NO. _____

IN THE
Supreme Court of the United States

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

v.

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

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

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

QUESTION PRESENTED

Jack Phillips is a cake artist. The Colorado Civil Rights Commission ruled that he engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act ("CADA") when he declined to design and create a custom cake honoring a same-sex marriage because doing so conflicts with his sincerely held religious beliefs.

The Colorado Court of Appeals found no violation of the Free Speech or Free Exercise Clauses because it deemed Phillips' speech to be mere conduct compelled by a neutral and generally applicable law. It reached this conclusion despite the artistry of Phillips' cakes and the Commission's exemption of other cake artists who declined to create custom cakes based on their message. This analysis (1) flouts this Court's controlling precedent, (2) conflicts with Ninth and Eleventh Circuit decisions regarding the free speech protection of art, (3) deepens an existing conflict between the Second, Third, Sixth, and Eleventh Circuits as to the proper test for identifying expressive conduct, and (4) conflicts with free exercise rulings by the Third, Sixth, and Tenth Circuits.

The question presented is:

> Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioner Masterpiece Cakeshop, Ltd., is a small Colorado corporation owned by Petitioner Jack Phillips, an individual and citizen of Colorado, and his wife.

Respondent Colorado Civil Rights Commission is an agency of the State of Colorado. Respondents Charlie Craig and David Mullins are individuals and citizens of Colorado.

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.

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INTRODUCTION

The First Amendment prohibits the government from telling private citizens "what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013). It is undisputed that the Colorado Civil Rights Commission (the "Commission") does not apply CADA to ban (1) an African-American cake artist from refusing to create a cake promoting white-supremacism for the Aryan Nation, (2) an Islamic cake artist from refusing to create a cake denigrating the Quran for the Westboro Baptist Church, and (3) three secular cake artists from refusing to create cakes opposing same-sex marriage for a Christian patron. App. 78a; App. 297a-App. 331a.

Neither should CADA ban Jack Phillips' polite declining to create a cake celebrating same-sex marriage on religious grounds when he is happy to create other items for gay and lesbian clients. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("[T]hose who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."). But the Commission ruled that is exactly what the law requires and the Colorado Court of Appeals upheld that mandate on appeal. In so doing, that court approved nothing less than the "outright compulsion of speech." *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557 (2005).

Jack Phillips is an artist. He has created elaborate custom cakes for over two decades. His cakes communicate the important celebratory

themes of birthday parties, anniversaries, graduations, and weddings. His faith teaches him to serve and love everyone and he does. It also compels him to use his artistic talents to promote only messages that align with his religious beliefs. Thus, he declines lucrative business by not creating goods that contain alcohol or cakes celebrating Halloween and other messages his faith prohibits, such as racism, atheism, and any marriage not between one man and one woman.

But Colorado has ordered him to create custom wedding cakes celebrating same-sex wedding ceremonies. This mandate violates one of the Free Speech Clause's essential rules: the government cannot compel a private citizen "to utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Given the exceptions to CADA that state authorities have recognized for other cake artists, including three secular cake artists who refused to create custom cakes criticizing same-sex marriage on religious grounds, the Commission's application of CADA additionally targets Phillips' religious beliefs about marriage for punishment in violation of the Free Exercise Clause.

This Court's review is needed to alleviate the stark choice Colorado offers to those who, like Phillips, earn a living through artistic means: Either use your talents to create expression that conflicts with your religious beliefs about marriage, or suffer punishment under Colorado's public accommodation law.

DECISIONS BELOW

The Colorado Court of Appeals decision is reported at 370 P.3d 272, and reprinted at App. 1-53a. The Supreme Court of Colorado's order denying the Petition for Writ of Certiorari of April 25, 2016, in which one Justice did not participate and two Justices would have granted certiorari, is not reported but is available at No. 15SC738, 2016 WL 1645027 (April 25, 2016) and reprinted at App. 54-55a.

The Administrative Law Judge's (ALJ) decision, is not reported and is reprinted at App. 61-91a (Dec. 6, 2013, No. CR 2013-0008). The Colorado Civil Rights Commission's order adopting the ALJ's opinion is not reported and is reprinted at App. 56-60a (May 30, 2014, No. CR 2013-0008).

STATEMENT OF JURISDICTION

On April 25, 2016, the Colorado Supreme Court issued an order denying Petitioners' Petition for Writ of Certiorari, thus leaving in place the Colorado Court of Appeals' decision rejecting Petitioners' claims that the application of CADA in this case violates their First Amendment rights. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISIONS

The text of the First and Fourteenth Amendments to the United States Constitution is found at App. 92a. The relevant portions of the

Colorado Anti-Discrimination Act (CADA), are set forth at App. 93-95a.

STATEMENT OF THE CASE

A. Factual Background

"The material facts are not in dispute." App. 62a. Jack Phillips opened Masterpiece Cakeshop, Inc.[1] over 22 years ago to pursue his life's vocation—creating artistic cakes. App. 274a, ¶ 6. Designing and creating specially commissioned cakes is a form of art and creative expression, the pinnacle of which is wedding cakes. App. 277-280a, ¶¶ 28-46. Phillips pours himself into their design and creation, marshaling his time, energy, and creative talents to make a one-of-a-kind creation celebrating the couple's special day and reflecting his artistic interpretation of their special bond. App. 277-280a, ¶¶ 28-47.

Phillips is also a Christian who strives to honor God in all aspects of his life, including his art. App. 274a, 281-283a, ¶¶ 7-8, 49-61. From Masterpiece's inception, Phillips has integrated his faith into his work. App. 281-282a, ¶¶ 50-57 (Phillips closes Masterpiece on Sundays, pays his employees well, and helps them with personal needs outside of work, all because of his religious beliefs).

Cake design and creation is its own art form and mode of expression. "*The Essential Guide to Cake*

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[1] For brevity's sake, Phillips and Masterpiece Cakeshop are referred to collectively as "Phillips."

Decorating 7-11 (2010). Cake making dates back to at least 1175 B.C. *Id.* Of any form of cake, wedding cakes have the longest and richest history. In modern Western culture, the wedding cake serves a central expressive component at most weddings and is traditionally served at the reception celebrating the couple's union. App. 185a. It not only communicates that the couple is now married, but forms the centerpiece of a ritual in which the couple celebrates their marriage by feeding each other cake and then sharing cake with their guests. *Id.* Only a wedding cake communicates this special celebratory message, slicing a pizza or a pot roast would not have the same effect. Wedding cakes are so essential to a modern wedding that one author suggests, "[a] memorable cake is almost as important as the bridal gown in creating the perfect wedding." *Id.* Because they are so important to creating the right celebratory mood, wedding cakes are uniquely personal to the newly married couple and require significant collaboration between the couple and the artist to create the perfect design. *Id.*

Because of the artistry associated with custom cakes, Phillips also honors God through his work by declining to use his creative talents to design and create cakes that violate his religious beliefs. App. 282-283a, ¶¶ 57-58, 62. This includes cakes with offensive written messages and cakes celebrating events or ideas that violate his beliefs, including cakes celebrating Halloween (a decision that costs him significant revenue), anti-American or anti-family themes, atheism, racism, or indecency. App. 283-284a, ¶¶ 61, 63-64. He also will not create cakes

with hateful, vulgar, or profane messages, or sell any products containing alcohol. *Id.*, ¶¶ 59, 61.

Consistent with this longstanding practice, Phillips also will not create cakes celebrating any marriage that is contrary to his understanding of biblical teaching. App. 276-277a, ¶¶ 21, 25. As a Christian, Phillips believes that God ordained marriage as the sacred union between one man and one woman, a union that exemplifies the relationship of Christ and His Church. App. 274-275a, ¶¶ 10-15. And Phillips' religious conviction compels him to create cakes celebrating only marriages that are consistent with his understanding of God's design. App. 275-277a, ¶¶ 16-22, 25. For this reason, Phillips politely declined to design and create a cake celebrating Respondents Craig's and Mullins' same-sex wedding, App. 287a, ¶ 78, but offered to make any other cake for them, *id.*, ¶ 79.

Although Respondents Craig and Mullins easily obtained a free wedding cake with a rainbow design from another bakery, App. 289-291a, they filed a charge of sexual orientation discrimination with the Civil Rights Division (the "Division"), App. 5a, ¶ 6.

The Commission found that Phillips violated the Colorado Anti-Discrimination Act ("CADA"), rejected Phillips's First Amendment defenses, and ordered him to: (1) create custom wedding cakes celebrating same-sex marriages if he creates similar cakes for one-man-one-woman marriages, (2) retrain his staff to do likewise, and (3) report to the Commission

every order he declines for any reason for a period of two years. App. 56-58a.

In contrast, while this case was still ongoing, the Commission found that three secular bakeries did not discriminate based on creed when they refused a Christian customer's request for custom cakes that criticized same-sex marriage on religious grounds. App. 293-327a. And it did so despite "creed" under CADA encompassing "all aspects of religious beliefs, observances, and practices … [including] *the beliefs or teachings of a particular religion*," 3 C.C.R. 708-1:10.2(H) (emphasis added), App. 96a. The Commission reasoned that—like Phillips—(1) the bakeries declined the request because they objected to the particular message of the cake and (2) the bakeries were willing to create other items for Christians. App. 297-331a. Unlike Phillips, the Commission exempted these secular bakeries from CADA's scope.

B. Procedural Background

On September 4, 2012, Respondents filed a charge of discrimination with the Colorado Civil Rights Division ("Division") against Phillips alleging that declining to create a wedding cake celebrating Respondents' same-sex ceremony constituted sexual-orientation discrimination in violation of CADA. App. 260-262a, 269-271a. Phillips timely responded. On May 31, 2013, the Division filed a notice of hearing and formal complaint against Phillips alleging that declining to create a wedding cake celebrating Respondents' same-sex ceremony

constituted sexual-orientation discrimination in violation of CADA. App. 62-63a.

On cross-motions for summary judgment, Phillips argued that he did not discriminate based on sexual orientation in violation of CADA because his religious objection to creating custom wedding cakes for same-sex wedding ceremonies is based on the celebratory message those cakes promote. Phillips does not object to serving all customers regardless of their sexual orientation. He simply believes that only marriage between a man and a woman should be celebrated. App. 276a. Thus, he declined to create custom art for a specific event because of the message it communicated, not because of the persons requesting it. App. 284-288a. In addition, Phillips argued that CADA should be read narrowly to avoid a constitutional violation because requiring him to create custom wedding cakes to celebrate a same-sex wedding ceremony would violate the compelled speech doctrine and his right to the free exercise of religion under the First and Fourteenth Amendments of the United States Constitution. App. 122-161a.

The administrative law judge ("ALJ") declined to interpret CADA narrowly, holding that Phillips violated CADA, and that applying CADA to require Phillips to create custom wedding cakes to celebrate same-sex wedding ceremonies did not violate the First and Fourteenth Amendments. App. 87-88a. The ALJ ordered Phillips to (1) create wedding cakes celebrating same-sex marriages if he creates similar cakes for one-man-one-woman marriages, (2) retrain

his staff to do likewise, and (3) report to the Commission every order he declines to fill for any reason for the next two years. *Id.* Phillips timely appealed these rulings to the Colorado Civil Rights Commission ("Commission"), App. 89-91a, 162-169a, 172-176a, which adopted the ALJ's opinion in full, App. 56-58a.

Phillips timely appealed the Commission's ruling to the Colorado Court of Appeals and argued that (1) he did not discriminate based on sexual orientation, (2) the order requiring him to create custom wedding cakes to celebrate same-sex wedding ceremonies violated the Free Speech Clause, and (3) requiring him to create custom wedding cakes to celebrate same-sex wedding ceremonies in violation of his conscience violated the Free Exercise Clause. App. 97a, 106a, 108-09a, 202-205a, 208-239a.

The Colorado Court of Appeals rejected a proper reading of CADA that would have allowed Phillips to decline commissions to create custom art promoting an unwelcome message, and instead held that declining to create a custom wedding cake to celebrate a same-sex wedding ceremony is unlawful sexual orientation discrimination under CADA. App. 12-22a.

The Colorado Court of Appeals then rejected Phillips's compelled-speech defense. App. 22-36a. In so doing, the court characterized the design and creation of Phillips' custom cakes as mere conduct, not pure speech. App. 30a. It subsequently held

that "the Commission's order merely requires that [Phillips] 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." App. 22a ¶ 45.

In reaching this conclusion, the Colorado Court of Appeals purported to apply the *Spence-Johnson* factors for determining if conduct is expressive.[2] It held that "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." App. 30a ¶ 62. And "to the extent the public infers from a [Phillips] wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to [Phillips]." App. 30a ¶ 62. In short, the court held that "a reasonable observer would understand that [Phillips's] compliance with the law is not a reflection of [his] own beliefs." App. 31a ¶ 64.

Finally, the Colorado Court of Appeals held that the Commission's order did not violate the Free Exercise Clause. It deemed CADA to be a neutral law of general applicability, despite the law's broad

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[2] The *Spence-Johnson* test contains two parts: "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked [first] whether "[a]n intent to convey a particularized message was present, and [second] [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. State of Washington*, 418 U.S. 405, 410-11 (1974).

exceptions and the Commission's decision to target for punishment only expressive business owners who, like Phillips, oppose same-sex marriage on religious grounds. App. 36-45a.

REASONS FOR GRANTING THE WRIT

Colorado state law compels Phillips to create custom 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 fundamental First Amendment principles: Phillips' custom wedding cakes constitute speech, and the state cannot compel an artist like Phillips to create speech. Courts have found many kinds of expression to be speech, from abstract paintings and sculpture to tattoos and custom-painted clothing. *See infra* Part II. Because such artistic expression inherently involves the "subtle shaping of thought," *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501 (1952), it deserves strong free speech protection. This Court should grant the petition for the following reasons.

First, the Colorado Court of Appeal's reasoning turns the compelled speech doctrine on its head. *All* coerced speech results from "compliance with [a] law." App. 31a ¶ 64. But instead of concluding that forcing Phillips to create art violates the Free Speech Clause, the Colorado Court of Appeals held that legal coercion robs Phillips of ownership of any message sent by his art. In other words, the court upheld the compulsion of Phillip's artistic expression *because* that speech was legally impelled. This circular logic threatens the continued vitality of the

compelled speech doctrine and directly conflicts with this Court's free speech precedent.

Second, the Colorado Court of Appeals' holding that Phillips' creative process and resulting art comprise not pure speech but conduct conflicts with rulings by the Ninth and Eleventh Circuits. Both courts of appeals have deemed the artistic process and product of "artist[s] practicing in a visual medium" to be pure speech protected by the First Amendment. *Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015). Only this Court may decide whether the Ninth and Eleventh Circuits' conclusion or the Colorado Court of Appeals' reductionist treatment of artistic expression is correct.

Third, the Colorado Court of Appeals' conclusion that Phillips' design and creation of artistic cakes is non-expressive conduct widens an existing conflict as to what legal standard controls whether Phillips' custom cakes are considered "expressive." Under the tests used by the Second and Sixth Circuits and the Colorado Court of Appeals, they may not be. But under the tests used by the Third and Eleventh Circuits, they likely are. This Court should resolve this entrenched conflict among lower courts.

Fourth, it is undisputed that CADA does not require other cake artists to create custom cakes promoting an unwelcome message. Yet the Colorado Court of Appeals upheld Respondents' determination that Phillips violated CADA by declining to create a custom cake for a same-sex wedding on religious grounds. This ruling squarely conflicts with this

Court's free exercise precedent and with decisions by the Third, Sixth, and Tenth Circuits.

I. The Colorado Court of Appeals' Reasoning Directly Conflicts with This Court's Compelled-Speech Precedent.

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Freedom of speech thus "includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. This right extends "beyond written or spoken words as mediums of expression," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995), and applies both to individuals and "business corporations generally," *id.* at 574. Its function is to protect "'the sphere of intellect and spirit'" and "individual freedom of mind" that the First Amendment "'reserve[s] from all official control.'" *Wooley*, 430 U.S. at 714-15 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Under this Court's compelled-speech precedent, the state invades this freedom of mind when it forces a private citizen to speak the government's own message,[3] or when it compels a citizen to speak the

[3] *See, e.g.*, *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l, Inc.*, 133 S. Ct. 2321, 2324 (2013) (private aid organizations mandated to publish a policy opposing prostitution); *Wooley*, 430 U.S. at 715 (citizens forced to display the state motto on their license plates); *Barnette*, 319 U.S. at 642 (students required to salute the flag and recite the Pledge of Allegiance).

message of a third party.[4] Yet here, the Colorado Court of Appeals held that the state may compel Phillips to create a custom wedding cake promoting a morally objectionable message.

Weddings are inherently expressive events. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("The core of the message in a wedding is a celebration of marriage and the uniting of two people in a committed long-term relationship."). And wedding cakes are one of their most recognizable celebratory features. App. 185a. Traditionally, a cake-cutting ceremony at the wedding reception expresses that the couple is now married and it is time for the celebration of their union to commence. Given Phillips' belief, "based on decent and honorable religious … premises," that God ordained marriage between a man and a woman, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), it is unsurprising that he would object to designing a custom cake for the purpose of honoring a same-sex wedding.

Even though the Colorado Court of Appeals recognized the distinct possibility that one could infer "from a [Phillips'] wedding cake a message celebrating same-sex marriage," App. 30a ¶ 62, it found no compelled speech in this case. And it did so

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[4] *See, e.g.*, *Hurley*, 515 U.S. at 572 (parade organizations required to include a LGBT contingent); *Pac. Gas & Elec. Co v. Pub. Utils. Comm'n of Cal.,* 475 U.S. 1, 5-6 (1986) (utility mandated to include a consumer group's conflicting speech in its newsletter); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspaper coerced to publish a political opponent's speech).

despite the fact that Respondents admitted at oral argument they would also hold "a fine art painter" who makes "oil paintings on commission" in violation of CADA if she declined to create paintings "that celebrates gay marriages." App. 248a. The Colorado Court of Appeals' rationale was that these artists' "compliance with the law is not a reflection of [their] own beliefs." App. 31a ¶ 64.

This conclusion is based on the unspoken assumption that any speech compelled by law is attributable to the state. But this Court's compelled-speech precedent is rooted in the opposite premise: "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. As this Court has recognized, "[w]ere the government freely able to compel corporate speakers to propound … messages with which they disagree, [free speech] protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986).

For the compelled speech doctrine to maintain strength, it could hardly be otherwise. Compelled speech is expression mandated by law. A law forcing a private citizen to speak is thus a necessary predicate. But that is the beginning, not the end, of the compelled-speech inquiry. This Court has recognized, time and again, that private speakers

are often (if not always) intimately connected with expression the government foists upon them.

The Barnette children were unquestionably associated with a disagreeable message when West Virginia forced them to salute the American flag and say the Pledge of Allegiance. *Barnette*, 319 U.S. at 626. So too were the Wooleys when New Hampshire compelled them to bear its motto on their license plates. *Wooley*, 430 U.S. at 707. Even the professional fundraisers in *Riley* were not sufficiently distanced from compelled disclosure of the gross receipts they gave to charity to lose free speech protection because these unwelcome statements came from their own mouths. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). More recently, this Court found that private organizations would be associated with any unwanted anti-prostitution policy they promulgated for the express purpose of receiving federal AIDS-prevention funds. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2325-26 (2013). In none of these cases was the Colorado Court of Appeals' suggested disclaimer, "the government made me do it," sufficient to avoid a violation of the Free Speech Clause.

Phillips is just as intimately connected with the message expressed by the custom same-sex wedding cakes Colorado seeks to force him to design and create as any of the speakers cited above. Indeed, Colorado requires him not only to interview the same-sex couple and develop a custom design celebrating their union, but to physically create their

wedding cake with his own two hands. Colorado thus mandates that Phillips do far more than recite an offensive message. It requires him to first research and draft that message and then bring it to life in three dimensional form using a variety of artistic techniques that range from painting to sculpture. Moreover, the Commission significantly magnified the intrusiveness of its compelled-speech order by requiring Phillips to reeducate his employees and report to the Commission every order he declines for any reason for the next two years. App. 58a.

If that is not compelled expression, nothing is. This Court has made clear that public accommodation statutes are subject to the same First Amendment bounds as all other laws. When an LGBT group sought to march as a unit in Boston's St. Patrick's Day Parade over the parade organizers' objection, this Court held that Massachusetts' public accommodation law could not be applied to grant them access. *Hurley*, 515 U.S. at 572-74. Attempts by state courts to render the parade "sponsors' speech itself to be the public accommodation" were bound to fail because the state "may not compel affirmance of a belief with which the speaker disagrees." *Id.* at 573.

Yet the Colorado Court of Appeals held that the Free Speech Clause has no bearing on the state's attempt to force Phillips to conceive and form an artistic monument to a concept of marriage he finds morally objectionable, reeducate his employees, and report any declined order to the Commission for the

next two years. And it did so based on the feeble justification that Phillips' speech is legally required. But all of the compelled speech this Court has invalidated over the last seventy years has been required by law. Under this rationale, the compelled speech doctrine would cease to exist. This Courts' review is urgently needed to revive it, particularly where, as here, Colorado compels speech in a viewpoint discriminatory manner only from cake artists who oppose same-sex marriage but not from those who support it. Under this Court's precedent, such government attempts to "prescribe what shall be orthodox in … matters of opinion or force citizens to confess by word or act their faith therein" cannot stand. *Barnette*, 319 U.S. at 642.

II. The Colorado Court of Appeals' Holding that Phillips' Art is Conduct, Not Pure Speech, Conflicts with Rulings by the Ninth and Eleventh Circuits.

Courts have found many kinds of artistic expression to be pure speech, from abstract paintings, fiction, music without words, theater, sculpture, stained-glass windows, pictures, drawings, and engravings to the sale of original artwork, movies, tattoos, custom-painted clothing, and even nude dancing.[5] But the Colorado Court of

[5] *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (nude dancing); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568-69 (1995) ("painting[s] of Jackson Pollock, music of Arnold Schöenberg, [and] Jabberwocky verse of Lewis Carroll."); *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (nude dancing);

Appeals ruled that Phillips' design and creation of custom wedding cakes—the highest form of his art—is not pure speech but mere conduct. *See* App. 27a ("Masterpiece's contentions involve claims of compelled expressive conduct."); App. 29a ("We begin by identifying the compelled conduct in question."). It did so despite the fact that Phillips' wedding cakes are a form of original artwork that require him to paint, draw, and sculpt various decorative elements and meld them together into a unified design that communicates a personalized celebratory message.[6]

This holding squarely conflicts with rulings by the Ninth and Eleventh Circuits. In *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010), the Ninth Circuit considered whether a city ban on tattoo parlors violated the Free Speech Clause. Answering this question required the court

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Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (theater); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (pictures, paintings, drawings, and engravings); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952) (movies); *Buehrle v. City of Key* West, 813 F.3d 973, 976 (11th Cir. 2015) (tattoos and tattooing); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (tattoos and tattooing); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (sale of original artwork); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 96 (2d Cir. 2006) (custom-painted clothing); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924-25 (6th Cir. 2003) (sale of original artwork); *Bery v. City of N.Y.*, 97 F.3d 689, 694-96 (2d Cir. 1996) (sale of original artwork); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) (stained-glass windows).

[6] The artistic nature of Phillips' profession is amply demonstrated by popular television programs such as TLC's Cake Boss and Food Network's Ace of Cakes.

to decide whether tattoos and the process of tattooing are pure speech or simply conduct. *Id.* at 1059. Because "[t]attoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression," the Ninth Circuit ruled that "a tattoo is a form of pure expression entitled to full constitutional protection." *Id.* at 1061. It concluded that speech does not lose protection "based on the kind of surface" to which it is applied. *Id.* Accordingly, the Ninth Circuit ruled that it made no difference "that a tattoo is engrafted onto a person's skin rather than drawn on paper." *Id.*

But the *Anderson* Court did not stop there. The Ninth Circuit went on to conclude that the process of tattooing is itself pure speech activity entitled to strong free speech protection. *Id.* It reasoned that "neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." *Id.* As the Ninth Circuit explained, "the process of tattooing is not intended to 'symbolize' anything. Rather, the entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process any more than the Declaration of Independence could have been created without a goose quill, foolscap, and ink." *Id.* at 1062.

The Eleventh Circuit in *Buehrle v. City of Key West*, 813 F.3d 973, 975 (11th Cir. 2015), adopted the

Ninth Circuit's reasoning wholesale in deciding whether an ordinance strictly limiting the number of tattoo parlors violated the Free Speech Clause. The Eleventh Circuit also refused to "draw[] a distinction between the process of creating a tattoo and the tattoo itself." *Id.* at 977. It joined "the Ninth Circuit in holding that the act of tattooing is sheltered by the First Amendment, in large part because … tattooing [is] virtually indistinguishable from other protected forms of artistic expression." *Id.* at 976.

Applying the Ninth and Eleventh Circuit's analysis to the facts at hand leads to the inevitable conclusion that Phillips' custom wedding cakes and artistic design process are pure speech. Phillips' custom cakes no less than tattoos are composed of words, realistic or abstract images, symbols, or a combination of these, all of which are protected forms of pure expression. That Phillips draws, paints, and sculpts using glazing, food coloring, icing, and fondant rather than ink, oils, and stone makes no difference under the Ninth and Eleventh Circuits' analysis.

What is more, the Ninth and Eleventh Circuits would reject any artificial separation between Phillips' artistic process and the custom wedding cakes that result. The entire purpose of Phillips designing a custom wedding cake is to produce the cake and the cake cannot be created without his artistic design process. Hence, the Ninth and Eleventh Circuits would deem both Phillips' custom wedding cakes and his creative process safeguarded as pure speech.

It is impossible to reconcile the Ninth and Eleventh Circuit's analysis with the Colorado Court of Appeal's conclusion that Phillips' custom wedding cakes and creative process are mere conduct and not pure expression. The Colorado Court of Appeals evaded strong precedent against compelled speech by reducing the creative process to a series of bare actions. But painting is not merely dabbing paint on canvas, opera is not simply inhaling and exhaling notes, and making an artistic wedding cake is not just baking batter and applying icing from a tub.

Only this Court may resolve which First Amendment approach is correct. The answer will have serious ramifications not only for Phillips' cake designs but for free speech protection of the arts nationwide.

III. The Colorado Court of Appeals' Application of the *Spence-Johnson* Factors Exacerbates a Longstanding Conflict Among the Federal Courts of Appeals.

In addition to the fact that Phillips' custom wedding cakes and design process should be considered pure expression, the Colorado Court of Appeals' application of the *Spence-Johnson* factors to determine whether they qualify as expressive conduct widens an entrenched conflict among the courts of appeals. *See* App. 29a (asking whether Phillips "conveys a particularized message celebrating same-sex marriage" by complying with CADA and "whether the likelihood is great that a

reasonable observer would" understand that message and attribute it to him).

The federal courts of appeals fundamentally disagree on the extent the *Spence-Johnson* factors survive this Court's decision in *Hurley*. *See Cressman v. Thompson*, 798 F.3d 938, 955 (10th Cir. 2015) ("Our sister circuits have taken divergent approaches to reconciling *Hurley* with the requirements of the *Spence-Johnson* test."); *Cressman v. Thompson*, 719 F.3d 1139, 1150 (10th Cir. 2013) ("Federal circuit courts have interpreted *Hurley's* effect on the *Spence-Johnson* factors differently.").[7]

On one end of the spectrum, the Second Circuit holds that the *Spence-Johnson* factors remain fully intact after *Hurley*. *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004) ("[W]e have interpreted *Hurley* to leave intact the Supreme Court's test for expressive conduct in *Texas v. Johnson*."). The Sixth Circuit uses an intermediate approach that requires conduct to convey "a particularized message"—but not "a narrow, succinctly articulable" one—as well as a great likelihood that this message "will be understood by those who view it." *Blau v. Fort*

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[7] Although the Tenth Circuit has noted this circuit conflict, it has refused to join it. *See Cressman*, 798 F.3d at 956 ("We have thus far refrained from articulating a precise post-*Hurley* symbolic-speech test and have 'merely observe[d] that *Hurley* suggests that a *Spence-Johnson* particularized message' standard may *at times* be *too high a bar* for First Amendment protection.'" (quoting *Cressman*, 719 F.3d at 1150)).

Thomas Pub. Sch. Dist., 401 F.3d 381, 388 (6th Cir. 2005) (quotations and alterations omitted).

But the Third and Eleventh Circuits view *Hurley* as having much greater effect. The Eleventh Circuit asks whether a reasonable person would interpret conduct as expressing "*some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004). On the other end of the continuum, the Third Circuit, views the *Spence-Johnson* factors as mere "signposts rather than requirements" and holds that *Hurley* "eliminated the 'particularized message' aspect of the *Spence-Johnson* test" altogether. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002).

The Colorado Court of Appeals paid lip service to *Hurley* but treated the *Spence-Johnson* factors as largely unchanged and controlling. *Compare* App. 26a ("The message need not be narrow, or succinctly articulable." (quotation omitted), *with* App. 29-30a ("Next, we ask whether, by comporting with CADA and [creating cakes honoring same-sex marriages Phillips] 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.") (emphasis added). Its approach thus most closely resembles that of the Second and Sixth Circuits.

Phillips has always maintained that his custom wedding cakes and artistic design process qualify as

pure speech. Regardless, Phillips' custom wedding cakes would be far more likely to receive free speech protection under the Third and Eleventh Circuits' expressive conduct tests, which do not require a particularized message, than under the Second and Sixth Circuits' and Colorado Court of Appeal's more stringent approach. Only this Court may resolve this longstanding conflict regarding *Hurley's* impact on the *Spence-Johnson* factors. It should do so before the proliferation of competing standards in lower courts expands still further.

IV. The Colorado Court of Appeals' Free Exercise Holding Directly Conflicts with this Court's Precedent and Rulings by the Third, Sixth, and Tenth Circuits.

Strict scrutiny applies under the Free Exercise Clause if a law allows for individualized exemptions or targets disfavored religious views for punishment. Colorado's application of CADA does both, yet the Colorado Court of Appeals held that Phillips' free exercise rights were not even implicated. That holding conflicts with this Court's precedent and decisions by the Third, Sixth, and Tenth Circuits.

A. Under *Smith* and *Lukumi*, Laws that Permit Individualized Exemptions or Target Religion Must Satisfy Strict Scrutiny, Not Rational Basis Review.

When a law allows for case-by-case exemptions based on "'the reasons for the relevant conduct,'" the government cannot deny a religious exemption without overcoming strict scrutiny. *Church of the*

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993) (quoting *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990)). It is undisputed that CADA allows for such individualized exceptions. Yet the Colorado Court of Appeals applied mere rational basis review to the Commission's decision to deny Phillips a religious exemption from CADA. *See* App. 49a ("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."). That holding conflicts with this Court's precedent.

Respondents have repeatedly affirmed, throughout this case, that CADA permits other cake artists to decline to create cakes that convey an offensive message. For example, Respondents have conceded that a baker may decline a custom order if "the design requested" violates a "tastefulness policy that applies to everyone's orders."[8] Appellees' Am. Answer Br. 12 n.5. But the State has refused Phillips' request for a religious exemption based on his particular objection to same-sex marriage.

The ALJ decision, for instance, that the Commission adopted in whole stated that CADA would allow "a black baker [to] refuse to make a cake

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[8] CADA also permits cake artists to decline a custom order for a number of other reasons, ranging from the consequential (*e.g.*, "I don't have the requisite skill") to the trivial (*e.g.*, "I don't like your political bumper sticker"). Respondents concede this by stating that "[b]usiness owners in all trades … have legal autonomy to be selective about which projects they will take on." Appellees' Am. Answer Br. 12 n.5.

bearing a white-supremacist message for a member of the Aryan Nation" and that "an Islamic baker could … refuse to make a cake denigrating the Koran for the Westboro Baptist Church." App. 78a. The ALJ reasoned that "the explicit, unmistakable, offensive message" communicated by these cakes gave "rise to the bakers' free speech right to refuse." App. 78a.

Similarly, when a Christian patron requested that three secular bakeries in Colorado—Azucar Bakery, Le Bakery Sensual, Inc., and Gateaux, Ltd.—create custom cakes disapproving of same-sex marriage on religious grounds, the Commission found no probable cause of discrimination based on creed. App. 297-331a. And it did so despite the fact that creed discrimination under CADA encompasses "all aspects of religious beliefs, observances, and practices … [including] *the beliefs or teachings of a particular religion*," 3 C.C.R. 708-1:10.2(H) (emphasis added). The Commission found an exception to CADA when the denial of a commission is "based on the explicit message that the [customer] wished to include on the cakes." App. 305a.

This offensive-message exception to CADA is expressly based on the Commission's individualized assessment of a baker's reasons for declining a cake order. If the Commission considers the denial based on the message of a cake, as it did for the African-American, Muslim, and three secular cake artists cited above, an exemption to CADA is made available. But if the Commission views the baker's rationale differently, as it did Phillips' religious

objection to creating custom cakes honoring a same-sex marriage, no exception to CADA applies.

Regardless of how Respondents characterize Phillips' religious objection, this Court's controlling precedent holds that because a system of individualized exemptions exists, Colorado cannot deny an exemption to Phillips without first hurdling strict scrutiny. *See Lukumi*, 508 U.S. at 537 ("[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" (quoting *Smith*, 494 U.S. at 884)).

Indeed, by deeming Phillips' religious reasons for declining to create a custom cake to be of less importance than those of other cake artists, the Commission "singled out" Phillips' religious practice for "discriminatory treatment." *Id.* at 538. This conclusion flows naturally from any survey of CADA's "real operation," an inquiry that *Lukumi* affirmatively requires. *Id.* at 535. In short, the Commission deemed every similarly-situated baker's objection to creating an offensive cake "message based" and thus exempt from CADA. It held only Phillips in violation of state law.

The Commission, for example, found it critically important that the three secular cake artists who refused a Christian patron's orders did so "based on the [custom cakes'] explicit message," although they were happy to create other items "ordered by Christian customers." App. 305a. Phillips explained that he too declined to create a custom same-sex

wedding cake based on its morally objectionable message and that he is happy to create other items for gay clients. App. 286-288a. After all, a wedding cake is not a passive object but a central component of the wedding reception that celebrates the couple's joining as one. Nonetheless, the Commission found Phillips in violation of CADA. The only explanation for this disparate treatment is the Commission's disapproval of Phillips' religious beliefs about same-sex marriage.

Such hostility was apparent during the proceedings in Phillips' case. One Commission member summarized the Commission's logic, during the course of an administrative hearing, as follows:

> 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.

App. 211-212a. The Commission thus disfavored Phillips' request for an exemption from CADA based on its religious nature. In so doing, the Commission violated the essential free exercise principle that "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on

conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543.

Yet the Colorado Court of Appeals ignored CADA's real operation and declined to address the evidence showing the Commission's targeting of Phillips' religious views. It held that CADA, on its face, "was not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct" and thus applied rational basis review. App. 45a. This Court alone may reestablish that the "Free Exercise Clause … extends beyond facial discrimination" and correct the Colorado Court of Appeals' fundamental error. *Lukumi*, 508 U.S. at 534.

B. The Colorado Court of Appeals' Application of *Smith* and *Lukumi* Conflicts with Rulings by the Third, Sixth, and Tenth Circuits.

The Colorado Court of Appeals' application of *Smith* and *Lukumi* directly conflicts with that of the Third, Sixth, and Tenth Circuits. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.), the Third Circuit encountered a police department that permitted exemptions to its "no beards" policy for medical reasons but rejected exemptions based on matters of faith. The court held that "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Id.* at 366.

The Sixth Circuit ruled similarly in *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012), a case in which a public university permitted counseling students to refer clients to other counselors for mundane reasons, such as an inability to pay, while rejecting any request for an exception founded in religious belief. This "exemption-ridden policy," in the Sixth Circuit's view, was "just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740.

The Tenth Circuit in *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1291 (10th Cir. 2004), considered a comparable university policy that prohibited theater students from declining to perform objectionable scripts. Instructors allowed "ad hoc" religious exemptions from this rule in some cases but not in others. *Id.* at 1298-99. Ruling that a "'system of individualized exemptions need not be a written policy, but rather the plaintiff may show a pattern of ad hoc discretionary decisions amounting to a 'system,'" the Tenth Circuit reversed the district court's grant of summary judgment and remanded for further proceedings. *Id.* at 1299.

Here, it is undisputed that the Commission permits a myriad of exceptions to CADA's nondiscrimination rule. An African-American baker may decline to create a custom cake celebrating the racist ideals of a member of the Aryan Nation. Likewise, a Muslim baker may refuse to create a custom cake denigrating his faith for the Westboro Baptist Church. Three secular cake artists may reject a Christian's custom cake order because they find his religious message critical of same-sex

marriage offensive. Respondents have also conceded that a cake artist may decline a custom order simply because it violates a general "tastefulness policy." Appellees' Am. Answer Br. 12 n.5. And this is not even to mention the categorical exemptions to CADA that permit any discrimination not based on protected grounds, no matter how irrational or petty.

In the Third, Sixth, and Tenth Circuits, Respondents' grant of ad-hoc exemptions to other cake artists and denial of one to Phillips would trigger strict scrutiny. But the Colorado Court of Appeals found that this system of individualized exemptions and targeting of Phillips' religious views made no difference under the Free Exercise Clause. This Court's review is needed to resolve this conflict, especially as free exercise analysis in Colorado's state and federal courts is now governed by different rules.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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

July 22, 2016

APPENDIX

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Filed: August 13, 2015

COLORADO COURT OF APPEALS **2015COA115**

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

King & Greisen, LLP, Paula Greisen, Denver, Colorado; Mark Silverstein, Sara R. Neel, Denver, Colorado; Ria Tabacco Mar, New York, New York, for Petitioners-Appellees

Jeremy D. Tedesco, Scottsdale, Arizona; Michael J. Norton, Natalie L. Decker, Greenwood Village, Colorado; Nicolle H. Martin, Lakewood, Colorado, for Respondents-Appellants

Cynthia H. Coffman, Attorney General, Stacy L. Worthington, Senior Assistant Attorney General, Denver, Colorado, for Appellee

Arnold & Porter LLP, Thomas W. Stoever, Jr., Holly A. Sterrett, Denver, Colorado, for Amicus Curiae National Center for Lesbian Rights

Ayesha N. Khan, Washington, D.C.; for Amicus Curiae Americans United for Separation of Church and State and Freedom From Religion Foundation

Wheeler Trigg O'Donnell, LLP, Craig R. May, Denver, Colorado, for Amicus Curiae Main Street Alliance, Hopscotch Bakery, and Gary's Auto Service; Mayer Brown LLP, Alex O. Kardon, Hannah Y.S. Chanoine, Rory K. Schneider, New York, New York; Mayer Brown, LLP, Richard B. Katskee, Washington, D.C.

Hogan Lovells US LLP, Andrew C. Lillie, Jessica Black Livingston, Denver, Colorado, for Amici Curiae National Council of Jewish Women; Nehirim; People for the American Way Foundation; Reconciling Works; Lutherans For Full

Participation; Reconstructionist Rabbinical College and Jewish Reconstructionist Communities; Religious Institute, Inc.; Sikh American Legal Defense and Education Fund; Anti-Defamation League; Bend the Arc: A Jewish Partnership for Justice; Central Conference of American Rabbis; Global Justice Institute; Hadassah, Women's Zionist Organization of America; Japanese American Citizens League; Keshet; Metropolitan Community Churches; More Light Presbyterians; T'ruah: The Rabbinic Call for Human Rights; Union for Reform Judaism; Women of Reform Judaism; and Women's League for Conservative Judaism

Brownstein, Hyatt, Farber & Schreck, LLP, John V. McDermott, Richard B. Benenson, Lauren E. Schmidt, Denver, Colorado, for Amicus Curiae NAACP Legal Defense and Educational Fund, Inc.

Reilly Pozner LLP, John M. McHugh, Anthony L. Giacomini, Denver, Colorado, for Amicus Curiae Lambda Legal Defense and Education Fund, Inc., One Colorado and One Colorado Educational Fund

OPINION

Opinion by JUDGE TAUBMAN

¶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. 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

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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 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.

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

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[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."

¶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 23-34-402 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]

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

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[4] Having affirmed the denials of the motions to dismiss, we now refer to Masterpiece and Phillips collectively as "Masterpiece" in this opinion.

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 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

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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.

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 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]

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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

¶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, 113 S. Ct. 753. 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.

¶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

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when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation.").

[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.

requires plaintiffs to establish an intent to discriminate, as in section 1985(3) action, the ALJ reasonably could have inferred from 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 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

¶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 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

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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.

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]

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[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.

¶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, 312 P.3d 153. This 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 Rosenberger 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]

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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 614509, 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

¶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 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

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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.").

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 Rosenberger*, 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 customer's 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

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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.

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 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]

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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

¶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

¶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 disagree.

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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).

[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

¶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

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

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 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 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.

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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 defendants' religious beliefs.").

¶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 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 noninvolvement 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. *Conners 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.

Filed: April 25, 2016

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	
Certiorari to the Court of Appeals, 2014CA1351 Civil Rights Commission, CR20130008	
Petitioner: Masterpiece Cakeshop Inc. and Jack C. Phillips, **v.** **Respondents:** Colorado Civil Rights Commission, Charlie Craig, and David Mullins.	Supreme Court Case No. 2015SC738
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

CHIEF JUSTICE RICE AND JUSTICE COATS WOULD GRANT as to the following issues:

Whether the Colorado Anti-Discrimination Act ("CADA") requires Phillips to create artistic expression that contravenes his religious beliefs about marriage.

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

Whether applying CADA to force Phillips to create artistic expression that violates his religious beliefs about marriage infringes his free speech rights under the United States and Colorado Constitutions.

BY THE COURT, EN BANC, APRIL 25, 2016.

JUSTICE EID does not participate.

Filed: May 30, 2014

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 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

s/Katina Banks
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:

Nicolle H. Martin
7175 W. Jefferson Avenue, Suite 4000
Lakewood, CO 80235

Michael J . Norton
Alliance Defending Freedom
7351 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111

Kristen K. Waggoner
Alliance Defending Freedom
14241 N.E. Woodinville-Duvall Rd., No. 488
Woodinville, W A 98072

Paula Greisen
King & Greisen
1670 York Street
Denver, CO 80206

Natalie L. Decker
26 W. Dry Creek Cr., Suite 600
Littleton, CO 80120

Jeremy D. Tedesco
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260

David Mullins
Charlie Craig
c/o Sara J. Rich
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350

Amanda Goad
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Stacy Worthington
Assistant Attorney General
Office of the Attorney General
1300 Broadway, l0th Floor
Denver, CO 80203

Counsel in support of the Complaint

Charmaine C. Rose
Assistant Attorney General
Office of the Attorney General
1300 Broadway, 8th Floor
Denver, CO 80203

Counsel for the Commission

s/Shayla Malone
Shayla Malone

Filed: December 6, 2013

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 Complainant's 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.

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[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.

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 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.

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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."

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 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. 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.*

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[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).

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.

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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.

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

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[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).

congress from making any 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. IrishAmerican* 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,

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[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.

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 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

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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.

[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) 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.

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-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]

[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

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

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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.*

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,

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

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 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

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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).

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, 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 § 24-34-6(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

s/Robert N. Spencer
ROBERT N. SPENCER
Administrative Law Judge

Hearing digitally recorded in CR#1

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS:

1. To abide by the decision of the Administrative Law Judge ("ALJ"). In the absence of an appeal or review of the decision by the Colorado Civil Rights Commission ("Commission") the decision will automatically become final 30 days after the mailing date.

2. To appeal the decision of the ALJ to the Commission a party must:

A. File a designation of record with the Commission within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties, pursuant to § 24-4-105(15)(a), C.R.S. and Commission Rule 10.13(B), 3 CCR 708-1. Any party wishing to have a transcript made part of the record is responsible for advancing the costs of the transcript to the Commission. Section 24-4-105(15)(a).

B. File a written notice of appeal containing exceptions to the ALJ's decision with the Commission within thirty (30) calendar days after the decision of the ALJ is mailed to the parties pursuant to § 24-4-105(14)(a)(Il) C.R.S. and Commission Rule 10.13(A), CCR 708-1.

C. Both the designation of record and the notice of appeal must be received by the Commission no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Sections 24-4-105(14) and (15), C.R.S. and Commission Rule 10.13, 3 CCR 708-1.

D. All papers and documents filed with the Commission on appeal shall be filed with an original and nine copies. Commission Rule 10.13(C), 3 CCR 708-1. All papers and documents shall be mailed or delivered to the following address:

Colorado Civil Rights Commission
c/o Colorado Civil Rights Division
1560 Broadway, Suite 1050
Denver, CO 80202

3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether parties file exceptions.

CERTIFICATION OF THE RECORD AND APPEAL PROCESS

Once the record is certified the Commission will mail a Certificate of Record of Hearing Proceedings and a Briefing Schedule to the parties. No new evidence will be considered by the

Commission on review. Either party may request oral argument before the Commission but the request must be made within 10 days of service of the Briefing Schedule. The Commission, in its discretion, may grant or deny the request for oral argument.

U.S. CONST. AMEND I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

C.R.S.A. § 24-34-601

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

Effective: August 6, 2014

(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.

3 C.C.R. 708-1:10.2

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

708-1:10.2. Definitions.

* * *

(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.

* * *

C.R.S.A. §24-34-307

C.R.S.A. §24-34-307. Judicial review and enforcement

Effective: August 5, 2015

(1) Any complainant or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue an order, may obtain judicial review thereof, and the commission may obtain an order of court for its enforcement in a proceeding as provided in this section.

(2) Such proceeding shall be brought in the court of appeals by appropriate proceedings under section 24-4-106(11).

(3) Such proceeding shall be initiated by the filing of a petition in the court of appeals and the service of a copy thereof upon the commission and upon all parties who appeared before the commission, and thereafter such proceeding shall be processed under the Colorado appellate rules. The court of appeals shall have jurisdiction of the proceeding and the questions determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript an order enforcing, modifying, and enforcing as so modified or setting aside the order of the commission in whole or in part.

(4) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

(5) Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereof, if such party shows reasonable grounds for the failure to adduce such evidence before the commission.

(6) The findings of the commission as to the facts shall be conclusive if supported by substantial evidence.

(7) The jurisdiction of the court shall be exclusive and its judgment and order shall be final, subject to review as provided by law and the Colorado appellate rules.

(8) The commission's copy of the testimony shall be available to all parties for examination at all reasonable times, without cost, and for the purpose of judicial review of the commission's orders.

(9) The commission may appear in court by its own attorney.

(9.5) Upon application by a person alleging a discriminatory housing practice under section 24-34-502 or a person against whom such a practice is alleged, the court may appoint an attorney for such person or may authorize the commencement or

continuation of a civil action without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(10) The commission or court upon motion may grant a stay of the commission order pending appeal.

(11) Appeals filed under this section shall be heard expeditiously and determined upon the transcript filed, without requirement for printing. Hearings in the court of appeals under this part 3 shall take precedence over all other matters, except matters of the same character.

(12) If no proceeding to obtain judicial review is instituted by a complainant or respondent within forty-nine days from the service of an order of the commission pursuant to section 24-34-306, the commission may obtain a decree of the district court for the enforcement of such order upon showing that such respondent is subject to the jurisdiction of the commission and resides or transacts business within the county in which the petition for enforcement is brought.

C.R.S.A. § 24-4-106

§ 24-4-106. Judicial review

Effective: May 9, 2014

(1) In order to assure a plain, simple, and prompt judicial remedy to persons or parties adversely affected or aggrieved by agency actions, the provisions of this section shall be applicable.

(2) Final agency action under this or any other law shall be subject to judicial review as provided in this section, whether or not an application for reconsideration has been filed, unless the filing of an application for reconsideration is required by the statutory provisions governing the specific agency. In the event specific provisions for rehearing as a basis for judicial review as applied to any particular agency are in effect on or after July 1, 1969, then such provisions shall govern the rehearing and appeal procedure, the provisions of this article to the contrary notwithstanding.

(3) An action may be commenced in any court of competent jurisdiction by or on behalf of an agency for judicial enforcement of any final order of such agency. In any such action, any person adversely affected or aggrieved by such agency action may obtain judicial review of such agency action.

(4) Except as provided in subsection (11) of this section, any person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court within thirty-five

days after such agency action becomes effective; but, if such agency action occurs in relation to any hearing pursuant to section 24-4-105, then the person must also have been a party to such agency hearing. A proceeding for such review may be brought against the agency by its official title, individuals who comprise the agency, or any person representing the agency or acting on its behalf in the matter sought to be reviewed. The complaint shall state the facts upon which the plaintiff bases the claim that he or she has been adversely affected or aggrieved, the reasons entitling him or her to relief, and the relief which he or she seeks. Every party to an agency action in a proceeding under section 24-4-105 not appearing as plaintiff in such action for judicial review shall be made a defendant; except that, in review of agency actions taken pursuant to section 24-4-103, persons participating in the rule-making proceeding need not be made defendants. Each agency conducting a rule-making proceeding shall maintain a docket listing the name, address, and telephone number of every person who has participated in a rule-making proceeding by written statement, or by oral comment at a hearing. Any person who commences suit for judicial review of the rule shall notify each person on the agency's docket of the fact that a suit has been commenced. The notice shall be sent by first-class certified mail within fourteen days after filing of the action and shall be accompanied by a copy of the complaint for judicial review bearing the action number of the case. Thereafter, service of process, responsive pleadings, and other matters of procedure shall be controlled by the Colorado rules of civil procedure.

An action shall not be dismissed for failure to join an indispensable party until an opportunity has been afforded to an affected party to bring the indispensable party into the action. The residence of a state agency for the purposes of this subsection (4) shall be deemed to be the city and county of Denver. In any action in which the plaintiff seeks judicial review of an agency decision made after a hearing as provided in section 24-4-105, the parties after issue is joined shall file briefs within the time periods specified in the Colorado appellate rules.

(4.5) Subject to the limitation set forth in section 39-8-108(2), C.R.S., the board of county commissioners of any county of this state may commence an action in the Denver district court within the time limit set forth in subsection (4) of this section for judicial review of any agency action which is directed to any official, board, or employee of such county or which involves any duty or function of any official, board, or employee of such county with the consent of said official, board, or employee, and to the extent that said official, board, or employee could maintain an action under subsection (4) of this section. In addition, in any action brought against any official, board, or employee of a county of this state for judicial enforcement of any final order of any agency, the defendant official, board, or employee may obtain judicial review of such agency action. In any such action for judicial review, the county official, board, or employee shall not be permitted to seek temporary or preliminary injunctive relief pending a final decision on the merits of its claim.

(4.7) The county clerk and recorder of any county may commence an action under this section in the Denver district court for judicial review of any final action issued by the secretary of state arising under the "Uniform Election Code of 1992", articles 1 to 13 of title 1, C.R.S. In any such action, the county clerk and recorder may seek temporary or preliminary injunctive relief pending a final decision on the merits of the claim as permitted under this section.

(5) Upon a finding that irreparable injury would otherwise result, the agency, upon application therefor, shall postpone the effective date of the agency action pending judicial review, or the reviewing court, upon application therefor and regardless of whether such an application previously has been made to or denied by any agency, and upon such terms and upon such security, if any, as the court shall find necessary and order, shall issue all necessary and appropriate process to postpone the effective date of the agency action or to preserve the rights of the parties pending conclusion of the review proceedings.

(6) In every case of agency action, the record, unless otherwise stipulated by the parties, shall include the original or certified copies of all pleadings, applications, evidence, exhibits, and other papers presented to or considered by the agency, rulings upon exceptions, and the decision, findings, and action of the agency. Any person initiating judicial review shall designate the relevant parts of such record and advance the cost therefor. As to alleged errors, omissions, and irregularities in the

agency record, evidence may be taken independently by the court.

(7) 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.

(8) Upon a showing of irreparable injury, any court of competent jurisdiction may enjoin at any time the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or

statutory jurisdiction or authority of the agency. If the court finds that any proceeding contesting the jurisdiction or authority of the agency is frivolous or brought for the purpose of delay, it shall assess against the plaintiff in such proceeding costs and a reasonable sum for attorney fees (or an equivalent sum in lieu thereof) incurred by other parties, including the state.

(9) The decision of the district court shall be subject to appellate review as may be permitted by law or the Colorado appellate rules, but a notice of intent to seek appellate review must be filed with the district court within forty-nine days after its decision becomes final. If no notice of intent to seek appellate review is filed with the trial court within forty-nine days after its decision becomes final, the trial court shall immediately return to the agency its record. Upon disposition of a case in an appellate court which requires further proceedings in the trial court, the agency's record shall be returned to the trial court. On final disposition of the case in the appellate court when no further proceedings are necessary or permitted in the trial court, the agency's record shall be returned by the appellate court to the agency with notice of such disposition to the trial court or to the trial court, in which event the agency's record shall be returned by the trial court to the agency.

(10) In any judicial review of agency action, the district court or the appellate court shall advance on the docket any case which in the discretion of the court requires acceleration.

(11)(a)Whenever judicial review of any agency action is directed to the court of appeals, the provisions of this subsection (11) shall be applicable except for review of orders of the industrial claim appeals office.

(b) Such proceeding shall be commenced by the filing of a notice of appeal with the court of appeals within forty-nine days after the date of the service of the final order entered in the action by the agency, together with a certificate of service showing service of a copy of said notice of appeal on the agency and on all other persons who have appeared as parties to the action before the agency. The date of service of an order is the date on which a copy of the order is delivered in person or, if service is by mail, the date of mailing.

(c) The record on appeal shall conform to the provisions of subsection (6) of this section. The designation and preparation of the record and its transmission to the court of appeals shall be in accordance with the Colorado appellate rules. A request for an extension of time to transmit the record shall be made to the court of appeals and may be granted only by that court.

(d) The docketing of the appeal and all procedures thereafter shall be as set forth in the Colorado appellate rules. The agency shall not be required to pay a docket fee. All persons who have appeared as parties to the action before the agency who are not designated as appellants shall, together with the agency, be designated as appellees.

(e) The standard for review as set forth in subsection (7) of this section shall apply to appeals brought under this subsection (11).

C.A.R. Rule 3

RULE 3. APPEAL AS OF RIGHT--HOW TAKEN

* * *

(b) Filing the Notice of Appeal or Petition for Review in Appeals From State Agencies. An appeal permitted by statute from a state agency directly to the court of appeals or appellate review from a district court must be in the manner and within the time prescribed by the particular statute.

* * *

(e) Contents of Notice of Appeal From State Agencies (Other Than the Industrial Claim Appeals Office) Directly to the Court of Appeals. The notice of appeal must set forth:

(1) A caption that complies in form with C.A.R. 32;

(2) A brief description of the nature of the case including:

(A) A general statement of the nature of the controversy (not to exceed one page);

(B) The order being appealed and a statement indicating the basis for the appellate court's jurisdiction;

(C) Whether the order resolved all issues pending before the agency;

(D) Whether the order is final for purposes of appeal; and

(E) The date of service of the final order entered in the action by the agency. The date of service of an order is the date on which a copy of the order is delivered in person, or, if service is by mail, the date of mailing;

(3) An advisory listing of the issues to be raised on appeal;

(4) Whether the transcript of any evidence taken before the administrative agency is necessary to resolve the issues raised on appeal;

(5) The names of counsel for the parties, their addresses, telephone numbers, e-mail addresses, and registration numbers;

(6) An appendix containing a copy of the order being appealed and the findings of the agency, if any; and

(7) A certificate of service in compliance with C.A.R. 25 showing service of a copy of the notice of appeal (with attachments) on the state agency and all other persons who have appeared as parties to the action before the agency, or as required by section 24-4-106(4), C.R.S. concerning rule-making appeals.

C.A.R. Rule 40

RULE 40. PETITION FOR REHEARING

(a) Time to File; Contents; Answer; Oral Argument; Action by Court if Granted.

(1) *Time.* Unless the time is shortened or extended by order, a petition for rehearing may be filed within 14 days after entry of judgment.

(2) *Contents.* The petition must state with particularity each point of law or fact the petitioner believes the court has overlooked or misapprehended and must include an argument in support of the petition.

(3) *Answer.* Unless the court requests a response, no answer to a petition for rehearing is permitted.

(4) *Oral Argument.* Oral argument is not permitted on a petition for rehearing.

(5) *Action by the Court.* If a petition for rehearing is granted, the court may:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other order it deems appropriate.

(b) Form of Petition; Length. The petition must comply in form with C.A.R. 32. The petition must include the following in the caption:

(1) If filed in the supreme court: the name of the author justice; the name of any justice who wrote or participated in a separate opinion; the name of any justice who did not participate in the case; whether the decision was en banc; and, if a departmental decision, the names of the participating justices.

(2) If filed in the court of appeals: the names of the author judge and participating judges, and the name of any judge who wrote or participated in a separate opinion.

Except by permission of court, a petition for rehearing must not exceed 1,900 words, excluding material not counted under C.A.R. 28(g)(1).

(c) Petition for Rehearing in Supreme Court Proceedings. A petition for rehearing filed in proceedings before the supreme court must comply with the requirements of subsections (a) and (b) of this rule.

(1) *In Direct Appeals.* A petition for rehearing may be filed in a direct appeal to the supreme court only after issuance of an opinion. No petition for rehearing may be filed after issuance of an order affirming a lower court order.

(2) *In Proceedings Under C.A.R. 21.* A petition for rehearing may be filed after issuance of an opinion discharging a rule to show cause or making a rule

absolute. No petition for rehearing may be filed after denial of a petition without explanation.

(3) *In Certiorari Proceedings.* A petition for rehearing may be filed after issuance of an opinion on the merits of a granted petition for writ of certiorari, or when, after granting a writ of certiorari, the court later denies the writ as having been improvidently granted. No petition for rehearing may be filed after issuance of an order denying a petition for writ of certiorari.

(4) *In Interlocutory Appeals in Criminal Cases under C.A.R. 4.1.* No petition for rehearing shall be permitted in interlocutory appeals filed pursuant to C.A.R. 4.1.

C.A.R. Rule 49

RULE 49. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

(a) Addressed to Judicial Discretion. A review in the Supreme Court on writ of certiorari as provided in section 13-4-108, C.R.S., and section 13-6-310, C.R.S., is a matter of sound judicial discretion and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Supreme Court's discretion, indicate the character of reasons which will be considered:

(1) Where the district or superior court on appeal from the county court has decided a question of substance not heretofore determined by this court;

(2) Where the Court of Appeals, or district or superior court on appeal from the county court, has decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court;

(3) Where a division of the Court of Appeals has rendered a decision in conflict with the decision of another division of said court; the same ground applies to judgments and decrees of district courts on appeal from the county court when a decision is in conflict with another district court on the same matters;

(4) Where the Court of Appeals has so far departed from the accepted and usual course of

judicial proceedings or so far sanctioned such procedure by a lower court as to call for the exercise of the Supreme Court's power of supervision.

C.A.R. Rule 51

RULE 51. REVIEW ON CERTIORARI--HOW SOUGHT

(a) Filing and Proof of Service. Review on certiorari shall be sought by filing with the clerk of the Supreme Court, with service had and proof thereof as required by C.A.R. 25, a petition which shall be in the form prescribed in C.A.R. 32 and a transcript of the record in the case as filed in said court which shall be certified by the clerk of the appropriate court. Service of a copy of the transcript of the record is not required.

(b) Appearance and Docket Fee. Upon the filing of the petition and the certified transcript of the record, counsel for the petitioner shall enter an appearance and pay the docket fee of $225.00, of which $1.00 shall be transferred to the state general fund as a tax levy pursuant to section 2-5-119, C.R.S. The case shall then be placed in the certiorari docket.

(c) Notice to Respondents. It shall be the duty of counsel for the petitioner to notify all the respondents of the date of filing, and of the docket number of the case, and that the transcript of the record has been filed in the Supreme Court.

(d) Docket Fee. Upon entry of appearance, counsel for respondent shall pay the docket fee of $115.00.

C.A.R. Rule 52

RULE 52. REVIEW ON CERTIORARI--TIME FOR PETITIONING

(a) To Review a District Court Judgment. A petition for writ of certiorari to review a judgment of a district court on appeal from a county court, shall be filed not later than 42 days after the rendition of the final judgment in said court.

(b) To Review Court of Appeals Judgment.

(1) Filing a petition for rehearing in the Court of Appeals, before seeking certiorari review in the Supreme Court, is optional.

(2) No petition for issuance of a writ of certiorari may be submitted to the Supreme Court until the time for filing a petition for rehearing in the Court of Appeals has expired.

(3) Any petition for writ of certiorari to review a judgment of the Court of Appeals shall be filed in the Supreme Court within 42 days of the issuance of the opinion of the Court of Appeals, if no petition for rehearing is filed, or within 28 days after the denial of a petition for rehearing by the Court of Appeals. Any petition for writ of certiorari to review a judgment of the Court of Appeals in workers' compensation and unemployment insurance cases shall be filed in the Supreme Court within 28 days after the issuance of the opinion of the Court of Appeals, if no petition of rehearing is filed, or within

14 days after the denial of a petition for rehearing by the Court of Appeals.

C.A.R. Rule 53

RULE 53. PETITION FOR WRIT OF CERTIORARI AND CROSS-PETITION FOR WRIT OF CERTIORARI

(a) The Petition. The petition for writ of certiorari shall be succinct and shall not exceed 12 pages, unless it contains no more than 3,800 words, exclusive of appendix. The petition shall comply with C.A.R. 32. The petition shall contain in the order here indicated:

(1) An advisory listing of the issues presented for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. Only the issues set forth or fairly comprised therein will be considered.

(2) A reference to the official or unofficial reports of the opinion, judgment, or decree from which review is sought.

(3) A concise statement of the grounds on which jurisdiction of the Supreme Court is invoked, showing:

> (A) The date of the opinion, judgment, or decree sought to be reviewed and the time of its entry;
>
> (B) The date of any order respecting a rehearing and the date and terms of any order

granting an extension of time within which to petition for writ of certiorari.

(4) A concise statement of the case containing the matters material to consideration of the issues presented.

(5) A direct and concise argument amplifying the reasons relied on for the allowance of the writ.

(6) An appendix containing:

(A) A copy of any opinions delivered upon the rendering of the decision of the Court of Appeals;

(B) If review of a judgment of the district court on an appeal from a county court is sought, a copy of the findings, judgment and decree in question; and

(C) The text of any pertinent statute or ordinance.

(7) *Repealed.*

(b) The Cross-Petition. Within 14 days after service of the petition for writ of certiorari, a respondent may file and serve a cross-petition. A cross-petition shall be succinct and shall not exceed 12 pages, unless it contains no more than 3,800 words, exclusive of appendix. The cross-petition shall comply with C.A.R. 32. A cross-petition shall have the same contents, in the same order, as the petition.

(c) Opposition Brief. Within 14 days after service of the petition, respondent may file and serve an opposition brief, a cross-petition or both. The petitioner may file an opposition brief within 14 days after service of a cross-petition. An opposition brief shall be succinct and shall not exceed 12 pages, unless it contains no more than 3,800 words. The opposition brief shall comply with C.A.R. 32.

(d) Reply Brief. Within 7 days after service of an opposition brief, a petitioner or cross-petitioner may file and serve a reply brief. A reply brief shall be succinct and shall not exceed 10 pages, unless it contains no more than 3,150 words. The reply brief shall comply with C.A.R. 32.

(e) No Separate Brief. No separate brief may be appended to the petition, any cross-petition, the opposition brief, or the reply brief.

(f) Filing and Service. An original of all petitions and briefs shall be filed with the clerk of the Supreme Court. Service shall be in the same manner as provided for service of the notice of appeal.

EXCERPTS OF ROA 408-411

Filed: October 31, 2013

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	Case Number: 2013-0008

Littleton, CO 80120 (0) 303-730-3009 natalie@denverlawsolutions.com Michael J. Norton, No. 6430 Alliance Defending Freedom 7951 E. Maplewood Avenue, Suite 100 Greenwood Village, CO 80111 (0) 720-689-2410 mjnorton@alliancedefending freedom.org	
RESPONDENTS' RESPONSE IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT	

Respondents, Jack Phillips and Masterpiece Cakeshop, Inc., by and through counsel, and pursuant to C.R.C.P. 56, request that the Court DENY Complainants' Motion for Summary Judgment and GRANT Respondents' Cross Motion for Summary Judgment. There are no genuine disputes as to any material fact in this case, and Respondents are entitled to judgment as a matter of law on the following grounds:

1. Jack Phillips and Masterpiece Cakeshop, Inc. did not violate COLO. REV. STAT. § 24-34-601 (2) (2013).

2. Jack Phillips and Masterpiece Cakeshop, Inc. should not be forced to

design and create a wedding cake for a marriage that is not legal in Colorado.

3. If Complainants are successful in showing that Respondents violated COLO. REV. STAT. § 24-34-601 (2) (2013), Respondents were justified in doing so because both the Colorado and the U.S. Constitutions guarantee Jack Phillips and Masterpiece Cakeshop, Inc. the right to decline to design and create a wedding cake for a same-sex wedding. Forcing Jack Phillips and Masterpiece Cakeshop, Inc. to design and create a wedding cake violates constitutionally guaranteed rights of Free Speech and Freedom of Religion under the Colorado and U.S. Constitutions.

4. Respondents hereby incorporate by this reference Respondents' BRIEF IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF JACK PHILLIPS'S CROSS MOTION FOR SUMMARY JUDGMENT, including Exhibits 1 - 28 attached thereto, which are filed simultaneously with this response and cross-motion.

Respondents Request the Following Relief:

5. Dismiss each Notice of Hearing and Formal Complaint with prejudice;

6. Issue a declaratory judgment that Jack Phillips and Masterpiece Cakeshop, Inc. did not engage in sexual orientation discrimination as prohibited by COLO. REV. STAT. § 24-34- 601 (2) (2013);

7. Rule that the Government's and Complainants' Complaint and the investigation by the Colorado Civil Rights Division as applied to the facts of this case violated Jack Phillips's and Masterpiece Cakeshop, Inc.'s rights to freedom of speech and free exercise of religion under the First Amendment to the United States Constitution and Article II, sections 4 and 10 of the Colorado Constitution;

8. Rule that Jack Phillips and Masterpiece Cakeshop, Inc. cannot be forced by the Government or Complainants to create a wedding cake that violates the public policy of the State of Colorado;

9. Such other and further relief as the Court deems just and equitable.

Respectfully submitted this 31st day of October, 2013.

Attorneys for Respondents
Jack C. Phillips and
Masterpiece Cakeshop, Inc.:

/s/ Nicolle H. Martin

Nicolle H. Martin, No. 28737
7175 W. Jefferson Avenue,
Suite 4000
Lakewood, Colorado 80235
303.332.4547
nicolle@centurylink.net

/s/ Natalie L. Decker
Natalie L. Decker, No. 28596
The Law Office of Natalie L.
Decker, LLC
26 W. Dry Creek Cr., Suite 600
Littleton, CO 80120
(0) 303-730-3009
natalie@denverlawsolutions.com

/s/ Michael J. Norton
Michael J. Norton, No. 6430
Alliance Defending Freedom
7951 E. Maplewood Avenue,
Suite 100
Greenwood Village, CO 80111
(0) 720-689-2410
mjnorton@alliancedefending
freedom.org

CERTIFICATE OF SERVICE

I certify that on this 31st day of October, 2013, a true and correct copy of the foregoing **RESPONDENTS' RESPONSE IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT** was filed with the Court and sent via electronic mail (by agreement of the parties) to the following:

David Mullins
Charlie Craig
c/o Sara J. Rich (via email: SRich@aclu-co.org)
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203

Charmaine Rose (via U.S. Mail)
Assistant Attorney General
Business and Licensing Section
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Stacy L. Worthington (via email:
Stacy.Worthington@state.co.us)
Civil Litigation & Employment Law Section
Office of the Attorney General
1300 Broadway, 10th floor
Denver, CO 80203

Amanda Goad (via email: agoad@aclu.org)
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Paula Greisen (via email: greisens@kinggreisen.com)
King & Greisen
1670 York Street
Denver, CO 80206

/s/ Nicolle H. Martin
Marilyn Kuipers

EXCERPTS OF ROA 443-465

[ROA 443]

Filed: October 31, 2013

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	Case Number: 2013-0008

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 (0) 720-689-2410 mjnorton@alliancedefending freedom.org	
BRIEF IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF JACK PHILLIPS'S CROSS MOTION FOR SUMMARY JUDGMENT	

* * *

III. Constitutional Guarantees Protect Jack Phillips' Right to Decline to Create a Celebratory Cake Promoting and Endorsing Same-Sex Marriage.

As explained below, applying the nondiscrimination statute to Jack in this instance raises serious constitutional infirmities. Before considering the constitutional questions, however, it is important to note that the Court need not do so; and, in fact, should not do so. The Colorado Supreme Court is clear: when it is possible to read a statute in a way that "avoid[s] potential constitutional infirmities," the court "*must"* do so. *Lopez v. People,* 113 P.3d 713, 728 (Colo. 2005) (en banc) (emphasis

added). This accords proper deference to the Legislature. As the Supreme Court explained, "the legislature intends a statute to be constitutional and we should construe it in a manner avoiding constitutional infirmity, if possible." *Bd. of Directors, Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA,* 105 P.3d 653, 656 (Colo. 2005). That is why the Supreme Court has taught that it is the court's "duty, if possible, to give full force and effect to legislative enactments. If a reasonable interpretation, that will avoid constitutional conflict, is at hand, we should adopt it." *Town of Sheridan v. Valley Sanitation Dist.,* 137 Colo. 315, 321, 324 P.2d 1038, 1041 (1958).

As explained above, the plain meaning of the statute at issue in this case requires that, for discrimination to occur, the sexual orientation of the customer must be the reason that a defendant declined to serve him or her. But in this case, as explained above, the sexual orientation of the customer was irrelevant to Jack. For Jack, it was not about sexual orientation but about the *event* he was being asked to participate in by creating a celebratory message for, and therefore promote. For the Government and Complainants to prevail, therefore, a meaning of the statute must be adopted that is not its plain meaning. That is to say, "because of" must be read out of the statute. Instead, the statute must be made to say that it is per se discriminatory to decline to provide something a gay customer requests. Further, the statute must be read to require something (recognizing a same-sex wedding) that the Government itself, whose statute it is, declines to do.

Reading the statute in this forced way will lead to "constitutional conflict." As the Supreme Court explained in *Town of Sheridan,* this Court should adopt the interpretation of the antidiscrimination statute that allows the court to avoid potential constitutional conflict. This Court should therefore end its analysis at this point and grant Jack's motion for summary judgment; for, Jack cannot be guilty of sexual orientation discrimination when he did not deny anyone services "because of" his or her sexual orientation.

To turn now to the constitutional questions, the Colorado public accommodations law under which the Complainants and the Government have brought their complaint is unconstitutional as applied to Jack's creation of wedding cakes. It infringes the free speech guarantees afforded by the First Amendment of the United States Constitution and by Article II, Section 10 of the Colorado Constitution. *See infra,* Part III.A. It also violates both state and federal guarantees of free exercise of religion. *See infra,* Part III.B. For these reasons, the law cannot be applied to Jack in the manner attempted in this case, and summary judgment is appropriate for him. This Court should therefore grant Jack's motion for summary judgment and deny the Complainants' motion for summary judgment.

A. Forcing Jack Phillips to Communicate a Celebratory Message About Same-Sex Marriage Infringes His State and Federal Free Speech Guarantees and Is Unconstitutional.

The state and federal constitutions both guarantee Jack, and every other person, broad free speech rights and protections. Article II, Section 10 of the Colorado Constitution states: "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 . . . ." As broad as the protections of the First Amendment to the U.S. Constitution are, as discussed below, the free speech provision of the Colorado Constitution provides even broader liberty and protection of free speech. *Bock v. Westminster Mall Co.,* 819 P.2d 55, 59-60 (Colo. 1991) (explaining that, for more than 100 years, Colorado's free speech provision has provided greater protection than First Amendment).

With the words "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ,'" the framers of the Constitution established the First Amendment as a shield to protect Americas most treasured and hard-fought rights. It is these rights the Government seeks to suppress by compelling Jack Phillips to make an unacceptable choice – violate his religious beliefs by speaking a message he morally disagrees with, or suffer significant pecuniary loss which will ultimately result in the loss of his business. The

moral and ethical consequences of this forced choice cannot be underestimated; betrayal of one's conscience is a lie – told not only to the person seeking to compel the message, but to all those who view the government forced creation of a wedding cake. Compounding this untenable reality, Jack Phillips's wedding cake will be regarded as approval of Complainants' *political* message. (Exs. 17-19, 21-24). Photo of Complainants' cake and photo showing same-sex marriage symbol at their protest, *A Rainbow Marriage: How Did the Rainbow Become a Symbol of Gay Rights,* Slate, June 26, 2013. Mr. Phillips seeks to safeguard his constitutional rights and to protect his conscience from unjust coercion by the Government.

First Amendment protection against abridging freedom of speech extends beyond spoken or written words. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 68 (2006); *see also Hurley v. lrish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) (saluting or not saluting a flag; wearing an armband; displaying a red flag, parading in uniform while displaying a swastika, music, and art all held to be speech protected by First Amendment). In fact, "the Constitution looks beyond written or spoken words as mediums of expression." *Id.* at 569. The design and creation of wedding cakes, as symbolic speech, is entitled to full First Amendment protection. *See Cressman v. Thompson,* 719 F.3d 1139, 1141 (l0th Cir. 2013); *ETW Corp. v. Jireh Publ'g, Inc.,* 332 F.3d 915, 924 (6th Cir. 2003) (recognizing that First Amendment protections have been specifically afforded to a variety of mediums of expression,

including music, pictures, films, art, entertainment, paintings, drawings, engravings, prints, sculptures, and speech that "is carried in a form that is sold for profit") (citations omitted)). As described above, wedding cakes are artistic creations that constitute speech, just like a host of other mediums of expression recognized by courts, and specifically by the United States Supreme Court.

1. Wedding Cakes Are Speech That Communicate Positive, Celebratory Messages About Marriages.

Cakes are often a method of communication. Wedding cakes are particularly so. As described above, the history, traditions and meaning of wedding cakes demonstrate this. Wedding cakes communicate both actual speech (e.g., the little "groom and groom" on top; any message iced on the cake; etc.) and also symbolic speech (e.g., what the cake stands for, any special attributes like rainbow colors, such as was used on the Complainants' cake as shown in Exhibits 18-19). Wedding cakes communicate a positive and celebratory message about marriage.

Jack uses his talent and creativity to create wedding cakes that convey both actual and symbolic speech. (Resp't Aff. ¶¶ 37-45). To suggest otherwise distills Jack's expressive wedding cakes into a fungible good, void of artistic style and expression. This renders wedding cakes interchangeable from one baker to the next, and ignores the communicative nature of a wedding cake. Jack's

wedding cakes convey a symbolic message about marriage, and as such, he is entitled to the full protection of the First Amendment.

Under the First Amendment, not only actual spoken speech, but also symbolic speech has long been protected by the Supreme Court. *See Hurley,* 515 U.S. at 569; *Texas v. Johnson,* 491 U.S. 397, 404 (1989) (burning of American flag held to be protected symbolic speech), and *Spence v. Washington,* 418 U.S. 405, 420 (1974) (hanging of upside down American flag embellished with peace symbols held to be protected symbolic speech). Wedding cakes are among the scores of symbols in our daily lives that express an articulable message, worthy of First Amendment protection. The Tenth Circuit Court of Appeals recently affirmed that symbolic speech falls under the umbrella of protected speech in *Cressman v. Thompson,* 719 F.3d 1139,1154 (10th Cir. 2013)[14]. The symbolic speech recognized in *Cressman* consisted of a license plate image of a Native American warrior shooting an arrow into the sky hoping to induce the "rain god" to answer the people's prayers for rain. *Id.* at 1141-42. The *Cressman* court determined that the display of the license plate "convey[ed] a particularized message that others would likely understand." *Cressman,* 719 F.3d at 1153-54. The court therefore held that the

[14] Cressman filed a section 1983 lawsuit against various Ok1ahoma State officials alleging violations of his right to freedom of speech, his right to freely exercise his religion and his due process rights, *Cressman,* 719 F.3d at 1143, when he was forced to display an image on his license plate that violated his religious beliefs. *Id.* at 1141.

plaintiff's complaint stated a "plausible compelled speech claim" because the image of the Native American warrior "convey[ed] a . . . message, covering up the image poses a threat of prosecution, and his only alternative to displaying the image is to pay additional fees for specialty license plates that do not contain the image." The Constitution recoils from compelled speech and protects citizens from being forced to speak when they would rather remain, silent, "regardless of whether the speech is ideological." *Id.* at 1152 (quoting *Axson-Flynn v. Johnson,* 356 F.3d 1277, 1284 n.4 (l0th Cir. 2004)).

2. The First Amendment Will Not Tolerate Government-Compelled Speech.

By its very nature, the right of free speech cannot mean that Jack must create and facilitate Complainants' speech. The very notion that Complainants and the Government can force Jack to create and design a wedding cake in violation of his deep and abiding faith is antagonistic to the very underpinnings of personal and religious liberty enshrined in the First Amendment.

Cressman, like the long line of compelled speech jurisprudence before it, stands for the principle that the First Amendment safeguards not just actual speech, but it safeguards the freedom of the mind – the right to decide whether to speak at all. *See Cressman,* 719 F.3d at 1152. Consequently, freedom of speech extends beyond spoken or written words. *See Hurley,* 515 U.S. at 574; *Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.,* 475 U.S. 1,

16 (1986); *Wooley v. Maynard,* 430 U.S. 705, 715 *(1977); Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 261 (1974).

Equally critical to the right to freedom of speech is the right not to speak at all. Indeed, more than 70 years ago the Supreme Court struck down a state law compelling students to salute and pledge allegiance to the flag of the United States. *West Virginia State Board of Educ.,* 319 U.S. at 633-34 (referring to the expressive nature of symbols, the Court stated, "[s]ymbolism is a primitive but effective way of communicating ideas." *Id.* at 632). Thirty years later, the Supreme Court again reaffirmed the principles handed down in *Barnette* when it held that an individual cannot be compelled to communicate the message of another. *Wooley,* 430 U.S. at 715 (forcing a driver to display the state's message on his license plate amounted to forced speech in violation of First Amendment). Speech can be considered compelled by forcing an entity to express a message and/or punish an entity for refusing to display or engage in the unwanted message or expression. *Id.* at 715. It can also be compelled by forcing an entity to host or accommodate another's message, thereby irreversibly altering the message of the complaining entity. "Our compelled-speech cases are not limited to the situation in which an individual must personally speak the Government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *Rumsfeld,* 547 U.S. at 63 (citing *Hurley,* 515 U.S. at 559 (1995) (forcing parade organizer to include LGBT group's

message, which organizer opposed, violated First Amendment); *Pacific Gas and Elec. Co.,* 475 U.S. at 9 (plurality opinion) (compelling plaintiff to include oppositional private speech of third-party in plaintiff's monthly newsletter violated First Amendment); *Miami Herald Publishing Co.,* 418 U.S. at 258 (right-of-reply statute violates editors' right to determine the content of their newspapers in violation of First Amendment).

The public accommodation statute, as applied to Jack, violates the compelled speech doctrine by punishing him for refusing to design and create a wedding cake that he finds morally and personally objectionable, and by forcing him to host or facilitate Complainants' symbolic message which conflicts with his sincerely held religious beliefs. *(See* Resp't Aff. ¶¶ 12-15).

Forcing Jack to provide a wedding cake for a same-sex marriage not only forces him to design and create Complainants' desired rainbow-themed message about same-sex marriage, but it also forces Jack to alter his own desired expression about marriage; namely, that it is the union of one man and one woman. It requires Jack to affirmatively create, facilitate and communicate a message about same-sex marriage that violates his conscience, goes against his sincerely held religious beliefs about marriage, and causes him to worry that God is displeased with him. Indeed, Complainants seek to compel Jack to change his views on same-sex marriage (Ex. 21) and to communicate a positive message about same-sex marriage. But the Government and Complainants cannot change Jack's

beliefs about marriage, and their attempt to use the public accommodation statute to do so is abusive and unconstitutional.

Such a result runs afoul of *Pacific Gas and Elec. Co.,* 475 U.S. 1 and *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241 (1974), both of which held that the Government and its law cannot compel someone to say what they would rather not. This type of compelled speech is especially pernicious because the fallout is widespread and not limited to chilling. To be sure, Jack Phillips is faced with a choice - violate his conscience or suffer significant pecuniary loss. The First Amendment was adopted as a shield against such cruel choices. *See Hurley,* U.S. 515 at 566. The *Pacific Gas* Court was especially troubled by such implications: If the government were "freely able to compel . . . speakers to propound political messages with which they disagree," protection of a speaker "would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Pacific Gas,* 475 U.S. at 16. Furthermore, it is well-established that the First Amendment is "a value-free provision whose protection is not dependent on the truth, popularity, or social utility of the ideas and beliefs which are offered. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . ." *Meyer v. Grant,* 486 U.S. 414, 433 (1988) (citations and quotations omitted).

Moreover, Complainants wish to convey a *political* message about same-sex marriage and to force Jack to convey that same political message.

According to Complainant Charlie Craig, they don't want to shut Masterpiece Cakeshop, Inc. down, they want to "change" their policy on "gay weddings." (Ex. 21). Remarkably – and significantly, Complainant did not say anything about sexual orientation; he said he wanted to change their policy on "gay weddings." The public accommodation statute most definitely was not designed to force a person to speak a political message or to change his policy on controversial ones; and further, the federal and state constitutions forbid such a purpose. There can be no doubt that the wedding cake that Complainants desired was, among other things, Complainants' political speech. One need only look at the wedding cake that they procured – the cake itself was rainbow themed, symbolic of the gay pride movement which Complainants whole-heartedly embrace. (Exs. 17-19, 21-24). Moreover, the Complainants' ceremony and reception exactly mirror a wedding between one man and one woman (presence of family and friends, wedding arch, exchanging of vows, kiss of the united couple, toast, wedding cake, cutting of the cake, feeding cake to one another, etc). (Exs. 11-20), and the couple has made it clear that they are in favor of same-sex marriage, which is a *political* issue for them and many others. (Exs. 21-24). The First Amendment protects all citizens from being forced by the government to speak someone else's message, especially when they prefer to remain silent. As the United States Supreme Court made clear in *Barnette,* the Government (and its law) is constitutionally forbidden to "force citizens to confess by word or deed" acceptance of a Government-

dictated orthodoxy. Yet that is precisely what will happen if the Government and its nondiscrimination law is allowed to force Jack to design a celebratory cake for a same-sex wedding. He will be forced to "confess" by "word" (the message the cake communicates) and "deed" (his act of designing and creating the cake) that same-sex marriage is just like opposite-sex marriage — a proposition that Jack does not support and with which he vehemently disagrees.

a. The First Amendment Protects Not Only the Right to Speak, But Also the Right To Refrain From Speaking.

The United States Supreme Court has explained that "'[s]ince *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say,' *id.,* at 16." *Hurley,* 515 U.S. at 573 *(quoting Pacific Gas & Electric Co.,* 475 U.S. at 11 (emphasis in original)). The State is allowed to compel speech in the "commercial advertising" realm by insisting that advertisements contain "purely factual and uncontroversial information." *Hurley,* 515 U.S. at 573 *(quoting Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 651 (1985)). But, significantly for this case, "outside that [commercial advertising] context it may not compel affirmance of a belief with which the speaker

disagrees. *Hurley,* 515 U.S. at 573 *citing West Virginia State Bd. of Educ.,* 319 U.S. at 642).

The *Hurley* Court explained the contours of this First Amendment rule that prohibits the Government from compelling particular messages. It noted that "this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley,* 515 U.S. at 573-74 *(citing Mcintyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341-342 (1995); *Riley v. National Federation of Blind of N.C., Inc.,* 487 U.S. 781, 797-798 (1988)). Significantly for the case at bar, the Court clarified that the First Amendment protection against compelled speech is enjoyed not only by "ordinary people" but also "business corporations," *Hurley,* 515 U.S. at 574, like Jack Phillips and Masterpiece Cakeshop, Inc. The "point" of protection against compelled speech, the *Hurley* Court explained, "is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Id.* at 574. *(citing Brandenburg v. Ohio,* 395 U.S. 444 (1969); *Terminiello v. Chicago,* 337 U.S. 1 (1949)). "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley,* 515 U.S. at 579.

Hurley is dispositive of the issue of whether a public accommodation statute can be used by the

government to compel speech. A group of LGBT plaintiffs in *Hurley* sought a court order forcing a Boston parade organizer to include the LGBT contingent it its annual parade celebrating St. Patrick's Day/Evacuation Day. *Id.* at 561-63. The plaintiffs wanted to march in the parade "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.* at 561. The parade organizer opposed the LGBT group's inclusion based on First Amendment grounds because it wished to convey "traditional religious and social values." *Id.* at 562. In rejecting the expressive nature of a parade, the lower court in *Hurley* characterized the parade as "an open recreational event that is subject to the public accommodations law." *Id.* at 563. In a unanimous decision, the Supreme Court disagreed. The Court found the organizer's claim to the "principle of autonomy to control one's own speech is as sound as the . . . parade is expressive." *Id.* at 574. The parade organizer's expression is like that of a composer, as the organizers "select[] the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each [participant's] expression in the [organizer's] eyes comports with what merits celebration on that day." *Id.* at 574. Consequently, applying the state's nondiscrimination law to the parade organizers, to force them to engage in speech they preferred not to speak, violated the First Amendment. *Id.* at 559. As the Court explained, Government "[d]isapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to

alter the message by including one more acceptable to others." *Id.* at 581.

As in *Hurley,* so it is in the instant case: the Government seeks to use its nondiscrimination law to force Jack to communicate a message he does not want to speak.[15] This is vastly different from most instances in which the nondiscrimination law might be enforced, which are not communicative in nature. The act of designing and creating of a wedding cake, which itself communicates, is inherently communicative, just like a parade. And so just as the Government's nondiscrimination law could not constitutionally be applied to the organizers of a parade to force them to alter their message so as to communicate something they would prefer not to communicate, so Colorado's nondiscrimination law cannot constitutionally be applied to Jack to force him to design a wedding cake, and thereby speak a message, that he does not want to speak.

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[15] The law at issue in *Hurley* was nearly identical to the nondiscrimination law at issue in this case. It provided: "Whoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation, . . . relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement..., or whoever aids or incites such distinction, discrimination or restriction, shall be punished . . . All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right." *Hurley,* 515 U.S. at 561 *(citing* Mass.Gen.Laws § 272:98 (1992)).

Finally, Complainants' and the Governments' reliance on *Elane Photography, LLC v. Willock,* 309 P.3d 53 (N.M. 2013) is misplaced. While this court may look to decisions from other state's courts for guidance, such guidance is not binding; and, indeed, may not even be persuasive. *See Schoen v. Schoen,* 292 P.3d 1224, 1227 (Colo. App. 2012). In the instant case, the New Mexico Supreme Court's *Elane Photography* decision should not be followed. It is at odds with the clear statement by the United States Supreme Court in *Hurley,* 515 U.S. 557, which says that a public accommodation nondiscrimination law cannot be applied when doing so forces one to alter his preferred message or speak a message he would prefer not to speak. *Accord Boy Scouts of Am. v. Dale,* 530 U.S. 640 (2000). Additionally, the *Elane Photography* case was brought under New Mexico law, which does not have a constitutional provision requiring that only opposite-sex marriage be recognized, as Colorado does. It is an outlier opinion, arising from a discrimination complaint brought within a dissimilar legal context. This Court should give it no weight, but should follow the United States Supreme Court's controlling precedent in *Hurley*.

lf there is any doubt about whether *Hurley* controls under the facts presented in this case, the *Cressman* case puts such doubts to rest as outlined above, *Cressman* held that the plaintiff had stated a plausible compelled speech claim when he alleged that the display of a Native American warrior shooting an arrow into the sky on his license plate was forced speech. Importantly, *Cressman* is a 10th Circuit Court case, and its opinions interpreting

federal constitutional law are far more persuasive than the opinion of an out-of-state court interpreting federal law.

b. Laws That Compel Speech Are Subject to Strict Scrutiny Review.

Laws that compel speech are subject to strict scrutiny. Because applying the Government's nondiscrimination law to Jack in this instance will substantially burden Jack's free speech rights, the Government bears the burden to demonstrate that application of the law to Jack is (1) is in furtherance of a compelling governmental interest; and is (2) the least restrictive means of furthering that compelling governmental interest. *Pacific Gas and Elec. Co.,* 475 U.S. at 912 (applying strict scrutiny review in the context of a compelled speech claim); *Lukumi,* 508 U.S. at 546 (applying strict scrutiny in the context of a free exercise claim); *see also Wooley v. Maynard,* 430 U.S. 705 (1977).

This strict scrutiny test is "the most demanding test known to constitutional law." *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997) (superseded by statute on other grounds unrelated to the strict scrutiny test or its articulation of it). A compelling interest is an interest of "the highest order," *Lukumi,* 508 U.S. at 546, and is implicated only by "the gravest abuses, endangering paramount interests." *Thomas v. Collins,* 323 U.S. 516, 530 (1945). In 2011, the Supreme Court described a compelling interest as a "high degree of necessity," noting that "[t]he State must specifically indentify

an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n,* 131 S. Ct. 2729, 2738, 2741 (2011) (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 543 (1980). Moreover, the strict scrutiny standard requires a particularized focus, not just the general assertion of a compelling state interest. *See Gonzales v. 0 Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 430-31 (2006).

3. The Colorado Public Accommodations Statute Is Unconstitutional as Applied Because It Compels Jack Phillips to Speak But Lacks a Constitutionally Cognizable Justification.

The public accommodation statute, as the Government seeks to apply it in this case, requires Jack to engage in both actual and symbolic speech, as previously described. Application of strict scrutiny requires the State to show that applying the public accommodation statute in this particular instance advances an "interest[] of the highest order." *Lukumi,* 508 U.S. at 546. It is not sufficient for the State to establish an interest in the broader purpose of the law in general. *Hurley,* 515 U.S. at 578-79. Thus, in order to withstand strict scrutiny, this Court must find that the State has a compelling interest in forcing Jack to create a wedding cake for a same-sex wedding reception and to compel him to

speak a message that violates his sincerely held religious beliefs. No such compelling interest exists in this case and thus, the public accommodation statute does not survive strict scrutiny.

B. Forcing Mr. Phillips to Communicate a Celebratory Message About Same-Sex Marriage Infringes His Free Exercise Guarantees and Is Unconstitutional.

In addition to the free exercise protections afforded by the First Amendment, Colorado's constitution provides protection for the free exercise of religion. Article II, Section 4 of the Colorado Constitution states: "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 . . . ." Consequently, Jack Phillips and Masterpiece Cakeshop, Inc. are entitled to broad protection under both the state and federal constitutions. *Bock,* 819 P.2d at 59-60.

1. The Colorado Public Accommodations Statute Infringes the Federal and Colorado Free Exercise Clauses Without a Constitutionally Cognizable Justification And So Is Unconstitutional as Applied.

It is well settled that the Free Exercise Clause of the First Amendment is implicated "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi,* 508 U.S. at 532. The public accommodation statute, as applied to Jack, violates his right to the free exercise of religion under the First Amendment and the Colorado Constitution. The Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST., Amend. I. Mr. Philips's "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi,* 508 U.S. at 531. Additionally, Complainants do not dispute the sincerity of Jack's religious beliefs. (Complainants' Mem. of Law in Supp. of Summ. J. 6.)

In forcing Jack to violate his conscience by creating and communicating Complainants' symbolic message, the State is burdening his free exercise of religion in accordance with his sincerely held religious beliefs.

As discussed above, the *Hurley* Court scrutinized a public accommodation statute nearly identical to the statute at issue in the instant case. *Hurley*, 515 U.S. at 561. The *Hurley* Court found that the Massachusetts public accommodation statute is "a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory

treatment in) public accommodations on proscribed grounds, including sexual orientation." *Id.* at 578. The Court did not take issue with the government's interest in ensuring equal access to public services, *(see id.* at 578), but it did take issue with the manner in which the public accommodation statute was applied. The Court concluded that "[w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent the beneficiaries of the law choose to alter it with messages of their own.", *Id.* at 578. The Court astutely noted that a broader objective might have been at play in the Massachusetts public accommodation statute, one that sought to forbid "acts of discrimination toward certain classes . . . to produce a society free of the corresponding biases." *Id.* at 578. The Court concluded that such an objective is "decidedly fatal." *Id.* at 579. As such, the statute as applied in *Hurley* did not survive strict scrutiny, and nor can Colorado's public accommodation statute under the facts presented here.

While the State certainly has a compelling interest in making sure all citizens have access to public services and privileges, it does not have a compelling interest in forcing Mr. Phillips to violate his conscience and use his talents to create symbolic expression that conflicts with his deeply held religious beliefs. It is undisputed that Complainants easily secured a wedding cake from another Colorado bakery (Complainant's Responses to Resp't Pattern and Nonpattern Interrogs. To Complainant Charlie Craig 3 and Complainant's Responses to Resp't

Pattern and Nonpattern Interrogs. to David Mullins 3 and Exs. 29-30, 17-18). Indeed, the only interest served by forcing Jack to create a wedding cake for a same-sex wedding reception is the interest in forcing him to communicate the message of another – a message that conveys approval and acceptance of same-sex marriage. *Hurley* has rejected such an interest and as such, the State's attempt to apply the public accommodation statute in a manner that forces Jack to violate his conscience must also be rejected as violative of Jack's First Amendment free exercise rights.

a. The State Constitution Provides Greater Protection Than The Federal Constitution, So This Court Should Subject the Statute to Strict Scrutiny Review.

Applying the public accommodations law would substantially burden the free exercise rights of Jack. A substantial burden on free exercise exists where the State pressures a person to violate his or her religious convictions by conditioning a benefit or right on faith-violating conduct. *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Thomas v. Review Bd. of Ind. Employment Security Div.,* 450 U.S. 707, 717-18 (1981). By forcing Jack "to choose between following the precepts of his religion and forfeiting [the right to make wedding cakes and remain in business], on the one hand, and abandoning one of the precepts of his religion in order to [maintain that right], on the other hand," this application of the public

accommodation law would impose a substantial "burden upon the free exercise of religion." *See Sherbert,* 374 U.S. at 404; *see also Thomas,* 450 U.S. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

Strict scrutiny should apply to this burden on free exercise rights under the Colorado Constitution. This was the standard that prevailed for both state and federal free exercise claims until 1990, when the U.S. Supreme Court limited the federal constitutional protection in some cases, stating that "the right of free exercise [under the United States Constitution] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. v. Smith,* 494 U.S. 872, 879 (1990).

In response, twenty-nine States insisted that all laws burdening their citizens' free exercise of religion must survive heightened review. Eighteen States enacted Religious Freedom Restoration Acts, which restored strict scrutiny for laws burdening the free exercise of religion.[16] Another twelve state

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[16] Ala Const. art. I, § 3.01; Ariz. Rev. Stat. Ann.§ 41-1493; Conn. Gen. Stat. Ann. § 52-57lb; Fla. Stat. Ann. §§ 761.01-05; Idaho Code Ann. § 73-402; 775 Ill. Comp. Stat. Ann. 35/1-99; Mo. Rev. Stat. § 1.302; N.M. Stat. Ann. §§ 28-22-1 to -5; Okla. Stat. Ann. tit. 51, § 251; 71 Pa. Stat. Ann. § 2404; R.I. Gen. Laws §§ 42-80.1-1 to -4; S.C. Code Ann. §§ 1-32-10 to -60; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to .012; La. Rev. Stat.

supreme courts have interpreted their state constitutions' free exercise protections to require heightened constitutional scrutiny.[17] The Colorado Supreme Court has not definitively decided whether it will follow *Smith's* approach when interpreting Colorado's free exercise clause or the twenty-nine states that have adopted an approach more protective of religious liberty. Indeed, as recently as February of 2013, the Colorado Court of Appeals recognized that no Colorado court has decided whether the federal free exercise clause is coextensive with Colorado's free exercise clause. *Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.,* Nos. 11CA1856 & 11CA1857, 2013 Colo. App. LEXIS 266, at **39 (Colo. App. 2013). Thus, this Court is free to follow the 29 other states that have chosen to subject laws that burden the religious freedom of its citizens to strict scrutiny. And there

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Ann. § 13:5233; Tenn. Code Ann. § 4-I-407; VA. Code Ann. § 57-2.02.

[17] *Fortin v. The Roman Catholic Bishop of Portland,* 871 A.2d 1208 (Me. 2005); *Larson v. Cooper,* 90 P.3d 125, 131 (Ala. 2004); *Valley Christian School v. Mont. High School Ass'n,* 86 P.3d 554 (Mont. 2004); *Odenthal v. Minnesota Conf. of Seventh-Day Adventists,* 649 N.W.2d 426, 442 (Minn. 2002); *City Chapel Evangelical Free Inc. v. City of South Bend ex ref. Dept. of Redevelopment,* 744 N.E.2d 443, 445-51 (Ind. 2001); *Humphrey v. Lane,* 728 N.E.2d 1039 (Ohio 2000); *Open Door Baptist Church v. Clark County,* 995 P.2d 33, 39 (Wa. 2000); *Catholic Charities of Diocese of Albany v. Serio,* 859 N.E.2d 459, 466 (N.Y. 2006); *McCready v. Hoffius,* 586 N.W.2d 723, 729 (Mich. 1998); *State v. Miller:,* 549 N.W.2d 235, 238-42 (Wis. 1996); *Attorney General v. Desilets,* 636 N.E.2d 233, 235-41 (Mass. 1994).

are at least two compelling reasons why Colorado should be the 30th state to apply strict scrutiny to a Free Exercise claim.

First, Colorado has historically applied strict scrutiny to infringements of fundamental rights. *See Engraff v. Indus. Comm'n,* 678 P.2d 564, 567 (Colo. App. 1983) (applying strict scrutiny to state statute burdening the plaintiff's federal free exercise rights under First Amendment). Relying on *Sherbert v. Verner,* 374 U.S. 398, 406-07, the Court of Appeals applied strict scrutiny to a law that burdened the free exercise of religion, finding that it must "do so in the least restrictive available way to achieve a compelling state interest." *Id.* at 567; *see In re E.L.M.C,* 100 P.3d 546, 552 (2006) (strict scrutiny standard applies to statutes which infringe on parent-child relationship); *Tattered Cover, Inc. v. City of Thornton,* 44 P.3d 1044, 1057 (Colo. 2002) (the state must show a compelling interest in order for a statute to withstand strict scrutiny when state action has implicated free speech rights); *In re Custody of 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") (citing *Evans v. Romer,* 882 P.2d 1335 (Colo.1994), *affd,* 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996)); *cf. Town of Foxfield v. Archdiocese of Denver,* 148 P.3d 339, 346 (Colo. App. 2006) (In wake of *Smith,* strict scrutiny applies to federal free exercise claims if ordinance is not neutral or generally applicable; if it is both neutral

and generally applicable, it need only be rationally related to legitimate governmental interest).

Second, the Colorado Supreme Court has long recognized that it is free to give broader protection under the Colorado Constitution than that given by the U.S. Constitution. It has in fact done so with various state constitutional rights, such as it has with free speech. *Bock v. Westminster Mall Co.,* 819 P.2d 55, 59-60 (1991) (articulating this concept and specifically finding that Colorado's free speech provision has provided greater protection than First Amendment).

b. The Statute Is Not Neutral and Generally Applicable, So It Is Subject to Strict Scrutiny Review.

In addition, strict scrutiny review is required because the Colorado public accommodations law is not neutral and generally applicable. If a law that burdens free exercise is not neutral or of general applicability, then the law must be justified by a compelling government interest, *Lukumi,* 508 U.S. at 531 (1993), and "must undergo the most rigorous of scrutiny." *Id.* at 546. In the present case, the public accommodation statute must be justified by a compelling government interest and be narrowly tailored to achieve that interest because the statute is not generally applicable.

The public accommodation statute is not generally applicable because it exempts large

categories of behavior that undermine the purpose of the statute at least as much as allowing Masterpiece Cakeshop, Inc. and Jack to decline to design and create a wedding cake for a same-sex wedding. The exemptions include exemptions for both religious and non-religious behavior. For example, the public accommodation statute exempts places principally used for religious purposes. Colo. Rev. Stat. § 24-34-601 (1). This exemption permits religious organizations to refuse to provide any service to gay people in relation to a marriage ceremony, marriage reception, baptism, First Communion, Confirmation, Bar/Bat Mitzvah, Brit Milah, Friday Prayers and a litany of other events and services. Thus, the options available to heterosexual persons are vastly greater than those available to gay persons.

Religious organizations are not the only places of public accommodation that are exempted by the statute. Places that restrict admission to individuals of one sex because of a bona fide relationship to the goods, services, advantages, etc. are exempt from the statute as well. Colo. Rev. Stat § 24-34-601 (3). Thus, places of public accommodation like all-male and all-female golf clubs, athletic clubs and schools are exempted under this statute. The broad exemptions for religious organizations, same-sex clubs, and schools illustrate that the public accommodation statute is not generally applicable and neutral. The state has carved out both secular and religious exemptions. Thus, the public accommodation statute shows a preference for religious and certain secular entities, creating large categories of behavior that are exempted from the statute. "The principle that government, in pursuit of legitimate interests,

cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi,* 508 U.S. at 543. Thus, although many of the exemptions apply to religious conduct, the public accommodation statute also contains other exemptions which prefer the secular to the religious and undermine the purpose of the statute. Moreover, as discussed in section II, Colorado law and public policy also undermine the purpose of the public accommodation statute. Although not specifically exempted from the statute, the State of Colorado exempts itself every time it denies a marriage license to a same-sex couple. (Ex. 25). When the State itself has decreed one man and one woman marriage to be the law of the land, it is estopped from arguing that it has a compelling interest in making sure same-sex couples have access to wedding cakes. Accordingly, the public accommodation statute is not a law of general applicability and must satisfy the requirements of strict scrutiny.

c. Strict Scrutiny Applies to Burdens on Free Exercise Rights Under the United States Constitution Because Other Constitutional Rights Are Also Burdened.

In *Employment Div. v. Smith,* the U.S. Supreme Court explained that it applies strict scrutiny to laws burdening First Amendment free

exercise rights when some other constitutional right, such as freedom of speech, freedom of association and freedom of the press, is *also* burdened. *Smith,* 494 U.S. at 881. As discussed above, applying the public accommodation law here would burden the free speech rights of Jack Phillips and Masterpiece Cakeshop, Inc., in addition to violating their free exercise rights. Thus, strict scrutiny applies to the federal free exercise analysis.

Additionally, this application of the public accommodation law will burden the property rights of Jack Phillips and Masterpiece Cakeshop, Inc., under the Fifth Amendment to the United States Constitution and Article II, Sections 15 and 25 of the Colorado Constitution, both of which prohibit the taking of property by the State.[18] Because of his religious beliefs, Jack will effectively be forced, by the Government, to cease designing and creating wedding cakes altogether if the public accommodation law is applied to him in this manner. This will result in the closing of Masterpiece Cakeshop, Inc., and amounts to a taking of Jack's property.

2. The Statute Fails Strict Scrutiny Review.

In order to survive strict scrutiny, the State must demonstrate that the law furthers a

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[18] These constitutional property rights not only bolster free exercise claims; they provide an independent constitutional reason why the public accommodations law cannot apply here.

"compelling state interest" and is "narrowly tailored" to that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993). Narrow tailoring requires that the State employ "the least restrictive means" for achieving its compelling interest. *Thomas,* 450 U.S. at 718.

Strict scrutiny requires a *particularized* focus. *See Gonzales,* 546 U.S. at 430-31 (discussing cases showing that strict scrutiny analysis demands a particularized focus on the parries and circumstances). The relevant government interest for strict scrutiny analysis thus is not the State's general interest in prohibiting discrimination, but its particular interest in forcing Jack, personally, to design and create a wedding cake for a same-sex wedding ceremony which Colorado does not recognize. *See Attorney Gen. v. Desilets,* 418 Mass. 316, 325-26, 636 N.E.2d 233, 238 (1994) ("The general objective of eliminating discrimination . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion. The analysis must be more focused."). But *this* –

Forcing a private artistic cake-maker to create and design a wedding cake for a same-sex wedding, to be served in honor of such wedding – would permit exactly what the state and federal constitutions forbid. Overriding the constitutional protections in this manner is not even a legitimate interest, let alone a compelling one. The public accommodations statute, as applied to Jack Phillips and Masterpiece Cakeshop, Inc., must fail strict scrutiny.

Even if, contrary to U.S. Supreme Court guidance, the relevant interest is characterized more broadly–as ensuring that entities providing goods or services to the public treat same-sex weddings the same as opposite-sex weddings – the Complainants cannot show that the State considers this to be a compelling government interest. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi,* 508 U.S. at 547 (alterations omitted). Here, because same-sex couples may not marry each other in Colorado, *see* Colo. Canst. art. II, Section 31, *the State and its political subdivisions* treat same-sex couples differently than opposite-sex couples for myriad marriage-related purposes when providing services to the public. The State, quite plainly then, does not consider there to be a compelling government interest in eliminating a form of differential treatment that it authorizes and practices in its own operations.

Furthermore, if the relevant interest might be characterized as ensuring that everyone has access to goods and services, applying the public accommodations statute to Jack Phillips in this instance is not the least restrictive means to achieve the interest. In fact, Complainants had no trouble obtaining a wedding cake elsewhere. Complainants stated that they had numerous offers from others to make their wedding cake, and in fact received one at no charge. It is simply not necessary to force a private citizen to utilize his artistic talents to design and create a wedding cake in order ensure that everyone has access to public accommodations. It is

not narrowly tailored and fails strict scrutiny. Alternatively, if a rational basis standard of review were to be utilized in this case, Jack should still prevail as there is simply no governmental interest, compelling or otherwise, in forcing him to design and create a wedding cake for a ceremony that the state does not recognize, which is unconstitutional, and which is against the stated public policy for Colorado, which has been reaffirmed as recently as this year.

Because the law, as applied to Jack, cannot satisfy strict scrutiny review – or any other, it is unconstitutional as applied, thus warranting summary judgment for Jack Phillips and Masterpiece Cakeshop, Inc.

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Filed: December 24, 2013

COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 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	Case Number: 2013-0008

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@alliancedefending freedom.org	
RESPONDENTS' DESIGNATION OF RECORD	

Respondents, Masterpiece Cakeshop, Inc. and Jack C. Phillips, by and through their legal counsel, pursuant to COLO. REV. STAT. § 24-4-105(14) and (15), and Commission Rule 10.13(B), hereby designate the following record for purposes of appeal and review by the Commission:

1. Charge of Discrimination signed by David Mullins;

2. Charge of Discrimination signed by Charlie Craig;

3. Requests for Information, CR 2013-008 (Craig);

4. Requests for Information- CR 2013-009 (Mullins);

5. Masterpiece Cakeshop's Responses to Request for Information- CR 2013-008 (Craig);

6. Masterpiece Cakeshop's Responses to Request for Information- CR 2013-009 (Mullins);

7. Probable Cause Determination, dated March 5, 2013 (Craig);

8. Probable Cause Determination, dated March 5, 2013 (Mullins);

9. Notice of Hearing and Formal Complaint- CR 2013-008 (Craig);

10. Notice of Hearing and Formal Complaint- CR 2013-009 (Mullins);

11. Procedural Order, dated June 5, 2013 (CR 2013-008 and CR 2013-009);

12. Unopposed Motion to Commence and Continue Hearing, dated June 24, 2013 (CR 2013-008 and CR 2013-009);

13. Unopposed Motion to Consolidate, dated June 25, 2013 (CR 2013-008 and CR 2013-009);

14. Order dated June 27, 2013 (re: Unopposed Motion to Commence and Continue);

15. Order of Consolidation, dated June 27, 2013 (both cases consolidated into CR 2013-008);

16. Motion for Leave to Intervene, dated June 27, 2013;

17. Motion to Dismiss Jack Phillips Pursuant to C.R.C.P. 12(b)(1), (2) and (5), dated July 1, 2013;

18. Respondents' Motion to Dismiss Pursuant to C.R.C.P. 12(b)(5), and all exhibits attached thereto, dated July 1, 2013;

19. Respondents' Brief in Support of Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1), (2) and (5), and all exhibits attached thereto, dated July 16, 2013;

20. Order Granting Motion to Intervene, dated July 9, 2013;

21. Response to Respondents' Motion to Dismiss Pursuant to C.R.C.P. 12(b)(5), and all exhibits attached thereto, dated July 31, 2013;

22. Response to Motion to Dismiss Jack C. Phillips, dated July 31, 2013;

23. Joint Discovery Plan, dated July 1, 2013;

24. Respondents' Motion for Leave to File Reply Briefs in Support of Motions to Dismiss Pursuant to C.R.C.P. 12(b)(1),(2), and (5), dated August 7, 2013;

25. Order Granting Leave to File Reply, dated August 12, 2013;

26. Respondent's Reply in Support of Motion to Dismiss Jack C. Phillips Pursuant to C.R.C.P. 12(b)(1), (2) and (5), and all exhibits attached thereto, dated August 26, 2013 and August 27, 2013;

27. Respondent's Reply in Support of Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1), (2), and (5), and all exhibits attached thereto, dated August 26, 2013 and August 27, 2013;

28. Respondent's Motion to Amend the Joint Discovery Plan, or in the Alternative, Motion to Compel Discovery, and all exhibits attached thereto, dated September 6, 2013;

29. Counsel in Support of the Complaint's Response to Respondent's Motion to Amend the Joint Discovery Plan, or in the Alternative, Motion to Compel Discovery, dated September 13, 2013;

30. Complainants' Response to Respondent's [sic] Motion to Amend the Joint Discovery Plan and Motion to Compel Discovery and Request for Protective Order, and all attachments thereto, dated September 19, 2013;

31. Complainants' Motion for Summary Judgment, dated September 20, 2013;

32. Memorandum of Law In Support of Complainants' Motion for Summary Judgment, and all exhibits attached thereto, dated September 20, 2013;

33. Order Continuing Hearing and Order Regarding Pending Motions, dated October 2, 2013;

34. Response to Complainants' Request for Protective Order, and all exhibits attached thereto, dated October 4, 2013;

35. Order Granting Complainants' Motion for Protective Order, dated October 9, 2013;

36. Respondents' Response in Opposition to Complainants' Motion for Summary Judgment and Cross Motion for Summary Judgment, dated October 31, 2013;

37. Brief in Opposition to Complainants' Motion for Summary Judgment and In Support of Jack Phillips's Cross Motion for Summary Judgment, and all exhibits attached thereto, dated October 31, 2013;

38. Complainants' Response in Opposition to Respondents' Cross Motion for Summary Judgment and Reply Brief in Support of Complainants' Motion for Summary Judgment, dated November 12, 2013;

39. Counsel in Support of the Complaints' Response in Opposition to Respondents' Cross-Motion for Summary Judgment, dated November 13, 2013;

40. Complainants' Motion for Leave for All Parties to Reply to Motions for Summary Judgment and Request to Vacate the Hearing

Date and Pretrial Statement Due Date, dated November 8, 2013;

41. Order Granting Request to File Reply and Order Vacating Hearing, dated November 14, 2013;

42. Reply In Support of Respondents' Cross Motion for Summary Judgment, dated November 25, 2013;

43. Initial Decision Granting Complainants' Motion for Summary Judgment and Denying Respondents' Motion for Summary Judgment, dated December 6, 2013;

44. Transcript from hearing held on September 26, 2013, at 9:00 a.m. The request for this transcript has already been made with the Office of Administrative Courts. Pursuant to COLO. REV. STAT. § 24-4-105(15)(a), Respondents are prepared to advance the costs of transcripts.

45. Transcript from hearing held on December 4, 2013, at 9:00 a.m. The request for this transcript has already been made with the Office of Administrative Courts. Pursuant to COLO. REV. STAT. § 24-4-105(15)(a), Respondents are prepared to advance the costs of transcripts.

Respectfully submitted this 24th day of December, 2013.

Attorneys for Respondents Jack C. Phillips and Masterpiece Cakeshop, Inc.:

/s/ Nicolle H. Martin
Nicolle H. Martin, No. 28737
7175 W. Jefferson Avenue,
Suite 4000
Lakewood, Colorado 80235
303.332.4547
nicolle@centurylink.net

/s/ Natalie L. Decker
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

/s/ Michael J. Norton
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

CERTIFICATE OF SERVICE

I certify that on this 24th day of December, 2013, a true and correct copy of the foregoing **RESPONDENTS' DESIGNATION OF RECORD** was filed with the Court and sent via electronic mail (by agreement of the parties) to the following:

David Mullins
Charlie Craig
c/o Sara J. Rich (via email: SRich@aclu-co.org)
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203

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

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

Amanda Goad (via email: agoad@aclu.org)
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Paula Greisen (via email: greisens@kinggreisen.com)
King & Greisen
1670 York Street
Denver, CO 80206

/s/ Nicolle H. Martin

Filed: January 3, 2014

COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202	
CHARLIE CRAIG and DAVID MULLINS, **Complainants,** v. **MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS,** **Respondents.** 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	**▲ COURT USE ONLY ▲** Case Number: 2013-0008

Littleton, CO 80120 (0) 303-730-3009 natalie@denverlawsolutions.com Michael J. Norton, No. 6430 Alliance Defending Freedom 7951 E. Maplewood Avenue, Suite 100 Greenwood Village, CO 80111 (0) 720-689-2410 mjnorton@alliancedefending freedom.org Kristen K. Waggoner, pro hac vice Alliance Defending Freedom 14241 N.E. Woodinville-Duvall Rd. No. 488 Woodinville, WA 98072 (0) 206-552-7568 (F) 206-552-7569 kwaggoner@alliancedefending freedom.org	

NOTICE OF APPEAL AND PETITION FOR REVIEW BY COLORADO CIVIL RIGHTS COMMISSION

RESPONDENTS, by and through their undersigned counsel, pursuant to COLO. REV. STAT. § 24-4-105(14)(a)(II) and Commission Rule 10.13(A), hereby petition the Colorado Civil Rights Commission ("Commission") to review the Initial Decision of the Administrative Law Judge issued on

December 6, 2013. In support hereof, Respondents assert the following exceptions and will fully brief these exceptions in compliance with the briefing schedule that the Commission issues:

1. The Administrative Law Judge erroneously denied Respondents' Motion to Dismiss Jack Phillips Pursuant to C.R.C.P. 12(b)(1),(2), and (5).

2. The Administrative Law Judge erroneously denied Respondents' Motion to Dismiss Pursuant to C.R.C.P. 12(b)(5).

3. The Administrative Law Judge erroneously granted Complainants' Motion for Protective Order and erroneously struck portions of Respondents' discovery requests thereby limiting Respondent's discovery.

4. The Administrative Law Judge erred in the Initial Decision in Granting Complainants' Motion for Summary Judgment and in Denying Respondents' Motion for Summary Judgment. Contrary to the findings in the Initial Decision:

    a. Respondents did not discriminate "because of" sexual orientation.

    b. Respondents acted in accordance with the provisions of Colo. Const. art. II, § 31 and COLO. REV. STAT. § 14-2-104, and the public policy of Colorado.

c. Respondents' conduct and expressions in declining to design and create a wedding cake are protected by the Free Speech Clause of the First Amendment of the United States Constitution and by Article II, Section 10 of the Colorado Constitution in that:

i. This case involves both actual and symbolic speech.

ii. Respondents cannot be forced to create and convey a message with which they disagree.

d. Respondents are protected by the Free Exercise Clause of First Amendment of the U.S. Constitution and Article II, Section 4 of the Colorado Constitution.

e. The ALJ's recommendation that Respondents "[c]ease 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" is overbroad and exceeds the scope of relief authorized

pursuant to COLO. REV. STAT. §§ 24-34-306(9) and 24-34-605.

Respectfully submitted this 3rd day of January, 2014.

Attorneys for Respondents Jack C. Phillips and Masterpiece Cakeshop, Inc.:

/s/ Nicolle H. Martin
Nicolle H. Martin, No. 28737
7175 W. Jefferson Avenue,
Suite 4000
Lakewood, Colorado 80235
(0) 303.332.4547
nicolle@centurylink.net

/s/ Natalie L Decker
Natalie L. Decker, No. 28596
The Law Office of Natalie L. Decker, LLC
26 W. Dry Creek Cr., Suite 600
Littleton, CO 80120
(0) 303-730-3009
natalie@denverlawsolutions.com

/s/ Michael J. Norton
Michael J. Norton, No. 6430
Alliance Defending Freedom
7951 E . Maplewood Avenue,
Suite 100

Greenwood Village, CO 80111
(0) 720-689-2410
mjnorton@alliancedefendingfreedom.org

/s/ *Kristen K. Waggoner*
Kristen K. Waggoner
Alliance Defending Freedom
14241 N.E. Woodinville-Duvall Rd. No. 488
Woodinville, WA 98072
(0) 206-552-7568
Email: kwaggoner@alliancedefendingfreedom.org

CERTIFICATE OF SERVICE

I certify that on this 3rd day of January, 2014, a true and correct copy of the foregoing was filed with the Colorado Civil Rights Commission and served on the parties or their counsel as follows:

David Mullins
Charlie Craig
c/o Sara J. Rich (via email: SRich@aclu-co.org)
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203

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

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

Amanda Goad (via email: agoad@aclu.org)
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Paula Greisen (via email: grcisens@kinggreisen.com)
King & Greisen
1670 York Street
Denver, CO 80206

/s/ Nicolle H. Martin
Nicolle H. Martin

Excerpts of Respondents' Brief in Support of Appeal to Colorado Civil Rights Commission filed April 18, 2014

Filed: April 18, 2014

COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202	
CHARLIE CRAIG and DAVID MULLINS, Complainants / Appellees, MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, Respondents / Appellants.	▲ 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	Case Number: CR2013-0008

Natalie L. Decker, No. 28596 The Law Office of Natalie L. Decker, LLC 26 W. Dry Creek Cr., Suite 600 Littleton, CO 80120 (0) 720-689-2410 natalie@denverlawsolutions.com Michael J. Norton, No. 6430 Alliance Defending Freedom 7951 E. Maplewood Avenue, Suite 100 Greenwood Village, CO 80111 (0) 720-689-2410 mjnorton@alliancedefendingfreedom.org Kristen K. Waggoner, pro hac vice Alliance Defending Freedom 14241 N.E. Woodinville-Duvall Rd. No. 488 Woodinville, WA 98072 (0) 206-552-7568 (F) 206-552-7569 Email: kwaggoner@alliancedefendingfreedom.org	
RESPONDENTS' BRIEF IN SUPPORT OF APPEAL	

* * *

b. The ALJ's Decision Violates the First Amendment's Compelled-Speech Doctrine and Colo. Const. art. II, Section 10.

The American tradition rests on the principle that each person must decide the ideas and beliefs deserving of expression. *Turner Broad. Sys. Inc. v. Federal Commc'ns Comm'n,* 512 U.S. 622, 641 (1994). As *Wooley v. Maynard,* 430 U.S. 705, 714 (1977), explained, "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable"[5] *Id.* The Colorado Supreme Court has repeatedly held that the free-speech guarantees of the Colorado Constitution are even broader than those afforded by the First Amendment. *Bock v. Westminster Mall Co.,* 819 P.2d 55, 59-60 (Colo. 1991). Government violates the compelled-speech doctrine by requiring a person to engage in unwanted expression, *Rumsfeld v. FAIR,* 547 U.S. 47, 61 (2007), and by forcing him to facilitate Complainants' message celebrating their Massachusetts same-sex marriage.[6] Although the ALJ conceded that Jack exercises considerable skill and artistry," ROA 603, he erred by holding that the

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[5] This broad protection extends to businesses and expression that is compensated. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 573-74 (1995).

[6] *See Rumsfeld v. FAIR.* 547 U.S. 47, 61-65 (2007); *see e.g., Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal,* 475 U.S. 1, 20-21 (1986); *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 258 (1974).

federal and state constitutions do not protect Jack's artistic creations as a form of speech.

i. Jack's Unique Cake Creations Are Protected Artistic Expression.

The ALJ's decision departs from established precedent that protects artistic expression.[7] The ALJ erred in concluding that the First Amendment and the Colorado Constitution would only protect Jack if the Complainants had demanded a cake with symbols or words that advocate support for same-sex marriage.[8] ROA 603. That, however, is a distinction without a difference. *Hurley* explains that First Amendment protection extends far beyond an "articulable" or "particularized" message. *Hurley,* 515 U.S. at 569-70. Otherwise, constitutional protection would "never reach the unquestionably

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[7] *See Brown v. Entm't Merch. Ass'n,* 131 S. Ct. 2729, 2733 (2011); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 568 (1995)(parades with or without words); *Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989)(music without words); *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 65-66 (1981)(dance); *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975)(theatre); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932-34 (1975)(topless dancing); *Anderson v. City of Hermosa Beach,* 621 F.3d 1051 (9th Gr. 2010)(tattoo and tattooing process); *White v. City of Sparks,* 500 F.3d 953, 956 (9th Cir. 2007)(paintings without a particular message); *Piarowski v. Ill. Cmty. Coll. Dist.,* 759 F.2d 625, 628-32 (7th Cir. 1985)(stained windows as "art for art's sake" that did not communicate a message).

[8] *As* mentioned earlier, the ALJ precluded Jack's ability to inquire into these issues by barring meaningful discovery.

shielded painting of Jackson Pollock [abstract expressionist], music of Arnold Schoenberg [expressionist music composer], or the Jabberwocky verse of Lewis Carroll . . . . " *Id.* The Constitution protects freedom of the mind to create abstract and even unintelligible expression. *Wooley,* 430 U.S. at 715 (quoting *W. Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943)). The compelled speech doctrine applies not only to Jack's original creative expression, but also to cases like this where a citizen is being forced to facilitate the message of another. *Rumsfeld,* 547 U.S. at 61-65.

Merriam Webster's Dictionary defines art as "the conscious use of skill and creative imagination especially in the production of aesthetic objects."[9] Television shows like "Ace of Cakes" and "Cake Boss" confirm that bakers like Jack consider their work as an expressive art form. Such artists find inspiration and imagination from many sources including, in Jack's case, his faith. Cake artists like Jack prepare one-of-a-kind creations that are inherently expressive whether they include words or symbols or express specific, articulable political messages. This is evidenced by the rainbow-design cake ultimately selected by Complainants. ROA 478.

Jack devotes hours to meet with clients, to design a wedding cake, to sketch it out on paper, and then to sculpt and design it. ROA 456. Pictures of his

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[9] http://www.merriam-webster.com/wdictionary/arts (last visited April 17, 2014).

cake creations demonstrate these commitments. ROA 462-64. He often is required to set up the cake at the wedding ceremony location and then to interact with those at the ceremony. ROA 456.

Wedding cakes also communicate a message of congratulations and honor to the union of the man and woman. Today, as in the past, the wedding cake is a centerpiece of the marriage ceremony and communicates a positive and celebratory message about the couple and their future. Toba Garrett, *Wedding Cake Art and Design* (2010). "A memorable cake is almost as important as the bridal gown in creating the perfect wedding." *Id.* Unlike the cases cited by the ALJ that involve prefabricated expression, the ALJ insists that Jack must use his artistic skill to actually create the unwanted expression. Even if that were not the case, the wedding cake necessarily conveys a celebratory message in support of a couple's union. This violates both components of the compelled-speech doctrine.

ii. Neither *Rumsfeld, Wooley,* nor *Barnette* Permit the Government to Compel Jack to Create and Design a Wedding Cake.

The ALJ relied on three main cases to support his decision: *Rumsfeld, Wooley,* and *Barnette.* These cases actually support Jack. The ALJ incorrectly held that even if the public accommodation statute impacts Jack's rights, any impact is "incidental" under *Rumsfeld.* But *Rumsfeld* dealt with the issue of judicial deference to Congress's military power in

which law schools challenged a statute requiring them to provide military recruiters with the same access to students as provided to other recruiters. 547 U.S. at 51, 61-65. The ALJ ignored the fact that *Rumsfeld* specifically acknowledged that the public accommodation statute at issue in *Hurley* affected the parade organizations' expression. In contrast, the Court concluded that the law schools' hosting military recruiters "does not affect the law schools' speech because the schools *are not speaking* when they host interviews and recruiting receptions." *Id.* at 64 (emphasis added). The ALJ ignored *Rumsfeld's* discussion of *Hurley* and focused solely on the "incidental" effect of requiring law schools to post logistical information about recruiter visits. Such a requirement is hardly equivalent to Jack laboring hours to design a cake that celebrates an event that conflicts with his religious convictions and Colorado law.

The ALJ also attempted to distinguish Jack's expression from cases like *Barnette* and *Wooley* by explaining that one's free speech exercise (refusal to salute the flag and display the state's motto) did not conflict with the rights of others. However, state law rights cannot trump constitutional rights. Legislatively created "equality" rights do not justify the suppression of free expression. *Barnette,* 319 U.S. at 638. *See also Hurley,* 515 U.S. 557 (parade organizers could exclude marchers despite public accommodation law); *Miami Herald v. Tornillo,* 418 U.S. 241 (1974) (newspaper could exclude replies from candidates despite statute granting right to equal space to reply); *Boy Scouts of Am. v. Dale,* 530 U.S. 640 (2000)(scouts could exclude certain

individuals despite public accommodation statute). Jack's creation of a wedding cake implicates his "individual freedom of mind" far more than does displaying a state-license plate or saluting a flag. *Wooley,* 430 U.S. at 714. As in *Hurley,* the government cannot use its nondiscrimination law to force Jack to create art and communicate a celebratory message he does not want to speak. Thus, the ALJ erred by not requiring the government to demonstrate that the law's application to Jack satisfied a compelling government interest and was implemented in the least restrictive means. *Pacific Gas,* 475 U.S. at 19; *Gonzales v. 0 Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 430- 31 (2006).

c. The ALJ's Decision Violates the Free Exercise Clause of First Amendment of the U.S. Constitution and Colo. Const. art. II, Section 4.

Both the Colorado and United States Constitutions protect Respondents' free exercise of religion. The ALJ erroneously found no free exercise protection for religious conduct if that conduct was otherwise "prohibited by law." ROA 606. Additionally, without citing any legal authority, the ALJ asserted that Jack's decision was the same type of conduct that the U.S. Supreme Court has found subject to "legitimate regulation."[10] The ALJ applied

[10] The Supreme Court cases that are somewhat factually similar to this case are *Hurley* and *Wooley, supra,* both of which were resolved in favor of the individual citizens' right to refuse

the neutral and generally applicable standard in *Employment Division v. Smith,* 494 U.S. 872 (1990), despite the fact that *Smith* does not govern claims under the Colorado Constitution.[11] The Colorado Supreme Court has yet to decide whether to follow *Smith's* approach or the approach of the 29 states that, either constitutionally or legislatively, apply *post-Smith* strict scrutiny standards. *See Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.,* Nos., --P.3d--, 2013 WL 791140, at 12 (Colo. App. 2013), cert. granted, 2014 WL 1046020 (Colo. Mar 17, 2014). Given that Colorado has applied strict scrutiny on other fundamental rights cases, ROA 443, and the Colorado Supreme Court has repeatedly stated that Colorado's free speech guarantees extend even broader protection than does the First Amendment, *Bock,* 819 P.2d at 59-60, the ALJ erred in not applying strict scrutiny here. Forcing Jack to create original work in violation of his conscience undoubtedly creates a substantial burden. *See Thomas v. Review Bd.,* 450 U.S. 707 717 (1981); *Sherbert v. Verner,* 374 U.S. 398, 404 (1963)*; Abdulhasseb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010). *See also Church of the Lukumi Babalu*

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forced participation in activities which they disagreed with, albeit on other First Amendment grounds.

[11] The ALJ erroneously relied on *Town of Foxfield v. Archdiocese of Denver,* 148 P.3d 339 (Colo. App. 2006) to support his application of *Smith. Foxfield* involved a First Amendment claim, not a claim under the Colorado Constitution. The petition for writ of certiorari stated the issue: '"Whether the ... parking ordinance is subject to strict scrutiny under the *United States Constitution." Town of Foxfield v. Archdiocese of Denver,* 2006 WL 3703933 (Colo. 2007)(emphasis added).

Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32, 542-43 (1993).

Moreover, as the public accommodation statute enables government officials to grant special discretionary exemptions, (C.R.S. § 24-34-601(3)[12]), it lacks neutrality and general applicability. *See Blackhawk v. Pennsylvania,* 381 F.3d 202, 209-11 (3d Cir. 2004) (Alito, J.); *Hartmann v. Stone,* 68 F.3d 973, 978 (6th Cir. 1995); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144, 167 (3d Cir. 2002). Indeed, the public accommodation statute requires a value judgment that some secular conduct deserves more protection than some religious conduct. Courts have repeatedly found that such a law is not generally applicable even when the law applied to a wide variety of secular conduct.[13] *See Fraternal Order of Police Newark v. City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999). The government exempts entities with religious objections nearly identical to Jack's. The state cannot claim it has a generally applicable law when it offers the same objection to religious organizations that Jack has requested and

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[12] Colorado's public accommodations statute permits the government to subjectively exempt an entity if it determines a "bona fide" relationship exists between gender and the goods, services, facilities, privileges, advantages, or accommodations offered. C.R.S. § 24-34-601(3). The government may also exempts entities with religious objections nearly identical to Jack's, such as churches.

[13] Similarly, strict scrutiny applies because the ALJ's decision infringes on Jack's hybrid rights under the free exercise clause, free speech clause, and as a taking. *Smith,* 494 U.S. at 881-82.

when it has the discretion to grant ad hoc exemptions based on gender. The ALJ erred by not considering all of the exemptions in Colorado's Anti-Discrimination Act (CADA).

* * *

III. Conclusion

Respondents respectfully request that the Commission decline to accept the ALJ's recommendation, deny Complainants' motion for summary judgment, and grant Respondents' motion for summary judgment. ROA 391-95.

Respectfully submitted this 18th day of April, 2014.

Attorneys for Respondents Jack C. Phillips and Masterpiece Cakeshop, Inc.:

/s/ Nicolle H. Martin
Nicolle H. Martin, no. 28737

/s/ Natalie L. Decker
Natalie L. Decker, no. 28596
The Law Office of Natalie L. Decker, LLC

/s/ Michael J. Norton
Michael J. Norton no. 6430
Kristen K. Waggoner, *pro hac vice*
Alliance Defending Freedom

* * *

Excerpt from Respondent's Reply Brief in Support of Appeal to Colorado Civil Rights Commission filed May 27, 2014

Filed: May 27, 2014

COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202	
CHARLIE CRAIG and DAVID MULLINS, Complainants / Appellees, MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, Respondents / Appellants.	▲ COURT USE ONLY▲
Attorneys for Respondents / Appellants: Nicolle H. Martin, No. 28737 7175 W. Jefferson Avenue Suite 4000 Lakewood, Colorado 80235 303.332.4547 nicolle@centurylink.net	Case Number: 2013-0008

Natalie L. Decker, No. 28596 The Law Office of Natalie L. Decker, LLC 26 W. Dry Creek Cr., Suite 600 Littleton, CO 80120 (0) 303-730-3009 natalie@denverlawsolutions.com Michael J. Norton, No. 6430 Alliance Defending Freedom 7951 E. Maplewood Avenue, Suite 100 Greenwood Village, CO 80111 (0) 720-689-2410 mjnorton@alliancedefendingfreedom.com	
RESPONDENTS' REPLY BRIEF IN SUPPORT OF APPEAL	

* * *

II. Complainants Fail to Explain How the ALJ's Decision Does Not Violate Jack's Free Speech Rights.

Complainants' argument against Jack's free speech claim hinges entirely on a false premise: that all Jack was asked to provide is a good or service that is completely devoid of any expressive element. Complainants' Br. 4. This is demonstrably untrue within the context of this case.

Jack is, and holds himself out to the public as, a cake artist. His company logo includes an artist's palette with a brush and whisk. A drawing inside his store depicts him as an artist painting on an easel. These core business images reflect Jack's belief that designing cake creations is a form of art and expression. Jack, and other cake artists like him (popularized on shows such as Food Network's "Ace of Cakes"), prepare unique creations that are inherently expressive regardless of whether they include particular words or symbols. This is especially true in the wedding cake context, as wedding cakes are universally understood to convey a celebratory message in support of the couple's union. Jack invests many hours in the wedding cake creative process, which includes meeting the clients, designing and sketching the cake, and then baking, sculpting, and decorating it. Complainants incorrectly peg Jack as a mere "retail service provider." Complainants' Br. 7. To the contrary, he is an artist who uses his talents and abilities to create expression that is fully protected by the First Amendment.

Indeed, a wealth of Supreme Court decisions recognize that individuals and organizations qualify as constitutionally protected speakers even if their sole role is to distribute messages that others create, and even when they earn money for conveying those messages. *See, e.g., Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 674 (1998) (public broadcaster is a constitutionally protected speaker when it "compil[es) . . . the speech of third parties"); *Hurley,* 515 U.S. at 569-70 (parade organization that compiles the "multifarious voices" of others is a

constitutionally protected speaker); *Riley v. Nat'l Fed'n of the Blind of N.C.,* 487 U.S. 781, 795-98 (1988) (professional fundraisers paid to speak their customers' messages are constitutionally protected speakers); *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 258 (1974) (newspaper is a constitutionally protected speaker when it compiles the writings of third parties on its editorial page); *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 265-66 (1964) (newspaper is a constitutionally protected speaker when its customers pay it to print an advertisement). Here, Jack is no mere disseminator of others' speech, but an active participant in the creative process and the artist who actually creates the expression. If the paid disseminator of others' speech is entitled to full First Amendment protection, then Jack's active use of his artistic talents and abilities to create expression is clearly entitled to such protection.

The Ninth Circuit's decision in *Anderson v. City of Hermosa Beach,* 621 F.3d 105 1 (9th Cir. 2010), emphatically confirms this. There, the question was whether a tattoo artist was protected by the First Amendment. The Court held that he was:

> [l]t makes no difference whether or not, as the district court determined, "the customer has [the] ultimate control over which design she wants tattooed on her skin." The fact that both the tattooist and the person receiving the tattoo contribute to the creative process or that the tattooist, as Anderson put it, "provide[s] a service," does not make the

> tattooing process any less expressive activity, because there is no dispute that the tattooist applies his creative talents as well.

Id. at 1062. Like the tattoo artist, cake artists like Jack "appl[y] their creative talents" to the cake design process and thus are entitled to full First Amendment protection.

The above case law and *Anderson* also firmly reject Complainants' odd notion that there is no First Amendment protection unless the speaker "initiate[s] [the] creative process." Complainants' Br. 7. As the Ninth Circuit observed in *Anderson,* such an approach to the First Amendment "would not protect the process of writing most newspaper articles–after all, writers of such articles are usually assigned particular stories by their editors, and the editors generally have the last word on what content will appear in the newspaper. Nor would the First Amendment protect painting by commission, such as Michelangelo's painting of the Sistine Chapel." *Anderson,* 621 F.3d at 1062. Complainants' narrow view of the First Amendment's scope is plainly incorrect.

Considering the above, Complainants are quite wrong to claim that Jack is not being forced "to incorporate elements [he] disagree[s] with into [his] own inherently expressive activity." *Id.* at 4-5. His unique wedding cake creations are protected artistic expression. Thus, the ALJ's order, unless overturned by the Commission, will force him to create unwanted expression. This is a prototypical violation

of the compelled speech doctrine. *Wooley v. Maynard,* 430 U.S. 705, 714 (1977) (the constitutional right to free speech "includes both the right to speak freely and the right to refrain from speaking"); *see also Hurley,* 515 U.S. at 573 (discussing the First Amendment right to "decide what not to say"). To put it in Complainants' words, a violation of the compelled speech doctrine occurs "when government forces citizens to incorporate undesired elements into their own constitutionally protected expressive activities." Complainants' Br. 5. That is precisely what is occurring here.

Complainants also argue that there is no compelled speech violation under *Wooley* and *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), because these cases have nothing to do with "a retail business" owner's compelled speech objections to a "broad mandate" contained within a state's anti-discrimination law. Complainants' Br. 6. But these attempted distinctions are irrelevant. The Supreme Court and lower federal courts have repeatedly held that free speech rights apply with full force to commercial businesses. *Hurley,* 515 U.S. at 574 (affirming that the right against compelled speech is "enjoyed by business corporations"); *see also Citizens United v. FEC,* 558 U.S. 310, 130 S. Ct. 876, 899-900 (2010) (collecting cases); *Riley,* 487 U.S. at 801 ("It is well settled 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."); *Andersen v. City of Hermosa Beach,* 621 F.3d 1051, 1063 (9th Cir. 2010) ("[T]he business of tattooing qualifies as purely expressive activity . . . and is therefore entitled to full constitutional

protection"). Moreover, the Supreme Court has twice found sexual orientation public accommodation laws unconstitutional when applied to compel the speech of particular private speakers. *Hurley,* 515 U.S. at 572-73 (government may not rely on public accommodation law to compel parade organization to facilitate the message of a gay-advocacy group); *Boy Scouts of America v. Dale,* 530 U.S. 640, 657-59 (2000) (First Amendment right of expressive association prohibits the government from applying a public-accommodation law to force the Boy Scouts to accept a scoutmaster who openly identifies as homosexual). Simply put, "broad mandates" often have unconstitutional applications, as CADA does here when applied to force Jack to use his artistic abilities to create unwanted expression.

CONCLUSION

A decision affirming the ALJ's ruling will be an unfortunate step in the direction of turning a nation founded by religious refugees into a nation whose laws create them. Respondents thus respectfully request, for the reasons stated above and in their opening brief, that the Commission reject the ALJ's decision and grant summary judgment in their favor.

Respectfully submitted this 27th day of May, 2014.

Attorney for Respondent
Masterpiece Cakeshop Inc. and
Jack C. Phillips

/s/ Nicolle H Martin
Nicolle H. Martin, No. 28737

CERTIFICATE OF SERVICE

I certify that on this 27th day of May, 2014, a true and correct copy of the foregoing **RESPONDENTS' REPLY BRIEF IN SUPPORT OF APPEAL** was filed with the Colorado Civil Rights Commission and served on the parties and/or their counsel of record as follows:

David Mullins
Charlie Craig
c/o Sara Rich Neel (via email: sneel@.aclu-co.org)
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203

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

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

Amanda Goad (via email: agoad@aclu.org)
American Civil Liberties Union
125 Broad Street, 18th Floor

New York, NY 10004
Paula Greisen (via email: greisen@kinggreisen.com)
Dana Menzel, menzelrw.kinggreisen.com
King & Greisen
1670 York Street
Denver, CO 80206

/s/ Marilyn Kuipers
Marilyn Kuipers

Excerpt from Notice of Appeal to the Colorado Court of Appeals filed July 16, 2014

Filed: July 16, 2014

COLORADO COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Suite 300 Denver, CO 80203	▲COURT USE ONLY▲
COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202 2013-0008	
APPELLANTS: MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, APPELLEES: CHARLIE CRAIG and DAVID MULLINS.	
Attorneys: Nicolle H. Martin, No. 28737 7175 W. Jefferson Avenue, Suite 4000	Case Number:

Lakewood, Colorado 80235
(0) 303-332-4547
nicolle@centurylink.net

Michael J. Norton, No. 6430
Natalie L. Decker, No. 28596
Alliance Defending Freedom
7951 E. Maplewood Avenue,
Suite 100
Greenwood Village, CO 80111
(0) 720-689-2410
mjnorton@alliancedefending
freedom.org
ndecker@alliancedefending
freedom.org

Jeremy D. Tedesco, AZ No. 023497
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(0) 480-444-0020
jtedesco@alliancedefending
freedom.org

NOTICE OF APPEAL

Appellants, Masterpiece Cakeshop, Inc. and Jack Phillips ("Jack"), by and through counsel, hereby submit this Notice of Appeal pursuant to C.A.R. 3.

I. DESCRIPTION OF THE NATURE OF THE CASE.

* * *

B. Order Being Appealed and Statement Indicating the Basis for Appellate Court's Jurisdiction.

The Appellant seeks review of the Commission's Final Agency Order affirming the ALJ's Initial Decision; denying Appellants' cross-motion for summary judgment and granting Appellees' motion for summary judgment; granting Appellees' motion for protective order; and denying Appellants' motion to dismiss the complaint and motion to dismiss Jack Phillips entered on May 3, 2014. This Court has appellate jurisdiction over this appeal pursuant to COLO. REV. STAT. § 24-34-307 (1) and (2) and COLO. REV. STAT. § 24-4-106 (11).

C. Whether the Order Resolved All Issues Pending before the Agency.

The Order dated May 30, 1014 resolved all issues pending before the Commission, except one. Appellants filed a Motion for Stay of Final Agency Order, seeking to stay the Commission's order pending this appeal. The Motion is pending before the Commission. Should the Commission deny the motion, Appellants will promptly file a stay request in this Court.

D. Whether the order is final for purposes of appeal.

The Commission's order is final pursuant to 3 COLO. CODE REGS. § 708-1, R. 10.13 (D).

E. Date of Service of the Final Agency Order.

The date of service of the Commission's final order is June 2, 2014.

II. ADVISORY LISTING OF THE ISSUES TO BE RAISED ON APPEAL

* * *

D. The ALJ erred in the Initial Decision by granting Appellees' Motion for Summary Judgment and denying Appellant' Cross-Motion for Summary Judgment. Contrary to the findings in the Initial Decision:

* * *

iii. Appellants are protected by the Free Speech Clause of the First Amendment of the United States Constitution and by Article II Section 10 of the Colorado Constitution from being forced to use their artistic talents to design and create expression they disagree with, here in the form of a wedding cake celebrating a same-sex union.

iv. Appellants are protected by the Free Exercise Clause of the First Amendment of the U.S. Constitution and Article II Section 4 of the Colorado Constitution from being forced to create a wedding cake celebrating a same-sex union in violation of their deeply held religious beliefs.

* * *

Respectfully submitted this 16th day of July, 2014.

Attorney for Appellants 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 16th day of July, 2014, a true and correct copy of the foregoing **NOTICE OF APPEAL** was filed with the Colorado Court of Appeals via ICCES and served via ICCES, and/or electronic mail and U.S. Mail on the Colorado Civil Rights Commission and the parties and/or their counsel of record as follows:

Colorado Civil Rights Commission (Via e-mail & U.S. Mail)
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
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203
sneel@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

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

Amanda Goad
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
agoad@aclu.org

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

/s/ Marilyn Kuipers
Marilyn Kuipers

Excerpt from Appellants' Opening Brief on Appeal filed January 9, 2015

Filed: January 9, 2015

COLORADO COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Suite 300 Denver, CO 80203	
COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202 Case No. 2013-0008	
RESPONDENTS-APPELLANTS: MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, v. PETITIONERS-APPELLEES: CHARLIE CRAIG and DAVID MULLINS.	▲ COURT USE ONLY ▲
Attorneys: Nicolle H. Martin, No. 28737 7175 W. Jefferson Avenue, Suite 4000	Case Number: 2014CA1351

Lakewood, Colorado 80235 (O) 303-332-4547 nicolle@centurylink.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@alliancedefending freedom.org ndecker@alliancedefending freedom.org Jeremy D. Tedesco, AZ No. 023497 Alliance Defending Freedom 15100 N. 90th Street Scottsdale, AZ 85260 (O) 480-444-0020 jtedesco@alliancedefending freedom.org	
APPELLANTS' OPENING BRIEF	

* * *

ISSUES PRESENTED FOR REVIEW

* * *

II. Whether The Commission's Order Forcing Phillips to Design and Create Celebratory Wedding Cakes for Same-Sex Weddings Violates the First Amendment's Compelled Speech Doctrine and the Free Speech Clause of the Colorado Constitution.

III. Whether The Commission's Order Forcing Phillips to Design and Create Celebratory Wedding Cakes for Same-Sex Weddings Violates the Free Exercise Clause of the First Amendment of the U.S. Constitution and the Colorado Constitution.

IV. Whether The Statute's Application to Phillips Fails Strict Scrutiny.

* * *

STATEMENT OF THE CASE

This case is about the Colorado Civil Rights Commission's (Commission) order compelling Appellants, Masterpiece Cakeshop, Inc. and Jack C. Phillips, (collectively Phillips) to design and create wedding cakes for same-sex unions in violation of their sincerely held religious beliefs.

In July of 2012, Complainants asked Phillips to design and create a wedding cake for their same-

sex wedding. Phillips politely declined, explaining that he would gladly make them any other type of baked item they wanted but that he could not make a cake promoting a same-sex wedding because of his religious beliefs. Complainants later filed a complaint with the Colorado Civil Rights Division (Division) alleging discrimination based on sexual orientation, citing Colorado's Anti-Discrimination Act (CADA). The matter was briefed and argued to an Administrative Law Judge (ALJ) in the Office of Administrative Courts who found that Phillips violated CADA's public accommodation statute. Phillips appealed and the Commission adopted the ALJ's ruling and issued a final agency order. Phillips seeks reversal of that order.

The Commission's impartiality is in serious question. In its public deliberations, its members virtually ignored Phillips's constitutional defenses. (Supp. PR. CF, Vol. 2, p. 877.) And at a later hearing on Phillips's motion to stay its order, one Committee member candidly explained why:

> 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.

(*Id.* at 932.) Such alarming bias and animus toward Phillips's religious beliefs, and toward religion in general, has no place in civil society. At least one Commission member holds such beliefs. And her comment suggests that other members of the Commission may share her view that people who believe marriage is only between a man and a woman are comparable to those who committed the Holocaust. This anti-religious bias undermines the integrity of the Commission's process and final order. Moreover, such religious hostility is barred by the Free Exercise Clause and raises a serious question of whether the Commission's analysis would have differed if Phillips's faith had not been the reason for the denial.

* * *

II. The Commission's Order Forcing Phillips to Design and Create Celebratory Same-Sex Wedding Cakes Violates the Compelled Speech Doctrine and the Colorado Constitution.

Standard of Review

Appellate courts reviewing compelled-speech claims must independently examine the record without deference to the lower courts on any issue, including factual findings. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S.

557, 567 (1995); *see also Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). Phillips preserved this issue by raising it in his cross-motion for summary judgment (Supp. PR. CF, Vol. 1, p. 448) and again in his appeal to the Commission. (*Id.* at 570.)

A. The Free Speech Clause of the First Amendment of the United States Constitution and Article II, section 10 of the Colorado Constitution apply to Phillips's wedding cakes.

The First Amendment provides broad free speech protections. But the Colorado Constitution provides even greater liberty of speech. *See Bock v. Westminster Mall Co.,* 819 P.2d 55, 59-60 (Colo. 1991). And no case suggests that the commercial marketplace is a "First Amendment free" zone. *Hurley*, 515 U.S. at 574 (long-standing right to be free from compelled-speech is "enjoyed by business corporations"); *see also Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 899-900 (2010) (collecting cases); *Pacific Gas and Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 16 (1986) ("[A] speaker is no less a speaker because he or she is paid to speak."). The First Amendment thus applies here because the items that the Commission's order would require Phillips to design and create—wedding cakes—are inherently expressive.

1. Wedding cakes constitute symbolic speech.

Freedom from government coercion is the hallmark of citizenship. The constitutional right to free speech extends beyond the spoken or written word. *Hurley,* 515 U.S. at 569. Indeed, for more than three-quarters of a century, symbolic speech has been protected under the First Amendment. *See, e.g.*, *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (displaying a red flag in protest of organized government); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (U.S. 1943) (saluting or not saluting a flag).[2] From nude dancing to surreptitious photography to tattooing a person's arm, speech occurs in many forms.[3]

If these things are expressive, surely wedding cakes are, too. Wedding cakes, the most elaborate and symbolic cakes available, undoubtedly

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[2] *See also Cressman v. Thompson*, 719 F.3d 1139, 1153 (10th Cir. 2013) (image of sculpture on Oklahoma license plate); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (tattoos composed of "realistic or abstract images, symbols, or a combination of these"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (wearing an armband to protest war)

[3] *Ex parte Thompson*, 442 S.W.3d 325, 344 (Tex. Crim. App. 2014) (covert photography of subjects without consent known as "upskirt photos"); *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (nude dancing); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995) (parades with or without words).

communicate something about marriage. In concluding they are "simply not speech," (Supp. PR. CF, Vol. 1, p. 716) the ALJ erred, particularly given his finding that Phillips exhibits "considerable skill and artistry" in designing and creating them. (*Id.*) This error turned on the fact that the Complainants had not discussed "what the cake would look like." (*Id.* at 716.) But the wedding cake itself—without words or figurines, is protected symbolic speech.

Merriam Webster's Dictionary defines wedding cake as "a usually elaborately decorated and tiered cake made for the celebration of a wedding."[4] Upon seeing one, an observer instantly understands that a marriage has just begun and the union should be congratulated and celebrated. Even wedding cake's status as a centerpiece of the reception sends a clear message – celebrate with the new couple. (*See id.* at 494.)

Wedding cakes have long communicated a celebratory message about marriage. In Roman times, small cakes were made and then crumbled over the head of the bride.[5] These cakes were awash with symbolism that wished the couple wealth, fertility, happiness, longevity, and health.[6] The use of the color white for wedding cakes is still a symbol of purity. In earlier times, it also served as a symbol of wealth and status.[7] Over the years, the three-

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[4] "Wedding cake," Merriam Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/wedding%20cake (last visited December 21, 2014).

[5] *See* Mich Turner, *Wedding Cakes* at cover page (2009).

[6] *Id.*

[7] *Id.*

tiered, round wedding cake became traditional symbols of the engagement ring, the wedding ring, and the eternity ring.[8] And if any doubt exists as to whether wedding cakes remain expressive, one need only look at the multicolor filling Complainants selected, which mirror the rainbow—a well-recognized symbol of the gay pride movement. (*Id*. at 495, 501-02.)

Ultimately, it does not matter whether Complainants desired to purchase a "nondescript cake" (*id*. at 716) from Phillips because they didn't ask for a generic cake; they specifically asked for a "wedding cake." (*Id*. at 711.) A wedding cake inherently expresses a celebratory message about joining of two people in marriage. And the Commission's order compels Phillips to design and create any conceivable wedding cake requested of him, not only nondescript baked goods. This includes a wedding cake stating "Jack Phillips supports same-sex marriages" or "Jesus endorses same-sex marriages." The Commission's order thus forces Phillips to express a wide range of messages that violate his beliefs.

What is more, the ALJ had to acknowledge that cakes are expressive (*id*. at 718) when confronted with the government forcing a hypothetical black or Jewish cake artist to create a cake celebrating the Aryan Nations Church or a homosexual baker to design a cake celebrating the

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[8] *The Essential Guide to Cake Decorating*, Jane Price, ed., (2010).

Westboro Baptist Church. *Id.* at 791. The ALJ recognized that such "explicit, unmistakable, offensive message[s] ... give[] rise to the bakers' *free speech right* to refuse." *Id.* at 718 (emphasis added). Plainly, the same is true here. Indeed, the only difference is a value judgment made by the ALJ. Such value judgments on speech have no place in a free society.

Designing and creating a same-sex wedding cake runs contrary to Phillips's faith. And the First Amendment protects Phillips's right to "decide for himself ... the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Neither the ALJ nor the State of Colorado may override that determination because they either do not find same-sex wedding cakes "unmistakably offensive" or because Phillips espouses a minority view about same-sex marriage. For "[if] there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics ... religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

The Free Speech Clause prohibits government from turning private citizens, like Phillips, into "instrument[s] for fostering public adherence to an ideological point of view [they] find[] unacceptable," *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), regardless of what others find outrageous. And the very "point" of the compelled speech doctrine "is to shield just those choices of content that in someone's

eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574.

"While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.* at 579; *see also Wooley*, 430 U.S. at 715 ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster ... an idea they find morally objectionable."); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not."); *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

If the ALJ was correct that a black, Jewish, or homosexual baker could claim First Amendment protection—and he certainly was—Phillips may claim the Free Speech Clause's protection as well.

2. Phillips is the speaker when he designs and creates wedding cakes

Phillips is undoubtedly the speaker when he designs and creates wedding cakes. Complainants may also be speakers with respect to certain elements under their control, such as a rainbow

theme. (Supp. PR. CF, Vol. 1, p. 495.) But Phillips's creativity and artistic skill, which are "considerable," (*id*. at 716) permeate the finished cake. Phillips spends considerable time consulting with his customers, (*id*. at 472, ¶¶ 37, 40), and sketching the design of the desired cake. (*Id*. at 473, ¶ 44.) Depending upon the design, Phillips may also transform a simple sheet cake into a sculpture. (*Id*. at ¶ 42.) Colors and decorations are forged by hand and ultimately, the cake is artfully put together. (*Id*. at ¶ 44.)

Phillips views himself as an active participant in the wedding when he designs and creates wedding cakes (*id*. at ¶ 45) and he believes his cakes are central to the wedding celebration itself. When Phillips creates a wedding cake, he is a chef, a painter, and sometimes a sculptor, but at all times, he is an artist. His work clearly falls under the protection of the First Amendment.

B. The Commission's order violates the Compelled-Speech Doctrine by requiring Phillips to design, create and engage in expression.

Free speech protection safeguards "both the right to speak freely and the right to refrain from speaking." *Wooley*, 430 U.S. at 714; *see also Hurley*, 515 U.S. at 573 ("[O]ne who chooses to speak may also decide what not to say.") (quotation marks and citations omitted). The latter aspect, commonly referred to as the compelled speech doctrine,

safeguards the freedom of mind and thought—the right to decide whether to speak at all.

Speech is compelled when the government punishes private actors for refusing to engage in unwanted expression, *Wooley*, 430 U.S. at 715, or forces them to alter their expression by "accommodate[ing] another speaker's message." *Rumsfeld v. FAIR*, 547 U.S. 47, 63-64 (2006) (citing *Hurley*, 515 U.S. at 559 (forcing parade organizer to include LGBT group's message violated First Amendment; *Pacific Gas*, 475 U.S. at 9 (compelling plaintiff to include opposing third-party speech in plaintiff's monthly newsletter violated First Amendment); *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 258 (1974) (right-of-reply statute in favor of third parties violates editors' right to determine a newspaper's content)). As applied here, the public accommodation statute violates the First Amendment by punishing Phillips for refusing to design and create a wedding cake that he finds morally objectionable, and by forcing him to facilitate Complainants' symbolic message.

The ALJ wrongly focused on whether Phillips's conduct in preparing a wedding cake is expressive, noting only in passing that the finished cake "does not necessarily qualify as 'speech.'" (Supp. PR. CF, Vol. 1, p. 716.) But the proper question is not whether the *conduct* in creating a cake is expressive; (*id*.) it is whether Phillips's artistic creation is expressive. *See Hurley*, 515 U.S. at 568-70 (evaluating whether the service that the complainant sought to access—the defendant's parade—was expressive); *cf. Rumsfeld*, 547 U.S. at

64 (noting "the expressive quality" of "a parade" (*Hurley*), "a newsletter" (*Pacific Gas*), and an "editorial page" (*Tornillo*)). The ALJ wrongly employed the test for expressive-conduct instead of that for compelled speech. (Supp. PR. CF, Vol. 1, p.716.) Never has the Supreme Court treated those discrete claims the same. *Compare Rumsfeld*, 547 U.S. at 61-65 (analyzing a compelled-speech claim); *with id*. at 65-68 (analyzing an expressive-conduct claim); *accord Wooley*, 430 U.S. at 713 (treating expressive conduct differently from compelled speech).

Moreover, the ALJ purported to apply *Rumsfeld* but the analysis started and ended with the conclusory assertion that forcing Phillips to design and create same-sex wedding cakes "is incidental to the state's right to prohibit discrimination on the basis of sexual orientation." (Supp. PR. CF, Vol. 1, p. 717.) First, *Rumsfeld* is a war powers case and "judicial deference ... is at its apogee 'when Congress legislates under its authority to raise and support armies.'" *Rumsfeld*, 547 U.S. at 58. No such deference applies here.

Second, in regards to compelled speech, the *Rumsfeld* Court concluded that laws schools' speech was incidental to an ideologically neutral service, providing recruiters access to campus. *Id*. at 62. Law schools were not required to issue communications supporting the Don't Ask Don't Tell policy. Their only involvement with the military was apprising students of recruiting events. *Id*. at 60-62. The law in question thus merely required equal access for military recruiters, not that law schools

communicate an ideological message contrary to their convictions.

The *Rumsfeld* Court distinguished such event announcements from compelling students to perform the Pledge of Allegiance, *Barnette*, 319 U.S. at 624, 632-34, or drivers to display the state motto "Live Free or Die" on their cars, *Wooley*, 430 U.S. at 715, because law schools were not expressing ideas in providing equal access to military recruiters. *Rumsfeld*, 547 U.S. at 64. But celebrating a wedding is nothing like making the neutral and purely factual statements at issue in *Rumsfeld*, such as "[t]he U.S. Army recruiter will meet interested students in Room 123 at 11 a.m." *Id.* at 62.

Phillips spends hours consulting clients, sketching out designs, baking, sculpting if necessary, and decorating with artistic skill honed over 40 years. (Supp. PR. CF, Vol. 1, p. 471-73.) The conduct at issue in *Rumsfeld* did not *produce* anything other than meeting announcements, but Phillips produces an individualized cake designed to honor, celebrate and support a specific couple's lifelong union. The Commission's order thus directly requires Phillips to engage in creative expression against his will. There is nothing "incidental" about this violation of the First Amendment.

C. The Commission's order violates the Compelled-Speech Doctrine by requiring Phillips to facilitate third-party messages.

A compelled-speech violation also occurs when (1) the government "force[s] one speaker to host or accommodate another speaker's message" and (2) the hosting speaker's expression is "affected by the speech it [is] forced to accommodate." *Rumsfeld*, 547 U.S. at 63. The Commission's order in this case not only directly requires Phillips to create expression, but it also mandates that he "host or accommodate another speaker's" views. *Id*. at 63.

First, hours spent designing and creating same-sex wedding cakes that communicate a message he does not believe in detracts from the time Phillips has to create wedding cakes that celebrate the joining of one man and one woman in marriage, a sentiment with which he agrees. *See id*. at 64 (recognizing that the "interference with [the] speaker's desired message" in *Tornillo* and *Pacific Gas* resulted from forcing the newspaper and the company to "tak[e] up space that could be devoted to other material").

Second, requiring Phillips to design and create wedding cakes that express positive celebratory messages about same-sex marriage chills his speech, for the only "safe course" is to stop creating wedding cakes altogether. *See Tornillo*, 418 U.S. at 257. And Phillips has, in fact, stopped creating wedding cakes altogether.

Third, the Commission's order changes Phillips's own expression that marriage is a union between one man and one woman ordained by God, exemplified by Christ's relationship with His Church. (Supp. PR. CF, Vol. 1, p. 469, ¶¶ 12-13.) Designing and creating wedding cakes *only* for one-man-one-woman marriages powerfully communicates that is what "marriage" means to Phillips. Forcing him to create and design wedding cakes celebrating any other type of union irreversibly alters this message and effectively requires him to disavow his religious beliefs about marriage. Phillips is "forced either to appear to agree" with the messages communicated by same-sex wedding cakes "or to respond" by clarifying his contrary views. *See Pacific Gas*, 475 U.S. at 15. The First Amendment bars the State from imposing that choice. *See Hurley*, 515 U.S. at 573 (recognizing that free speech "applies ... equally to statements of fact the speaker would rather avoid").

Moreover, Phillips cannot effectively clarify his religious views if forced to design and create same-sex wedding cakes in practice. The public accommodation statute forbids expression or communication "that indicates that ... an individual's patronage or presence at a place of public accommodation is ... unwelcome, objectionable, unacceptable or undesirable because of sexual orientation." § 24-34-601(2). The Commission likely views any expression reflecting negatively on same-sex marriage; for example, "Masterpiece Cakeshop believes that Jesus regards marriage as between a man and a woman, and anything else is sinful,"

(Supp. PR. CF, Vol. 1, p. 470, ¶ 15), as a violation of this vague statutory language.

Rather than celebrating or condemning the joining of two people of the same sex in marriage, Phillips would prefer to remain silent on that subject. *See Pac. Gas*, 475 U.S. at 9-10 (noting government cannot "force[] speakers to alter their speech to conform with an agenda they do not set," including speakers that "prefer to be silent"). Complainants seek to alter Phillips's expression and impose their own expression on him: "We're not trying to shut down Masterpiece Cake Shop. We want Masterpiece Cake Shop's policy toward gay weddings to change." Supp. PR. CF, Vol. 1, p. 499. In other words, Complainants seek to force Phillips to adopt their message about same-sex weddings. But this command by the government runs afoul of the First Amendment. *See Pac. Gas*, 475 U.S. at 16 (recognizing that forcing a speaker to "alter [his] own message as a consequence of the government's coercive action" violates the Free Speech Clause).

Indeed, the Supreme Court has oft rejected such unconstitutional demands to parrot or host another's prepackaged message. *See, e.g., Barnette*, 319 U.S. at 642; (salute flag/recite Pledge of Allegiance); *Wooley*, 430 U.S. at 717 (display state motto on their license plates); *Pacific Gas*, 475 U.S. at 20-21 (require a company to include a third party's newsletter in a billing envelope); *Tornillo*, 418 U.S. at 258 (mandate a newspaper to include a third party's writings in its editorial page). The facts in this case are even more problematic. The Commission's order not only forces Phillips to echo

other's expression, but requires that he *design and create* that unwanted expression—a violation of artistic freedom well beyond anything the Supreme Court has previously encountered and condemned.

Finally, the ALJ relied on two war-powers cases (*O'Brien* and *Rumsfeld*), rather than *Hurley*, the Supreme Court's unanimous decision regarding public accommodation laws' application to compel Phillips to engage in unwanted expression. (Supp. PR. CF, Vol. 1, p. 717.) The ALJ gave no reason for ignoring this controlling precedent, which establishes that government cannot employ a public accommodation statute to compel speech.

Hurley involved an LGBT group that wished to compel a Boston parade organizer to include it in an annual St. Patrick's Day parade. 515 U.S. at 561-63. The LGBT group wished "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.* at 561. But the parade organizer wished to convey "traditional religious and social values" and rejected the LGBT group's participation. *Id.* at 562. A unanimous Supreme Court found that the organizer's claim to the "principle of autonomy to control one's own speech is as sound as the ... parade is expressive." *Id.* at 574.

The Supreme Court concluded that applying a state nondiscrimination law to require the parade organizers to engage in unwanted third-party speech that affected their message violated the First Amendment. *Id.* at 559; *see also id.* at 581 ("Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to

compel the speaker to alter the message by including one more acceptable to others."); *id.* at 579 ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.").

Hurley thus establishes that public accommodation statutes, though constitutional on their face, can and have been applied in ways that violate the Compelled Speech Doctrine. The government is applying Colorado's public accommodation statute exactly that way here.

III. The Commission's Order Forcing Phillips to Design and Create Celebratory Wedding Cakes for Same-Sex Weddings Violates the Free Exercise Clause of the First Amendment of the U.S. Constitution and Article II, Section 4 of the Colorado Constitution.

Standard of Review

Whether the Commission's decision forcing Phillips to design and create same-sex wedding cakes violates the Free Exercise Clause of the First Amendment of the U.S. Constitution and Article II, Section 4 of the Colorado Constitution is a question of law reviewed de novo. § 24-4-106(11)(e). Phillips preserved this issue by raising it in his cross-motion for summary judgment (Supp. PR. CF, Vol. 1, p. 456)

and again in his appeal to the Commission. (*Id*. at 574.)

The U.S. Constitution and the Colorado Constitution protect the free exercise of religion. U.S. Const. amend. I; Article II, § 4 of the Colorado Constitution. Consequently, Phillips is entitled to broad protection under both state and federal law. But the ALJ found no protection for religious conduct if it is otherwise "prohibited by law." (Supp. PR. CF, Vol. 1, p. 719.)

A. The State's targeting of Phillips's religious beliefs violates Free Exercise protections.

At a minimum, the Free Exercise Clause's "protections ... pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). Here, one Commissioner openly revealed her bias against religion in general and Phillips's religious beliefs in particular, and suggested that the entire Commission shared her views. (Supp. PR. CF, Vol. 2, p. 932.) Such blatant religious targeting violates the Free Exercise Clause because it "impose[s] special disabilities on the basis of religious views." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990).

By specifically targeting religious expression for disfavored treatment, the Commission has engaged in "discrimination 'on the basis of religious views or religious status,' [which] is subject to heightened constitutional scrutiny." *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (striking down a state law that denied scholarships to students that attended "pervasively sectarian" colleges and universities). Government, quite simply, may not "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Sadly, that is what happened below.

B. The State Constitution provides greater protection than the federal Constitution, so this court should subject the statute to strict scrutiny review.

Under the Colorado Constitution, strict scrutiny should apply to the government's burdening of free exercise rights. That standard prevailed in both the state and federal realm until 1990, when the U.S. Supreme Court controversially limited the First Amendment's scope, stating that "the right of free exercise [under the United States Constitution] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (1990).

In response, twenty-nine States have insisted that all laws burdening citizens' free exercise of religion survive strict scrutiny review. Eighteen States enacted Religious Freedom Restoration Acts to restore the status quo.[9] Another twelve state supreme courts interpreted their state constitutions' free exercise protections to require strict scrutiny.[10]

Here, the ALJ erroneously applied the *Smith* standard. But *Smith* does not govern claims under the Colorado Constitution. In fact, the ALJ wrongly relied on *Town of Foxfield v. Archdiocese of Denver*, 148 P.3d 339 (Colo. App. 2006), which involved a First Amendment claim, not a claim under the

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[9] Ala. Const. art. I, § 3.01; Ariz. Rev. Stat. Ann. § 41-1493; Conn. Gen. Stat. Ann. § 52-571b; Fla. Stat. Ann. §§ 761.01-05; Idaho Code Ann. § 73-402; 775 Ill. Comp. Stat. Ann. 35/1-99; Mo. Rev. Stat. § 1.302; N.M. Stat. Ann. §§ 28-22-1 to -5; Okla. Stat. Ann. tit. 51, § 251; 71 Pa. Stat. Ann. § 2404; R.I. Gen. Laws §§ 42-80.1-1 to -4; S.C. Code Ann. §§ 1-32-10 to -60; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to .012; La. Rev. Stat. Ann. § 13:5233; Tenn. Code Ann. § 4-1-407; VA. Code Ann. § 57-2.02.

[10] *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005); *Larson v. Cooper*, 90 P.3d 125, 131 (Ala. 2004); *Valley Christian School v. Mont. High School Ass'n*, 86 P.3d 554 (Mont. 2004); *Odenthal v. Minnesota Conf. of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002); *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443, 445-51 (Ind. 2001); *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); *Open Door Baptist Church v. Clark County*, 995 P.2d 33, 39 (Wa. 2000); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006); *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998); *State v. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996); *Attorney General v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994).

Colorado Constitution. The petition for writ of certiorari stated the issue: "Whether the ... parking ordinance is subject to strict scrutiny under the *United States Constitution*." *Town of Foxfield v. Archdiocese of Denver*, 2006 WL 3703933 (Colo. 2007) (emphasis added).

The Colorado Supreme Court has not definitively decided whether to follow *Smith*'s approach when interpreting Colorado's free exercise clause or that of a majority of states, which are more protective of religious liberty. *See Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.*, 2013 COA 20, ¶ 61, *cert. granted*, 2014 WL 1046020 (Colo. Mar 17, 2014) *argued* (Dec. 10, 2014) (certiorari not sought on this issue). Thus, this court is free to apply strict scrutiny. And there are at least two compelling reasons why this Court should do so.

First, Colorado has historically applied strict scrutiny to infringements of fundamental rights. *See Engraff v. Indus. Comm'n,* 678 P.2d 564, 567 (Colo. App. 1983) (applying strict scrutiny to state statute burdening the plaintiff's federal free exercise rights under First Amendment); *see also In re E.L.M.C*, 100 P.3d 546, 552 (2006) (strict scrutiny applies to laws affecting parent-child relationship); *Tattered Cover, Inc. v. City of Thornton,* 44 P.3d 1044, 1057 (Colo. 2002) (compelling interest required when law implicates free speech rights); *In re Custody of 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, the Colorado Supreme Court has long recognized that it is free to give broader protection under the Colorado Constitution than is accorded by the U.S. Constitution. It has, in fact, done so with certain state constitutional rights, including freedom of speech. *Bock,* 819 P.2d at 59-60 (finding that Colorado's free speech provision provides greater protection than the First Amendment).

C. Because the statute is not neutral and generally applicable, it is subject to strict scrutiny review.

Under the Free Exercise Clause, laws that burden religiously-motivated conduct are subject to strict scrutiny if they are either (1) not generally applicable, or (2) not religiously neutral. *Smith*, 494 U.S. at 879; *see also Town of Foxfield,* 148 P.3d at 346. The Commission's application of the public accommodation statute to Phillips is unlawful under either standard. First, unlike most "across-the-board ... prohibition[s] on a particular form of conduct," *id.* at 884, the statute does not apply generally to all members of society in the same way. It exempts from the definition of "place of public accommodation" "a church, synagogue, mosque, or other place that is principally used for religious purposes." § 24-34-601(1), C.R.S. 2013. Such exemptions "are of paramount concern when a law has the incidental effect of burdening religious practice," which the public accommodation statute—at a minimum—unquestionably does here. *Lukumi,* 508 U.S. at 542.

In this case, there is no legitimate reason – compelling or otherwise – for granting a religious exemption from the statute to other religious actors, but denying one to Phillips. Phillips's religious reasons for objecting to same-sex marriage are exactly the same and granting these groups an exception from the statute "endangers [the government's] interests" in preventing "discrimination" based on sexual orientation to an identical degree. *See Lukumi*, 508 U.S. at 543 (noting a law lacks general applicability when it "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree"); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (same). Hence, the Ordinance is not generally applicable and is subject to strict scrutiny.

Second, by exempting most religious organizations from the statute's ban on sexual orientation discrimination, the State has explicitly recognized that the morality of homosexual conduct is an important religious question for many citizens. *See* §§ 24-34-401(3), C.R.S. 2013; 24-34-601(1); 39-3-112(3)(b)(IV), C.R.S. 2013. Indeed, Complainants, (*see* Supp. PR. CF, Vol. 1, p. 556) as well as "many religions recognize marriage [in particular] as having spiritual significance." *Turner v. Safley*, 482 U.S. 78, 96 (1987)

The State thus exempts most religious groups from the statute's restrictions on places of public accommodation. *See* § 24-34-601(1). Yet it has refused to do the same for Phillips. *See Blackhawk*, 381 F.3d at 209 (for a law to be "neutral" it must

"not target religiously motivated conduct either on its face or as applied in practice"). In so doing, the State has engaged in the "differential treatment of two religions," which is not religiously neutral. *Lukumi*, 508 U.S. at 536; *see also id.* at 536 (exempting kosher slaughterhouses but not other religious killings from a ban on animal cruelty is not religiously neutral and may constitute "an independent constitutional violation").

The Free Exercise Clause prohibits the State from "preferring some religious groups over" Phillips. *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953). Indeed, the Supreme Court has long held that government may "effect no favoritism among sects." *Larson v. Valente*, 456 U.S. 228, 246 (1982). This lack of neutrality triggers strict scrutiny, the "most rigorous" standard known to constitutional law, *Lukumi*, 508 U.S. at 544, and one the public accommodation statute's application to Phillips cannot hurdle.

Places that restrict admission to individuals of one sex because of secular reasons, such as a bona fide relationship to the goods, services, advantages, of the facility, are exempt from the statute as well. § 24-34-601(3), C.R.S. 2013. Thus, all-male and all-female golf clubs, athletic clubs and schools are also exempted under the statute. Such broad exemptions for religious organizations, same-sex clubs, and schools demonstrate that the public accommodation statute is not generally applicable and neutral. Strict scrutiny therefore applies.

D. Strict Scrutiny applies to burdens on Free Exercise rights under the United States Constitution when other constitutional rights are also burdened.

Smith explained that strict scrutiny applies to laws burdening free exercise rights when another constitutional right, such as freedom of speech, freedom of association, or freedom of the press, is *also* burdened. *Smith*, 494 U.S. at 881. Phillips presents such a hybrid free-exercise and compelled speech claim here. *See Axson-Flynn*, 356 F.3d at 1295-97. Certainly, the ALJ's decision substantially burdens the free exercise of religion and also compels artistic expression. The government and Complainants must therefore show that applying the public accommodation statute to Phillips satisfies strict scrutiny. *See Thomas v. Review Bd. of Industry Employment Security Division*, 450 U.S. 707, 718 (1981).

IV. The Statute's Application to Phillips Fails Strict Scrutiny.

Standard of Review

Whether applying the public accommodation statute to Phillips fails strict scrutiny is a question of law reviewed de novo. § 24-4-106(11)(e). Phillips preserved this issue by raising it in his cross-motion for summary judgment (Supp. PR. CF, Vol. 1, p. 463) and again in his appeal to the Commission. (*Id*. at 574.)

A. The public accommodation statute fails to serve a compelling interest.

The Supreme Court has twice applied strict scrutiny to applications of public accommodation laws to expressive conduct and, in both instances, the Court held that strict scrutiny was not met. *See Hurley*, 515 U.S. at 579 (non-commercial speech restrictions may not "be used to produce thoughts and statements acceptable to some groups" as the First Amendment "has no more certain antithesis"); *Dale*, 530 U.S. 657 (public accommodation laws do not serve a "compelling interest" when they "materially interfere with the ideas" a person or group wishes "to express"). This court should hold the same.

Any government action that compels protected expression is subject to strict scrutiny. *Pacific Gas*, 475 U.S. at 19; *see also Hurley*, 515 U.S. at 575-79. Under that standard, the government's actions are presumed unconstitutional unless the state bears the burden of proving they are a "narrowly tailored means of serving a compelling state interest." *Pacific Gas*, 475 U.S. at 19; *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) (explaining the burden of justifying speech restrictions is on the government).

In *Hurley*, for example, the Court did not evaluate the government's general interest in preventing discrimination, but its particular interest in applying the law to the parade at issue. *Id.* at 578. There, as here, the public accommodation law's

purpose is "simply to require [Phillips] to modify the content of [his] own expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id*. As Complainants have explained, they "want Masterpiece Cake Shop's policy toward gay weddings to change." (Supp. PR. CF, Vol. 1, p. 499.) But this seeks "to allow exactly what the general rule of speaker's autonomy forbids." *Id*.

Moreover, "[a] law [also] cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (alterations omitted). The public accommodation statute, as explained above, exempts religious organizations and same-sex clubs and schools from its scope. It thus fails the first prong of the compelling interest test.

B. Protecting Phillips's First Amendment right against compelled speech would not result in widespread CADA exemptions.

Adopting Phillips's position will not result in the creation of an exception that swallows the nondiscrimination rule. Phillips's compelled speech objection is limited to very specific facts. First, like claims would apply *only* to businesses that create and sell *expression*. This includes, for example, newspapers, marketers, publicists, lobbyists, speech writers, photographers, and other artists.

Second, the compelled speech doctrine does not *wholly* exempt a business that creates and sells expression from CADA's public accommodation provision. It has no application, for example, to requests for any unexpressive goods or services that a business provides.

Third, compelled speech claims would apply *only* to claims under CADA's public accommodation provision, not CADA's employment and housing provisions. For example, Phillips's argument would not shield a law firm who refuses to promote female attorneys, *see Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984), but it could protect a law firm's decision not to further a cause that its partners could not advance in good conscience.

C. The public accommodation statute is not narrowly tailored to serve a compelling state interest.

The State's marginal interest in ensuring that people may obtain artistically designed wedding cakes celebrating same-sex marriages can be served "through means that would not violate [Phillips's] First Amendment rights." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 19 (1986). But, so far, it has not even made such an attempt. *Cf. id.* (concluding compelled speech flunked narrow tailoring test because there was "no substantially relevant correlation between governmental interest asserted and the State's effort to compel appellant" to engage in unwanted expression (quotation omitted)).

For instance, the State could engage in counter-speech favoring the celebration of same-sex unions, as well as the acknowledgment and reward of bakeries that are willing to design and create cakes to celebrate these events. It could do so through educational programs, advertising schemes, a business ranking system, an awards scheme, or other means. Any of these alternatives is more narrowly tailored to advance the government's interests than restricting Phillip's freedom of speech. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507-08 (1996) (plurality op.) (finding a statute not sufficiently tailored).

Because all of these options are "less restrictive of speech" than forcing Phillips to engage in creative expression, "the State must use [these] alternative[s] instead." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001). Importantly, under strict scrutiny, courts may "not assume [such] plausible, less restrictive alternative[s] would be ineffective." *Playboy*, 529 U.S. at 824.

* * *

Respectfully submitted this 9th day of January, 2015.

Attorney for Appellants 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 9th day of January, 2015, a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** was filed with the Colorado Court of Appeals 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

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

Amanda Goad
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
agoad@aclu.org

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

/s/ Nicolle H. Martin
Nicolle H. Martin

Excerpts from Petition for Writ of Certiorari to the Colorado Supreme Court filed on October 23, 2015

Filed: October 23, 2015

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

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@alliancedefending freedom.org ndecker@alliancedefending freedom.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@alliancedefending freedom.org	Case Number: 2015SC000738
PETITION FOR WRIT OF CERTIORARI **TO THE COLORADO COURT OF APPEALS**	

* * *

ISSUES PRESENTED FOR REVIEW

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

The questions presented are:

* * *

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

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

* * *

JURISDICTION

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

* * *

REASONS TO GRANT THE WRIT

*** * ***

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

The Court of Appeals' decision imperils one of our most precious constitutional freedoms—the right to be free from compelled speech. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *see also Bock v. Westminster Mall Co.,* 819 P.2d 55, 59 (Colo. 1991) (Colo. Const. art. II, § 10 "provides greater protection

of free speech than does the First Amendment."). Besides contradicting free speech precedent, the Court of Appeals' ruling also has startling implications. If permitted to stand, it allows the State to use CADA, or other laws, to force its citizens to create, promote, or disseminate expression with which they disagree. Whether the Court of Appeals' decision conflicts with compelled speech precedent is a substantial question of law that warrants this Court's review.

The primary problem with the Court of Appeals' ruling is that it sidestepped the core free speech issue by incorrectly finding that Phillips' artistic creations do not "warrant First Amendment protection[]." App. 106, ¶ 45. It did so despite acknowledging that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated." App. 42, ¶ 71. Phillips' case presents just such a scenario.

Indeed, Phillips' design and creation of special-order cakes—like the unique creations of artists using other mediums—is constitutionally-protected expression. It is established that speech protections extend "beyond written or spoken words as mediums of expression," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995), including artistic expression in mediums as diverse as wordless music, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989), nude dancing, *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000), theatre performance, *Se. Promotions, Ltd. v. Conrad*, 420

U.S. 546, 557-58 (1975), painting, *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007), sculpture, *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996), and tattoos, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010).

Further, wedding cakes, as iconic symbols that celebrate a couples' union and love for one another, are uniquely expressive. *See Barnette*, 319 U.S. at 632 (recognizing that symbols are often used as a "short cut from mind to mind" to communicate "some system, idea, institution, or personality"). Throughout history, wedding cakes have communicated a message about the wedding or the newlyweds. App. 98-100 (summarizing several treatises that discuss the historical use of wedding cakes to communicate requests for good fortune; blessings of wealth, fertility, happiness, longevity, and health; and purity and virginity). The modern three-tiered wedding cake symbolizes the three rings associated with marriage—the engagement ring, the wedding ring, and the eternity ring, *id*. at 100, and is an integral part of a customary ritual at the reception, where the married couple cuts the cake and feeds it to each other. A sheet cake, a pizza, or a salad would not communicate the same message.

Contrary to the Court of Appeals' ruling, Phillips' artistic creations are fully protected by the First Amendment and the question of whether CADA may coerce his expression is squarely presented here. Moreover, under the Complainants' interpretation of CADA, which was adopted by the Court of Appeals, every artists' conscience is at risk. *See* App. 136-37 (confirming that "a fine art painter

[who] advertises to the public that … she will make oil paintings on commission" would violate CADA if she declines a customer request to create a painting "that celebrates gay marriages").

The Court of Appeals also evaded the core compelled speech issue by improperly asking whether third-party observers would think that Phillips conveys a celebratory message about same-sex marriage by designing and creating Complainants' wedding cake. App. 37, ¶ 64. This approach directly contradicts *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977), where the Court found a compelled-speech violation even though no one thought the Wooleys supported the state motto merely because it was featured on their standard license plates. *Id.* at 715.

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

celebrated," App. 106, ¶ 46, and that it violates Phillips' religious beliefs to convey this message about any marriage that conflicts with biblical teaching, App. 103, ¶ 21.

The Court of Appeals also found that Phillips undercut the free speech protections otherwise accorded his work by "charg[ing] for [his] goods and services." App. 38, ¶ 66. Yet it is firmly established that the protection against compelled speech is "enjoyed by business corporations generally," *Hurley*, 505 U.S. at 574, and that "a speaker's rights are not lost merely because compensation is received." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 801 (1988).

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

In a similar vein, the Court of Appeals wrongly disconnected Phillips' expression from the act of creating it, and concluded that the act of creation was mere conduct that CADA could compel. App. 34-36, ¶¶ 60-62. "[T]he Supreme Court … has [not] drawn a distinction between the process of

creating a form of *pure* speech … and the product of these processes … in terms of the First Amendment protection afforded." *Anderson v. City of Hermosa Beach*, 621 F.3d 14 1051, 1061 (9th Cir. 2010). Hence, "the process of expression through a medium" and "the expression itself" are both entitled to full First Amendment protection. *Id*. This principle applies to cake artistry just as much as it applies to painting, sculpting, tattooing, composing, and other forms of artistic expression.

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

The Commission compounded its compelled speech violation by requiring Phillips to provide "comprehensive staff training" on CADA. App. 82. This mandate will necessarily require Phillips to engage in unwanted expression and is plainly intended to subvert his desire to operate his business

according to his religious convictions. This kind of state action is palpably repugnant to our 15 constitutional liberties.

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

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

protections of the United States and Colorado Constitutions.

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

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

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

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[2] *See* C.R.S. § 24-34-601(3) (exempting places of public accommodation that "restrict admission … to individuals of one

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

* * *

Respectfully submitted this 23rd day of October, 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

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sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation"); *see also* C.R.S. § § 24-34-601(1) (exempting "a church, synagogue, mosque, or other place that is principally used for religious purposes").

Dora
Department of Regulatory Agencies

John W Hickenlooper
Governor

Barbara J. Kelley
Executive
Director

Division of Civil Rights
Steven Chavez
Director of Division of Civil Rights

1560 Broadway, Suite 1050
Denver, CO 80202
(303) 894-2997
(303) 894-7830 (fax)
(800) 262-4845 (toll free)

200 West "B" Street, Suite 234
Pueblo, CO 81003
(719) 542 1298
(303) 869-0498 (fax)

222 S. 6th Street, Suite 301
Grand Junction, CO 81505
(970) 248-7303
(970) 248-7304
(970) 242-1262 (fax)

September 21, 2012

Masterpiece Cakeshop
3355 S. Wadsworth Boulevard
LAKEWOOD, CO 80227

Charge Number: P20130007X
David Mullins v. Masterpiece Cakeshop

Dear Sir or Madame:

David Mullins, the Charging Party has filed a charge of alleged discrimination with the Colorado Civil Rights Division naming Masterpiece Cakeshop as the Respondent. Pursuant to this Commission's Rule 10.4(G)(2), you are being furnished with a copy of the charge of alleged discrimination. Attached to this notice is a copy of the charge of alleged discrimination and a request for information. Masterpiece Cakeshop hereby is required to provide a response to the enclosed Request for Information within 30 days from the date of this letter.

When a charge of discrimination is filed with the Colorado Civil Rights Division, the Division initiates a timely investigation of this claim. Due to the general legal requirements that the administrative processing of this charge be completed within 270

days. your timely compliance with this request is essential. The data that you submit in response to this request may be sufficient for us to complete our investigation. However, if we need additional information at a later date, we will count on your continued cooperation to help us to resolve this charge as efficiently as possible. If you have any questions about the investigative process you may contact the investigator assigned to this claim. You may obtain the name of the assigned investigator by calling the Division's general office number at (303) 894-2997. Please provide the receptionist with the case number (cited above in this letter) and the name of the person who filed the claim (Charging Party).

Additionally, please be aware that either party involved in this matter has the option to find resolve to this case via "Alternative Dispute Resolution (ADR)," or mediation. Please consult the enclosed paperwork for further information regarding this process. The ADR process is a mediation forum for trying to reach resolution through settlement negotiation. It is not an adversarial proceeding for the parties to present their positions relative to the facts of the charge. If you agree to participate in the ADR conference, the Division will authorize postponement of the 30-day deadline for submitting a response to the enclosed Request for Information, contingent upon your agreement to grant the Colorado Civil Rights Division a 90-day Motion for Extension of jurisdictional time. The 90-day extension to the 270-day jurisdictional time limit will provide the Division adequate time to conduct

the investigation should the mediation be unsuccessful.

If you agree to participate in the ADR conference, we will postpone the 30-day deadline for submitting your response to the enclosed Request for Information, and provided that you grant the Colorado Civil Rights Division a 90-day Motion for Extension of Time. The 90-day extension to the 270-day jurisdictional time limit will provide the Division adequate time to conduct the investigation should the mediation not be successful.

If mediation fails, a response to the Request for Information will be due 21 days from the date of the failed mediation. If you have any questions regarding the ADR process or wish to schedule an ADR conference please contact the Division at (303) 894-2997 and ask to speak with a member of the ADR Unit in order to register your interest in participating in mediation through the Division. Questions regarding matters other than mediation should be addressed to the assigned investigator.

Sincerely,

s/Steven Chavez
Steven Chavez,
Director

cc: David Mullins

September 21, 2012

Charge Number: P20130007X

David Mullins v. Masterpiece Cakeshop

REQUEST FOR INFORMATION

Please submit the following specific, written information and/or documentation by the deadline indicated. Your failure to do so may result in our issuing a finding based on the available evidence.

Please be advised that incomplete responses will not be accepted. If you, or your representative, believe some item is not relevant to the case, you must discuss your reasons with the investigator before deleting the information from your response.

1. Written Position Statement in response to the Charge of Discrimination to include:

    a. A specific response to the action complained of and the specific and detailed sequence of events that led to the alleged denial of the goods, services, benefits, or privileges offered.

    b. General nature of your business or organization and the service it provides.

    c. Your response should contain the name, job/position title; the

Sexual Orientation of the official(s) who made the business decision which is the basis of this complaint.

d. Also, identify by job/position title and Sexual Orientation of any other employee(s) who was/were involved in this business decision.

e. Provide supporting documentation substantiating the reason(s) for the business decision.

2. Submit a true and complete list of all employees/members employed or affiliated on the date of the first membership, current title or position held including any board, trustee or committee assignment and Sexual Orientation identification.

3. Provide written statements from any individual who has personal, direct knowledge of either the issues raised in the administrative complaint; and/or the reason(s) for Charging Party's asserted denial of the goods, services, benefits or privileges offered. For each witness, give their full and complete name (correct spelling or more fully identify if needed), organization position/title, if applicable, mailing

address, telephone number and Sexual Orientation identification:

a. If a person named above is no longer a member/employee, provide the above requested identifying information, the affiliation separation date and a brief reason for the separation.

4. Copies of any documents, records, reports, policies, etc. relied upon in making the decision(s) in question including, but not limited policies/procedures concerning the reason for allegedly denying the Charging Party goods, services, benefits or privileges offered. If not available in written form, please provide a written explanation of how such situations have been handled in the past.

5. Provide any other information/ documentation/witnesses you deem relevant to the merits of this complaint or which you believe will support your position.

6. Answer: Is the Charging Party currently welcome at your place of business or to become affiliated with your organization? If not, why not? If yes, but only if certain conditions are met or only under certain conditions, what are those conditions?

CHARGE OF DISCRIMINATION The Privacy Act of 1974 affects this form. See Privacy Act Statement before completing this form.		FEPA Charge Number P20130007X

COLORADO CIVIL RIGHTS DIVISION

Name *(Charging Party)*		(Area Code) Telephone
David Mullins		*(720) 849-2142*
Street Address	City, State, and Zip Code	County
1401 E. Girard Pl, #9-135,	*ENGLEWOOD, CO 80113*	*ARAPAHOE*
Name (Respondent)	Number of Employees	(Area Code) Telephone
Masterpiece Cakeshop		*(303)986-3110*
Street Address	City, State, and Zip Code	County
3355 S. Wadsworth Boulevard	*LAKEWOOD, CO 80227*	*JEFFERSON*
Discrimination Based On:	Date Most Recent Discrimination Occurred	
Sexual Orientation		*July 19, 2012*

I. *Jurisdiction:* The Colorado Civil Rights Division has jurisdiction over the subject matter of this charge; that each named Respondent is subject to the jurisdiction of the Colorado Civil Rights Division and is covered by the provisions of the Colorado Revised Statutes (C.R.S. 1973, 24-34-301, *et. seq.).* as reenacted.

II. *Personal Harm:* That on or about July 19, 2012, the Respondent, a place of public accommodation, denied me the full and equal enjoyment of a place of accommodation on the basis of my sexual orientation, gay.

III. *Respondent's Position:* Unknown

IV. *Discrimination Statement:* I believe I was unlawfully discriminated against because: of my sexual orientation in violation of Title 24, Article 34. Part 6 (Discrimination in Places of Public Accommodation) of the Colorado Revised Statutes (C.R.S.). 1) On or about July 19, 2012, my significant other, my mother. and I visited the Respondent's establishment for the purpose of ordering a wedding cake. We were attended to by the store Owner. 2) While looking at pictures of the different cakes available, I informed the Owner that the cake was for my and my significant other's wedding. 3) The Owner replied that his policy is to deny service to individuals of our sexual orientation based on his religious beliefs. 4) Based on his response and refusal to provide us service, we exited the store.

V. WHEREFORE, the Charging Party prays that the Colorado Civil Rights Division grant such relief as may exist within the Division's power and which the Division may deem necessary and proper.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/4/12 Charging Party/Complainant (Signature) *s/David J. Mullins*

September 21, 2012

Masterpiece Cakeshop
3355 S. Wadsworth Boulevard
LAKEWOOD, CO 80227

Enclosed:

PA Service Letter (A/B Cases) CCRD-L-36ab
Charge of Discrimination CCRD-F-67
RFI Body (Pa)(CCRD Uploaded)

Colorado Civil Rights Division

Dora
Department of Regulatory Agencies

John W Hickenlooper
Governor

Barbara J. Kelley
Executive
Director

Division of Civil Rights
Steven Chavez
Director of Division of Civil Rights

1560 Broadway, Suite 1050
Denver, CO 80202
(303) 894-2997
(303) 894-7830 (fax)
(800) 262-4845 (toll free)

200 West "B" Street, Suite 234
Pueblo, CO 81003
(719) 542 1298
(303) 869-0498 (fax)

222 S. 6th Street, Suite 301
Grand Junction, CO 81505
(970) 248-7303
(970) 248-7304
(970) 242-1262 (fax)

September 21, 2012

Masterpiece Cakeshop
3355 S. Wadsworth Boulevard
LAKEWOOD, CO 80227

Charge Number: P20130008X
Charlie Craig v. Masterpiece Cakeshop

Dear Sir or Madame:

Charlie Craig, the Charging Party has filed a charge of alleged discrimination with the Colorado Civil Rights Division naming Masterpiece Cakeshop as the Respondent. Pursuant to this Commission's Rule 10.4(G)(2), you are being furnished with a copy of the charge of alleged discrimination. Attached to this notice is a copy of the charge of alleged discrimination and a request for information. Masterpiece Cakeshop hereby is required to provide a response to the enclosed Request for Information within 30 days from the date of this letter.

When a charge of discrimination is filed with the Colorado Civil Rights Division, the Division initiates a timely investigation of this claim. Due to the general legal requirements that the administrative processing of this charge be completed within 270

days, your timely compliance with this request is essential. The data that you submit in response to this request may be sufficient for us to complete our investigation. However, if we need additional information at a later date, we will count on your continued cooperation to help us to resolve this charge as efficiently as possible. If you have any questions about the investigative process you may contact the investigator assigned to this claim. You may obtain the name of the assigned investigator by calling the Division's general office number at (303) 894-2997. Please provide the receptionist with the case number (cited above in this letter) and the name of the person who filed the claim (Charging Party).

Additionally, please be aware that either party involved in this matter has the option to find resolve to this case via "Alternative Dispute Resolution (ADR)," or mediation. Please consult the enclosed paperwork for further information regarding this process. The ADR process is a mediation forum for trying to reach resolution through settlement negotiation. It is not an adversarial proceeding for the parties to present their positions relative to the facts of the charge. If you agree to participate in the ADR conference, the Division will authorize postponement of the 30-day deadline for submitting a response to the enclosed Request for Information, contingent upon your agreement to grant the Colorado Civil Rights Division a 90-day Motion for Extension of jurisdictional time. The 90-day extension to the 270-day jurisdictional time limit will provide the Division adequate time to conduct

the investigation should the mediation be unsuccessful.

If you agree to participate in the ADR conference, we will postpone the 30-day deadline for submitting your response to the enclosed Request for Information, and provided that you grant the Colorado Civil Rights Division a 90-day Motion for Extension of Time. The 90-day extension to the 270-day jurisdictional time limit will provide the Division adequate time to conduct the investigation should the mediation not be successful.

If mediation fails, a response to the Request for Information will be due 21 days from the date of the failed mediation. If you have any questions regarding the ADR process or wish to schedule an ADR conference please contact the Division at (303) 894-2997 and ask to speak with a member of the ADR Unit in order to register your interest in participating in mediation through the Division. Questions regarding matters other than mediation should be addressed to the assigned investigator.

Sincerely,

s/Steven Chavez
Steven Chavez,
Director

cc: Charlie Craig

September 21, 2012

Charge Number: P20130008X

Charlie Craig v. Masterpiece Cakeshop

REQUEST FOR INFORMATION

Please submit the following specific, written information and/or documentation by the deadline indicated. Your failure to do so may result in our issuing a finding based on the available evidence.

Please be advised that incomplete responses will not be accepted. If you, or your representative, believe some item is not relevant to the case, you must discuss your reasons with the investigator before deleting the information from your response.

1. Written Position Statement in response to the Charge of Discrimination to include:

    a. A specific response to the action complained of and the specific and detailed sequence of events that led to the alleged denial of the goods, services, benefits, or privileges offered.

    b. General nature of your business or organization and the service it provides.

    c. Your response should contain the name, job/position title; the

Sexual Orientation of the official(s) who made the business decision which is the basis of this complaint.

d. Also, identify by job/position title and Sexual Orientation of any other employee(s) who was/were involved in this business decision.

e. Provide supporting documentation substantiating the reason(s) for the business decision.

2. Submit a true and complete list of all employees/members employed or affiliated on the date of the first membership, current title or position held including any board, trustee or committee assignment and Sexual Orientation identification.

3. Provide written statements from any individual who has personal, direct knowledge of either the issues raised in the administrative complaint; and/or the reason(s) for Charging Party's asserted denial of the goods, services, benefits or privileges offered. For each witness, give their full and complete name (correct spelling or more fully identify if needed), organization position/title, if applicable, mailing

address, telephone number and Sexual Orientation identification:

a. If a person named above is no longer a member/employee, provide the above requested identifying information, the affiliation separation date and a brief reason for the separation.

4. Copies of any documents, records, reports. policies, etc. relied upon in making the decision(s) in question including, but not limited policies/procedures concerning the reason for allegedly denying the Charging Party goods, services, benefits or privileges offered. If not available in written form, please provide a written explanation of how such situations have been handled in the past.

5. Provide any other information/ documentation/witnesses you deem relevant to the merits of this complaint or which you believe will support your position.

6. Answer: Is the Charging Party currently welcome at your place of business or to become affiliated with your organization? If not, why not? If yes, but only if certain conditions are met or only under certain conditions, what are those conditions?

CHARGE OF DISCRIMINATION The Privacy Act of 1974 affects this form. See Privacy Act Statement before completing this form.		FEPA Charge Number P20130008X

COLORADO CIVIL RIGHTS DIVISION

Name *(Charging Party) Charlie Craig*		(Area Code) Telephone *(720) 849-2142*
Street Address *1401 E. Girard Pl, #9-135,*	City, State, and Zip Code *ENGLEWOOD, CO 80113*	County *ARAPAHOE*
Name (Respondent) *Masterpiece Cakeshop*	Number of Employees	(Area Code) Telephone *(303)763-5754*
Street Address *3355 S. Wadsworth Boulevard*	City, State, and Zip Code *LAKEWOOD, CO 80227*	County *JEFFERSON*
Discrimination Based On: *Sexual Orientation*	Date Most Recent Discrimination Occurred *July 19, 2012*	

I. *Jurisdiction:* The Colorado Civil Rights Division has jurisdiction over the subject matter of this charge; that each named Respondent is subject to the jurisdiction of the Colorado Civil Rights Division and is covered by the provisions of the Colorado Revised Statutes (C.R.S. 1973, 24-34-301, *et. seq.).* as reenacted.

II. *Personal Harm:* That on or about July 19, 2012, the Respondent, a place of public accommodation, denied me the full and equal enjoyment of a place of accommodation on the basis of my sexual orientation, gay.

III. *Respondent's Position:* Unknown

IV. *Discrimination Statement:* I believe I was unlawfully discriminated against because: of my sexual orientation in violation of Title 24, Article 34. Part 6 (Discrimination in Places of Public Accommodation) of the Colorado Revised Statutes (C.R.S.). 1) On or about July 19, 2012, my significant other and I visited the Respondent's establishment for the purpose of ordering a wedding cake. We were attended to by the store Owner. 2) While looking at pictures of the different cakes available, we informed the Owner that the cake was for my and my significant other's wedding. 3) The Owner replied that his policy is to deny service to individuals of our sexual orientation based on his religious beliefs. 4) Based on his response and refusal to provide us service, we exited the store.

V. WHEREFORE, the Charging Party prays that the Colorado Civil Rights Division grant such relief as may exist within the Division's power and which the Division may deem necessary and proper.

I declare under penalty of perjury that the foregoing is true and correct.

Date: 9/4/12 Charging Party/Complainant (Signature) *s/Charlie Craig*

September 21, 2012

Masterpiece Cakeshop
3355 S. Wadsworth Boulevard
LAKEWOOD, CO 80227

Enclosed:

PA Service Letter (A/B Cases) CCRD-L-36ab
Charge of Discrimination CCRD-F-67
RFI Body (Pa)(CCRD Uploaded)

Colorado Civil Rights Division

Excerpt from Exhibits to Brief in Opposition to Complainants' Motion for Summary Judgment and in Support of Jack Phillips's Cross Motion for Summary Judgment

[ROA 468]

Filed: October 31, 2013

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, CO 80202	
CHARLIE CRAIG and DAVID MULLINS, Complainants, v. JACK C. PHILLIPS AND MASTERPIECE CAKESHOP, INC., 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	Case Number: 2013-0008

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
(0) 720-689-2410
mjnorton@alliance
defendingfreedom.org

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.

s/ Jack Phillips
Jack Phillips

* * *

Excerpt from Exhibits to Brief in Opposition to Complainants' Motion for Summary Judgment and in Support of Jack Phillips's Cross Motion for Summary Judgment

[ROA 494]

Excerpt from Exhibits to Brief in Opposition to Complainants' Motion for Summary Judgment and in Support of Jack Phillips's Cross Motion for Summary Judgment

[ROA 495]

Excerpt from Exhibits to Brief in Opposition to Complainants' Motion for Summary Judgment and in Support of Jack Phillips's Cross Motion for Summary Judgment

[ROA 515]

*** * ***

Interrogatory No. 21: State whether you procured a wedding cake for your wedding reception with David Mullins, and if so; provide the date that you selected your wedding cake; the name, address, and telephone number of the wedding cake provide and why you selected that provider.

Response to Interrogatory No. 21: Objection, lack of relevance and beyond the scope of permissible discovery, CRCP 26((1). Without waiving the preceding objection, Complainants state: We did procure a wedding cake (date unknown) from Lora's Donuts & Bakery Shop, 11804 Oswego Street, Englewood, Colorado 80112, (303) 662-8315. We selected this provider because they contacted us after hearing about our story and told us that they were personally offended by the treatment we received at Masterpiece Cakeshop. They offered to provide us with a cake for free, and we accepted that offer.

EXCERPTS OF ROA 931-933

P20130008X, CR1013-0008 Hearing 07-25-2014
Transcribed from an Audio Recording

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.

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* * *

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.)

* * * * *

Excerpt from Appellees' Amended Answer Brief filed on March 10, 2015

Filed: March 10, 2015

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203	
COLORADO CIVIL RIGHTS COMMISSION, DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202 Case No. 2013-0008	**▲COURT USE ONLY▲**
RESPONDENTS-APPELLANTS: MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, v. PETITIONERS-APPELLEES: CHARLIE CRAIG and DAVID MULLINS.	Court of Appeals Case No. 2014CA1351
Mark Silverstein, Attorney No. 26979 Sara R. Neel, Attorney No. 36904 American Civil Liberties Union Foundation of Colorado	

303 E. 17th Avenue, Suite 350, Denver, CO 80203 (303) 777-5482 Paula Greisen, Attorney No. 19784 King & Greisen, LLP 1670 York Street, Denver, CO 80206 (303) 298-9878 Amanda Goad (admitted *pro hac vice*; CA Bar No. 297131)) American Civil Liberties Union Foundation 1313 West 8th Street, Los Angeles, CA 90017 (213) 977-9500	
APPELLEES' AMENDED ANSWER BRIEF	

* * *

[5] Business owners in all trades of course have legal autonomy to be selective about which projects they will take on, and can legitimately reject a prospective customer if, for example, the business lacks capacity to fulfill the customer's desired project scope, if the design requested violates a tastefulness policy that applies to everyone's orders, or if the parties cannot agree on a price. The only reasons business owners may *not* reject customers are those prohibited by law –i.e., based on protected characteristics.

* * *

Exhibit A to Appellants' Notice of Supplemental Authority filed on April 13, 2015

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 0 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(1)].

On Behalf of the Colorado Civil Rights Division

s/Jennifer McPherson,	3/24/2015
Interim Director	
Or Authorized Designee	Date

Exhibit B to Appellants' Notice of Supplemental Authority filed on April 13, 2015

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 0 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 baker, 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 his 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, sec, sexual orientation, disability, etc." The Respondent avers that the Charging Party's request was intended to "denigrate individuals of a 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.

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 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 other customers because of his 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 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 "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. Indeed,

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(1)].

On Behalf of the Colorado Civil Rights Division

s/Jennifer McPherson,	3/24/2015
Interim Director	
Or Authorized Designee	Date

Exhibit C to Appellants' Notice of Supplemental Authority filed on April 13, 2015

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 be "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 0 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 indicates that the Respondent employs six persons, of whom two are non-Catholic, 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 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 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(1)].

On Behalf of the Colorado Civil Rights Division

s/Jennifer McPherson, 3/24/2015
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

s/Rufina Hernandez
Rufina Hernandez,
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: P201400701X; 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

s/Rufina Hernandez
Rufina Hernandez,
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

s/Rufina Hernandez
Rufina Hernandez,
Director
cc: Azucar Sweet Shop and Bakery
David Goldberg

Excerpts from Transcription of Video file titled AM session 13CA0453, 14CA1351, 14CA1661.MP4 Regarding David Mullins & Charlie Craig vs. Masterpiece Cakeshop Court of Appeals Oral Argument

*** * ***

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.

* * *

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.

s/Kerry L. Viens
KERRY L. VIENS
CSR NO.11942