SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2014CA1351 Judges Taubman, Loeb, and Berger COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202; Case No. CR2013-0008	
Petitioners MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, v. Respondents CHARLIE CRAIG and DAVID MULLINS.	▲ **COURT USE ONLY** ▲
Nicolle H. Martin, No. 28737 7175 W. Jefferson Avenue, Suite 4000 Lakewood, CO 80235 (O) 303-332-4547 nicollem@comcast.net Michael J. Norton, No. 6430 Natalie L. Decker, No. 28596 Alliance Defending Freedom 7951 E. Maplewood Avenue, Suite 100 Greenwood Village, CO 80111 (O) 720-689-2410 mjnorton@alliancedefendingfreedom.org ndecker@alliancedefendingfreedom.org Jeremy D. Tedesco, AZ No. 023497 Alliance Defending Freedom 15100 N. 90th Street Scottsdale, AZ 85260 (O) 480-444-0020; (F) 480-444-0028 jtedesco@alliancedefendingfreedom.org	Case Number**:** 2015SC000738
REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI **TO THE COLORADO COURT OF APPEALS**	

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 53(d).

Choose one:

✓ It contains 3,000 words.

☐ It does not exceed 10 pages.

✓ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 32 and C.A.R. 53.

/s/ Nicolle H. Martin

Nicolle H. Martin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

***Cases*:**

***Statutes*:**

***Regulations*:**

***Other Authorities*:**

INTRODUCTION

From religious freedom restoration acts in Indiana and Arkansas to lawsuits in Washington and Kentucky, a nationwide debate is raging over the right of business owners to create messages consistent with their beliefs.[1] This debate rages on because of the important moral and legal issues at stake – free speech, religious freedom, equality, discrimination, tolerance.

This Court now faces the opportunity to decide how Colorado law resolves these issues. Does the Colorado Anti-Discrimination Act (CADA) require expressive business owners like petitioner Jack Phillips to create artwork they consider objectionable? Do expressive business owners have the right to convey only those messages consistent with their religious beliefs? Can CADA force these owners to train their employees to violate their religious beliefs and to report those efforts to the state? This Court has never addressed these important questions, the decision below decided these questions contrary to U.S. Supreme Court precedent, and Colorado Civil Rights Commission decisions disagree how these questions apply to expressive businesses. Therefore, this appeal satisfies C.A.R. 49(a) and merits this Court's attention. Colorado citizens deserve to know what CADA

[1] *See Baked in the Cake: Legal Battles Follow Gay Marriage Ruling*, USA TODAY, (July 22, 2015) available at http://www.usatoday.com/story/news/nation/2015/07/22/gay-marriage-religion-discrimination/29812729/.

requires of them and how CADA impacts their fundamental rights to speech and religious liberty.

To deter this Court from reviewing these issues, respondents characterize this appeal as a "straightforward" CADA action. Individuals' Resp. 2.[2] But neither respondent cites a single Colorado case that resolves how CADA applies to protected speech or to religious exercise. This silence is no shock. Straightforward CADA actions do not raise issues of nation-wide debate, do not involve protected speech or religious exercise, do not require intricate First Amendment analysis, and do not create inconsistent Commission decisions – one requiring Philips to create cakes contrary to his religious beliefs and others allowing bakers to decline cake requests contrary to their beliefs.[3]

Even respondents' attorneys acknowledge this. For the same organization (the ACLU) that represents the individual respondents recently asked Washington's Supreme Court to review a similar public accommodation case because it raised "a fundamental and urgent issue of broad public import…." that created "far-reaching implications."[4] Phillips agrees. When public accommodation

[2] Citations to the state's brief and the individual respondents' brief opposing certiorari use the following format: State Resp. (page #); Individuals' Resp. (page #).
[3] App. 117-34.
[4] Suppl. App. 3.

laws compel expressive businesses to speak, train, and report against their religious beliefs, these laws raise important issues, especially since the U.S. Supreme Court has invalidated public accommodation laws for compelling speech.

This Court should not sit by as lower courts contradict precedent about fundamental constitutional freedoms. Rather, this Court should address the ongoing national debate about religious liberty and resolve whether CADA forces business owners to speak messages contrary to their faith.

ARGUMENT

I. This Court should determine if CADA compels artistic expression plus training and reporting to ensure CADA's consistent application and to avoid constitutional infirmities.

Phillips and respondents agree that "a neutral store policy that applies to all customers is something wholly different than refusing service because of a customer's protected characteristic." Individuals' Resp. 7. *See* App. 107-09 (describing Phillips' general and neutral policy prohibiting the creation of any cake that is illegal, hateful, or contrary to Phillips' religious beliefs). But when do businesses refuse service "because of" a protected characteristic? C.R.S. § 24-34-601(2); App. 87. Because the Commission has decided that question inconsistently, this Court needs to clarify CADA's requirements.

Phillips gladly serves gays and lesbians—whether married to their same-sex partner or not. But because of his religious belief that marriage is between one man and one woman, he will not celebrate any other conception of marriage. App. 102-104. Respondents requested Phillips to do precisely that—to design and create a wedding cake for them to "*celebrate* with friends in Colorado" a same-sex wedding. App. 4 (emphasis added).

Thus, the question is whether refusal to celebrate any conception of marriage outside one-man-one-woman marriage necessarily constitutes refusal to serve customers "because of" their sexual orientation. It does not. Many heterosexuals celebrate same-sex marriages, sometimes even at their own opposite-sex weddings. *See Meet the Straight Couples Who Were Waiting to Marry Until All Gay Couples Could*, TIME (June 30, 2015), http://time.com/3939846/straight-couples-gay-same-sex-marriage-supreme-court-ruling/. Likewise, people of any sexual orientation can celebrate marriage involving polygyny or polyandry.

The Court of Appeals held, however, that "discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation." App. 22. But Phillips did not decline respondents' request because of his opposition to an act that only same-sex couples engage in. He objects to *any* marriage celebrated by anyone that does not include one man and one woman.

Moreover, even if Phillips only objected to same-sex marriage, he could do so for reasonable reasons unrelated to sexual orientation. As the Supreme Court recently held, people can distinguish between traditional marriage and same-sex marriage and can object to the latter for non-discriminatory "good faith" and "sincere" reasons. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015). Thus, objecting to same-sex marriage is not equivalent to opposing gays and lesbians.

The Commission's own decisions confirm the distinction between status-based and message-based "discrimination." For example, Azucar Bakery declined William Jack's request to make cakes with Biblical statements and symbols expressing his religious opposition to same-sex marriage. App. 118. Mr. Jack alleged creed discrimination under CADA, where "creed" encompasses "the beliefs or teachings of a particular religion," 3 C.C.R. 708-1:10.2(H), App. 89. But according to the Commission, the bakery did not commit creed discrimination because it would provide other products to Jack despite his creed and only refused Jack's requested cakes because they expressed a message the bakery found objectionable. App. 120.[5]

[5] While the Commission argues that the letters of determination are not final agency actions, the Commission made final determinations consistent with the letters of determination. App. 132-134.

The Azucar Bakery matter is analogous to Phillips', but the Commission reached different results. Phillips will serve people of all sexual orientations but refused to make a wedding cake for the individual respondents because that cake would express a message he found objectionable. These contradictory outcomes cannot stand.

Quite simply, Phillips, like Azucar Bakery, is concerned about creating artistic items that celebrate events or ideas that violate his beliefs, not the requestor's protected status. Therefore, there is no "but for" causality between the requesters' sexual orientation and Phillips' denial—which even the Commission acknowledges as necessary. *See Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 253 (Colo. App. 2006); State Resp. 5.

This Court should resolve the Commission's inconsistent application of CADA and interpret CADA in accordance with its plain meaning. This plain meaning distinguishes between refusing to convey an objectionable message and refusing to serve someone "because of" their membership in a protected class. And this plain meaning also avoids constitutional problems. *See* §§ II & III, *infra*; *see also* Cert. Pet. 9-18. Because the court below and the Commission rejected this plain meaning and brought CADA into conflict with constitutional freedoms, this Court should intervene to clarify businesses' rights and obligations under CADA.

II. This Court should determine whether CADA can compel business owners to create artistic expression and then to train and to report on those efforts.

CADA compels Phillips to create wedding cakes endorsing a view of marriage different from his own, but the First Amendment protects Phillips' right not to do so. That protection turns on two conditions: Phillips' wedding cakes constitute speech, and CADA cannot compel that speech. Although respondents deny both premises, Supreme Court precedent confirms each, and each premise raises an issue worthy of this Court's consideration.

Courts have found most artistic expressions to be speech, from paintings and sculptures to nude dancing and tattoos. *See* Cert Petition, 9-11. Phillips' wedding cakes fit within that protection of artistic expression because his wedding cakes require great artistry and uniquely convey messages celebrating marriage. Thus, respondents are simply wrong. As an iconic symbol, wedding cakes do convey a specific message endorsing and honoring the married couple. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (symbols are often used as a "short cut from mind to mind" to communicate "some system, idea, institution, or personality"). And Phillips would certainly convey a specific message when he trains his employees to violate his religious beliefs and when he reports his efforts to the Commission.

Moreover, Phillips does not even have to pinpoint a "specific" message conveyed by his wedding cakes because even symbols that convey general and vague messages constitute speech. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (affirming that First Amendment protection is not "confined to expressions conveying a 'particularized message'"). Because vague symbols constitute speech, Phillips' wedding cakes, which convey a specific message, must constitute speech as well.

Phillips does not have to pinpoint a "specific" message conveyed by the process of creating or selling his cakes either. Individuals' Resp. 8-9; State Resp. 11-12. That applies the wrong test and spotlights the wrong thing. Courts focus on the created object, not the act of selling. *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."). And because Phillips' wedding cakes express a message, his process of creating and selling that cake become part of his endorsement of that message.

The expressive aspect of wedding cakes also makes details about these cakes irrelevant. Although Phillips refused to create a wedding cake for respondents before discussing its details, Phillips' wedding cakes always convey celebratory messages about marriage. Phillips did not want to convey those messages and

should not be forced to. Moreover, the Commission's order requires Phillips to create any wedding cake requested, even cakes with words. App. 82. To say this order does not affect speech ignores its broad scope and sharply narrows the broad protection Supreme Court precedent accords private speech.

The need for review is also great because the Court of Appeals relied on third party misperceptions to decide its compelled speech analysis. Although some compelled accommodation cases discuss misattribution, this is not a compelled accommodation case. CADA does not merely require Phillips to host/accommodate a message; CADA requires Phillips to personally create and speak an objectionable message. This factor makes Phillips' situation like *Wooley v. Maynard*, which does not turn on misattribution, as respondents admit. Individuals' Resp. 11. Just as *Wooley* protects the "right to avoid becoming the courier" of objectionable messages regardless of misattribution, 430 U.S. 705, 717 (1977), *Wooley* condemns efforts to make Phillips a "conduit" for objectionable messages regardless of misattribution. Individuals' Resp. 10.

Moreover, even if CADA forced Phillips to accommodate messages, accommodation cases do not always require attribution. *See Pac. Gas & Electric Co. v. Pub. Utilities Comm'n.*, 475 U.S. 1, 15 n.11 (1986) (refusing to attribute hosted message to the public utility company yet still finding compelled speech).

Misattribution does not matter if the hosted message impacts the host's own message. *Compare id. with Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (hosting recruiters did not affect law schools' speech); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (mall owner did not object to leafletters' message). And compelling Phillips to endorse any other marriage assuredly impacts his speech favoring one-man-one-woman marriage, speech conveyed every time he creates a wedding cake for such a marriage.

That impact also explains why disclaimers cannot solve Phillips' objection. Disclaimers remedy misattribution; they do not remedy the harm of hosting a message that impacts the host's own message or of personally creating an objectionable message. *PG&E*, 475 U.S. at 15 n.11, 16 (rejecting disclaimer's usefulness and condemning efforts to "require speakers to affirm in one breath that which they deny in the next").

Phillips' wedding cakes are clearly protected speech, and the Commission clearly applied CADA in a manner that unjustifiably compels that speech. The Commission found that CADA requires Phillips to create an expressive item celebrating marriages to which he objects and requires Phillips to train his employees and report to the Commission in a manner that violates his beliefs. That compulsion does not vanish because CADA regulates all businesses and often

regulates conduct. CADA still targets particular viewpoints, compelling cake artists to create cakes favoring certain marriages but allowing them to avoid creating cakes against those marriages. Cert. Petition 15. And even neutral laws that regulate conduct can compel speech in certain applications. *See Hurley*, 515 U.S. at 569 (invalidating application of public accommodation law).[6] For this reason, respondents' trope that CADA compels equal treatment not speech completely misses the mark. That description merely begs the question without grappling with the expressive nature of Phillips' wedding cakes.

And these wedding cakes do not express messages as a means to some other end. Creating wedding cakes forms the core of Phillips' business. For this reason, CADA regulates more than speech incidental to conduct. While laws may be able to compel speech incidental to conduct in certain situations, laws cannot compel expression central to an organization's essence, message, and purpose. So, unlike the law schools in *Rumsfeld* which did not exist to send recruitment emails, Masterpiece Cakeshop exists to create items, especially those that are expressive like wedding cakes. In this respect, CADA targets an activity at the core of what

[6] While respondents limit *Hurley* only to non-profit organizations (Individuals' Resp. 10 n.2), *Hurley* explicitly applied its logic to "business corporations generally." 515 U.S. at 574.

Masterpiece and Phillips do and because that activity is expressive, CADA directly burdens Phillips' expression and beliefs.

Respondents claim that Phillips' arguments lack limits, but that is not true. They simply account for the well-established principle that public accommodation laws violate the First Amendment when they are "applied to expressive activity." *Hurley*, 515 U.S. at 578. Phillips' arguments would not grant businesses broad exemptions from CADA, but instead ensure that, in those limited instances where businesses are engaged in expression, the government cannot punish or compel their speech. The legal principle Phillips seeks to vindicate would not only protect him, but also ensure that a gay tailor could decline to create a jacket embossed with messages favoring marriage between one man and one woman, or that a black tailor could decline to make shirts displaying the confederate flag. Freedom from compelled speech is a fundamental right all citizens enjoy, not just those with "acceptable" beliefs.

If any arguments lack limits, respondents' do because they would permit anti-discrimination laws to compel speech anytime a business "opens its doors to the public." Individuals' Resp. 13-14. But this broad proposition is extremely dangerous. The government should not be able to force writers to create misogynistic novels, musicians to sing at KKK rallies, web designers to design

anti-Semitic websites, or printers to create t-shirts they consider objectionable. *See Hands on Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm'n,* No. 14–CI–04474 (Fayette Cir. Ct. 2015), available at http://perma.cc/75FY-Z77D (protecting print shop against public accommodations law). Respondents' theory endangers these and every other expressive business in Colorado and undermines the ability of every Colorado citizen to receive authentic expression. This grave threat to the marketplace of ideas warrants this Court's consideration.

III. This Court should determine the standard to assess free-exercise claims in Colorado and whether CADA can compel business owners to create artistic expression against their religious beliefs and then to train and to report on those efforts.

As Respondents concede, "this Court has not decided what level of scrutiny should apply to free exercise claims under the Colorado Constitution." Individuals' Resp. 16. But this issue dramatically impacts the degree of religious freedom that Coloradans will enjoy. Therefore, this court should grant review to resolve this open issue.

Strict scrutiny applies, and Phillips should prevail. Strict scrutiny requires respondents to show that requiring Phillips to use his artistic talents to celebrate same-sex marriage and then to train his employees to do the same serves a compelling interest and that this requirement is the least restrictive means of

achieving that interest. *See City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997). This they cannot do.

Respondents cannot simply claim a compelling interest in "eradicating discrimination" generally, for courts must look "beyond broadly formulated interests justifying the general applicability of government mandates" to actually "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). As the Commission implicitly recognized by allowing bakeries to decline to make cakes bearing religious messages, the State's interest in prohibiting discrimination extends only to "acts of invidious discrimination." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984).

Phillips' refusal to create objectionable expression is neither invidious nor arbitrary. Indeed, while public accommodations laws like CADA may generally be "well within the State's usual power to enact" without violating the First Amendment, different considerations arise when the law is applied in the "peculiar way" it was here. *Hurley*, 515 U.S. at 572. As *Hurley* held, public accommodations laws cannot "be used to produce thoughts and statements acceptable to some groups" because the First Amendment "has no more certain antithesis." *Id.* at 579. A public accommodations law does not serve a "compelling interest" when it

"materially interfere[s] with the ideas" that a person wishes to express. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000).

Thus, CADA achieves no compelling interest by forcing Phillips to express celebratory messages that violate his sincerely held religious beliefs simply so that Coloradans can buy cakes from their baker of choice. Moreover, the state has several less restrictive means available to achieve its interests. This Court should grant review to decide the critical issue of whether strict scrutiny or rational basis review applies to free-exercise claims.

CONCLUSION

This Court should grant the petition.

Respectfully submitted this 13th day of November, 2015.

Attorney for Petitioners Masterpiece Cakeshop, Inc. and Jack C. Phillips

/s/ Nicolle H. Martin
Nicolle H. Martin, No. 28737
7175 W. Jefferson Avenue, Suite 4000
Lakewood, Colorado 80235

CERTIFICATE OF SERVICE

I certify that on this 13th day of November, 2015, a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** was filed with the Colorado Supreme Court via ICCES and served via ICCES, on the Colorado Civil Rights Commission and the parties and/or their counsel of record as follows:

Colorado Civil Rights Commission
Department of Regulatory Agencies
1560 Broadway, Suite 1050
Denver, CO 80202
Shayla.malone@state.co.us

David Mullins
Charlie Craig
c/o Sara J. Neel
Mark Silverstein
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203
sneel@aclu-co.org
msilverstein@aclu-co.org

Charmaine Rose
Assistant Attorney General
Business and Licensing Section
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
charmaine.rose@state.co.us

Ria Tabacco Mar
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

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

Paula Greisen
King & Greisen
1670 York Street
Denver, CO 80206
greisen@kinggreisen.com

/s/ Nicolle H. Martin
Nicolle H. Martin