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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.	
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APPELLEES' AMENDED ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

It contains 9,493 words (exclusive of certificates, tables, and identified issues).

The brief complies with C.A.R. 28(k).

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on, if applicable.

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

s/ Paula Greisen

Paula Greisen, No. 19784

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... **iii**

STATEMENT OF THE CASE **1**

SUMMARY OF THE ARGUMENT **2**

ARGUMENT **2**

I. PHILLIPS VIOLATED CADA BY REFUSING TO SERVE APPELLEES BECAUSE OF THEIR SEXUAL ORIENTATION. 3

A. PHILLIPS AND MASTERPIECE CAKESHOP DISCRIMINATED ON THE BASIS OF SEXUAL ORIENTATION. 3

B. OFFERS TO SELL SOME PRODUCTS DO NOT CURE ILLEGAL DENIAL OF SERVICE. 5

C. PHILLIPS' CONTENTION THAT HE LACKED ANTI-GAY ANIMUS IS IRRELEVANT. 7

II. ENFORCEMENT OF CADA DOES NOT VIOLATE CONSTITUTIONAL FREE SPEECH PROVISIONS. 11

A. PHILLIPS' WORK AS A COMMERCIAL BAKER IS NOT CONSTITUTIONALLY PROTECTED SPEECH. 11

B. THE COMPELLED SPEECH DOCTRINE DOES NOT APPLY. 15

III. ENFORCEMENT OF CADA DOES NOT VIOLATE CONSTITUTIONAL FREE EXERCISE GUARANTEES. 23

A. CADA IS A NEUTRAL LAW OF GENERAL APPLICABILITY AND SHOULD NOT BE SUBJECT TO STRICT SCRUTINY. 25

B. APPELLANTS' CLAIMS DO NOT INVOLVE HYBRID RIGHTS. 30

C. CADA DOES NOT SUBSTANTIALLY BURDEN FREE EXERCISE RIGHTS. 31

D. **CADA SURVIVES STRICT SCRUTINY ANALYSIS.** 35

IV. THE COMMISSION PROPERLY REJECTED MASTERPIECE CAKESHOP'S ATTEMPT TO SEEK OVERBROAD AND IRRELEVANT DISCOVERY. 42

V. THE COMMISSION'S DECISIONS WERE PROCEDURALLY APPROPRIATE. 42

CONCLUSION **42**

TABLE OF AUTHORITIES

CASES

Arcara v. Cloud Books, 478 U.S. 697 (1986) 22

Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004) 30

Blackhawk v. Pennsylvania, 381 F.3d 202 (3rd Cir. 2004) 27

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 36, 41

Bodaghi v. Dep't of Natural Resources, 995 P.2d 288 (Colo. 2000, en banc) 8

Bragdon v. Abbott, 524 U.S. 624 (1998) 8

Braunfeld v. Brown, 366 U.S. 599 (1961) 35

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 9, 10

Brown v. Dade Christian Schs., Inc., 556 F.2d 310 (5th Cir. 1977) 41

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) 40

Christian Legal Soc'y Chapter v. Martinez, 561 U.S. 661(2010) 5

Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993) ..... passim

City of L.A. Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978) 8

Colorado Civil Rights Comm'n v. Big O Tires, 940 P.2d 397 (Colo. 1997) 8

Colorado Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358 (Colo. 1988) 7

Corp. of Presiding Bishop of Church of Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 27

Cressman v. Thompson, 719 F.3d 1139 (10th Cir. 2013) 17

Cunningham v. Dep't of Highways, 823 P.2d 1377 (Colo. Ct. App. 1991) 8

Cutter v. Wilkinson, 544 U.S. 709 (2005).....40

Dole v. Shenandoah Baptist Church, 899 F.2d 1389 (4th Cir. 1990) 40

EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986) 41

Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013)..... passim

Employment Division v. Smith, 494 U.S. 872 (1990) ..... passim

Fields v. City of Tulsa, 753 F.3d 1000 (10th Cir. 2014).....41

Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006) 24, 25, 30

Harvey v. NYRAC, Inc., 813 F. Supp. 206 (E.D.N.Y. 1993).....6

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).....37

Hishon v. King & Spalding, 467 U.S. 69 (1984) 15

Holt v. Hobbs, 574 U.S. ___ (2015) 40

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995)..... 19, 20, 21

Kaemmerling v. Lappin, 553 F.3d 669 (D.C. Cir. 2008)..... 32, 34

Miami Herald Pub. Co., v. Tornillo, 418 U.S. 241 (1974).....17

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) 32

N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988).....37

Nathanson v. Mass. Comm'n Against Discrimination, 2003 WL 22480688 (Mass. Super. 2003).....14

Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941 (D.S.C. 1966)..... 33, 41

Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) 7

Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986) 16, 17

Prince v. Massachusetts, 321 U.S. 158 (1944) 35

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 20

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 36, 37

Robinson v. Power Pizza, Inc., 993 F. Supp. 1462 (M.D. Fla. 1998) 6

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) 16, 18

Sherbert v. Verner, 374 U.S. 398 (1963) 39

Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) 34, 36, 37, 38

Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998) 24, 31

Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996) 32

United States v. Lee, 455 U.S. 252 (1982) 34, 35, 40

United States v. O'Brien, 391 U.S. 367 (1968) 12, 22

Washington v. Klem, 497 F.3d 272 (3rd Cir. 2007) 32

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 16, 17, 39

Wooley v. Maynard, 430 U.S. 705 (1977) 17

STATUTES

42 U.S.C. § 1985(3) 9

42 U.S.C. § 2000bb-1 31

42 U.S.C. § 2000cc(a)(1) 31

C.R.S. 24-34-101 *et seq.* 20

C.R.S. 24-34-402 7

C.R.S. 24-34-402(1)(a) 7

C.R.S. 24-34-601 25

C.R.S. 24-34-601 *et seq.* 7

C.R.S. 24-34-601(1) 11, 26, 27

C.R.S. 24-34-601(2) 26

C.R.S. 24-34-601(3) 28

OTHER AUTHORITIES

2008 Colo. Legis. Serv. Ch. 341 (S.B. 08-200) (West) 37

David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 Colum. J. of Gender & L. 51 (2011) 28

Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990) 39

RULES

C.R.C.P. 26(b) 41

STATEMENT OF THE CASE

Nearly three years ago, Appellees David Mullins and Charlie Craig were making plans to marry in Massachusetts, and then to celebrate with their friends and family at a reception back home in Denver. Supp. PR. CF, Vol. 1, p. 14. On July 19, 2012, Mullins and Craig visited Masterpiece Cakeshop. *Id*. They intended to shop for wedding cakes and hoped to order one for their reception. *Id*.

When Craig and Mullins explained to Masterpiece Cakeshop owner Jack Phillips that the two of them were getting married, Phillips immediately refused to sell them any wedding cake, citing a store policy against providing cakes or other baked goods for weddings and commitment ceremonies celebrated by same-sex couples. *Id*. at p. 24, ¶13. Craig and Mullins left the store without having an opportunity to finish surveying the wedding cake options available at Masterpiece Cakeshop, much less to explain their specific cake needs. *Id.* at p. 5, ¶13. They were turned away from the business solely because they were two men seeking a wedding cake for their marriage to one another. The record thus shows that Masterpiece Cakeshop and Phillips discriminated against Craig and Mullins because of their sexual orientation, in violation of the public accommodations provision of the Colorado Anti-Discrimination Act ("CADA").

SUMMARY OF ARGUMENT

Appellants Jack Phillips and Masterpiece Cakeshop contend both that their refusal to sell Mullins and Craig a wedding cake was not sexual orientation discrimination, and that enforcement of CADA in this instance would infringe their constitutional rights to free exercise of religion and free expression. As further explained infra, case law makes clear that refusal to sell any wedding cake to a gay couple constitutes discrimination based on sexual orientation.

Appellants' constitutional defenses also fail, as detailed below. Selling cakes does not require a commercial baker to endorse or participate in weddings, and expecting a business to determine which orders it can fill without categorically denying some products to members of a protected class does not represent government compulsion of speech. Similarly, while religious freedom is an important American value, the constitutional principle of free religious exercise cannot justify violation of longstanding, broadly applicable laws against discrimination. This Court accordingly should uphold the Commission's Order.

ARGUMENT

Standard of Review: Appellants agree that all the issues before the Court were preserved for appeal and that these issues present questions of law that are

reviewed de novo, except that the ALJ's grant of a protective order is reviewed for abuse of discretion.

I. APPELLANTS VIOLATED CADA BY REFUSING TO SERVE APPELLEES BECAUSE OF THEIR SEXUAL ORIENTATION.

A. PHILLIPS AND MASTERPIECE CAKESHOP DISCRIMINATED ON THE BASIS OF SEXUAL ORIENTATION.

By his own admission, Phillips denied Mullins and Craig the type of service they sought at Masterpiece Cakeshop because they were a same-sex couple. Phillips acknowledges that on July 19, 2012, he sat down at a table in his shop with prospective customers who had expressed interest in purchasing a wedding cake. Supp. PR. CF, Vol. 1, p. 5, ¶1. He also admits that at the time, selling wedding cakes was part of Masterpiece Cakeshop's business. *Id*. He further admits that once Mullins and Craig explained that they wanted to purchase a cake for "our wedding," he stated that he was not willing to provide a wedding cake for them. *Id.*

In other words, all Phillips needed to know to decide to deny Mullins and Craig the opportunity to buy a wedding cake was that they were two men planning to marry each other. When this incident occurred, it was Masterpiece Cakeshop's categorical policy to refuse to sell wedding cakes for same-sex couples, and Phillips had turned away others before for the same reason. *Id*. at pp. 5, 267-74.

This is clearly discrimination "because of" sexual orientation. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013) (under New Mexico public accommodations law, photography studio illegally discriminated "because of…sexual orientation" because "[i]t provides wedding photography services to heterosexual couples, but it refuses to work with homosexual couples under equivalent circumstances.").

That Masterpiece Cakeshop purports to deny wedding cakes to "same-sex couples marrying one another" rather than to "gay couples" is a distinction without a legal difference. Coloradans who marry members of the same sex are gay, lesbian, or bisexual,[1] and same-sex weddings are celebrations of the very relationships that distinguish gay, lesbian, and bisexual people from heterosexuals. *See Elane*, 309 P.3d at 61 (refusing to photograph same-sex commitment ceremonies was illegal because "[t]o allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the [public accommodations statute]"); *Christian Legal Soc'y Chapter v. Martinez*,

[1] Appellants' contentions otherwise cannot be taken seriously. Neither their argument that "no law requires" individuals entering same-sex marriages to have particular sexual orientations, nor their citation to a report that two heterosexual men in New Zealand married as part of a radio competition stunt (Opening Br. 7), has any bearing on the reality that the Coloradans impacted by a store policy of refusing service for "weddings of same-sex couples" will be gay, lesbian, or bisexual.

561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct" in identifying discrimination against gay people). Accordingly, a policy of denying wedding cakes to same-sex couples has the effect of denying a category of service to people of specific sexual orientations, and violates CADA.

B. OFFERS TO SELL SOME PRODUCTS DO NOT CURE ILLEGAL DENIAL OF SERVICE.

Phillips contends that he is willing to sell a birthday cake, cookies, or other non-wedding cake products to gay customers. Supp. PR. CF, Vol. 1, p. 9; Opening Br. 4. Assuming this is true, it does not affect the illegality of Masterpiece Cakeshop's admitted policy and practice of denying same-sex couples the opportunity to order wedding cakes. As the New Mexico Supreme Court observed in *Elane*, the basic principle behind public accommodations nondiscrimination laws is that businesses holding themselves out as open to the public must make their full range of goods and services available to all customers without imposing restrictions based on protected characteristics. 309 P.3d at 62 ("For example, if 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 Willock does not cure its refusal to provide other services that it offered to the general public.") A business's refusal to sell one product or

service—such as wedding cakes—on the basis of a protected characteristic is therefore discrimination, whether or not the business makes other goods available to the victims.[2]

Historically, courts have treated restrictions on some customers' ability to access particular goods or services as violating public accommodations discrimination laws, if such restrictions are based on membership in protected classes. *See generally, e.g.*, *Robinson v. Power Pizza, Inc.*, 993 F. Supp. 1462 (M.D. Fla. 1998) (granting injunction against restaurant that refused to deliver orders to predominantly African-American neighborhood and rejecting its policy of delivering orders from its residents at intermediate "drop off sites" as racially discriminatory in violation of federal law); *Harvey v. NYRAC, Inc.*, 813 F. Supp. 206 (E.D.N.Y. 1993) (denying summary judgment to defendant rental car purveyor pursuant to New York anti-discrimination statute where plaintiff alleged that because of her race she was not permitted to rent a "luxury" vehicle, but was offered the opportunity to rent a different car model instead). By denying Craig and Mullins the opportunity to purchase the type of item they wanted, Phillips and

[2] By way of illustration, a bakery that willingly sold birthday and graduation cakes to multiracial families would nonetheless illegally discriminate because of race if it refused to sell wedding cakes to or for interracial couples.

Masterpiece Cakeshop violated CADA, and their purported willingness to sell Appellees other items does not cure this violation.

C. PHILLIPS' CONTENTION THAT HE LACKED ANTI-GAY ANIMUS IS IRRELEVANT.

Phillips argues strenuously that anti-gay animus did not inspire Masterpiece Cakeshop's policy of denying wedding cake service to same-sex couples. Opening Br. 4, 8. But this Court is not tasked with evaluating Phillips' feelings, and the motivations behind Masterpiece Cakeshop's policy do not impact its illegality.

To prove a violation of CADA, a plaintiff need not show "animus," "bigotry," or "malice." No such language appears in the statute, which simply prohibits denials of service "because of" sexual orientation and other protected characteristics. C.R.S. 24-34-601 *et seq.*[3] The record here clearly establishes that

[3] Contrary to Appellants' characterization, there is also no case law in Colorado holding that the "because of" language in CADA requires a showing of intent. In fact, the Colorado Supreme Court upheld a Commission finding of illegal discrimination, based on similar language in an employment discrimination section of CADA, when the practice at issue had merely a disparate impact on women. *Colorado Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1363 (Colo. 1988) (refusal to provide insurance coverage for pregnancy was illegal sex-based discrimination, pursuant to C.R.S. 24-34-402, because of its disparate impact on female policyholders); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983) (benefits policy covering pregnancy more generously for employees than for employees' spouses effectively disadvantaged male employees and thus violated federal sex discrimination law). However, Phillips' admissions of the reason he turned away Craig and Mullins demonstrate

Phillips turned Craig and Mullins away from purchasing a wedding cake at Masterpiece Cakeshop because they were a gay couple, and nothing further is required.[4]

The U.S. Supreme Court has repeatedly found illegal discrimination in circumstances where a defendant's actions did not result from "animus" or a deliberate effort to hurt people with a protected characteristic. In *City of L.A. Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707-08 (1978), the Court held that requiring female employees to make greater pension contributions than males constituted intentional discrimination in violation of the federal Civil Rights Act, notwithstanding the defendant's argument that such a policy was intended to foster equity (as data showed that female employees lived longer). Similarly, in *Bragdon v. Abbott*, 524 U.S. 624, 648-55 (1998), the Court considered whether a

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that intent to discriminate was present here. *See, e.g.*, Supp. PR. CF, Vol. 1, pp. 7-8.

[4] *See also Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 303-4 (Colo. 2000, en banc) (state agency violated C.R.S. 24-34-402(1)(a) by discriminating against an employee "because of" his national origin, even though none of the evidence reflected overt negativity toward Iranians); *Colorado Civil Rights Comm'n v. Big O Tires*, 940 P.2d 397, 402 (Colo. 1997) (upholding finding of race-based employment discrimination under CADA, based on disparate treatment in disciplinary process without direct evidence of intent to discriminate against plaintiff as an African-American); *Cunningham v. Dep't of Highways*, 823 P.2d 1377, 1381 (Colo. Ct. App. 1991) (intent to discriminate "need not be proven by direct evidence, but may be inferred from the circumstances", and not all discrimination actionable under CADA is of an "invidious" nature).

dentist's refusal to treat an HIV-positive woman violated the public accommodations provision of the Americans with Disabilities Act. It deemed that decision intentional discrimination, noting that the dentist's "belief that a significant risk [of contracting HIV from the patient] existed, even if maintained in good faith, would not relieve him from liability." *Id.* at 649. Here, too, Phillips and Masterpiece Cakeshop violated CADA by denying Mullins and Craig service "because of" their sexual orientation, and whether a desire to harm gay people motivated that denial is beside the point.

Appellants' efforts to draw support from *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), are unavailing. In *Bray*, the Supreme Court assessed whether the defendant's organizing protests at abortion clinics rendered it a conspiracy subject to tort liability under a federal civil rights statute. *Id.* at 267, citing 42 U.S.C. § 1985(3). Prior caselaw held that, as a required element of this claim, plaintiffs must show that "class-based, invidiously discriminatory animus [lay] behind the conspirators' action." *Bray*, 506 U.S. at 267, quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The *Bray* Court rejected plaintiffs' claims for two reasons: the lack of specific evidence of intentional animus against women, and its determination that "the disfavoring of abortion ...is not *ipso facto* [] discrimination against women…." 506 U.S. at 272-75. The present case

substantially differs from *Bray* in that Appellees do not allege a conspiracy or intentional tort, and accordingly have no obligation to show "class-based, invidiously discriminatory animus."

Indeed, the *Bray* Court's analysis of whether discrimination against women could be inferred in that case supports a finding here that refusing wedding cake sales to same-sex couples is discrimination against gay people.

> 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. But opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women.

Id. at 270. Here, Masterpiece Cakeshop's policy of refusing to sell cakes for the weddings of same-sex couples resembles such an impermissible tax on yarmulkes, since same-sex weddings are "engaged in exclusively or predominantly" by gay and bisexual people.

In sum, Masterpiece Cakeshop as of July 2012 had an admitted policy of sexual orientation discrimination– it categorically refused to sell wedding cakes for same-sex couples. Supp. PR. CF, Vol. 1, pp. 11-12. That policy, and its

enforcement against Craig and Mullins, were patently illegal under CADA, regardless of the owners' specific motivations in enacting the policy.

II. ENFORCEMENT OF CADA DOES NOT VIOLATE CONSTITUTIONAL FREE SPEECH PROVISIONS.

Phillips' claim that the Commission's order infringes his constitutional right to free expression must fail. Anti-discrimination protections, including CADA, regulate conduct, not speech. When a business opens its doors to the public, it elects to provide goods and services equitably in accordance with applicable law, and neither the business nor its proprietor engages in constitutionally protected speech by filling customers' orders. CADA does not require Phillips to communicate a government message against his will or to incorporate elements he disagrees with into his own inherently expressive activity. Accordingly, there is no Free Speech violation associated with enforcing Colorado's nondiscrimination law here.

A. PHILLIPS' WORK AS A COMMERCIAL BAKER IS NOT CONSTITUTIONALLY PROTECTED SPEECH.

Phillips contends that his baking of wedding cakes should be immune from regulation under CADA because wedding cakes are "inherently expressive" in nature. Opening Br. 12. But this claim elides the important distinction between an

individual's own First Amendment-protected speech, and commercial activity performed on behalf of clients.

Many entities covered by Colorado's public accommodation law provide services that involve design, creativity, or artistry. *See* C.R.S. 24-34-601(1) (defining "place of public accommodation" to include, among other things, "any business offering wholesale or retail sales to the public"). Appellees do not contest that bakers sometimes contribute creativity and design skills in filling customer orders– but the same could be said of hairdressers, software developers, architects, tailors, and a wide variety of other professionals who offer goods or services to the public and thus are public accommodations properly subject to Colorado's nondiscrimination protections. That performing a particular service or making a particular good entails creativity and design does not render that work constitutionally protected "speech" by the service provider.[5] *See 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

[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.

in the conduct intends thereby to express an idea.") Regardless of how much artistry or passion goes into it, commercial work performed for a client is categorically distinct from creative projects undertaken of one's own accord, and is not entitled to the same forms of protection.

Phillips' effort to characterize wedding cakes as *uniquely* expressive is unavailing. Just as many goods sold by public accommodations entail elements of creativity and expression, many customers solicit products from such businesses that are specifically intended to convey messages or commemorate occasions. The fact that a customer expresses a desire to secure an item for a particular occasion does not change a business owner's obligation to make goods and services available equitably.[6] *See Elane*, 309 P.3d at 53 (photography studio violated

[6] Appellants attempt to characterize the wedding cake Mullins and Craig ultimately obtained from another vendor, after they were denied service at Masterpiece Cakeshop, as conveying a political message offensive to Phillips. Opening Br. 24. However, the undisputed facts of this case show that Phillips denied service based only on the fact that Appellees were two men marrying each other, before the consultation progressed to talk of colors, filling, or anything else about the type of cake they wanted. Supp. PR. CF, Vol. 1, p. 5; *see also id.* at p. 716 n.7. Characteristics of the particular cake Craig and Mullins secured elsewhere, after they suffered illegal discrimination at Masterpiece Cakeshop, has no bearing on the legality of Phillips' categorical refusal to discuss what order they might like to place. Although Masterpiece Cakeshop continues to try to make cake characteristics an issue in this case, that question simply is not before this Court. The record here is clear that Masterpiece Cakeshop's policy of denying wedding cake service to certain customers was based on customers' identities, not on

public accommodations statute by refusing to photograph event because it was the commitment ceremony of two women). The fact that weddings have personal significance for many people illustrates that discrimination in the provision of wedding-related services is hurtful to prospective customers and important to address through enforcement of anti-discrimination laws, not that such laws should be disregarded in circumstances connected with weddings.

Several courts have observed that the messages conveyed by commercial projects entailing design and/or expression are those of the customer, not those of the business or its owner. *See, e.g., Elane,* 309 P.3d at 68-69 (rejecting argument that studio's taking of photographs for hire could be perceived as its or its' owners approval of marriage by same-sex couples); *Nathanson v. Mass. Comm'n Against Discrimination*, 2003 WL 22480688, *6 - *7 (Mass. Super. 2003) (attorney was subject to Massachusetts public accommodations law and could not legally refuse service to a prospective client based on gender; First Amendment defense failed because in advocating for a client, she "operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself.") It would be illogical for customers to pay for the promulgation of a *service provider's* chosen

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distinct characteristics of the cakes they sought, and thus the policy constituted illegal discrimination.

message; instead, patrons pay for goods and services that often entail the expression of their *own* messages. *See generally Hishon v. King & Spalding*, 467 U.S. 69, 71-78 (1984) (rejecting law firm's claim that applying federal employment discrimination law to its partner selection process "would infringe constitutional rights of expression or association" because "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.") Thus, anti-discrimination laws appropriately regulate service providers' conduct in fulfilling the wishes and, in some cases, conveying the messages of clients, rather than any aspect of service providers' own expressive activities.

B. THE COMPELLED SPEECH DOCTRINE DOES NOT APPLY.

Phillips also argues that holding him liable for breaching Colorado's public accommodations statute would violate his First Amendment rights by compelling him to speak. Opening Br. 17-25.[7] However, the compelled speech doctrine applies only in limited circumstances not present here: when government forces someone to express its own specific message, or when government forces someone to incorporate undesired elements into their own constitutionally protected

[7] Appellants cite Article II, Section 10 of the Colorado Constitution as well, but no Colorado case law supports their argument.

expressive activities. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). Enforcement of CADA here fits neither description, and is entirely permissible under the First Amendment.

Appellants cite cases in which a government entity's efforts to require communication of its own message by unwilling private individuals have been held unconstitutional. The Supreme Court's seminal case on this issue was *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), holding that West Virginia infringed public school students' First Amendment rights by requiring them to recite the Pledge of Allegiance, thus mandating the literal speaking not only of a specific message chosen by the government, but of one that entailed "affirmation of a belief and an attitude of mind." *Id.* at 633. The Court observed that the First Amendment does not allow a state to "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." *Id.* at 642.

Subsequently, the Supreme Court has struck down statutes that explicitly required private entities to engage in speech with prescribed content or viewpoint. *See, e.g.*, *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986) (law requiring utility to include copies of a particular environmentalist publication with bills sent to customers); *Wooley v. Maynard*, 430

U.S. 705 (1977) (requirement that license plates display "Live Free or Die" slogan); *Miami Herald Pub. Co., v. Tornillo*, 418 U.S. 241 (1974) (law compelling newspapers to print responses from political candidates who had been criticized in editorials); *see also Cressman v. Thompson*, 719 F.3d 1139 (10th Cir. 2013) (denying Oklahoma's motion to dismiss a case similar to *Wooley* that challenged the state's requirement to display a particular image on license plates). None of these cases support Appellants' claims here.

In *Barnette* and *Wooley*, the constitutional violation stemmed from government's selection of a specific message that private entities were broadly required to affirm or promote. *See Wooley*, 430 U.S. at 715 (rejecting state's attempt to require drivers to "use their private property as a 'mobile billboard' for the State's ideological message.") In *Tornillo* and *Pacific Gas & Electric*, government entities imposed speech on private entities by dictating the speaker and viewpoints. In contrast, CADA does not require any private entity to espouse a specific government message, or to relay expression on particular viewpoints from particular third parties. Appellants' objections to the messages they feel are conveyed by wedding cakes, and to the legal requirement that a baker choosing to sell wedding cakes do so for gay and straight couples alike, do not somehow

convert the generally applicable CADA into a specific mandate that businesses communicate a particular message.[8]

A second line of cases holds that private speakers cannot be compelled by government action to incorporate unwanted elements into their messages. But these cases are inapplicable here. Service providers like bakers are paid to convey their customers' messages. The fruits of their labors in commercial contexts are not expressions of their own viewpoint entitled to protection from outside incursions. As stated in *Elane*:

> The United States Supreme Court has never found a compelled-speech violation for the application of antidiscrimination laws to a for-profit public accommodation. In fact, it has suggested that public accommodation laws are generally constitutional. See *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 . . . [T]he focal point of [such statues is] rather on the act of discriminating against individuals in the provision of

[8] Even if the enforcement of CADA here were construed as mandating speech, that speech would be incidental to the statute's primary effects on conduct, and therefore the speech burden would be constitutional. *See Rumsfeld*, 547 U.S. at 61-62 (rejecting law schools' argument that statute requiring them to permit military recruiting on campus violated the compelled speech doctrine, even though it effectively required schools to send e-mails and post flyers bearing a particular message they found objectionable, because "[t]he compelled speech to which the law schools point is plainly incidental to the [statute]'s regulation of conduct").

> publicly available goods, privileges, and services on the proscribed grounds.")

Elane, 309 P.3d at 66.

Appellants also misconstrue *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) as determinative here. *Hurley* arose from the efforts of the plaintiff organization ("GLIB") to march in a St. Patrick's Day parade. GLIB sued alleging that their exclusion violated the Massachusetts public accommodations nondiscrimination statute, but the Supreme Court ultimately found that the parade organizers, a private nonprofit group, had a First Amendment right to exclude them. The Court held that the very purpose of the parade was to convey its organizers' own message: "[W]e use the word 'parade' to indicate marchers who are making some kind of collective point, not just to each other but to bystanders along the way…every participating unit affects the message conveyed by the private organizers…" *Id.* at 567-72. The *Hurley* Court also noted that the "expressive character of both the parade and the marching GLIB contingent" was important to assessing the situation, and contrasted the facts of the *Hurley* case with the apparent objective of the statute:

> [T]he object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be

> turned away merely on the proprietor's exercise of personal preference.

Id. at 578. Finally, the *Hurley* Court discussed the "likelihood of misattribution" as a factor contributing to its decision, noting that "each [parade] unit's expression is perceived by spectators as part of the whole" and that there exists no "customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants…" *Id.* at 576-577 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (requiring shopping mall to permit literature distribution on premises is not compelled speech, in part because mall owner can easily post disclaimers noting that materials distributed do not reflect its views)).

The present case more closely resembles "what the old common law promised" than *Hurley*. That a commercial bakery engages in cake design does not render its commercial activity fundamentally "expressive" in character, nor is conveying messages to the public the central purpose and function of a commercial bakery. It strains credulity to say that Masterpiece Cakeshop's body of commercial work either makes or is perceived as making a "collective point." *See* Supp. PR. CF, Vol. 1, p. 480 (depicting wide variety of cakes produced by Masterpiece Cakeshop for different occasions). Similarly, observers are extremely unlikely to believe that the proprietors of a commercial bakery personally share in

every message conveyed explicitly or implicitly by the items they produce for customers, including cakes inscribed with words and symbols marking customers' birthdays, graduations, weddings, and other life events. *See Hurley*, 515 U.S. at 577.[9] Accordingly, *Hurley* does not support Appellants' claim that enforcing CADA in this context violates the First Amendment.

Finally, even if CADA were viewed as burdening Appellants' First Amendment rights, the statute and its application in this case would pass constitutional muster. CADA makes no reference to speech or expression. C.R.S. 24-34-101 *et seq.* It neither targets expressive activities for regulation, nor exempts businesses whose work entails an expressive or creative aspect. The statute does not warrant First Amendment strict scrutiny because it applies to all businesses engaged in trade with the public in Colorado, regardless of the nature of the business, and any burden on expressive activity is incidental at most. The Supreme Court articulated the applicable distinction when it held that a county's closure of an adult bookstore on public nuisance grounds did not burden the owners' First Amendment rights, and that prior case law applying heightened

[9] If misattribution were a serious concern, Phillips would be free to post notices in his store and on its website clarifying that he does not share in all the sentiments written on or conveyed by cakes he sells. Supp. PR. CF, Vol. 1, p. 718.

scrutiny to laws that do burden free expression had "no relevance" to the challenged public nuisance statute:

> …[W]e have not traditionally subjected every criminal and civil sanction imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place…or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity…

Arcara v. Cloud Books, 478 U.S. 697, 706-707 (1986). A "government regulation [affecting individual conduct with both speech and non-speech elements] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

Laws against public accommodations discrimination are within states' constitutional power to enact, and serve to further compelling government interests in ensuring minority groups' ability to access goods and services and participate fully in society. *See infra*, III.D. CADA's purpose is unrelated to burdening free

expression. Its burden on free expression is incidental at most, and confined to the extent necessary to fulfill the goal of ensuring equal access. For all of these reasons, Appellants cannot demonstrate that enforcing CADA in conjunction with their refusal to sell wedding cakes would violate their right to free expression.

III. ENFORCEMENT OF CADA DOES NOT VIOLATE CONSTITUTIONAL FREE EXERCISE GUARANTEES.

Phillips and Masterpiece Cakeshop contend that the religious exercise clauses of the Colorado and United States Constitutions entitle them to thwart the purposes of CADA and to discriminate based on sexual orientation. *See* Opening Br. 25-37. In essence, they argue that because Phillips' faith defines marriage as between a man and a woman, he and his for-profit secular business are above the law and may discriminate against same-sex couples. While religious freedom is one of our most cherished liberties, it is not unlimited and cannot be used to harm others. Appellants' claim fails as a matter of law.

In *Employment Division v. Smith*, the Supreme Court held that the federal Free Exercise Clause is not offended by a neutral law of general applicability. 494 U.S. 872, 885 (1990). The Court explained, "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).'" *Id.* at 879. Though that law may have

"the incidental effect of burdening a particular religious practice" it "need not be justified by a compelling governmental interest." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993); *see also Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 697-98 (10th Cir. 1998) ("a law (or policy) that is neutral and of general applicability need not be justified by a compelling governmental interest even if that law incidentally burdens a particular religious practice or belief.") (citations omitted). Thus "a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). As explained *infra* at D, Colorado has not just a legitimate interest, but a compelling one, in eradicating discrimination, and thus CADA undoubtedly survives rational basis review.

Smith, however, recognized that there are two kinds of claims that may still trigger strict scrutiny under the Free Exercise Clause, and Appellants contend that both apply in this case. Under the first exception, laws that are not neutral and generally applicable, but target religious exercise, are invalid unless they satisfy strict scrutiny. *See id.* (citing *Lukumi*, 508 U.S at 546). Under the second exception, so-called "hybrid claims" involving free exercise and another constitutional right can also trigger some version of strict scrutiny. *See Smith*, 494

U.S. at 881-82. This case does not actually involve either exception, and therefore strict scrutiny is not appropriate under the U.S. Constitution.

A. CADA IS A NEUTRAL LAW OF GENERAL APPLICABILITY AND SHOULD NOT BE SUBJECT TO STRICT SCRUTINY.

Smith's requirements that laws be neutral and generally applicable are "interrelated." *Lukumi*, 508 U.S. at 531. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United*, 451 F.3d at 649-50 (citation omitted). Similarly, a law is generally applicable unless it selectively "impose[s] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543. Here, there can be no serious question that CADA satisfies both requirements.

First, CADA is neutral because it exists for the important, salutary purpose of protecting all Colorado residents and visitors from discrimination based on a range of protected characteristics, including sexual orientation. C.R.S. 24-34-601. CADA applies to all such discrimination, regardless of the underlying motive. *See supra* at I.

Second, CADA is generally applicable because it does not target religiously motivated conduct. That Phillips happens to have violated CADA because of his religious beliefs does not mean that CADA targets his religious exercise. To the contrary, CADA is indifferent as to why a business owner might discriminate, and

the Free Exercise Clause does not provide Appellants any refuge. As the Supreme Court explained in *Smith*, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." 494 U.S. at 878-879.

Appellants argue that exemptions in CADA fatally undermine its general applicability under *Smith*, focusing first on the provision that exempts facilities used primarily as houses of worship from regulation as public accommodations. Opening Br. 30-32. This argument clearly fails, since the exemption for houses of worship was aimed at *accommodating* religious freedom, not targeting it. Indeed, the provision exempting houses of worship from regulation as public accommodations demonstrates how the legislature went out of its way to ensure that CADA would not target religious freedom, and clarify for the public that public accommodations regulation does *not* impact faith communities' ability to define and regulate themselves. *See Corp. of Presiding Bishop of Church of Christ*

of Latter-Day Saints v. Amos, 483 U.S. 327, 334-38 (1987) (discussing purposes and effects of religious exemptions to nondiscrimination laws).[10]

Appellants' reliance on *Lukumi* and *Blackhawk v. Pennsylvania* is unavailing. In both of these cases, courts found that a statute's enforcement in a context where the plaintiff sought exemption on religious grounds improperly targeted religious exercise, because the statutory enforcement scheme afforded broad opportunities for others to obtain exemption on *secular* grounds. *See Lukumi*, 508 U.S. at 536 (statute was unconstitutional where its wording excluded from regulation "almost all killings of animals except for religious sacrifice" and context suggested it was adopted for the express purpose of blocking Santeria religious practice), and *Blackhawk*, 381 F.3d 202 at 212-14 (3rd Cir. 2004) (Native American who kept bears for spiritual reasons was unconstitutionally denied

[10] Appellants argue that "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." Opening Br. 31. This is patently erroneous. Although Appellants do not dispute that many Coloradans have religiously-based opinions regarding same-sex relationships, the CADA provision exempting houses of worship from the definition of public accommodations is NOT specific to sexual orientation. C.R.S. 24-34-601(1). Rather, it applies to all the characteristics CADA covers. C.R.S. 24-34-601(2) (disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry). Colorado has merely recognized that houses of worship are not public accommodations, and thus may include or exclude individuals for *any* reason, unlike retail businesses that CADA regulates. *See* C.R.S. 24-34-601(1).

wildlife permit fee waiver, where waivers were broadly available to other wildlife-keepers based on financial "hardship" and other secular reasons). These fact patterns sharply contrast with the present case, in which CADA does not provide broad opportunities for secular exemptions, and the provision Appellants complain of merely exempts distinctly *religious* entities from regulation as public accommodations.

Similarly, Appellants argue erroneously that the State of Colorado "exempts most religious organizations" from CADA, and thus engages in improper "differential treatment of two religions" by enforcing CADA here. *See* Opening Br. 31. If Phillips himself and/or the for-profit retail business he owns were actually defined as "religious organizations," then all Colorado people of faith and the businesses they run would also qualify as "religious organizations." This is legally incorrect, and as a factual matter exempting such a broad swath of the community would defeat CADA's purposes. Further, there is absolutely no indication here that the State has treated religions unequally, especially since the provision at issue refers to "a church, synagogue, mosque, or other place that is principally used for religious purposes," C.R.S. 24-34-601(1), thus both specifically exempting Christian churches and making clear that the same exemption is available to all houses of worship regardless of faith tradition.

Appellants also contend that CADA's exemption allowing public accommodations to restrict admission to individuals of one sex, "if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations" offered, also threatens the law's general applicability. C.R.S. 24-34-601(3); *see also* Opening Br. 32. This argument is of no avail. Narrow exemptions like this are common in public accommodations statutes and are aimed at permitting specialized institutions such as single-sex health clubs or schools to provide a service specific to one sex. *See generally* David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 Colum. J. of Gender & L. 51, 93 n.176 (2011). They neither target religion, nor suggest that the law is not generally applicable, and they also do not apply to retail bakeries.

Both the provision allowing sex segregation in limited circumstances and the provision exempting houses of worship foster CADA's overall goals of eradicating discrimination and ensuring equal access to public accommodations for all Coloradans. In contrast, as explained herein, an exemption for Appellants would directly conflict with the purposes of CADA. Taken together, the statute's narrow exemptions are insufficient to trigger strict scrutiny under *Smith* and *Lukumi*. Were Appellants' reasoning accepted, any law that contained a secular exemption—no matter how reasonable or tailored—would automatically trigger

strict scrutiny. That would allow the exception to swallow the rule. But federal courts, including the Tenth Circuit, have expressly declined to take this approach. *See Grace United*, 451 F.3d at 651 ("Grace United seems to be asking us to adopt a *per se* rule requiring that any ... regulation which permits any secular exception satisfy a strict scrutiny test to survive a free exercise challenge. Consistent with the majority of our sister circuits, however, we have already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption.") (citing *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004)). CADA, a comprehensive law whose only exemptions further its purposes of preventing discrimination and safeguarding minorities' full participation in society, is both neutral and generally applicable.

B. APPELLANTS' CLAIMS DO NOT INVOLVE HYBRID RIGHTS.

Phillips also argues that strict scrutiny is proper because his religious exercise claim involves hybrid rights. *See* Opening Br. 32-33. At the outset, "[t]he hybrid rights doctrine is controversial. It has been characterized as mere *dicta* not binding on lower courts, criticized as illogical, and dismissed as untenable." *Grace United*, 451 F.3d at 656 (citations omitted). The Tenth Circuit does recognize the exception, but only "where the plaintiff establishes a 'fair probability, or a likelihood,' of success on the companion claim." *Axson-Flynn*, 356 F.3d at 1295.

See also Swanson, 135 F.3d at 699 ("[W]e believe that simply raising such a [hybrid-rights] claim is not a talisman that automatically leads to the application of the compelling-interest test. We must examine the claimed infringements on the party's claimed rights to determine whether either the claimed rights or the claimed infringements are genuine.").

Appellants have failed to "present[] a colorable independent constitutional claim" under the Free Speech Clause and therefore their claims do not trigger the hybrid rights exception. *Grace United*, 451 F.3d at 656. As explained, *supra* at II, Phillips' free speech claim fails because CADA targets commercial conduct, not inherently expressive activity, and does not trigger constitutional protections against compelled speech. Because their free speech claim is not viable, Appellants have failed to present a hybrid rights claim triggering strict scrutiny.

C. CADA DOES NOT SUBSTANTIALLY BURDEN FREE EXERCISE RIGHTS.

CADA does not substantially burden Appellants' religious exercise. Prohibiting Phillips—who has decided to open a secular, for-profit bakery that serves the general public—from discriminating against customers on the basis of sexual orientation does not substantially burden his religious exercise.

"An inconsequential or de minimis burden on religious practice does not rise to [the] level" of substantial. *Kaemmerling v. Lappin*, 553 F.3d 669, 678 (D.C. Cir.

2008); *see also, e.g., Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("substantial burden requires something more than an incidental effect on religious exercise").[11] Similarly, laws "'which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs' do not constitute substantial burdens on the exercise of religion." *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996 (citation omitted)). Thus, a substantial burden on religion does not arise from "any incidental effect of a government program which may have some tendency to coerce individuals into acting contrary to their religious beliefs," but rather, occurs only in those cases where government puts "substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Washington v. Klem*, 497 F.3d 272, 279-80 (3rd Cir. 2007).

That test is plainly not satisfied here. CADA does not force Phillips to support, endorse, or participate in any wedding. All CADA requires is that when Phillips is operating his business he, like all other business owners in the state,

[11] *Kaemmerling* and other cases cited herein were decided under statutes that prohibit government-imposed "substantial burdens" on religion, including the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc(a)(1) , and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, just as the Supreme Court's pre-*Smith* free exercise cases did. Therefore, such cases are instructive when determining what amounts to a "substantial burden" on religious exercise.

must treat everyone who enters his business with dignity and respect and make his full menu of goods and services available to all customers. This does not impose a substantial burden on religious exercise. As one court explained in rejecting the claim of a restaurant owner religiously opposed to "any integration of the races whatever,"

> 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 establishments 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). This Court should likewise reject Phillips' claim of a license to discriminate. Phillips remains entirely free to continue believing that the Bible limits marriage to between a man and a woman, to advocate against marriage equality for same-sex couples as a policy matter, to espouse his personal religious beliefs regarding marriage, and to continue opposing the marriage of same-sex couples in his personal life. What he

cannot do under Colorado law is pick and choose which customers Masterpiece Cakeshop will serve which products based on their sexual orientation.

Moreover, any alleged burden on Phillips' religious exercise applies to his commercial activities as a baker. *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994). As the Supreme Court has explained, "[w]hen 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." *United States v. Lee*, 455 U.S. 252, 261 (1982).

That Phillips views his baking as "honoring God" does not alter the analysis. *See, e.g.*, Opening Br. 4. Appellees do not question the sincerity of Phillips' beliefs. But the subjective inquiry as to whether a religious belief is sincerely held is separate and apart from the objective legal question as to whether CADA substantially burdens religious exercise. *See, e.g., Kaemmerling* , 553 F.3d at 679 (court "accept[s] as true the factual allegations that [the plaintiff's] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened . . ."). The objective facts in this case demonstrate that CADA imposes, at most, only an incidental burden on Appellant Phillips' religious exercise.

D. CADA SURVIVES STRICT SCRUTINY ANALYSIS.

While strict scrutiny does not apply for the reasons set forth above, and the Colorado courts have not ruled on whether the Colorado Constitution requires strict scrutiny for religious exercise claims, CADA nonetheless satisfies even that higher level of review.

Even assuming *arguendo* that CADA would be subject to a strict scrutiny analysis, the law would nonetheless survive strict scrutiny because it furthers a "compelling state interest" and is "narrowly tailored" to that interest. *Lukumi*, 546 508 U.S. at 531-32. The Supreme Court has held that a wide range of government interests are sufficiently compelling to merit denial of a religious exemption. *See, e.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (state's interest in "improving the health, safety, morals and general well-being of [] citizens" warranted denying Jewish storeowners religious exemption from Sunday closing law); *Lee*, 455 U.S. at 260 ("broad public interest in maintaining a sound tax system" justified denial of religious exemption from social security tax); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("interests of society to protect the welfare of children" were sufficiently compelling to enforce child labor laws against sect distributing religious pamphlets).

In light of these precedents, there can be little question that Colorado has "a compelling interest in eradicating discrimination in all forms."[12] *EEOC v. Miss. Coll.*, 626 F.2d 477, 489 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (Minnesota's public accommodations law reflects the "[s]tate's strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services" and "plainly serves compelling state interests of the highest order."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983) ("Th[e] governmental interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."); *Swanner*, 874 P.2d at 282-283 (crediting state's interest in "preventing acts of discrimination based on irrelevant characteristics.")

The United States Supreme Court has recognized the "serious and personal harms" that result from discrimination, which "both deprives persons of their individual dignity and denies society the benefits of wide participation in political,

[12] Contrary to Appellants' claims, the relevant inquiry is not whether Colorado has a compelling interest in "ensuring that people may obtain artistically designed wedding cakes." Opening Br. 36. This characterization trivializes the profound dignitary harm that people—including Craig and Mullins—experience when they are turned away from a business because of who they are. The government interest in this case is no more about securing gay couples' access to cake than *Newman* was about ensuring African-Americans' access to barbecue dinners.

economic, and cultural life." *Roberts,* 468 U.S. at 625; *see also Board of Dirs. Of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987) ("public accommodations laws plainly serv[e] compelling state interests of the highest order")(internal quotation marks omitted); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988) ("the Court has recognized the State's 'compelling interest' in combating invidious discrimination")(citations omitted); *Swanner*, 874 P.2d at 282-83 (noting that in addition to ensuring access, public accommodations laws serve the separate important purpose of protecting minority group members from hurtful incidents of discrimination).

By implementing CADA, Colorado seeks to eradicate discriminatory practices. CADA since 2008 has prohibited discrimination on the basis of sexual orientation, among other characteristics, in employment, housing, public accommodations, advertising, consumer credit transactions, labor organizing, and automobile insurance. 2008 Colo. Legis. Serv. Ch. 341 (S.B. 08-200) (West). This broad commitment to ensuring that all Coloradans are treated equally "vindicate[s] 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 250 (1964).

Further, uniform enforcement of antidiscrimination laws is the "least restrictive means" of achieving the state's interest in preventing the social harms of discrimination. *See Lukumi*, 508 U.S. at 578. CADA recognizes that all discrimination, regardless of motivation, is a social evil that must be prohibited in all forms. Even if one person is turned away because of who they are, all of society suffers, as the state's interest in eradicating discrimination "does not involve a numerical cutoff below which the harm is insignificant." *Swanner*, 874 P.2d at 282-83. Whether same-sex couples can purchase wedding cakes from other bakeries is beside the point. As the Alaska Supreme Court noted in a housing discrimination case:

> The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing . . . discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination. . . . [T]his interest will clearly suffer if an exemption is granted to accommodate the religious practice at issue.

Id. at 283 (citations and quotations omitted).

Importantly, Appellants' requested religious exemption here would not be limited to a refusal to bake wedding cakes for same-sex couples. Were Phillips exempted from CADA in this instance, there is no principled reason he, or another business owner, would not be similarly permitted to discriminate because of other

religious beliefs. By the same logic, tomorrow a Jewish restaurant owner could refuse to serve Muslim patrons, and the next day a Catholic bus driver could refuse to drive someone to a pharmacy to obtain contraceptives.[13] The state surely has a compelling interest in ensuring that claims of religious freedom for one cannot be used to oppress others.

The Supreme Court has recognized that the Free Exercise Clause does not justify exemptions that adversely impact others.[14] *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (in exempting claimant from state unemployment benefits policy, noting that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties."); *Barnette*, 319 U.S. at 630 (in excusing students from reciting Pledge of Allegiance, noting that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so"); *cf. Cutter v.*

[13] Phillips' contention that the present case is singular because it concerns a wedding cake is unavailing. There is no limit to the range of products and services business owners could cite as uniquely spiritually significant if nondiscrimination laws were subverted to allow exemptions based on individual regulated entities' claimed religious discomfort with filling the customer's order.

[14] This is consistent with the understanding of religious liberty at the founding. "As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace." Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1145 (1990) (citation omitted).

Wilkinson, 544 U.S. 709, 720 (2005) ("[C]ourts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."); *Lee*, 455 U.S. at 261 ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."); *see also Holt v. Hobbs*, 574 U.S. ___ (2015) (Ginsburg, J., concurring) (prisoner entitled to religious exemption from institutional restriction on beards, because "accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief"); *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2783 (2014) (in response to concern that discrimination "might be cloaked as religious practice to escape legal sanction," noting "[o]ur decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.")

Fortunately, courts have rejected arguments like Appellants' and denied claims that religious freedom entitles individuals or businesses to discriminate against women, *see, e.g.*, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990) (religiously affiliated school must pay married male and female teachers equally, despite leaders' belief that the "Bible clearly teaches that

the husband is the head of the house, head of the wife, head of the family,"); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986) (school cannot offer unequal health benefits to female employees based on similar "head of household" religious tenet); or against people of minority faiths, *see, e.g.*, *Fields v. City of Tulsa*, 753 F.3d 1000 (10th Cir. 2014) (rejecting Free Exercise and other claims by Christian police officer who challenged discipline for refusing to participate in community policing event hosted by Islamic Society); or against racial minorities, *see, e.g.*, *Bob Jones*, 461 U.S. at 583 n.6 (college that prohibited interracial dating not entitled to tax-exempt status); *Brown v. Dade Christian Schs., Inc.*, 556 F.2d 310, 311 (5th Cir. 1977) (rejecting Free Exercise claim by school that refused to admit African-Americans based on a "sincerely held [] religious belief that socialization of the races would lead to [unacceptable] racial intermarriage"); *Newman*, 256 F. Supp. at 944 (restaurant could not refuse to seat African-Americans even though owner's religion opposed racial integration). This Court should reject Masterpiece Cakeshop's attempt to use religion as a sword against Craig, Mullins, and other prospective customers.

IV. THE COMMISSION PROPERLY REJECTED MASTERPIECE CAKESHOP'S ATTEMPT TO SEEK OVERBROAD, IRRELEVANT DISCOVERY.

By order dated October 9, 2013, the ALJ appropriately granted Appellees' motion for a protective order against several irrelevant and overbroad discovery requests. The information sought in several of Appellants' discovery requests, particularly details as to the wedding and reception that Mullins and Craig went on to hold months after the discrimination incident at issue, could not be germane to any claim or valid defense of a party in this case. The ALJ also correctly determined that the central facts of this matter were not in dispute such that discovery as to distant collateral matters would not be reasonable under the circumstances. Thus, granting the protective order was appropriate under C.R.C.P. 26(b).

V. THE COMMISSION'S DECISIONS WERE PROCEDURALLY APPROPRIATE.

In response to the other issues raised by Appellants Phillips and Masterpiece Cakeshop, Appellees Mullins and Craig adopt by reference the arguments made by the Civil Rights Commission in its separate Answer Brief.

CONCLUSION

For all the reasons stated above, this Court should affirm the Civil Rights Commission's Final Agency Order dated May 30, 2014.

DATED this 10th day of March, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2015, a true and correct copy of the **APPELLEES' AMENDED ANSWER BRIEF** was filed using the Court's ICCES electronic filing system and/or was served via U.S. Mail, postage paid, on the following:

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