NO. 16-111

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND
JACK C. PHILLIPS,
Petitioner,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774

NICOLLE H. MARTIN
7175 W. Jefferson Ave
Suite 4000
Lakewood, CO 80235
(303) 332-4547

JEREMY D. TEDESCO
Counsel of Record
KRISTEN K. WAGGONER
JORDAN W. LORENCE
J. CALEB DALTON
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jtedesco@ADFlegal.org

Counsel for Petitioners

CORPORATE DISCLOSURE STATEMENT

Petitioner Masterpiece Cakeshop, Ltd. is a Colorado corporation wholly owned by Jack Phillips and his wife. It does not have any parent companies, and no entity or other person has any ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

***Cases*:**

***Statutes*:**

***Regulations*:**

INTRODUCTION

Respondents amplify the Colorado Court of Appeals' errors by adopting the extreme position that Phillips' artistic expression must communicate a particularized message to merit free speech protection, Colo. Civil Rights Comm'n Opp. Br. ("Colorado") 10-12, and that laws like the Colorado Anti-Discrimination Act ("CADA") regulates only conduct and thus can never violate the First Amendment as applied to speech, Craig & Mullins Opp. Br. ("C&M") 10-11. But *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), rejected both propositions. *See id.* at 578 (ruling that the "peculiar" application of a public accommodation law to expression violates "the general rule of speaker's autonomy"); *id.* at 569 (explaining that "a 'particularized message'" is "not a condition of constitutional protection").

Nor have Respondents assuaged the significant conflicts raised in the petition. They either endorse the Colorado Court of Appeals' circular reasoning that legal coercion robs Phillips of ownership of any message sent by his art, C&M 10, or seek to avoid the issue altogether, Colorado 20. But speech compulsion is the problem, not the solution. And Respondents' claim that *Rumsfeld v. Forum for Academic and Institutional, Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), transformed this Court's compelled-speech precedent is not plausible. *See infra* Part II.

Indeed, Respondents emphasize *FAIR*, 547 U.S. at 64-65, but ignore its framework, which examined whether any pure speech existed before engaging in

expressive-conduct analysis. The Ninth and Eleventh Circuits did the same when custom artistic expression, like Phillip's, was subject to state regulation. *See, e.g.*, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1059 (9th Cir. 2010); *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015). But the Colorado Court of Appeals proceeded straight to an outdated version of the *Spence-Johnson* test. App. 25-26a. Respondents troubling reply is that it does not matter whether Phillips' "custom wedding cakes [are] a form of pure speech," the state is free to compel him to create regardless, C&M 18, or—at the very least—the state may compel Phillips to engage in artistic expression that lacks any particular "message or symbol" the state views as communicating an "explicit, unmistakable, offensive message," Colorado 6. The former position would entomb the compelled speech doctrine altogether, while the latter would allow the government to punish unpopular viewpoints at will.

Because Respondents cannot deny that an entrenched conflict exists regarding the expressive-conduct test post-*Hurley*, they argue it does not matter here. C&M 15; Colorado 16. No dispute exists, however, that the lower court applied the *Spence-Johnson* factors to Phillips' artistic expression by asking whether he demonstrated "an intent to convey a particularized message," albeit not a "narrow" or "succinctly articulable" one, and whether "the likelihood was great that the message would be understood by those who viewed it." App. 26a (quotations omitted); Colorado 17. This language mirrors the Sixth Circuit's in *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 388 (6th Cir.

2005), which is irreconcilable with Third and Eleventh Circuit caselaw that expressly rejects the need for a "*specific*," *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004), or "*particularized* message," *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) (emphasis added).

Respondents also urge the Court to ignore "the Civil Rights Division's [contradictory] resolution of … claims" involving a Christian patron's requests for custom cakes disapproving same-sex marriage on religious grounds. C&M 20. Yet they do not deny that Colorado permits secular cake artists to decline orders that express "offensive messages" critical of same-sex marriage. C&M 21; Colorado 6. Their only argument is that Phillips' religious offense at being forced to design custom cakes honoring same-sex marriages, which express the unconscionable message that "a wedding has occurred, a marriage has begun, and the couple should be celebrated," App. 280a, is somehow different. C&M 21-22; Colorado 6-7. But that merely shows that Colorado's individualized determination of whether CADA is violated "devalues religious reasons for" declining to speak in violation of the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993).

I. The Free Speech Issues Raised by the Petition are Concrete and Pressing.

Respondents' attempts to muddy the record cannot bear scrutiny. It is disingenuous to claim that Phillips declined to sell a pre-made cake for use at

Craig's and Mullins' wedding reception. Colorado 9-10. Petitioners' counsel disclaimed any such intent on Phillips' part below. Tr. Colo. App. Oral Argument 9-10. And the Colorado Court of Appeals acknowledged that Craig and Mullins "requested that Phillips *design and create a cake to celebrate their same-sex wedding*." App. 4a (emphasis added); *see also* App. 65a (finding that "Phillips informed Complainants that he does not create wedding cakes [specifically] for same-sex weddings"). A premade cake sitting on the shelf could not have been designed and created to celebrate Craig's and Mullin's same-sex wedding. Thus, only Phillips' custom artistic wedding cakes are at issue.[1] *See* App. 4a (recognizing Phillips advised "Craig and Mullins that he would be happy to make and sell them any other baked goods").

More to the point, the state compels Phillips to design and create custom wedding cakes honoring same-sex marriages despite conceding that he employs "considerable skill and artistry" in doing so, App. 28a, 75a, and that—at least in some instances—his work constitutes protected speech, Colorado 15 ("[C]reating a cake could … be expressive and could therefore implicate the First Amendment."); Colorado 15-16 (admitting regulation of a cake shop "could give rise to a First Amendment claim"). The only reason Respondents claim that Phillips' artistic expression is

---

[1] Phillips' religious objection is to celebrating, through his art, any marriage that is not between one man and one woman (including polygamous marriages) regardless of who requests him to do so. App. 274-75a, 277a, 284-86a. He gladly serves "people of all races, all faiths, all sexual orientations, and all walks of life." App. 282a.

not protected here is because of their myopic focus on the *Spence-Johnson* test and the lack of discussion between Phillips, Craig, and Mullins regarding "any message or symbol [on] the cake that could be reasonably interpreted as endorsing or advocating for same-sex marriage." Colorado 6. But that focus on the perceived lack of a particularized message is misplaced. C&M 4; Colorado 8.

Hurley, which involved a compelled-speech claim in the public accommodation context, is controlling. It established that

> a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' *cf. Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.

Hurley, 515 U.S. at 569.

Phillips' custom art may likewise be abstract and need not reflect "an exact message" celebrating same-sex marriage to warrant free speech protection. *Id.* *But see* Colorado 6. As the Ninth and Tenth Circuits recognize, artistic expression may warrant First Amendment protection without reference to the *Spence-Johnson* test.[2] *See Anderson*, 621 F.3d at

[2] Indeed, this Court has never utilized expressive-conduct analysis in the compelled-speech context. *See, e.g.*, *Wooley v.*

1061 (holding that *Spence* only applies to "processes that do *not* produce pure expression"); *Cressman v. Thompson*, 719 F.3d 1139, 1153 (10th Cir. 2013) (recognizing the *Spence-Johnson* factors may set "too high a threshold for [the] First Amendment protection" of art). Their holdings conflict with the opinion below, App. 25-26a, which fails to grasp that "[t]he constitutional harm of compelled speech" is "being forced to speak rather than to remain silent" regardless of whether the message sent is readily discernable, *Cressman*, 719 F.3d at 1152.

Moreover, forcing Phillips to create a "nondescript" custom wedding cake for a same-sex couple, C&M 3; Colorado 6, would still compel him to speak a well-defined (unconscionable) message, which is "that a wedding has occurred, a marriage has begun, and the couple should be celebrated," App. 280a. Phillips tailors that message to each "specific couple" through an artistic design process that includes an in-depth "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." App. 278-79a. Only then is he able to "sketch out the cake on paper," "bake a sheet cake and then sculpt the desired shape or design," mix "the desired colors for frosting and decorations," "actually create[] the cake itself and decorat[e] it" through painting and other artistry, and then determine which "symbolic items" to place "on the top." App. 278-80a.

Maynard, 430 U.S. 705, (1977) ("find[ing] it unnecessary to pass on the 'symbolic speech' issue").

If the record were inadequate as to what Craig and Mullins sought, as Respondents suggest, Colorado 10, the Colorado Court of Appeals could have remanded for fact finding, but it did not. The court chose to err on the side of compelling speech. And it did so despite the fact that Craig and Mullins ultimately acquired a cake for their wedding reception featuring "a filling with rainbow colors," App. 75a n.7, the preeminent symbol of LGBT pride. If such a cake is not "'sufficiently expressive' to raise First Amendment concerns," nothing is. App. 29a; Colorado 10.

The assertion that a different case "might require a different outcome" is simply not credible. App. 34-35a; Colorado 10. Phillips operates his expressive business under an administrative order that requires him to create any custom "wedding cakes" that "same-sex couples" might request if he would create those cakes for "heterosexual couples." App. 57a. That edict is not limited to nondescript cakes but encompasses custom wedding cakes bearing text, such as "God blesses this marriage," a concept Phillips neither wishes to communicate nor believes. The Colorado Court of Appeals affirmed that order, which also requires Phillips to reeducate his employees and report to the Commission every order he declines for two years, in full. App. 57-58a.

Respondents' argument that applying CADA to Phillips compels only conduct and not expression fares no better. C&M 15; Colorado 20. The Colorado Court of Appeals found as much. App. 36a. But the same was true in *Hurley*. 515 U.S. at 567 (noting

state courts found "petitioners' activity [fell] within the vast realm of nonexpressive conduct"). Nonetheless, this Court independently examined the record and held that the state's application of its public accommodation law unconstitutionally intruded into "the field of free expression." *Id.* at 568 (quotation omitted).

The Court should do the same here, especially as Respondents have upped the ante by claiming that CADA universally "regulates conduct, not speech" and that applications of the law are never subject to First Amendment challenge. C&M 1; *see also* C&M 10 (arguing that no one would ever attribute speech compelled by CADA to the speaker because he or she is "compl[ying] with a [legal] requirement not to discriminate"); C&M 15 ("[T]he Act … merely prohibits the discriminatory refusal to provide goods and services …."). *Id.* In fact, Respondents adopt the sweeping position that it makes no difference whether the "goods and services" CADA compels are "of an expressive or artistic nature." C&M 11. Forcing a fine art painter to accept a commission for a "picture that celebrates gay marriages" is perfectly acceptable in their view. App. 332a. That cannot be the law. *See Hurley*, 515 U.S. at 578-79 (holding that states cannot constitutionally apply public accommodation laws to "produce speakers free of … biases").

Respondents advance several reasons why Phillips should be denied speaker autonomy but none have merit. First, they claim that Phillips has no free speech rights because he makes a living by selling artistic expression. C&M 6; Colorado 8. This Court

explained decades ago that "a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). Importantly, *Hurley*, 515 U.S. at 574, itself recognized that compelled speech protection belongs to "business corporations generally," including "professional" speech creators like Phillips.

Second, Respondents argue that CADA establishes an equal access requirement that is not targeted at speech. C&M 7, 10; Colorado 1, 21. But the same was true in *Hurley* where Massachusetts' public accommodation law did "not, on its face, target speech or discriminate on the basis of its content," 515 U.S. at 572, and was "applied" to provide equal access to "expressive activity," *id.* at 578. This Court found speech coercion anyway. Indeed, two of its pivotal compelled speech cases invalidated equal access requirements that compelled businesses to engage in unwanted expression. *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 4 (1986) (invalidating a requirement that a utility company provide equal publication space in its newsletter to a consumer group); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974) (striking down a mandate that forced newspapers to provide equal publication space to politicians they criticized).

Third, Respondents claim that CADA is content and viewpoint neutral. C&M 6. But Phillips is compelled to design wedding cakes honoring same-sex marriages *only* because the state deems his refusal to

do so related to sexual orientation—a protected classification under CADA. C&M 1, 4, 22; Colorado 1, 4-5, 7, 16. Artists may decline commissions for *any* reason the state deems unrelated to a protected class. C&M 21-22; Colorado 19. CADA's narrow list of protected classes, Colo. Rev. Stat. § 24-34-601(2)(a), renders the law facially content based. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."). Furthermore, the state applies CADA in a transparently viewpoint-based manner to bar artists' speaker autonomy only if they decline to celebrate same-sex marriage. *See* Pet. 7, 27-28; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (striking down a law that regulated speech on certain disfavored subjects, including race and gender, as viewpoint discriminatory).

II. *FAIR* Did Not Rewrite this Court's Compelled Speech Precedent.

Much of Respondents' argument, and the Colorado Court of Appeals' holding, is premised on the notion that FAIR radically altered this Court's compelled speech precedent. App. 30-31a; C&M 7-10; Colorado 20-21. But *FAIR* addressed a funding requirement that forced law schools to give military recruiters the same access to campus provided to other recruiters. 547 U.S. at 58. This unique mandate implicated Congress' power to raise and support armies and impose funding conditions, *Id.* at 58-60, neither of which are at issue here.

This Court held that law schools were "not speaking" by allowing JAG officers to "host interviews." *Id.* at 64. In other words, providing an empty room for third parties to engage in their own speech is not expressive, it is simply assisting "students in obtaining jobs." *Id.* The schools were thus not engaged in pure speech or expressive conduct because the meaning of "treating military recruiters differently from other recruiters" was not apparent. *Id.* at 66. And the provision of emails or posters listing the date, time, and location of military recruiters' meetings was "incidental to the Solomon Amendment's regulation of [non-expressive] conduct" and therefore unprotected. *Id.* at 62.

When the provision of physical space for *others* to speak is all that is required, it makes sense to say that a law "regulates conduct, not speech." *Id.* at 60; C&M 1, 8. But *FAIR*'s rationale does not apply to forcing Phillips to design and create unwanted artistic expression *himself*. That would be the equivalent of compelling the schools in *FAIR* to draft a JAG officer's speech promoting the military's recruitment goals.

III. The Free Exercise Clause Bars Devaluing Artists' Religious Reasons for Declining to Speak as Invidious Discrimination.

Respondents defend the state's findings of no violation of CADA when three secular bakeries refused a Christian customers' request to create cakes disapproving of same-sex marriage on religious grounds because they view these denials as message based. C&M 21; Colorado 7, 11. Yet Phillips' message-based objection to celebrating same-sex

marriages they derisively label as "invidious discrimination." C&M 25; *see* App. 280-88a. But if sexual orientation and celebrating same-sex marriage is "closely correlated" enough to strip away speaker autonomy under CADA, App. 15-16a; C&M 4, surely the Christian creed and religious criticism of same-sex marriage are as well. *See* 3 C.C.R. 708-1:10.2(H). Colorado's "unequal treatment" of religious reasons for declining to speak in its individualized assessment of the "reasons for [Phillips'] relevant conduct" violates the Free Exercise Clause. *Lukumi*, 508 U.S. at 537, 542 (quotations omitted).

IV. This Case is a Clean Vehicle for Resolving the Question Presented.

Respondents attempt to detract from the clean vehicle this case presents to resolve the important question presented. Colorado 1, 9-10. But as the Colorado Court of Appeals recognized, "[t]he parties [do] not dispute any material facts," App. 6a, they simply differ on the law. Only this Court may resolve the conflicting First Amendment rules that now govern in state and federal courts in Colorado.

It should do so now because Respondents' efforts to eliminate speaker autonomy are not limited to custom cakes. They submit that artists who paint, take photographs, design floral art, and perform custom calligraphy are subject to the same speech-compelling rules. C&M 11; Colorado 13-14. And the cases they cite reveal a disturbing trend of state courts repudiating *Hurley*. *But see Hands on Originals, Inc. v. Lexington-Fayette Urban Cnty. Human Rights Comm'n*, No. 13-CI-04474 (Ky. Cir. Ct.

Apr. 27, 2015) (on appeal), http://perma.cc/75FY-Z77D; *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56 (N.D. Ohio 1995).

Due to this recurrent error, Philips is required to forego approximately 40% of his expressive business. His livelihood is on the line.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, this Court should grant review.

Respectfully submitted,

JEREMY D. TEDESCO
Counsel of Record
KRISTEN K. WAGGONER
JORDAN W. LORENCE
J. CALEB DALTON
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jtedesco@ADFlegal.org

DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd., Suite D-1100
Lawrenceville, GA 30043

(770) 339-0774

NICOLLE H. MARTIN
7175 W. Jefferson Ave.
Suite 4000
Lakewood, CO 80235
(303) 332-4547

December 12, 2016