded in CR#1

STATE OF COLORADO **COLORADO CIVIL RIGHTS COMMISSION** 1560 Broadway, Suite 1050, Denver, Colorado 80202 **CHARLIE CRAIG and DAVID MULLINS,** Complainant/Appellant, vs. **MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILIPS** Respondent/Appellee.	▲ **COURT USE ONLY** ▲ **Case No.:** CR 2013-0008
FINAL AGENCY ORDER	

This matter came before the Colorado Civil Rights Commission ("Commission") at its regularly scheduled monthly meeting on May 30, 2014. During the public session portion of the monthly meeting the Commission considered the record on appeal, including but not limited to the following:

- Initial Decision of Administrative Law Judge Robert N. Spencer ("ALJ") in this matter ("Initial Decision");
- Respondents' Brief in Support of Appeal;
- Complainants' Opposition to Respondents' Appeal;
- Counsel in Support of the Complainants' Answer Brief; and
- Documents listed in the Certificate of Record.

Based upon the Commission's review and consideration, it is hereby ORDERED that the Initial Decision is ADOPTED IN FULL. In doing so, we further AFFIRM the following:

1. The Order Granting Complainants' Motion for Protective Order is AFFIRMED; and

2. The Order concerning Respondents' Motion to Dismiss the Formal Complaint and Motion to Dismiss Phillips is AFFIRMED;

REMEDY

It is further ORDERED by the Commission that the Respondents take the following actions:

1. Pursuant to § 24-34-306(9) and 605, C.R.S., the Respondents shall cease and desist from discriminating against Complainants and other same-sex couples by refusing to sell them wedding cakes or any product Respondents would sell to heterosexual couples; and

2. Pursuant to 24-34-306(9) and 605, C.R.S., the following REMEDIAL MEASURES shall be taken:

a. The Respondents shall take remedial measures to ensure compliance with the Public Accommodation section of the Colorado Anti-Discrimination Act, § 24-34-601(2), C.R.S., including but not limited to comprehensive staff training on the Public Accommodations section of the Colorado Anti-Discrimination Act and changes to any and all company polices to comply with § 24-34-601(2), C.R.S. and this Order.

b. The Respondents shall provide quarterly compliance reports to the Colorado Civil Rights Division for two years from the date of this Order. The compliance reports shall contain a statement describing the remedial measures taken.

c. The Respondents' compliance reports shall also document the number of patrons denied service by Mr. Phillips or Masterpiece Cakeshop, Inc., and the reasons the patrons were denied service.

Dated this 30th day of May, 2014, at Denver Colorado

Katina Banks, Chair
Colorado Civil Rights Commission
1560 Broadway, Suite 1050
Denver, CO 80202

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **FINAL AGENCY ORDER** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 2nd day of June 2014 addressed as follows:

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Shayla Malone

West's Colorado Revised Statutes Annotated
Constitution of the State of Colorado [1876] (Refs & Annos)
Article II. Bill of Rights

C.R.S.A. Const. Art. 2, § 4

§ 4. Religious freedom

Currentness

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

Notes of Decisions (182)

C. R. S. A. Const. Art. 2, § 4, CO CONST Art. 2, § 4
Current with amendments adopted through the Nov. 4, 2014 General Election.

End of Document

West's Colorado Revised Statutes Annotated
Constitution of the State of Colorado [1876] (Refs & Annos)
Article II. Bill of Rights

C.R.S.A. Const. Art. 2, § 10

§ 10. Freedom of speech and press

Currentness

No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.

Notes of Decisions (523)

C. R. S. A. Const. Art. 2, § 10, CO CONST Art. 2, § 10
Current with amendments adopted through the Nov. 4, 2014 General Election.

End of Document

West's Colorado Revised Statutes Annotated
Constitution of the State of Colorado [1876] (Refs & Annos)
Article II. Bill of Rights

C.R.S.A. Const. Art. 2, § 31

§ 31. Marriages--valid or recognized

Currentness

Only a union of one man and one woman shall be valid or recognized as a marriage in this state.

Credits
Added by Initiative Nov. 7, 2006, eff. upon proclamation by the governor, Dec. 31, 2006.

Notes of Decisions (1)

C. R. S. A. Const. Art. 2, § 31, CO CONST Art. 2, § 31
Current with amendments adopted through the Nov. 4, 2014 General Election.

End of Document

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Colorado Revised Statutes Annotated
Title 24. Government--State
Principal Departments
Article 34. Department of Regulatory Agencies
Part 6. Discrimination in Places of Public Accommodation (Refs & Annos)

C.R.S.A. § 24-34-601

§ 24-34-601. Discrimination in places of public accommodation--definition

Effective: August 6, 2014
Currentness

(1) As used in this part 6, “place of public accommodation” means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor. “Place of public accommodation” shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.

(2)(a) It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.

(b) A claim brought pursuant to paragraph (a) of this subsection (2) that is based on disability is covered by the provisions of section 24-34-802.

(2.5) It is a discriminatory practice and unlawful for any person to discriminate against any individual or group because such person or group has opposed any practice made a discriminatory practice by this part 6 or because such person or group has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to this part 6.

(3) Notwithstanding any other provisions of this section, it is not a discriminatory practice for a person to restrict admission to a place of public accommodation 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.

Credits

Repealed and reenacted by Laws 1979, H.B.1355, § 3. Amended by Laws 1989, S.B.13, § 11; Laws 1993, S.B.93-242, § 65, eff. July 1, 1993; Laws 2008, Ch. 341, § 6, eff. May 29, 2008; Laws 2014, Ch. 250, § 7, eff. Aug. 6, 2014.

Notes of Decisions (9)

C. R. S. A. § 24-34-601, CO ST § 24-34-601
Current through the First Regular Session of the 70th General Assembly (2015).

End of Document

West's Colorado Administrative Code
Title 700. Department of Regulatory Agencies
708. Civil Rights Commission
3 CCR 708-1. State of Colorado Civil Rights Commission Rules and Regulations
Introduction

3 CCR 708-1:10.2
3 Colo. Code Regs. 708-1:10.2Alternatively cited as 3 CO ADC 708-1

708-1:10.2. Definitions.

Currentness

(A) “Administrative Law Judge” (ALJ) means a hearing officer appointed by the Commission through the Office of Administrative Courts of the Department of Personnel and Administration or a hearing officer appointed by the Governor at the request of the Commission, for purposes of conducting an administrative hearing authorized by the Law.

(B) “Auxiliary Aids” means services or devices that enable persons with disabilities to have an equal opportunity to participate in, and enjoy the benefits of public accommodations, public entities, and other activities, programs, employment, housing, and services. Such services or devices may include, but are not limited to, the following: qualified readers, qualified interpreters, service animals, breathing equipment, wheelchairs, walkers, and orthopedic appliances.

(C) “Bona Fide Occupational Qualification” (BFOQ) means employment qualifications that employers are allowed to consider while making decisions about hiring and retention of employees. The qualification should relate to an essential job duty and is necessary for operation of the particular business.

(D) “Charging Party” or “Complainant” means a person alleging a discriminatory or unfair practice prohibited by the Law.

(E) “Commission” means the Colorado Civil Rights Commission created by § 24-34-303, C.R.S.

(F) “Commissioner” means a duly appointed member of the Commission.

(G) “Covered Entity” means any person, business, or institution required to comply with the anti-discrimination provisions of the Law.

(H) “Creed” means all aspects of religious beliefs, observances or practices, as well as sincerely-held moral and ethical beliefs as to what is right and wrong, and/or addresses ultimate ideas or questions regarding the meaning of existence, as well as the beliefs or teachings of a particular religion, church, denomination or sect. A creed does not include political beliefs, association with political beliefs or political interests, or membership in a political party.

(I) “Days” means calendar days.

(J) “Director” means the director of the Colorado Civil Rights Division, which office is created by § 24-34-302, C.R.S.

(K) “Discriminatory or Unfair Practice” means one or more acts, practices, commissions or omissions prohibited by the Law.

(L) “Division” means the Colorado Civil Rights Division, created by § 24-34-302, C.R.S.

(M) “Domestic Service” means the performance of tasks such as housecleaning, cooking, childcare, gardening and personal services by an individual in a private household.

(N) “Employee,” within the meaning of § 24-34-401(2), C.R.S., means any person who performs services for remuneration on behalf of an employer. An “employee” does not include the following:

(1) A person in the domestic service of any person;

(2) An independent contractor, as provided in Rule 75;

(3) A non-paid or uncompensated volunteer of a nonprofit organization or governmental agency;

(4) A partner, officer, member of a board of directors, or major shareholder, however if the individual is subject to the organization's direction and control and/or does not participate in managing the organization, then the individual shall be considered an employee;

(5) An elected governmental official or a person appointed to serve the remainder of a term of an elected governmental official; or

(6) A religious minister, whether lay or ordained, or other employee of a church or religious organization whose job duties are primarily of a ministerial, religious, spiritual or non-secular nature.

(O) “Employer” shall have the meaning set forth in § 24-34-401, C.R.S., and references in these rules to “employers” shall include employment agencies and labor organizations.

(P) “Facility” means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(Q) “Gender identity” means an innate sense of one's own gender.

(R) “Gender expression” means external appearance, characteristics or behaviors typically associated with a specific gender.

(S) “Investigation” means the systematic inquiry into the allegations of a charge by the Division and its Staff pursuant to its authority under 24-34-302 and 306.

(T) “Law” means Parts 3 through 7 of Article 34 of Title 24, of the Colorado Revised Statutes. Whenever these Rules refer to a provision of the Law or any other statutory or regulatory provision, the reference shall mean the current statutory or regulatory provision in effect, as hereinafter amended, revised, or re-codified.

(U) “Mail” means first class, postage pre-paid, United States mail, facsimile, or electronic mail.

(V) “Major life activities” means life functions, including, but not limited to, the following: caring for one's self, performing manual tasks, walking, standing, seeing, hearing, speaking, breathing, eating, sleeping, procreating, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include major bodily functions, including, but not limited to the following: functions of the immune system; cell growth; digestive, bladder and bowel functions; neurological and brain functions; respiratory and circulatory functions; endocrine functions; and reproductive functions.

(W) “Mental impairment” means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term “mental impairment” includes, but is not limited to, such diseases and conditions as the following: emotional illness, anxiety disorders, mood disorders, post-traumatic stress disorder, depression, schizophrenia, and bipolar disorder.

(X) “National origin” refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.

(Y) “Party” or “parties” means the Charging Party/Complainant and/or the Respondent.

(Z) “Petitioner” means a party who applies to the appropriate court for judicial review or enforcement of final agency action or a party seeking declaratory relief under these Rules.

(AA) “Physical impairment” means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems including, but not limited to, the following: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. The term “physical impairment” also includes, but is not limited to, such diseases and conditions as the following: orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, cancer, heart disease, diabetes, and human immunodeficiency virus (HIV) infection.

(BB) “Religion” means all aspects of religious observance, belief and practice. A person does not have to be a member or follower of a particular organized religion, sect or faith tradition to have a religion.

(CC) “Respondent” means any person, agency, organization, or other entity against whom a charge is filed pursuant to any provisions of the Law.

(DD) “Sexual orientation,” means a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person's perception thereof.

(EE) “Substantially limits” means the inability to perform a major life activity that most people in the general population can perform, or a significant restriction as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which most people in the general population can perform that same major life activity.

(FF) “Staff” means the Director and all persons employed to carry out the functions and duties of the Division pursuant to § 24-34-302, C.R.S.

(GG) “Transgender” means having a gender identity or gender expression that differs from societal expectations based on gender assigned at birth.

Credits
Amended Dec. 15, 2014.

Current through CR, Vol. 38, No. 18, September 25, 2015.

3 CCR 708-1:10.2, 3 CO ADC 708-1:10.2

End of Document

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Charge No. P20130008X

Charlie Craig
1401 E. Girard Pl , #9-135
Englewood, CO 80113 — Charging Party

Masterpiece Cakeshop
3355 S. Wadsworth Blvd.
Lakewood, CO 80227 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is sufficient evidence to support the Charging Party's claim of denial of full and equal enjoyment of a place of public accommodation based on his sexual orientation. As such, a Probable Cause determination hereby is issued.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about July 19, 2012, the Respondent, a place of public accommodation, denied him the full and equal enjoyment of a place of accommodation on the basis of his sexual orientation (gay). The Respondent avers that its standard business practice is to deny service to same-sex couples based on religious beliefs.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P 2d 288 (Colo. 2000).

The Respondent is a bakery that provides cakes and baked goods to the public, and operates within the state of Colorado.

The Charging Party states that on or about July 19, 2012, he visited the Respondent's place of business for the purpose of ordering a wedding cake with his significant other, David Mullins ("Mullins"), and his mother Deborah Munn ("Munn"). The Charging Party and his partner planned to travel to Massachusetts to marry and intended to have a wedding reception in Denver upon their return. The Charging Party and his significant other were attended to by the Respondent's Owner, Jack Phillips ("Phillips") The Charging Party asserts that while viewing photos of the available wedding cakes, he informed the owner that the cake was for him and his significant other. The Charging Party states that in response, Phillips replied that his standard business practice is to deny service to same-sex couples based on his religious beliefs. The Charging Party states that based on Phillips response and refusal to provide service, the group left the Respondent's place of business.

The Charging Party states that on July 20, 2012, in an effort to obtain more information as to why her son was refused service, Munn telephoned Phillips. During this telephone conversation, Phillips stated that "because he is a Christian, he was opposed to making cakes for same-sex weddings for any same-sex couples."

The record reflects that Phillips subsequently commented to various news organizations, that he had turned approximately six same-sex couples away for this same reason. The Respondent has not argued that it is a business that is principally used for religious purposes.

Respondent Owner Jack Phillips ("Phillips") states that on July 19, 2012, the Charging Party, Mullins, and Munn visited his bakery and stated that they wished to purchase a wedding cake. Phillips asserts that he informed the Charging Party that he does not create wedding cakes for same-sex weddings. According to Phillips, this interaction lasted no more than 20 seconds. Phillips states that the Charging Party, Mullins, and Munn subsequently exited the Respondent's place of business. The Respondents avers that on July 20, 2012, during a conversation with Munn, he informed her that he refused to create a wedding cake for her son based on his religious beliefs and because Colorado does not recognize same-sex marriages.

The Respondent states that the aforementioned situation has occurred on approximately five or six past occasions. The Respondent contends that in those situations, he advised potential customers that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. Respondent owner Phillips adds that he told the Charging Party and his

partner that he could create birthday cakes, shower cakes, or any other cakes for them. The Respondent asserts that this decision rested in part based on the fact that the state of Colorado does not recognize same sex marriages.

In an affidavit provided by the Charging Party during the Division's investigation, Stephanie Schmalz ("S. Schmalz") states that on January 16, 2012, she and her partner Jeanine Schmalz ("J. Schmalz") visited the Respondent's place of business to purchase cupcakes for their family commitment ceremony. S. Schmalz states that when she confirmed that the cupcakes were to be part of a celebration for her and her partner, the Respondent's female representative stated that she would not be able to place the order because "the Respondent had a policy of not selling baked goods to same-sex couples for this type of event." Following her departure from the Respondent's place of business, S. Schmalz telephoned the Respondent to clarify its policies. During this telephone conversation, S. Schmalz learned that the female representative was an owner of the business and that it was the Respondent's stated policy not to provide cakes or other baked goods to same-sex couples for wedding-type celebrations.

S. Schmalz subsequently posted a review on the website Yelp describing her experiences with the Respondent. An individual identifying himself as "Jack P. of Masterpiece Cakeshop" posted a reply to Schmalz's review, in which he stated that "...a wedding for [gays and lesbians] is something that, so far, not even the State of Colorado will allow" and did not dispute that he refuses to serve gay and lesbian couples planning weddings or commitment celebrations.

S. Schmalz states that after learning of the Respondent's policy, she later contacted the Respondent's place of business and spoke to Phillips. During this conversation, S. Schmalz claimed to be a dog breeder and stated that she planned to host a "dog wedding" between one of her dogs and a neighbor's dog. Phillips did not object to preparing a cake for S. Schmalz's "dog wedding."

In an affidavit provided by the Charging Party during the Division's investigation, Samantha Saggio ("Saggio") states that on May 19, 2012, she visited the Respondent's place of business with her partner, Shana Chavez ("Chavez") to look at cakes for their planned commitment ceremony. Saggio states that upon learning that the cake would be for the two women, the Respondent's female representative stated that the Respondent would be unable to provide a cake because "according to the company, Saggio and Chavez were doing something 'illegal.'"

In an affidavit provided by the Charging Party during the Division's investigation, Katie Allen ("Allen") and Alison Sandlin ("Sandlin") state that on August 6, 2005, they visited the Respondent's place of business to taste cakes for their planned commitment ceremony. Allen states that upon learning of the women's intent to wed one another, the Respondent's female representative stated, "We can't do it then" and explained that the Respondent had established a policy of not taking cake orders for same-sex weddings, "because the owners believed in the word of Jesus."

Allen and Sandlin state that they later spoke directly with Phillips. During this conversation, Phillips stated that "he is not willing to make a cake for a same-sex commitment ceremony, just as he would not be willing to make a pedophile cake."

Discriminatory Denial of Full and Equal Enjoyment of Services – Sexual Orientation (gay)

To prevail on a claim of discriminatory denial of full and equal enjoyment of services, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought goods, services, benefits or privileges from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied a type of service usually offered by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his sexual orientation. The Charging Party visited the Respondent's place of business for the purpose of ordering a wedding cake for his wedding reception. The evidence indicates that the Charging Party and his partner were otherwise qualified to receive services or goods from the Respondent's bakery. During this visit, the Respondent informed the Charging Party that his standard business practice is to deny baking wedding cakes to same-sex couples based on his religious beliefs. The evidence shows that on multiple occasions, the Respondent turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. The Respondent's representatives stated that it would be unable to provide a cake because "according to the company, [the potential same-sex customers] were doing something 'illegal,'" and "because the owners believed in the word of Jesus." The Respondent indicates it will bake other goods for same sex couples such as birthday cakes, shower cakes or any other type of cake, but not a wedding cake. As such, the evidence shows that the Respondent refused to allow the Charging Party and his partner to patronize its business in order to purchase a wedding cake under circumstances that give rise to an inference of unlawful discrimination based on the Charging Party's sexual orientation.

Based on the evidence contained above, I determine that the Respondent has violated C.R.S. 24-34-402, as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(II), as re-enacted, the Parties hereby are ordered by the Director to proceed to attempt amicable resolution of these charges by compulsory mediation. The Parties will be contacted by the agency to schedule this process.

On Behalf of the Colorado Civil Rights Division

Steven Chavez, Director
or Authorized Designee

3/5/2013
Date

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, CO 80202	
CHARLIE CRAIG and DAVID MULLINS, Complainants, v. **MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS,** Respondents.	▲ COURT USE ONLY ▲
Attorneys for Respondents: Nicolle H. Martin, No. 28737 7175 W. Jefferson Avenue, Suite 4000 Lakewood, Colorado 80235 303.332.4547 nicolle@centurylink.net Natalie L. Decker, No. 28596 The Law Office of Natalie L. Decker, LLC 26 W. Dry Creek Cr., Suite 600 Littleton, CO 80120 (O) 303-730-3009 natalie@denverlawsolutions.com Michael J. Norton, No. 6430 Alliance Defending Freedom 7951 E. Maplewood Avenue, Suite 100 Greenwood Village, CO 80111 (O) 720-689-2410 mjnorton@alliancedefendingfreedom.org	Case Number: 2013-0008
BRIEF IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF JACK PHILLIPS'S CROSS MOTION FOR SUMMARY JUDGMENT	

of Christ's relationship with the Church, is simply incompatible with Jack's sincerely held religious beliefs about God's design for marriage and its importance. (Resp't Aff. ¶¶ 21, 67-68). He could not do so without violating his conscience and becoming himself guilty of displeasing God, something that, because of his religious convictions, he tries his best not to do.

2. Creating a Celebratory Cake Promoting and Endorsing a Same-Sex Marriage Would Force Jack Phillips to Engage In Speech He Does Not Want To Speak and Communicate a Message He Finds Objectionable.

Additionally, Jack declined to create a cake celebrating a same-sex marriage because of the message it would communicate. Jack does not hate gay people or harbor any ill will toward them, in fact he believes that God loves *everyone equally*. Nor does Jack oppose same-sex marriage because he wants to deprive gay couples the happiness and benefits marriage brings. Rather, as already explained, Jack has sincerely held religious beliefs that God created and intended marriage to be the union of one man and one woman in order to demonstrate important truths about Christ's relationship with the Church. Consequently, Jack does not want to create a message that promotes and endorses a different view of marriage.

There can be no question that wedding cakes are communicative. There is a reason that those getting married generally choose to celebrate with a wedding cake as opposed to, say, a lasagna. Wedding cakes have come to be understood as celebrating the joyous event of marriage. Wedding cakes communicate a message of congratulations, honor to the union of the couple and a message to all that we are married.

Cake making and decorating is its own form of art and communication.[4] Cake making dates back to at least 1175 B.C.[5] Of any form of cake, wedding cakes have the longest and richest history.

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[4] *See* Toba Garrett, *Professional Cake Decorating*, 2d. edition (2012)(discusses the history of cakes and cake decorating, and provides tips for "cake artists"); Toba Garrett, *A Professional Approach: Wedding Cake Art and Design* (2010) ("Cake decorating is a labor of love and combines baking and fine art in a

In modern Western culture, the wedding cake is a central piece of the wedding and is traditionally served at the reception celebrating the union of the couple.[6] How important is a wedding cake? It is so important that one author suggests, "A memorable cake is almost as important as the bridal gown in creating the perfect wedding."[7] Because they are so important to creating the right mood of celebration, wedding cakes are uniquely personal to the couple whose union is being celebrated.[8]

From the very earliest use, wedding cakes were used to communicate a message about the wedding or the marrying couple. In Roman times, small cakes were made and then crumbled over the head of the bride.[9] This "crowning of the bride", was a symbolic request for good fortune and blessings; the contents of the cake, which were foods believed to be pleasing to the gods, would cause the gods to bless the bride with abundance. Early wedding cakes were rich fruit cakes baked with vine fruits steeped in brandy.[10] These cakes were symbols which communicated wealth, fertility, happiness, longevity, and health.[11] Even the traditional use of the color white for cakes communicates it was used as a symbol of purity and virginity; in the early 19th century, when refined sugars were more expensive and more difficult to find, the white was also a symbol communicating

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way that continues to astonish admirers."); *The Essential Guide to Cake Decorating* (Jane Price, ed., 2010)("Cake decorating is a fabulous mixture of cooking and art..."); Mich Turner, *Wedding Cakes* at cover page (2009)("A memorable cake is almost as important as the bridal gown in creating the perfect wedding."); *Id.* at 11("The wedding cake should be center stage at the reception, a star in its own right."); see generally The Culinary Institute of America, *Cake Art* (2008).

[5] *The Essential Guide to Cake Decorating* 7-11 (2010).

[6] Turner, supra note 3 at 11 ("Nowadays the wedding cake...is an important and integral part of the wedding along with the wedding dress and the bride's bouquet.").

[7] Turner, supra, note 3 at cover page.

[8] *See* Toba Garrett, *Wedding Cake Art and Design* (2010) (Master decorator, Toba Garret discusses the artistic aspect of wedding cakes and the collaboration of the "cake artist" and the couple uniting; "Designing and creating a wedding cake...is challenging ... requires a great deal of skill... A wedding cake is uniquely personal because it is based on a couple's specific ideas.").

[9] *See* Turner, supra note 3 at 11.

[10] *Id.*

[11] *Id.*

wealth and status.[12] Over the years, the three-tiered round wedding cake became the traditional wedding cake as each of the round cakes were symbolic of the three rings associated with marriage. The engagement ring, the wedding ring, and the eternity ring each are represented by a tier of the three-tiered wedding cake.[13]

The wedding cakes that Jack designs and creates (Ex. 2), other celebratory cakes he creates (Ex. 3), as well as those of other cake makers (Ex4), obviously require a unique artistic talent. They are very clearly a method of communication. One need only look at the cakes themselves to immediately recognize the message that is being conveyed and the event that the cakes are celebrating. (*See* Exs. 2-4).

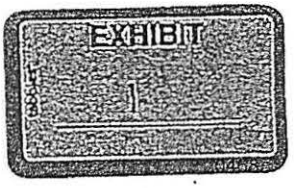
Because of this communicative nature of wedding cakes, Jack could not just bake a cake and pretend it did not mean anything. Jack knew better. He knew that the cake did, in fact, mean something. It meant that a wedding had occurred, a marriage had begun, and that the union of the couple should be celebrated. That is what a wedding cake communicates. (Resp't Aff. ¶ 46). After all, that was why the Complainants wanted a wedding cake – they wanted to celebrate their marriage. And it was that message that created the crisis of conscience for Jack.

It is important to remember, as already explained, that Jack would have declined to design and create a celebratory cake promoting same-sex marriage no matter who the customer was or what her sexual orientation might be. Jack is not interested in who his customers are attracted to or how they identify. When it comes to selling baked goods, whether a person identifies as "straight" or "gay" does not matter to him. All Jack is concerned about is that he not be forced to create and give voice to a message that conflicts with his sincerely held religious beliefs and places him in the position of displeasing his God. That is precisely why Jack declined to design and create the

[12] Turner, supra note 3 at 11.
[13] *The Essential Guide to Cake Decorating*, supra note 3 at 11.

0439

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, CO 80202	
CHARLIE CRAIG and DAVID MULLINS , Complainant, v. JACK PHILLIPS AND MASTERPIECE CAKESHOP, INC., Respondent.	▲ COURT USE ONLY ▲
Attorneys for Respondent: Nicolle H. Martin, No. 28737 7175 W. Jefferson Avenue, Suite 4000 Lakewood, Colorado 80235 303.332.4547 nicolle@centurylink.net Natalie L. Decker, No. 28596 The Law Office of Natalie L. Decker, LLC 26 W. Dry Creek Cr., Suite 600 Littleton, CO 80120 (O) 303-730-3009 natalie@denverlawsolutions.com Michael J. Norton, No. 6430 Alliance Defending Freedom 7951 E. Maplewood Avenue, Suite 100 Greenwood Village, CO 80111 (O) 720-689-2410 mjnorton@alliancedefendingfreedom.org	Case Number: 2013-0008
AFFIDAVIT OF JACK PHILLIPS	



I, JACK PHILLIPS, do hereby state the following:

1. I am a Christian.
2. I believe in Jesus Christ as my Lord and savior, and I am accountable to Him.
3. I have been a Christian for approximately thirty-five years.
4. As a follower of Jesus Christ, my main goal in life is to be obedient to Him and His teachings in all aspects of my life.
5. I own and operate Masterpiece Cakeshop, Inc.
6. Masterpiece Cakeshop, Inc. opened for business in 1993.
7. I desire to honor God through my work at Masterpiece Cakeshop, Inc.
8. The Bible instructs: "Whatever you do, in word or in deed, do all in the name of the Lord Jesus." Col. 3:17 (NIV).
9. The church I belong to believes the Bible is the inspired word of God.
10. I believe the Bible is the inspired word of God.
11. I believe the accounts contained in the Bible are literally true and its teachings and commands are authority for me.
12. I believe that God created Adam and Eve, and that God's intention for marriage is that it should be the union of one man and one woman.
13. I derive this belief from the first and second chapters of *Genesis* in the Bible, as well as other passages from the Bible, including Ephesians 5:21-32 which describes marriage as a picture of Christ's relationship with the Church.
14. The Bible states"[F]rom the beginning of creation, God made them male and female, for this reason, a man will leave his father and mother and be united with his wife and the

two will become one flesh. So they are no longer two, but one. Therefore, what God has joined together, let not man separate." Mark 10:6-9 (NIV).

15. I believe this is a quote from Jesus Christ which shows unequivocally that, in His own words, *He* regards marriage as between a man and a woman, and anything else is sinful.

16. The Bible further instructs me to "flee" or run from sinful things, and particularly those relating to sexual immorality: "Flee immorality. Every other sin that a man commits is outside the body, but the immoral man sins against his own body. Or do you not know that your body is the temple of the Holy Spirit who is in you, whom you have from God, and that you are not your own? For you have been bought with a price; therefore, glorify God in your body." 1 Corinthians 6:18, 19 (NIV)

17. In 1 Thessalonians 5:22, the Bible instructs me to "reject every kind of evil, " and Romans 1:32 says, "Although they know God's righteous decree that those who do such things deserve death, they not only continue to do these very things but also approve of those who practice them."

18. I believe the Bible commands me to avoid the very appearance of doing what is displeasing to God.

19. I believe that if I do not, I am displeasing to God and dishonoring Him.

20. I believe it is also very clear that Bible commands me to flee from sin and not to participate or encourage it in any way.

21. I believe, then, that to participate in same-sex weddings by using my gifts, time and talents would violate my core beliefs, the instructions of the Bible and displeasing to God.

22. I will not deliberately disobey and violate the commands of the sovereign God of the universe.

23. I am also aware same-sex marriage is prohibited under the Colorado law (C.R.S. § 14-2-104), as well as Article II, Section 31 of the Colorado Constitution.

24. Neither I nor my business would serve other weddings that are not legally recognized, nor will we create cakes that celebrate illegal activities.

25. If a client wanted a cake for a polygamous wedding, or a wedding for a reception for a man or woman waiting for their divorce to be finalized, but still actually married to other people, we would decline to design and create wedding cakes for such occasions.

26. Creating a bone-shaped cake for a celebration of a dog's "wedding" hosted by an *animal breeder*, while I personally don't think that this would be a prudent use of time or resources, is not religiously objectionable. It is a celebration that is not illegal, immoral or unbiblical that no one, including the animals, thinks is a legitimate marriage.

27. I have worked in bakeries for nearly 40 years, and have been decorating cakes for most of that time.

28. I believe that decorating cakes is a form of art and creative expression, and the Masterpiece Cakeshop, Inc. logo which appears in the store, on business cards, and on our advertising reflects this view.

29. Our logo is an artists' paint palate with a paintbrush and whisk.

30. Exhibit 5 is a true and accurate photograph that shows my logo. This is on display on a wall inside Masterpiece Cakeshop, Inc.

31. Exhibit 6 is a true and accurate photograph of a drawing that depicts me as an artist. This is hanging behind the counter in Masterpiece Cakeshop, Inc.

32. Exhibit 7 is a true and accurate photograph that shows the sign on the outside of Masterpiece Cakeshop, Inc.

33. Exhibit 8 is a true and correct copy of a business card from Masterpiece Cakeshop, Inc.

34. I design and create the majority of wedding cakes sold by Masterpiece Cakeshop, Inc.

35. Exhibit 2 is a true and accurate collection of photographs of weddings cakes from Masterpiece Cakeshop, Inc.

36. Exhibit 3 is a true and accurate of photographs of other cakes from Masterpiece Cakeshop, Inc., which demonstrate both the artistic nature of our cakes and that they communicate a specific message.

37. In order to design and create a wedding cake, we have a consultation with the customer(s) in order to get to know their desires, their personalities, their personal preferences and learn about their wedding ceremony and celebration. This allows me to design the perfect creation for the specific couple.

38. Exhibits 9 and 10 are true and accurate photographs that show the table at Masterpiece Cakeshop, Inc. where we consult with customers and show samples of some of our cake creations.

39. Couples may select from one of our unique creations that are on display inside the store, or they may request that I design and create something entirely different.

40. In order to design a cake, before it is actually created I usually sketch out the cake on paper.

41. I need to determine how to design the specific cake desired by the couple in a manner which will physically work, and which will accommodate the number of guests and any special features desired.

42. If the couple desires a special design or shape, for the actual wedding cake or a groom's cake, I bake a sheet cake and then sculpt the desired shape or design from the sheet cake(s).

43. Couples may also place symbolic items on the top of the cake, such as a bride and groom.

44. In addition to my creativity and artistic talent, the entire process involves a great deal of resources. The process includes the time and talent spent consulting with the customer(s), designing and sketching the cake, baking the cakes, sculpting (if necessary), making the frosting and any decorations, creating the desired colors for frosting and decorations, actually creating the cake itself and decorating it, and delivering it to the location of the wedding celebration.

45. As the creator of a wedding cake, I believe that I am an important part of the wedding celebration for the couple, and my creations are a central component of the wedding. By creating a wedding cake for the couple, I am an *active* participant and I am associated with the event.

46. A wedding cake communicates that a wedding has occurred, a marriage has begun, and the couple should be celebrated.

47. In some instances I interact with people at the weddings, particularly if the wedding ceremony and celebratory reception are held at the same venue.

48. It is common for people to come to Masterpiece Cakeshop, Inc. and ask me to create a cake or other goods for them as a result of seeing one of my wedding cakes at another wedding celebration.

49. As I have already stated, as a Christian I strive to honor God in all aspects of my life, which includes my business.

50. As a follower of Jesus, I believe it is important to treat my employees honorably and have made every effort to do so since the inception of Masterpiece Cakeshop, Inc.

51. For example, the majority of the positions that I need filled are categorized in most retail bakeries as minimum wage jobs. The other bakery owners I had talked to at the time we opened were paying minimum wage to most of their counter staff - around $6 per hour at the time. I was paying $7.50 or more to start.

52. Back at the very beginning, I wanted my people to be secure in their work and satisfied with the pay, and I continue to feel that way.

53. Over the years, I've also helped employees with personal needs beyond the work day - loaning or giving them money to help in situations when there was a need.

54. Masterpiece Cakeshop, Inc. is not open on Sundays, nor will it or its employees deliver cakes or baked goods on Sundays.

55. Masterpiece Cakeshop, Inc. is closed on Sundays in order to honor God and to allow myself and my employees to attend church.

56. Masterpiece Cakeshop, Inc. and I gladly serve people of all races, all faiths, all sexual orientations, and all walks of life, and have since the day our doors opened.

57. When the shop was opened, specific consideration was given and discussions were had in order to determine what cakes and products would be created and sold at Masterpiece Cakeshop, Inc.

58. This was done in order to ensure that God would be honored through Masterpiece Cakeshop, Inc.

59. For example, we made a decision that we would not sell any goods with alcohol in them, including coffee drinks or baked goods. This has proven to be a wise decision, since only

a few years after we opened, and just a few doors away from our shop, an Alcoholics Anonymous Club opened. If our cakes were an enticement and temptation for something that most of these people (many of whom have become good friends) are trying to control in their lives, how would we be able to love, support and help them, while at the same time promoting one of the things that has devastated many of their lives? The Bible also teaches: "Beloved, let us love one another, for love is of God and everyone that loveth is born of God and knoweth God. He that loveth not, knoweth not God, for God is love." 1 John 4:7, 8.

60. There are many other types of cakes and baked goods that I will not design or create.

61. I will not create cakes that promote anti-American or anti-family themes, a flag-burning or a cake with a hateful message (e.g., "God hates fags"), a terrorist message, a KKK celebration of an atrocity against African Americans, an atheist message such as "God is dead" or "there is no God," or even simply vulgarity or profanity on a cake.

62. While these various kinds of messages and celebrations are protected under the same Colorado Revised Statute, 24-34-601, as 'creeds' (defined as 'a set of principles or beliefs' according to the Oxford American Desk Dictionary and Thesaurus) and the Colorado and U.S. constitutions, the heart-attitude of them does not honor Christ and that is where I seek to establish my base and why I will not design or create them.

63. Additionally, I will not create or sell Halloween cakes, cookies, brownies or anything else related to this day because of my sincerely held religious beliefs.

64. I have worked in bakeries for nearly 40 years and *I am fully aware* of how lucrative these four or five weeks in late September and all of October can be. Time magazine, Business & Money section 9/26/2012, reported that, in 2012, Americans would spend an estimated

'$8 Billion on Halloween candy, pumpkins and decorations'. ***This includes cakes.*** To turn away that kind of business can cost not only an immediate revenue loss, but can also keep a customer from returning for other products throughout the year. However, I would rather take a chance on *losing that business* than to use the talents and the business that God has given me to make a 'quick buck', making and selling products in order to *make a profit* on a day that exalts witches, demons and devils.

65. The Bible teaches, in Galatians 5:20: "The acts of the sinful nature are obvious; sexual immorality, impurity and debauchery; idolatry and *witchcraft*, hatred, jealousy, fits of rage, selfish ambition, dissensions, factions and envy; drunkenness orgies and the like."

66. Similar to the above examples and for the above reasons, I do not design and create wedding cakes for same-sex weddings.

67. I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer. Conversely, I will design and create wedding cakes for the wedding of one man and one woman, regardless of the sexual orientation of the customer. If a gay person asked me to design and create a wedding cake for the wedding of a man and a woman, I would happily do so. But if a straight person asked me to design and create a wedding cake for a same-sex wedding, I would not do so. Whether the customer is gay or straight is not important to me. I don't care who anybody is attracted to and don't ask. My decision on designing and creating wedding cakes has nothing to do with the sexual orientation of the customer. It has nothing to do with the sexual orientation of anyone. It has everything to do with the nature of the wedding ceremony itself, and about my religious belief about what marriage is and whether God will be pleased with me and my work.

68. For example, a woman asked us to create a simple sheet cake with a photo transfer of two men on a cake. She advised me that it was for the men's wedding. I replied that I don't make cakes for same-sex weddings. I don't know if *she* was homosexual or not, if she was ordering the cake on her own, or if she was ordering it for the two men. To me it didn't matter whether *she* was 'straight' or not. I wasn't turning *her* away, I was rejecting *the cake* for the same sex wedding. It did not matter who was ordering it. The issue was the nature of the event and that I cannot participate in such a ceremony based on my sincerely held religious beliefs.

69. I cannot, and will not, design and create wedding cakes for a same-sex wedding regardless of the amount of money offered for such cake.

70. On or about July 19, 2012, two men and a woman came to Masterpiece Cakeshop, Inc.

71. They did not have an appointment, nor do we offer appointments.

72. We sat down at the cake consulting table.

73. The woman was not at the table at any time.

74. She was elsewhere in the store during the interaction.

75. I greeted the two men and introduced myself.

76. The men introduced themselves as "David" and "Charlie."

77. The men said that they wanted a wedding cake for "our wedding."

78. I told them that I do not create wedding cakes for same-sex weddings.

79. I told them 'I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.'

80. Charlie Craig and David Mullins each immediately got up and left the store.

81. They did not ask any questions, ask to sample anything, or engage in any discussion.

82. David Mullins yelled something about a "homophobic" cakeshop as he left the store.

83. The entire interaction lasted about 20 seconds.

84. A woman identified as Deborah Munn called the next day.

85. I advised Ms. Munn that I do not create wedding cakes for same-sex weddings because of my religious beliefs, and also stated that Colorado does not allow same-sex marriages.

86. As a follower of Jesus, and as a man who desires to be obedient to the teaching of the Bible, I believe that to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a *personal endorsement* and *participation in* the ceremony and relationship that they were entering into.

87. I would be pleased to create any other cakes or baked goods for Charlie and David, or any other same-sex couples.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Signed this 31st day of October, 2013.

Jack Phillips

EXHIBIT
17

EXHIBIT
18
tabbies

STATE OF COLORADO

CITY AND COUNTY OF DENVER

Colorado Civil Rights Commission Meeting

Held on July 25, 2014

Colorado State Capitol

200 East Colfax Avenue, Old Supreme Court Chambers

In re: CHARLIE CRAIG and DAVID MULLINS v. MASTERPIECE CAKESHOP, INC.

Case No: P20130008X, CR2013-0008

This transcript was taken from an audio recording by Katherine A. McNally, Certified Transcriber, CET**D-323.

ARIZONA REPORTING SERVICE, INC.
Audio Transcriptions
Suite 502
2200 North Central Avenue
Phoenix, Arizona 85004-1481

discriminating against gay couples, because I mean, by the very definition, when two people of the same sex want to get married, it tells me that they are of a certain sexual orientation. So that argument, again, fails.

Go ahead.

FEMALE SPEAKER: Well, I just want to point out that this -- this case is really not about same sex marriage. It's -- it's about a couple -- it's just about a gay couple that wanted a cake to celebrate a life event in their life.

FEMALE SPEAKER: Um-hmm.

FEMALE SPEAKER: That doesn't really -- it could have been a civil union. It could have been a -- you know, let's wrap, you know, ribbon around a tree and -- and -- and say that we hope, you know, the world gets to be a better place with us in it as a couple. So it's not -- I mean, I think there's some rhetoric that this is a case about same sex marriage. Well, it's really not. It's really about a case about denial of service.

FEMALE SPEAKER: You -- yeah, you're exactly right --

MALE SPEAKER: Um-hmm.

FEMALE SPEAKER: -- Commissioner Hess.

I would also like to reiterate what we said in

the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be -- I mean, we -- we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to -- to use their religion to hurt others. So that's just my personal point of view.

THE CHAIRMAN: Okay. Any other comments?

Okay. So there's a motion on the floor to deny the respondent's Motion for Stay of our final order. And all those in favor, please signify by saying aye.

(A chorus of ayes.)

THE CHAIRMAN: Those opposed?

Any abstentions?

Therefore the Commission denies the respondent's motion for a stay of our final order.

(Conclusion of audio at 27:54.1.)

* * * * *

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

Charge No. P20140069X

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104 Charging Party

Azucar Bakery
1886 S. Broadway
Denver, CO 80210 Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is insufficient evidence to support the Charging Party's claims of unequal treatment and denial of goods or services based on creed. As such, a **No Probable Cause** determination hereby is issued.

The Division finds that the Respondent did not discriminate based on the Charging Party's creed. Instead, the evidence reflects that the Respondent declined to make the Charging Party's cakes, as he had envisioned them, because he requested the cakes include derogatory language and imagery. The evidence demonstrates that the Respondent would deny such requests to any customer, regardless of creed.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about March 13, 2014, he was treated unequally and denied goods or services in a place of public accommodation based on his creed, Christianity. The Respondent denies the allegations of discrimination and avers that the requested cake by the Charging Party was denied solely on the basis that the writing and imagery were " hateful and offensive".

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof,

then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery operating within the State of Colorado.

The Charging Party visited the Respondent's store on or about March 13, 2014, and was met by Pastry Chef Lindsay Jones ("Jones") (Christian). The Charging Party asked Jones for a price quote on two cakes made in the shape of open Bibles. The Charging Party requested that one of the cakes include an image of two groomsmen, holding hands in front of a cross, with a red "X" over the image. The Charging Party also requested that each cake be decorated with Biblical verses. On one of the cakes, he requested that one side read "God hates sin. Psalm 45:7" and on the opposite side of the cake "Homosexuality is a detestable sin. Leviticus 18:2." On the second cake, which he requested include the image of the two groomsmen with a red "X" over them, the Charging Party requested that it read: "God loves sinners," and on the other side "While we were yet sinners Christ died for us. Romans 5:8." The Charging Party did not state that the cakes were intended for a specific purpose or event.

After receiving the Charging Party's order, Jones excused herself from the counter and discussed the order with Owner Marjorie Silva ("Silva") (Catholic) and Manager Michael Bordo ("Bordo") (Catholic). Silva came to the counter to speak with the Charging Party. Silva asked the Charging Party about his general cake request and the Charging Party explained that he wanted two cakes made to look like Bibles. The Charging Party then explained to Silva that he wanted the verses as referenced above to appear on the cakes.

Silva states that she does not recall the specific verses that the Charging Party requested, but recalls the words "detestable," "homosexuality," and "sinners." The parties dispute what occurred next. The Charging Party alleges that Silva told him that she would have to consult with an attorney to determine the legality of decorating a cake with words that she felt were discriminatory. Silva denies that she told the Charging Party that she needed to consult with

an attorney, and states that she informed the Charging Party that she would make him cakes in the shape of Bibles, but would not decorate them with the message that he requested. Silva states that she declined to decorate the cakes with the verses or image of the groomsmen and offered instead provide him with icing and a pastry bag so he could write or draw whatever message he wished on the cakes himself. Silva also avers that she told the Charging Party that her bakery "does not discriminate" and "accept[s] all humans."

Later that day, the Charging Party returned to the bakery to inquire if Silva was still declining to make the cakes as requested. Bordo states that he reiterated the bakery would bake the cakes, but would not decorate them with the requested Biblical verses or groomsmen. The Charging Party asked Bordo if "he consider[ed] not baking [his] cake discrimination against [him] as a Christian," to which Bordo responded "no." The Charging Party then left the bakery.

The Charging Party maintains that he did not ask the Respondent or its employees to agree with or endorse the message of his envisioned cakes.

The Respondent avers that the Charging Party's request was not accommodated because it deemed the design and verses as discriminatory to the gay, lesbian, bisexual, and transgender community. The Respondent further states that "in the same manner [it] would not accept [an order from] anyone wanting to make a discriminatory cake against Christians, [it] will not make one that discriminates against gays." The Respondent states that it welcomes all customers, including the Charging Party, regardless of their protected class.

The evidence demonstrates that the Respondent specializes in cakes for various occasions, including weddings, birthdays, holidays, and other celebrations. On the Respondent's website, there are images of cakes created for customers in the past. There are numerous cakes decorated with Christian symbols and writing. Specifically, in the category of "Baby Shower and Christening Cakes" there are images of three cakes depicting the Christian cross, two of which include the words "God Bless" and one inscribed with "Mi Bautizo" (Spanish for "my baptism"). There is also an image of a wedding cake created by the Respondent depicting an opposite sex couple embracing in front of a Christian cross. The Respondent's website also provides that the bakery will make cakes "for every season of the year," including the Christian holidays of Easter and Christmas.

The Respondent states that it has previously denied cake requests due to business constraints, such as inability to meet customer deadlines due to high demand, but maintains that it would deny any requests deemed "offensive" or "hateful."

Comparative data reflects that the Respondent employs six persons, of whom three are Catholic and three are non-Catholic Christian. The record reflects that, in an average year, the Respondent produces between 60 and 80 cakes with Christian themes and/or symbolism.

Unequal Treatment

To prevail on a claim of discriminatory denial of equal treatment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified

recipient of the goods and services of the Respondent; and (4) the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Charging Party alleges that the Respondent treated him differently than persons of non-Christian creed by "demeaning his beliefs." There is insufficient evidence to demonstrate the Respondent treated the Charging Party differently than customers outside of his protected class.

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class (2) the Charging Party sought services or goods from the Respondent; (3) the Charging party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Respondent was a qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Respondent denied the Charging Party's request to make cakes that included the Biblical verses and an image of groomsmen with a red "X" over them. The circumstances do not give rise to an inference that the Respondent denied the Charging Party goods or services based on his creed. Indeed, the evidence demonstrates that the Respondent would have made a cake for the Charging Party for any event, celebration, or occasion regardless of his creed. Instead, the Respondent's denial was based on the explicit message that the Charging Party wished to include on the cakes, which the Respondent deemed as discriminatory. Additionally, the evidence demonstrates that the Respondent regularly creates cakes with Christian themes and/or symbolism, which are presumably ordered by Christian customers. Finally, the Respondent avers that it would similarly deny a request from a customer who requested a cake that it deemed discriminatory towards Christians.

Based on the evidence contained above, I determine that the Respondent has not violated C.R.S. 24-34-601(2), as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(I)(A) and Rule 10.6(A)(1) of the Commission's Rules of Practice and Procedure, the Charging Party may appeal the dismissal of this case to the Commission within ten (10) days, as set forth in the enclosed form.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or

b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(l)].

On Behalf of the Colorado Civil Rights Division

Jennifer McPherson, Interim Director
Or Authorized Designee

3/24/2015
Date

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

Charge No. P20140070X

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104 — Charging Party

Le Bakery Sensual, Inc.
300 E. 6th Ave.
Denver, CO 80203 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is insufficient evidence to support the Charging Party's claims of unequal treatment and denial of goods or service based on creed. As such, a **No Probable Cause** determination hereby is issued.

The Division finds that the Respondent did not discriminate based on the Charging Party's creed, but instead refused to create cakes for anyone, regardless of creed, where a customer requests derogatory language or imagery.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about March 13, 2014, he was denied equal treatment and access to goods or services in a place of public accommodation based on his creed, Christianity. The Respondent denies the allegations of discrimination and avers that the cake requested by the Charging Party was denied solely on the basis that the writing and imagery were "hateful."

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in

the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery operating within the State of Colorado.

The Charging Party visited the Respondent's store on or about March 13, 2014, and was met by Owner John Spotz ("Spotz") (no religious affiliation). The Charging Party asked Spotz for a price quote on two cakes. The Charging Party requested that two sheet cakes be made to resemble open Bibles. Spotz informed the Charging Party that he "had done open Bibles and books many times and that they look amazing." The Charging Party then elaborated that on one cake, he wanted an image of two groomsmen, appearing before a cross, with a red "X" over the image. The Charging Party described the image as "a Ghostbusters symbol over the illustration to indicate that same-sex unions are un-Biblical and inappropriate." The Charging Party wanted Biblical verses on both cakes. The Charging Party showed Spotz the verses, which he had written down on a sheet of paper, and read them aloud. The verses were: "God hates sin. Psalm 45:7" "Homosexuality is a detestable sin. Leviticus 18:2" and on the cake with the image of groomsmen before a cross with a red "X", the verses: "God loves sinners" and "While we were yet sinners Christ died for us. Romans 5:8."

After the Charging Party made the request for the image of the groomsmen with the "X" over them, Spotz asked if the Charging Party was "kidding him." The Charging Party responded that his request was serious. Spotz then informed the Charging Party that he would have to decline the order as envisioned by the Charging Party because he deemed the requested cake "hateful." The Charging Party did not state to Spotz or the Division whether the cakes were intended for a specific purpose or event. The Charging Party then left the bakery, after Spotz declined to create the cakes as the Charging Party had requested.

The Charging Party maintains that he did not ask the Respondent, or its employees, to agree with or endorse the message of his envisioned cakes.

The Respondent avers that everyone, including the Charging Party, is welcome at its bakery, regardless of creed, race, sex, sexual orientation or disability. The Respondent states that its refusal to create the specific cake requested by the Charging Party was based on its policy "not [to] make a cake that is purposefully hateful and is intended to discriminate against any person's creed, race, sex, sexual orientation, disability, etc." The Respondent avers that the Charging Party's request was intended to "denigrate individuals of specific sexual orientation."

The record reflects that the Respondent specializes in making unique and intricate cakes for various occasions. The Respondent's website provides "[it] can design cakes that look like people, cars, motorcycles, houses, magazines, and just about anything you can imagine." The Respondent's website also includes images of cakes it has created for customers in the past, including cakes made to look like books and magazines. The Respondent also makes wedding cakes for both opposite sex and same sex couples, as well cakes for the Christian holidays of Christmas and Easter.

The Respondent denies that it has ever denied services or goods to customers based on their creed and/or religion.

It is the Respondent's position that production of the cake requested by the Charging Party would run afoul of C.R.S. § 24-34-701, which provides that a place of public accommodation may not "publish . . . or display in any way manner, or shape by any means or method . . . any communication . . . of any kind, nature or description that is intended or calculated to discriminate or actually discriminates against any . . . sexual orientation . . . ."

Spotz states that the only time he recalls denying a cake request was when he received a phone call in which the caller asked if he could decorate a cake with "a sexy little school girl."

Comparative data reflects that the Respondent employs four persons, of whom one is Catholic, one is Jewish, and two have no religious affiliation. The record reflects that the Respondent creates at least one Christian themed cake per month, increasing to three or four Christian themed cakes in the month of December.

Unequal Treatment

To prevail on a claim of discriminatory denial of equal treatment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; and (4) the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Charging Party alleges that the Respondent treated him differently than persons of non-Christian creed by "demeaning his beliefs." There is insufficient evidence to demonstrate the Respondent treated the Charging Party differently than other customers because of his creed.

The Charging Party's request was denied because he requested the cakes include language *and images the Respondent deemed hateful.*

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class (2) the Charging Party sought services or goods from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party sought to order two cakes from the Respondent bearing Biblical verses and imagery indicating that same-sex marriage is "un-Biblical and inappropriate." The Respondent denied the Charging Party's request to make cakes that included the requested Biblical verses and an image of groomsmen with a red "X" over them. The circumstances do not give rise to an inference that the Respondent denied the Charging Party goods or services based on his creed. Instead, the evidence demonstrates that the Respondent was prepared to create the cakes as described by the Charging Party, until he requested the specific imagery of the two groomsmen with a red "x" placed over image and the "hateful" Biblical verses. Additionally, the record reflects that the Respondent has produced cakes featuring Christian symbolism in the past, which were presumably ordered by Christian customers.

Based on the evidence contained above, I determine that the Respondent has not violated C.R.S. 24-34-601 (2), as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(I)(A) and Rule 10.6(A)(1) of the Commission's Rules of Practice and Procedure, the Charging Party may appeal the dismissal of this case to the Commission within ten (10) days, as set forth in the enclosed form.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or

b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(I)].

On Behalf of the Colorado Civil Rights Division

Jennifer McPherson, Interim Director
Or Authorized Designee

3/24/2015
Date

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

Charge No. P20140071X

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104 — Charging Party

Gateaux, Ltd.
1160 N. Speer Blvd.
Denver, CO 80204 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is insufficient evidence to support the Charging Party's claims of unequal treatment and denial of goods or services based on creed. As such, a **No Probable Cause** determination hereby is issued.

The Division finds that the Respondent did not discriminate based on the Charging Party's creed, but instead refused to create cakes for anyone, regardless of creed, where a customer requests derogatory language or imagery.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about March 13, 2014, he was denied equal treatment and access to goods or services in a place of public accommodation based on his creed, Christianity. The Respondent denies the allegations of discrimination and avers that the cake order requested by the Charging Party was denied because the cakes included what was deemed to contain "offensive" or "derogatory" messages and imagery. In addition, the Respondent was uncertain whether it could technically create the cakes as described by the Charging Party.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof,

then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery operating within the State of Colorado.

The Charging Party visited the Respondent's store on or about March 13, 2014, and was met by Manager Michelle Karmona ("Karmona"). The Charging Party asked Karmona for a price quote on two cakes. The Charging Party requested that two sheet cakes be made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. The Charging Party requested that one of the cakes include an image of two groomsmen, holding hands, with a red "X" over the image. On one cake, he requested that one side read "God hates sin. Psalm 45:7" and on the opposite side of the cake "Homosexuality is a detestable sin. Leviticus 18:2." On the second cake, with the image of the two groomsmen covered by a red "X," the Charging Party requested that it read: "God loves sinners" and on the other side "While we were yet sinners Christ died for us. Romans 5:8." The Charging Party did not state to the Respondent or the Division whether the cake was intended for a specific purpose or event.

The parties dispute the events that occurred next. The Charging Party alleges that Karmona initially indicated that the Respondent would be able to make the Bible shaped cakes, but once she read the Biblical verses, she excused herself from the counter. The Charging Party further alleges that Karmona returned a short time later, informing him that she had spoken with the Respondent's Owner, Kathleen Davia ("Davia") (Catholic). The Charging Party claims that at this time Karmona informed him that the Respondent would bake the cakes, but would not include such a "strong message." The Respondent denies that this occurred, claiming instead that the Charging Party had indicated that he wanted the groomsmen to be three-dimensional figurines with a "Ghostbusters X" over the figures. Karmona felt the Respondent would be unable to accommodate the request as described by the Charging Party, based on "technical capabilities." The Respondent claims that the Charging Party was told that the

Bible-shaped cakes, with the Biblical verses, *sans* the groomsmen figurines and "Ghostbusters X," could be made.

The Respondent avers that, as with all customers, the Charging Party was asked to elaborate as to the purpose of the cakes, how he wished to present it, and how he would use it. The Charging Party would not provide an explanation to the Respondent. The Respondent alleges that it was the Charging Party's refusal to elaborate that left it with the impression that it would not be able to produce the cakes as requested by the Charging Party. The Respondent avers that it consistently requests that customers provide an image for them to replicate when it is something the Respondent does not "stock." For example, the Respondent avers that a customer requesting a cake with the image of a popular cartoon character can easily be created; however, when a customer requests a specific image without a photo reference or elaboration of the image, the Respondent will decline the request. Karmona then referred the Charging Party to another bakery with the belief that that bakery would be better suited to create the cakes as envisioned by the Charging Party.

The Respondent does not have a specific policy regarding the declination of a customer request, but states that the employee who receives the order also decorates the cake. It is the Respondent's position that, based on its individual employees' pastry knowledge, experience, and qualifications, they are best able to determine whether they have the ability to create the cake that a customer requests. Therefore, in the case of the Charging Party's request, Karmona determined that she would be unable to create the cakes as the Charging Party described.

The Respondent states that it has previously denied customer requests based on technical requirements, including inability to create the requested image, and requests for buttercream iced cakes where the Respondent maintained a fondant decorated cake would be preferable. Additionally, the Respondent states that it has denied customer requests for cakes that included crude language such as "eat me" or "ya old bitch" or "naughty images," on the basis that the imagery and messages were not what the Respondent wished to represent in its products. The Respondent's other reasons for declining customers' request include: availability of the product, insufficient time to create the cake requested, and scheduling conflicts.

The Charging Party avers that he did not ask the Respondent, or any of its employees, to agree with or endorse the message of his envisioned cakes.

Comparative data indicates that the Respondent employs six persons, of whom two are non-Catholic Christian, two are Agnostic, one is Catholic, and one is Atheist. The record reflects that the Respondent regularly creates Christian themed cakes and pastries, including items for several Catholic and non-Catholic Christian church events. Additionally, the evidence demonstrates that they have produced a number of cakes with Christian imagery and symbolism during the relevant time period.

The Respondent states that the Charging Party is welcome to return to the bakery.

Unequal Treatment

To prevail on a claim of discriminatory denial of equal treatment, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought the goods and services of the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; and (4) the Charging Party was treated differently by the Respondent than other individuals not of his/her protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party visited the Respondent and sought two cakes bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Charging Party alleges that the Respondent treated him differently than persons outside of his protected class by "demeaning his beliefs." The evidence demonstrates that the Respondent attempted to engage the Charging Party in a dialogue regarding the cakes in more detail, which the Charging Party declined. There is insufficient evidence to demonstrate that the Respondent treated the Charging Party differently based on his creed. The evidence demonstrates that the Respondent would not create cakes with wording and images it deemed derogatory. The Respondent has denied other customers request for derogatory language without regard to the customer's creed.

Denial of Service

To prevail on a claim of discriminatory denial of goods, services, benefits, or privileges, the evidence must show that: (1) the Charging Party is a member of a protected class (2) the Charging Party sought services or goods from the Respondent; (3) the Charging arty is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied services or goods by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his creed, Christianity. The Charging Party was a qualified recipient of the goods and services of the Respondent. The Charging Party visited the Respondent and sought two cakes bearing Biblical verses and imagery indicating that same-sex marriage is, in his words "un-Biblical and inappropriate." The Respondent denied the Charging Party's request to make cakes that included the Biblical verses and an image of groomsmen with a red "X" over them. The circumstances do not give rise to an inference that the Respondent denied the Charging Party goods or services based on his creed. Instead, the evidence suggests that based on the Respondent's understanding of the Charging Party's request, it would be unable to create the cake that he envisioned. The record reflects that the Respondent has denied customer requests for similar reasons. Additionally, the evidence demonstrates that the Respondent regularly produces cakes and other baked goods with Christian symbolism and messages, and continues to welcome the Charging Party in its bakery.

Based on the evidence contained above, I determine that the Respondent has not violated C.R.S. 24-34-601(2), as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(I)(A) and Rule 10.6(A)(1) of the Commission's Rules of Practice and Procedure, the Charging Party may appeal the dismissal of this case to the Commission within ten (10) days, as set forth in the enclosed form.

If the Charging Party wishes to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, such must be done:

a. Within ninety days of the mailing of this notice if no appeal is filed with the Colorado Civil Rights Commission or

b. Within ninety days of the mailing of the final notice of the Commission dismissing the appeal.

If Charging Party does not file an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action [CRS 24-34-306(l)].

On Behalf of the Colorado Civil Rights Division

Jennifer McPherson 3/24/2015

Jennifer McPherson, Interim Director
Or Authorized Designee

Date

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

June 30, 2015

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104

Charge Number: P20140070X; William Jack vs. Le Bakery Sensual, Inc.

Dear Mr. Jack:

This letter is to inform you that the Colorado Civil Rights Commission has reviewed your appeal. The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director's decision of no probable cause.

If you wish to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, you need to file within 90 days of the date of this mailing pursuant to CRS 24-34-306(2)(b)(I)(B & C).

Pursuant to CRS 24-34-306 (2) (b) (I) if you as the Charging Party do not file such an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action.

On behalf of the Commission

Rufina Hernández,
Director

cc: Le Bakery Sensual, Inc.
Jack Robinson

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

June 30, 2015

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104

Charge Number: P20140071X; William Jack vs. Gateaux, Ltd.

Dear Mr. Jack:

This letter is to inform you that the Colorado Civil Rights Commission has reviewed your appeal. The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director's decision of no probable cause.

If you wish to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, you need to file within 90 days of the date of this mailing pursuant to CRS 24-34-306(2)(b)(I)(B & C).

Pursuant to CRS 24-34-306 (2) (b) (I) if you as the Charging Party do not file such an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action.

On behalf of the Commission

Rufina Hernández,
Director

cc: Gateaux, Ltd.
Kathleen Davia

COLORADO
Department of
Regulatory Agencies
Colorado Civil Rights Division

1560 Broadway Street, Suite 1050
Denver, CO 80202

June 30, 2015

William Jack
4987 E. Barrington Ave.
Castle Rock, CO 80104

Charge Number: P20140069X; William Jack vs. Azucar Sweet Shop and Bakery.

Dear Mr. Jack:

This letter is to inform you that the Colorado Civil Rights Commission has reviewed your appeal. The Commission has determined that there is insufficient basis to warrant further action and has affirmed the director's decision of no probable cause.

If you wish to file a civil action in a district court in this state, which action is based on the alleged discriminatory or unfair practice that was the subject of the charge filed with the Commission, you need to file within 90 days of the date of this mailing pursuant to CRS 24-34-306(2)(b)(I)(B & C).

Pursuant to CRS 24-34-306 (2) (b) (I) if you as the Charging Party do not file such an action within the time limits specified above, such action will be barred and no State District Court shall have jurisdiction to hear such action.

On behalf of the Commission

Rufina Hernández,
Director

cc: Azucar Sweet Shop and Bakery
David Goldberg

TRANSCRIPTION OF VIDEO FILE

TITLE OF VIDEO:

AM SESSION 13CA0453, 14CA1351, 14CA1661.MP4

REGARDING:

DAVID MULLINS & CHARLIE CRAIG vs. MASTERPIECE CAKESHOP

JUDGE BERGER: Can I ask you a hypothetical question to, again, to try and explore the limits of your argument? Suppose a fine art painter advertises to the public that he or she will make oil paintings on commission, and then a patron contacts the artist and requests that the artist paint a commissioned picture that celebrates gay marriages, and the artist refuses saying, "I won't do that. That's -- I don't believe that. That would infringe upon my First Amendment rights." Does the artist violate CADA in those circumstances?

MS. MAR: Well, as an initial matter, Your Honor, we, of course, disagree that baking and selling a cake is expressive in the way that, you know, painting a portrait would be. But in the hypothetical as Your Honor had described it, I think the key question really would be whether that painter was operating as a public accommodation open to the general public, and the fact that the service provided is artistic does not change the general rule of it. If a business chooses to solicit business from the general public, it can't turn around and refuse to serve certain members of the public based on a protected characteristic. They can't have it both ways.

Now, the painter certainly could choose to operate, you know, on some other basis. They don't have to operate as a public accommodation, but if they choose

to operate as a public accommodation, then they would not be allowed to turn away customers based on a protected characteristic under CADA.

I also wanted to address the second half of Judge Taubman's question regarding the Cakeshop's offer to sell cookies and brownies to Dave and Charlie but not a wedding cake. CADA states very clearly that business owners must offer full and equal goods and services to lesbian and gay customers. In other words, a business open to the public must offer the same goods and services to all customers, regardless of sexual orientation. As I noted, no more and no less. Can't offer a limited menu or second-class service based on anyone's protected characteristic. As the Supreme Court noted in the *Elane Photography* case, if a restaurant offers a full menu to male customers, it can't refuse to serve entrees to women, even if it would still serve them appetizers. No one would seriously question that that is sex discrimination. And so too here if a business is in the business of selling wedding cakes, it can't refuse to sell that product to particular customers simply because of their sexual orientation.

Faith also does not give the Cakeshop a license to discriminate in the commercial contexts that Colorado has chosen to regulate since 1895. As the Supreme Court noted more than 30 years ago in *United States vs. Lee*, when

CERTIFICATE & DECLARATION

I, KERRY L. VIENS, CSR, certify that I was provided with a digital video recording of the above proceedings. Said video recording was transcribed by me to the best of my ability and consists of the above transcribed pages numbered pages 1-52.

Kerry L. Viens

KERRY L. VIENS
CSR NO. 11942