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	
RESPONDENTS-APPELLANTS: MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, v. PETITIONERS-APPELLEES: CHARLIE CRAIG and DAVID MULLINS.	
Attorneys: Nicolle H. Martin, No. 28737 7175 W. Jefferson Avenue, Suite 4000 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@alliancedefendingfreedom.org ndecker@alliancedefendingfreedom.org Jeremy D. Tedesco, AZ No. 023497 Alliance Defending Freedom 15100 N. 90th Street Scottsdale, AZ 85260 (O) 480-444-0020 jtedesco@alliancedefendingfreedom.org	Case Number: 2014CA1351
APPELLANTS' REPLY BRIEF	

COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Suite 300, Denver, CO 80203	
COLORADO CIVIL RIGHTS COMMISSION	
RESPONDENTS-APPELLANTS: MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, v. PETITIONERS-APPELLEES: CHARLIE CRAIG and DAVID MULLINS.	
Attorney: Nicolle H. Martin, No. 28737 7175 W. Jefferson Avenue, Suite 4000 Lakewood, Colorado 80235 (O) 303-332-4547 nicolle@centurylink.net	Case Number: 2014CA1351
CERTIFICATE OF COMPLIANCE	

I hereby certify that this brief complies with all 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).

Choose one:

- ✓ It contains 5688 words.
- ❑ It does not exceed 30 pages.

C.A.R. 28(k) is not applicable to this brief. Respondent-Appellants' Opening Brief 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 (R.____, p.___), not to an entire document, where the issue was raised and ruled on.

- ✓ 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/ Nicolle H. Martin
Nicolle H. Martin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

***Cases*:**

***Statutes*:**

***Other Authorities*:**

INTRODUCTION

This case asks whether Colorado's Anti-Discrimination Act (CADA) may compel an artist to create expression that contradicts his religious beliefs. The answer must be "no."

Government coercion of conscience—whether pursued through compulsion of word or deed—is grievously unjust and unconstitutional. Such governmental actions "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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (U.S. 1943). To put it another way, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Accordingly, the United States Supreme Court has ruled that the First Amendment bars the government from compelling: public school students to salute the United States flag when doing so would violate their religious convictions, *Barnette*, *supra*; a newspaper to print political candidates' replies to editorials they did not wish to print, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); individuals to display a morally and religiously objectionable state motto on their license plate, *see Wooley*, *supra*; a utility company to place a third party's newsletter taking positions at odds with the utility in its billing envelopes,

Pacific Gas and Elec. Co. v. Pub. Utilities Comm'n of California, 475 U.S. 1 (1986); professional fundraisers to disclose the percentage of charitable contributions collected that were actually turned over to charity, *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc*., 487 U.S. 781 (1988); and parade organizers to include a contingent that expressed a viewpoint at odds with the organizers' desired expression, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995).

The First Amendment's ban on compelled expression has particular significance for artists, like Appellant Jack Phillips. Unlike the conscientious objectors in prior cases where the Supreme Court found compelled speech violations, Colorado is applying CADA to require Phillips not only to "utter what is not in his mind," *Barnette*, 319 U.S. at 634, but also to force him to employ his mind, time, energy, and artistic talents to *actually create* the unwanted expression.

The uniquely invasive compulsion faced by artists is why "[p]rotection for free expression in the arts should be particularly strong when asserted against a state effort to compel expression, for then the law's typical reluctance to force private citizens to act augments its constitutionally based concern for the integrity of the artist." *Redgrave v. Bos. Symphony Orchestra, Inc*., 855 F.2d 888, 905 (1st Cir. 1988) (internal citation omitted); *see also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) ("The Constitution exists precisely so . . .

esthetic and moral judgments about art and literature[] can be formed, tested, and expressed. . . . [T]hese judgments are for the individual to make, not for the government to decree, even with the mandate or approval of a majority.").

Appellees urge this Court to allow Colorado to run roughshod over Phillips' conscience because they claim CADA regulates his conduct, not his religious speech or beliefs. Appellees' Br. 11. While Phillips agrees that a batch of muffins or chocolate chip cookies is not communicative (and would gladly sell them to Appellees (Supp. PR. CF, Vol. 2, p. 477)), wedding cakes certainly are. They inherently communicate a celebratory message regarding the union of two persons in marriage. Phillips pours himself into their design and creation, marshaling his time, energy, and creative and artistic talents to make a one-of-a-kind cake creation celebrating the couple's special day. (*Id*. at 472-73, ¶¶ 37-44.) He consults with the couple so he knows and understands their distinctive relationship, (*id*. at 473, ¶ 44), and then spends hours brainstorming and creating a design that reflects his artistic interpretation of their special bond. (*Id*. at 472, ¶ 37.) Using the tools of his art, he takes a blank canvas—here, several layers of cake—and transforms them into a work of art through the application of expressive, decorative elements. And his religious convictions compel him to create expression celebrating only those marriages that are consistent with God's design for marriage, those between one

man and one woman. (*Id*. at 469-470, ¶¶ 12-15.) This case does not involve Phillips' conduct, but his unique, religiously-inspired artistic expression.

Despite Appellees' repeated assertion that cakes aren't speech but mere commodities, their attorneys recently embraced the communicative aspect of cakes when another Colorado baker, Marjorie Silva, faced charges of religious discrimination under CADA for declining to create a cake that references biblical teaching about sex and marriage.[1] They claim she has the right to decline to create such cakes based on "her standards of offensiveness."[2] And professor Nancy Leong at University of Denver Law School has rightly observed that requiring Silva to create the requested cake "would infringe on her own free speech rights."[3]

Phillips agrees with Appellees' attorneys and professor Leong that Silva's free speech right not to use her artistic abilities to create a cake that violates her "standards of offensiveness" trumps CADA. He only seeks to vindicate the same right here. The right to be free from compelled speech applies to everyone, not just those who hold the "right" views in the eyes of the state or society. For "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or

---

[1] *See* http://www.washingtonpost.com/news/post-nation/wp/2015/01/22/this-colorado-baker-refused-to-put-an-anti-gay-message-on-cakes-now-she-is-facing-a-civil-rights-complaint/.

[2] *See* https://www.aclu.org/blog/lgbt-rights-religion-belief/half-baked-complaint-alleges-discrimination-where-there-none.

[3] *See* http://www.9news.com/story/money/business/2015/01/20/azucar-bakery-anti-gay-words-cake/22050891/.

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." *Barnette*, 319 U.S. at 642. In this case, the continued vitality of this fundamental principle of our constitutional system hangs in the balance.

ARGUMENT

I. Phillips' Free Speech Rights Are Violated By Applying CADA To Coerce His Artistic Expression.

A. Phillips' Unique Cake Creations Are Protected Expression.

Appellees[4] argue that Phillips' customized cake creations are not entitled to First Amendment protection because they are mere "goods and services" that convey no message. Appellees' Br. 11. This is demonstrably untrue.

Phillips is an artist and his form of art is creating unique cake creations. Phillips holds himself out to the public as a cake artist. (Supp. PR. CF, Vol. 2, p. 471, ¶¶ 28-29.) His company logo includes an artist's palette with a brush and whisk. (*Id*. at 485.) A drawing inside his store depicts him as an artist painting on an easel. (*Id*. at 483.) In the wedding context, Phillips invests many hours in the creative process, which includes meeting the clients, designing and sketching the wedding cake, and then baking, sculpting, and decorating it. (*Id.* at 472-73, ¶¶ 37-44.)

[4] Hereinafter, "Appellees" refers to Appellees and the Commission because they joined each others' briefs in full.

And Phillips clearly intends to convey a message with his unique cake creations. His work is intimately connected to his faith. (*Id*. at 469, ¶ 7.) He believes God granted him artistic and creative abilities and that he is religiously obligated to use those abilities in a manner that honors God. (*Id*. at 475, ¶ 62.) He thus declines to create cakes that convey messages that are contrary to his religious convictions, like those celebrating atheism, racism, indecency, or Halloween. (*Id*. at 475, ¶¶ 61-63.) Nor will Phillips create wedding cakes honoring same-sex marriages, regardless who orders them, because Phillips believes that God ordained marriage as the sacred union between one man and one woman, (*id*. at 476, ¶ 67.), and that marriage exemplifies the relationship between Christ and His followers. (*Id*. at 469, ¶ 61-63.)

In fact, the expressive aspect of Phillips' cake creations is especially apparent in the wedding cake context. Wedding cakes are the centerpiece of a wedding reception and are universally understood by those in attendance to convey a celebratory message in support of the couple's union. *See* Appellants' Opening Br. 12-14. Thus, contrary to Appellees' mischaracterizations, Phillips, and other cake artists like him (popularized on television shows such as "Ace of Cakes" and "Cake Boss"), prepare unique cake creations that are inherently expressive. Each cake represents Phillips' artistic interpretation of the distinctive, sacred bond

shared by the couple. They are thus fully protected by the First Amendment, as are all other forms of art.

That Phillips' artistic creations may not include words is irrelevant to the question of whether they are expression protected by the First Amendment, for "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515. U.S. at 569. Indeed, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Id*.

B. Phillips' Artistic Expression Does Not Lose Its First Amendment Protection Because It Is Commissioned By Paying Clients.

Appellees argue that Phillips' creative expression is not protected by the First Amendment because it is "commercial work performed for a client." Appellees' Br. 13, 18. That they cite virtually no caselaw to support this proposition is unsurprising considering that the United States Supreme Court has repeatedly rejected it.[5]

[5] The only cases they do cite, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), and *Nathanson v. Mass. Comm'n Against Discrimination*, 2003 WL 22480688 (Mass. Super. 2003), directly conflict with the Supreme Court decisions discussed in this section.

Indeed, the Supreme Court has 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 stating that business corporations have free speech rights). And it has further observed that "a great deal of vital" and constitutionally protected expression "results from an economic motive." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011). It is thus firmly established 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." *Riley*, 487 U.S. at 801.

Phillips' consultation with clients during the design process also does not compromise the protected nature of his speech. As the United States Court of Appeals for the Ninth Circuit explained in the tattooist context,

> [t]he fact that both the tattooist and the person receiving the tattoo contribute to the creative process or that the tattooist … 'provides[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. Under [any opposing] logic, 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. As with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in expressive activity.

Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1062 (9th Cir. 2010).

And while Phillips' customized cakes represent his own artistic expression, Supreme Court caselaw makes clear that his cake creations would be protected by the First Amendment even if their sole purpose was to convey the messages of his customers. In *Riley*, for example, the Court concluded that professional fundraisers, who were paid to speak their customers' messages, were fully safeguarded by the constitutional protection against compelled expression. 487 U.S. at 795-98; *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (holding that a public broadcaster is a constitutionally protected speaker when it "compil[es] . . . the speech of third parties").

C. The Compelled Speech Doctrine Forbids Applying CADA To Force Phillips To Create Unwanted Expression.

CADA's application to force Phillips to design and create wedding cakes celebrating same-sex weddings that he would not otherwise design and create is a prototypical compelled speech violation. *See Hurley*, 515 U.S. at 573 ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'"). Courts have noted that the right to be free from compelled speech has special significance for artists, like Phillips. *See Redgrave*, *supra*.

Appellees nonetheless contend that there is no compelled speech violation here because CADA does not require Phillips to convey "a specific government

message, or relay expression on particular viewpoints from particular third parties." Appellees' Br. 16-17. Of course, here, the government *is* compelling Phillips to express a particular message of a particular third party: he must design and create wedding cakes that celebrate same-sex marriages. But Phillips need not prove compulsion of a particular message because no Supreme Court case has ever held such proof is necessary to prevail on a compelled speech claim. For example, in *Hurley* the Court expressly noted that the parade at issue lacked "a particularized message." 515 U.S. at 574. And it was enough that the parade organizer simply "decided to exclude a message it did not like from the communication it chose to make." *Id.* *Hurley* similarly protects Phillips' decision regarding "what merits celebration" in the marriage context from state intermeddling. *Id.*

Appellees are also quite wrong to claim that mandating that Phillips design and create wedding cakes celebrating same-sex marriages imposes a mere "incidental" burden on his speech rights. Appellees' Br. 18 n.8. In *Wooley*, the Court found a compelled speech violation where a couple objected to bearing the state motto on their license plate. *Wooley*, 430 U.S. at 707. Here, the Commission's order not only requires Phillips to speak an unwanted message, but also forces him to employ his God-given skills and talent to design, create and convey the objectionable message. If displaying a disagreeable motto on one's

license plate is not "incidental" for compelled speech purposes, forcing Phillips to design and create wedding cakes to celebrate same-sex marriages cannot be.

Appellees claim that *Hurley* is distinguishable because the parade organizers were making a "collective point" through inclusion of various parade contingents. Appellees' Br. 20. They argue that it "strains credulity to say that [Phillips'] body of commercial work either makes or is perceived to make a 'collective point.'" *Id*. But Phillips' free speech claim is not predicated on any "collective point" made by his "body of commercial work." Rather, he is claiming that a specific aspect of his work—the design and creation of wedding cakes—is artistic expression that conveys a message of celebration and honor concerning the married couple. He objects to using his artistic talents and ability to convey what is to him an objectionable message.

II. Phillips' Free Exercise Rights Are Violated By The Application Of CADA To Coerce His Artistic Expression.

Appellees' brief shows a disturbing disregard for the constitutional guarantee of religious freedom. For example, Appellees assert that free exercise rights end where they "adversely impact others." Appellees' Br. 39. If this were true, the Free Exercise Clause would be a dead letter. But, tellingly, none of the cases Appellees cite actually supports their fanciful limit on religious freedom. *See id.* 39-40.

The Supreme Court recently rejected this argument in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Obama administration argued that "a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties." *Id*. at 2781 n. 37. The Court dispensed quickly with the notion that the government could wield such a religious-freedom-trump-card:

> [Adverse impact on others] will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest. But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties ... By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.

Id. This approach would render the Free Exercise Clause meaningless as well.

Appellees also cite cases that they claim involve instances where courts ruled that nondiscrimination laws trumped religious exercise. Appellees' Br. 40-41. But none of the cited cases involved *compelled expression* that violated the objectors' sincerely held religious beliefs, which immediately distinguishes them from this case. Further, in many of the cases the court rejected the free exercise claim *because the plaintiffs' religious beliefs did not even conflict with the law in question*. Those cases include *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389,

1398-99 (4th Cir. 1990), *EEOC v. Freemont Christian Sch.*, 781 F.2d 1362, 1368 (9th Cir. 1986), and *Fields v. City of Tulsa*, 753 F. 3d 1000, 1009 (10th Cir. 2014).

Appellees further rely on cases that involve seriously misguided attempts to justify racial discrimination based on religion. Appellees' Br. 41. But there is simply no way to legitimately compare Phillips with pernicious racists. Phillips is simply trying to live his life consistently with the orthodox and historical teachings of his religion concerning marriage—teachings that are harmonious with the whole course of human history. Claude Levi-Strauss, *The View From Afar* 40-41 (1985) ("[T]he family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society."). Moreover, those who cited religion as an excuse for racism refused to serve black people, at all, based on their race. Phillips has served, and is happy to in the future serve, gays and lesbians. He just cannot celebrate same-sex marriages. Appellees' race analogy is mere hyperbole.

Happily, Appellees' miserly view of the Free Exercise Clause is not the law and the enforcement of CADA against Phillips violates governing Supreme Court precedent.

A. CADA Is Not Being Applied In A Neutral Manner and Is Not Generally Applicable.

It is particularly troubling for Appellees to claim that in enforcing CADA against Phillips the state was "indifferent" to his religious reasons for declining to design and create a wedding cake celebrating same-sex marriage. Appellees' Br. 25. Indeed, one member of the Civil Rights Commission made it quite clear that the Commission upheld CADA's enforcement against Phillips because of his religious beliefs:

> I would also like to reiterate what we said in the hearing or the last meeting [where the Commission upheld the enforcement of CADA against Phillips]. 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.

(Supp. PR. CF, Vol. 2, p. 877.)

Incredibly, Appellees completely ignore this alarming admission of religious bias, and the Commission off-handedly dismisses it in a footnote. Commission's Br. 8 n.3. But the Commissioner's statement epitomizes the kind of targeted religious discrimination that violates the Free Exercise Clause. For at its core, that essential First Amendment provision bars the government from "penaliz[ing] or discriminat[ing] against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

The Commission's bias also violates a "basic requirement of due process," *i.e.*, a "fair trial in a fair tribunal." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). This impartiality requirement "applies to administrative agencies which adjudicate as well as to courts." *Id.* "[A] biased decisionmaker," which Phillips was clearly before, is "[n]ot only … constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Id.* at 47 (citation omitted). The Commission's religious bias alone is sufficient to warrant reversal of its decision and Order.

Rather than responding to the Commission's religious bias and targeted enforcement of CADA, Appellees claim that the law is neutral because it does not facially target religion. Appellees' Br. 25. But the Supreme Court has recognized that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

CADA also is not generally applicable. "Neutrality and general applicability are interrelated, and … failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. Here, the

Commission's lack of neutrality in enforcing CADA also renders it not generally applicable (in addition to the many reasons set forth in Appellants' Opening Brief).

Appellees respond that CADA's exemption of other religious organizations that hold the same religious beliefs concerning marriage as Phillips is irrelevant to the general applicability inquiry because those exemptions are aimed at "accommodating religious freedom, not targeting it." Appellees' Br. 26. But this entirely misses the point. It is religious discrimination for the state to accommodate some religious persons and groups but not Phillips.

Critically, in *Burwell* the Supreme Court rejected Appellees' distinction between religious organizations and for-profit businesses for purposes of religious freedom protections. *See* Appellees' Br. 28, 34. The Court resolved a federal circuit conflict over the rights of for-profit corporations to exercise religion by announcing that "[a] corporation is simply a form of organization used by human beings to achieve desired ends," and that "protecting the free-exercise rights of corporations … protects the religious liberty of the humans who own and control those companies." 134 S. Ct. at 2768. Appellees' artificial distinction between religious organizations and for-profit businesses cannot carry the day.

B. CADA Burdens Phillips' Religious Exercise And He Need Not Prove the Burden Is Substantial.

CADA is neither neutral nor generally applicable, thus if its application to Phillips merely burdens his religion it violates the Free Exercise Clause. *Lukumi*,

508 U.S. at 546 ("A law *burdening* religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.") (emphasis added).

Of course, here, the burden CADA imposes on Phillips' religious beliefs *is* substantial, meeting the lower burden under *Lukumi*. The Statement of Facts included in the Commission's Brief proves this. They state that Phillips:

- is a Christian whose "main goal in life is to be obedient to Jesus and His teachings in all aspects of his life";
- "believes that … God's intention for marriage is the union of one man and one woman";
- "believes that the Bible commands him to avoid doing anything that would displease God, and not to encourage sin in any way";
- "believes that decorating cakes is a form of art and creative expression," and that he must "honor God through his artistic talents"; and
- "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." Commission's Br. 6-7.

Colorado is using its coercive power to compel Phillips to use his mind, time, energy, and artistic talents to design and create artistic expression that violates his sincerely held religious beliefs. His decision to resist the state's

compulsion and follow his religious beliefs resulted in an order that he create custom cakes, adopt business policies, and train his employees in a manner that violates his religious conscience. He must also submit compliance reports to the government and will forever remain under the threat of expensive and time-consuming litigation each time he follows his religious beliefs and declines to design and create wedding cakes that celebrate same-sex marriage. Put simply, following his religious beliefs jeopardizes his ability to continue earning a living as a baker, his lifelong profession and a calling of God.

In *Sherbert*, the Supreme Court found a substantial burden where the state forced the plaintiff to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404. Here, the burden is even more substantial, as Phillips is forced to choose between following his religious beliefs or staying in business. No state should put its citizens to such a Hobson's Choice.

III. Forcing Phillips To Engage In Creative Expression Is Not Justified By Strict Scrutiny.

A. Compelling Phillips to Engage in Creative Expression Does Not Serve a Compelling Interest.

Appellees claim that CADA satisfies strict scrutiny by stressing the broad nondiscrimination interests it serves. Appellees' Br. 36-38. But resort to such

general interests is insufficient to satisfy the compelling interest inquiry, which requires courts to look "beyond broadly formulated interests justifying the general applicability of government mandates." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431, (2006). Instead, courts must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id*. This approach is especially important when public accommodation laws are applied in the "peculiar" manner to compel speech, like CADA is being applied here. *See Hurley*, 515 U.S. at 572.

Under CADA, Phillips is required to use his artistic talents and abilities to create and design wedding cakes that celebrate same-sex marriages, a message Phillips does not wish to convey. This application of CADA runs headlong into *Hurley*, which held that nondiscrimination laws may not "be used to produce thoughts and statements acceptable to some groups," as the First Amendment "has no more certain antithesis." *Id*. at 579; *see also Boy Scouts of America v. Dale*, 530 U.S. 640, 657 (2000) (noting that public accommodation laws do not serve a "compelling interest" when they "materially interfere with the ideas" a person or group wishes "to express"). The purpose CADA serves as applied to Phillips is categorically invalid under the First Amendment, and therefore is not "compelling."

Appellees nonetheless insist that CADA serves a compelling interest by relying on a far-fetched parade of horribles concerning religiously-motivated discrimination they claim would be protected by law if Phillips prevails. Appellees' Br. 38-39. But Phillips is not seeking a broad exemption from CADA. He is happy to design and create cakes honoring almost any event. He simply cannot, in good conscience, design and create cakes celebrating atheism, racism, indecency, Halloween, or same-sex marriages. (Supp. PR. CF, Vol. 2, p. 475, ¶ 61-63.)

Granting Phillips' request that CADA be enforced in a manner that respects his free speech and free exercise rights will not undermine the protections public accommodations and other laws provide against discrimination. It will simply recognize and reaffirm that such laws violate the First Amendment when they are "applied to expressive activity." *Hurley*, 515 U.S. at 578. And its scope would be limited to those businesses that create and sell *expression*. This includes, for example, newspapers, freelance authors, publicists, speech writers, photographers, videographers, painters, and other communicative professions and artists. It would thus protect the right of Colorado baker Marjorie Silva to decline to create a cake that references biblical teaching about sex and marriage based on her "standards of offensiveness," or a gay Colorado photographer to decline an offer from Westboro Baptist Church to shoot photos at its latest demonstration. These are just results

that rightly and universally protect conscience. Phillips' conscience is deserving of the same respect and protection.

B. Compelling Phillips to Engage in Creative Expression is Not the Least Restrictive Means of Serving the State's Interests.

It has long been recognized that, under our Constitution, the state may use "persuasion and example" to foster ideas, but not "compulsion." *Barnette*, 319 U.S. at 640.

Yet here the state has resorted to coercing Phillips to create artistically designed wedding cakes celebrating same-sex marriages, rather than furthering its interests through more tailored means that avoid compelling expression. In their opening brief at 36, Appellants highlighted several available alternatives that would further the state's goals without "violat[ing] [Phillips's] First Amendment rights." *Pacific Gas*, 475 U.S. at 19. Appellees' brief is silent as to why these alternatives are not sufficient, instead demanding that Phillips' conscience be violated.

Appellees also recite what other cases have said about the harm to society caused by acts of discrimination. Appellees' Br. 38. Yet the harm suffered by society when the government coerces conscience—and especially that of artists—far outweighs any alleged harm Appellees raise. In fact, Appellees have suffered no real harm at all. Phillips does not flatly refuse service to gay and lesbian customers—conduct that would plainly violate CADA—but instead objects to

using his artistic talents and abilities to create expression celebrating an event that violates his religious beliefs. There are some 300 other bakeries in the Denver area that are available to fulfill such requests. The State has no vital interest in compelling Phillips personally to provide such a non-essential service, especially when scores of other bakeries are ready and willing to do so. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (noting that to establish a compelling interest the State must "specifically identify an actual problem in need of solving" (quotation omitted)).

Juxtapose Appellees' overstated arguments with the actual harm suffered by Phillips—government coercion to create expression he disagrees with. The Supreme Court has said this type of compulsion "grates on the First Amendment," is "nothing less than a proposal to limit speech in the service of orthodox expression," and is a "decidedly fatal objective" if pursued to produce bias-free speakers and expressive conduct. *Hurley*, 515 U.S. at 579. And not just Phillips but all of society loses when the "esthetic and moral judgments" of artists must bow to "government … decree[] [or] … the mandate[s] … of a majority." *Playboy Entm't Group, Inc.*, 529 U.S. at 818. Moreover, no one's conscience is safe if the government can coerce the conscience of artists. *See Redgrave*, 855 F.2d at 905 (recognizing the unique harm compelled speech poses to "the integrity of the artist").

CADA's enforcement against Phillips fails strict scrutiny, and thus should be found unlawful by this Court.

IV. Phillips Did Not Decline to Design and Create Complainants' Wedding Cake Because of Their Sexual Orientation and Thus Did Not Violate CADA.

The gravamen of Appellees' argument is that Phillips' motivation for declining to design and create their wedding cake is irrelevant. Appellees' Br. 7. But the plain language of the statute requires that discrimination be "because of" an individual's status. § 24-34-601(2), C.R.S. 2013. According to Merriam Webster's Dictionary "because" is defined as "for the reason that." Appellees are wrongly redefining the public accommodation statute into a *per se* discrimination statute, despite plain statutory language to the contrary. Under Appellees' novel interpretation, every decision not to take on a project for someone covered by CADA would be illegal discrimination, whether it was because a cake artist ran out of flour or was anticipating being closed for an extended vacation. Because deciding not to take on a project can be based on benign reasons, just as they are here, the reason or motivation for the decision will always be a relevant inquiry.

Inexplicably, Appellees claim that Phillips admitted that he declined to design and create their wedding cake "because they were a same-sex couple." Appellees' Br. 3. Notably, they provide no record cite for this bold, new claim

because there is none. The undisputed evidence—indeed, evidence stipulated to by Appellees (Supp. PR. CF, Vol. 2, p. 530, p. 654)—is that

> [a]s a follower of Jesus, and as a man who desires to be obedient to the teaching of the Bible, [Phillips] believes 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.

(*Id*. at p. 427, ¶ 32.) From the beginning, this has been Phillips' sole motivation for his decision to decline to design and create Appellees' wedding cake. Appellees are simply mischaracterizing the undisputed evidence to prop up their weak claims.

The fallacy of Appellees' argument that intent is never relevant in this context is revealed in their brief, which concedes that

> [b]usiness 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.

Appellees' Br. 12 n.5. In each of the examples, the business owner's intent must be considered in order to even assess whether it was a "legitimate[] reject[ion]."

Appellees' contention that CADA is a *per se* discrimination statute cannot even bear the weight of their own arguments.[6]

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Commission's Final Agency Order and remand with instructions to grant Respondents' cross motion for summary judgment, deny the Government's and Complainants' motion for summary judgment, enter declaratory judgment in Respondents' favor, and vacate the ALJ's Initial Decision.

Respectfully submitted this 31st day of March, 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

[6] Appellants rely on their prior briefing, *see* Appellants' Br. 37-41, in relation to their appeal of the Commission's denial of Phillips' Motions to Dismiss, granting of Complainants' Motion for Protective Order, striking of Phillips' Discovery Requests, and overbroad Final Order.

CERTIFICATE OF SERVICE

I certify that on this 31st day of March, 2015, a true and correct copy of the foregoing **APPELLANTS' REPLY 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