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SUPREME COURT, STATE OF COLORADO
1300 Broadway, Denver, CO 80210

Colorado Court of Appeals, JJ Taubman, Loeb, and Berger, Case No. 14CA1351

Petitioners: MASTERPIECE CAKE SHOP, INC., and any successor entity, and JACK C. PHILLIPS

v.

Respondents: CHARLIE CRAIG and DAVID MULLINS and COLORADO CIVIL RIGHTS COMMISSION

▲ **COURT USE ONLY** ▲

Case No.: 2015SC000738

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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/s/ Brian Lanni
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Respondent Colorado Civil Rights Commission submits the following brief in opposition to the Petition for Writ of Certiorari filed by Masterpiece Cake Shop ("Masterpiece") and Jack C. Phillips. The Commission also joins in the RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI filed by Respondents Charlie Craig and David Mullins.

ISSUES PRESENTED FOR REVIEW

Whether Masterpiece violated CADA when it refused to serve Craig and Mullins because of their sexual orientation.

Whether the act of making a wedding cake is sufficiently expressive to warrant First Amendment free speech protection.

Whether CADA is a neutral law of general applicability that does not offend the First Amendment right to free exercise.

STATEMENT OF THE FACTS AND CASE

In July of 2012, Craig and Mullins sought to purchase a cake from Phillips at Masterpiece to celebrate their same-sex wedding. Phillips refused, stating that his religious beliefs prohibited him from making a

cake celebrating a same-sex wedding. Without discussing any details of the requested cake, Craig and Mullins left Masterpiece.

Craig and Mullins filed a discrimination charge against Masterpiece with the Colorado Civil Rights Division ("CCRD"), alleging discrimination based on their sexual orientation under the Colorado Anti-Discrimination Act (CADA), §§ 24-34-301 to 804, C.R.S. (2015). The CCRD conducted an investigation and found probable cause to support the charge. The Colorado Civil Rights Commission ("Commission") then filed a formal charge of discrimination by a place of public accommodation because of orientation in violation of § 24-34-601(2), C.R.S. (2015).

The ALJ granted summary judgment in favor of Craig and Mullins, and the Commission affirmed the ALJ's order. The Commission issued a final order directing Masterpiece to alter company policy and train staff to comply with CADA, and to file quarterly compliance reports documenting all patrons who are denied service and reasons for denial.

Masterpiece sought review in the Court of Appeals. On August 13, 2015, the Court of Appeals issued an opinion affirming the Commission's order. *Mullins v. Masterpiece Cakeshop, Inc.*, 2015 COA 115 (No. 14CA1351, August 13, 2015) ("*Masterpiece I*"). Masterpiece now seeks review by this Court.

ARGUMENT

The issues presented for review are not special, important, or unique issues for which review by this Court is proper. The Court of Appeals' decisions are not in conflict with the decision of any other division, and are in accord with the Constitution, Colorado statutes, and case law including the applicable decisions of this Court. Indeed, the Court of Appeals relied heavily on U.S. Supreme Court precedent in reaching its sound conclusions. The circumstances of this case do not satisfy any of the factors identified in C.A.R. 49(a), and the petition should be denied.

I. Masterpiece's discrimination was based upon Craig and Mullins' sexual orientation and was therefore a violation of CADA.

The Court of Appeals correctly held that same-sex marriage is closely correlated to sexual orientation, and therefore correctly affirmed the ALJ's finding that Masterpiece violated CADA and discriminated against Craig and Mullins because of their sexual orientation.

A. The Court of Appeals correctly held that Masterpiece's discriminatory act was based upon Craig and Mullins's sexual orientation.

CADA provides that it is discriminatory and unlawful for a person, "directly or indirectly, to refuse, withhold from, or deny an individual … *because of* … sexual orientation … the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation …." § 24-34-601(2)(a), C.R.S. (2015) (emphasis added).

In *Tesmer v. Colo. High Sch. Activities Ass'n*, a division of the Court of Appeals held that to prevail on a CADA discrimination claim a plaintiff must show that, "but for" their membership in a protected class, they would not have been denied the full privileges of a place of

public accommodation. 140 P.3d 249, 253 (Colo. App. 2006). Membership in that class need not be the sole cause; rather, a plaintiff must show only that the discriminatory action was based *in part* on membership in a protected class. *Id.* In reaching this interpretation of CADA, the court relied on the same definition of "because of" as Masterpiece. *Id.* (citing *American Heritage Dictionary* 159 (4th ed. 1999) (defining "because of" as "on account of; by reason of")). The court also noted that this interpretation was "consistent with opinions issued by the vast majority of federal circuit courts that have addressed the issue under the ADA," and cited seven opinions in support. *Tesmer*, 140 P.3d at 253 (citations omitted).

The Court of Appeals rejected Masterpiece's attempt to cast its discriminatory act as one based on same-sex marriage and not on sexual orientation. The court properly declined to distinguish between "discrimination based on a person's status and discrimination based on conduct closely correlated with that status." *Masterpiece I* at 15, ¶ 32. In reaching this conclusion, the court relied on Supreme Court precedent. *Id.* (citing *Christian Legal Soc'y Chapter of Univ. of Cal.,*

Hastings Coll. of Law v. Martinez, 561 U.S. 661, 689 (2010) ("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."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (equating a ban on the act of interracial marriage with discrimination based on race)). The court also noted that the recent Supreme Court decision *Obergefell v. Hodges* equated laws banning same-sex marriage to discrimination on the basis of sexual orientation. 576 U.S. ___, 135 S. Ct. 2584 (2015).

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993), is readily distinguishable from this case. As the Court of Appeals noted, the federal statute at issue in *Bray* required proof of "invidiously discriminatory animus" motivating the discriminatory act; CADA has no such requirement. *Masterpiece I*, p. 19, ¶ 37. The court further noted that (1) even if CADA did require similar intent, Masterpiece's admission that the refusal to serve Craig and Mullins was "because of"

its opposition to same-sex marriage was sufficient to infer such intent, and (2) the *Bray* court itself observed that "some activities … if they are targeted, and if they also happen to be engaged in … predominately by a particular class of people, an intent to disfavor that class can be readily presumed." *Id.* at ¶¶ 38-9, citing *Bray*, 506 U.S. at 270.

Masterpiece asserts that CADA permits a business owner to decline a customer's business for many reasons, "including petty ones," and therefore his discriminatory act should not be a violation of CADA either. (*See* Petition, p. 6, ¶ 2). This argument is without merit because CADA specifically prohibits discrimination on the basis of sexual orientation, and that is what occurred in this case.

Masterpiece also asserts that the Court of Appeals erred in focusing its analysis on same-sex marriage because it is opposed not just to same-sex marriage but to other, unspecified forms of marriage as well. (*See* Petition, p. 6 ¶ 2). It is irrelevant that Masterpiece's opposition is not limited to same-sex marriage. It is the admitted opposition to same-sex marriage that is the issue here, because that opposition formed at least part of the basis for Masterpiece's

discriminatory act. That is all that CADA requires. *Tesmer*, 140 P.3d at 253.

Thus, the Court of Appeals' holding that Masterpiece violated CADA when he discriminated against Craig and Mullins on the basis of their sexual orientation was firmly grounded in substantial case law, including the CADA interpretation of another division of the Court of Appeals, a multitude of federal holdings, and several decisions of the U.S. Supreme Court.

B. The other Commission orders cited by Masterpiece are distinguishable from this case.

The Commission cases that Masterpiece cites are distinguishable from this case, and do not present any inconsistency or conflict with the Court of Appeals' decision. In those cases, three bakeries refused a Christian customer who requested cakes adorned with derogatory messages about homosexuals. The CCRD issued letters of determination finding no discrimination, and the Commission did not take any further action.

The letter of determination is not a final agency action; it "is merely preparatory to further proceedings. If the [Commission] finds that probable cause to charge discrimination exists, the rights and obligations of the parties are fixed by *de novo* proceedings…." *Demetry v. Colo. Civ. Rts Comm'n,* 752 P.2d 1070, 1072 (Colo. App. 1988). A letter of determination therefore is not a final Commission order and carries no weight whatsoever.

Moreover, in those cases the CCRD found that the bakeries' refusal was based not on the customer's membership in any protected class, but on the derogatory nature of the messages he requested. "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." *Masterpiece I*, p. 21, n. 8.

Here, Masterpiece readily admits that the refusal to serve Craig and Mullins was because of its opposition to same-sex marriage. Unlike the other bakeries, Masterpiece's discriminatory act could not have had anything to do with the message Craig and Mullins might have requested on the cake, as Masterpiece refused to serve them before any

discussion of the cake's design took place. Unlike the other bakeries, Masterpiece did not object to "creating a specific expressive item;" it objected to creating *any* wedding cake at all, regardless of its design, merely because Craig and Mullins intended to enter into a same-sex marriage. Under U.S. Supreme Court precedent, that refusal is tantamount to discrimination based upon Craig and Mullins' membership in a protected class.

It is immaterial that Masterpiece was willing to provide other products or services to Craig and Mullins. Masterpiece fails to cite any authority or support for the assertion that this willingness somehow negates a violation of CADA. As the Court of Appeals noted, "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." *Masterpiece I*, p. 20, ¶ 40.

The Court of Appeals' decision is entirely consistent with these other cases and the Commission's interpretation of CADA. The Court of Appeals clearly held that CADA prohibits discrimination on the basis of

sexual orientation, and these cases do nothing to cloud or contradict that holding.

C. The fact that Colorado law did not, at the time, recognize same-sex marriage has no bearing on whether Masterpiece violated CADA.

Masterpiece asserts that its discriminatory act could not have violated CADA, because Colorado did not recognize same-sex marriage at the time. Masterpiece fails to cite authority in support of this argument. CADA has prohibited discrimination on the basis of sexual orientation since 2008. *See* § 24-34-601, C.R.S. (2008); CO SB 08-200.

II. The act of making a wedding cake is not sufficiently expressive to warrant First Amendment protection.

Compliance with CADA does not compel Masterpiece to express a specific message, and therefore does not present a constitutional issue.

The First Amendment prohibits the government from telling people what they must say. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). This prohibition extends not just to speech but to expressive conduct. *Tex. v. Johnson*, 491 U.S. 397, 404 (1989). For this First Amendment protection to apply

to conduct, however, the conduct must be "inherently expressive;" it is not enough that the "person engaging in the conduct intends thereby to express an idea." *Rumsfeld*, 547 U.S. at 65-66. The U.S. Supreme Court has found conduct inherently expressive when "[a]n intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it." *Spence v. Wash.*, 418 U.S. 405, 410-11 (1974).

The Court of Appeals correctly applied this standard and concluded that Masterpiece's compliance with CADA would not, in great likelihood, send a particularized message of celebration that reasonable observers would understand and attribute to Masterpiece. A commercial bakery's mere act of making a wedding cake does not convey a celebratory message about same-sex marriage, and to the extent that an observer would understand it as a celebratory message, that message is more likely to be attributed to the customer. Masterpiece, a business, creates cakes and other baked goods that are undoubtedly intended for a wide variety of events and occasions – no

reasonable observer would attribute a message of approval or disapproval on the part of Masterpiece. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 68 (N.M. 2013) ("While photography may be expressive, the operation of a photography business is not.").

Substantial case law supports this conclusion. *See, e.g.*, *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. ___, 131 S.Ct. 2343, 2350 (2011) (a legislator's vote is not an expressive communication subject to First Amendment protection and "symbolizes nothing"); *Rumsfeld*, 547 U.S. at 65 (allowing military recruiters to operate on campus does not convey school's endorsement of military policy); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841-42 (1995) (state university's funding of religious student publication does not convey an endorsement of the message therein); *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 87 (1980) (law requiring shopping center owner to allow distribution of literature did not compel speech or convey endorsement of any message).

Furthermore, the court noted that if Masterpiece is truly concerned that a celebratory message might be attributed to it, it is free

to disassociate from that message through a posted notice or disclaimer. *PruneYard*, 447 U.S. at 87. In fact, CADA *requires* that Masterpiece, as a place of public accommodation, post a notice that "summarizes the discriminatory or unfair practices prohibited by the Law." Commission Rule 20.1, 3 CCR 708-1.

Masterpiece's hypothetical in which homeowners are required to display a confederate flag is vastly removed from the circumstances of this case. There is no genuine comparison between a flag, an object which serves primarily as a symbol of endorsement, to the cake at issue here. *See Spence*, 418 U.S. at 410 ("The Court for decades has recognized the communicative connotations of the use of flags.").

Even if the Court of Appeals had found that CADA does compel speech, that speech would be "plainly incidental" to CADA's regulation of discriminatory conduct. *Rumsfeld*, 547 U.S. at 62. "[I]t 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.* (citing *Giboney* v. *Empire Storage & Ice*

Co., 336 U.S. 490, 502 (1949)). As the court noted, regulation of expressive conduct is permissible if there is a sufficiently important government interest, and if the regulation's impact on expression is no more than necessary to achieve that purpose. *Masterpiece I*, p. 31, ¶ 56 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

III. CADA is a neutral law of general applicability and therefore does not violate Masterpiece's free exercise rights.

Because CADA does not target religion but is neutral and generally applicable, it does not conflict with Masterpiece's constitutional free exercise rights.

The Free Exercise Clause of the First Amendment "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)." *Emp't Div. v., Dep't of Human Res. V. Smith*, 494 U.S. 872, 879 (1990) (internal quotations omitted). A law is neutral unless its purpose is to infringe upon or restrict practices because of their religious motivation. *Church of Lukumi Babalu Aye v. City of Hialeah*,

508 U.S. 520, 533 (1993). A law is generally applicable if it does not in effect regulate only religiously motivated conduct. *Id.* at 542-43. A valid law that is neutral and generally applicable does not offend the First Amendment, and need only be rationally related to a legitimate government interest. *Id.*

The Court of Appeals, again relying on U.S. Supreme Court precedent, correctly concluded that CADA is both neutral and generally applicable. Its purpose is to protect individuals from discrimination based upon their membership in an enumerated class, and it regulates such discrimination whether it is religiously motivated or not. CADA easily passes rational basis review and overcomes Masterpiece's First Amendment challenge.

The Court of Appeals further analyzed Masterpiece's challenge under the Colorado Constitution's Free Exercise Clause, recognizing that the Colorado Constitution has been interpreted more broadly than the U.S. Constitution in some respects. *Masterpiece I*, p. 56, ¶ 98; Colo. Const. Art. II, § 4. The court rejected Masterpiece's argument that, under the Colorado Constitution, CADA should be subjected to strict

scrutiny. In support, the court cited numerous Colorado cases relying on federal precedent and applying the same standards in interpreting Colorado's Free Exercise Clause. *Masterpiece I*, pp. 56-57, ¶¶ 98-99; *see, e.g.*, *Ams. United for Separation of Church and State Fund, Inc., v. State*, 648 P.2d 1072, 1081-82 (Colo. 1982) (Colorado's Free Exercise clause "embod[ies] the same values of free exercise and government non-involvement secured by the religious clauses of the First Amendment.").

Masterpiece does not have any constitutional right to refuse service to gays and lesbians, just as it does not have a right to refuse service to members of a particular race or gender, on the basis of religious belief. To hold otherwise, and to carve out the exception that Masterpiece seeks here, would render CADA powerless to eradicate discrimination against Colorado's protected classes so long as religious belief is cited as the basis for it.

CONCLUSION

The Petition fails to raise valid considerations under C.A.R. 49 and Petitioner's arguments lack merit. Respondents respectfully request the Petition be denied.

Respectfully submitted this 6th day of November, 2015.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** upon all parties herein by filing with the Court's ICCES electronic filing system and/or by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 6th day of November, 2015, addressed as follows:

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