STATE OF COLORADO COLORADO CIVIL RIGHTS COMMISSION 1560 Broadway, Suite 1050 Denver, Colorado 80202	
Complainants/Appellees: CHARLIE CRAIG and DAVID MULLINS v. **Respondents/Appellants:** MASTERPIECE CAKESHOP, INC. and any successor entity, and JACK C. PHILLIPS	**▲ COURT USE ONLY ▲** **CASE NUMBER** 2013 CR 0008 2013 CV 0009
Amanda Goad, New York State #4362448 American Civil Liberties Union Foundation LGBT & AIDS Project 125 Broad Street, 18th Fl. New York, NY 10004 Telephone: (212) 549-2627 Mark Silverstein #26979 Sara Rich, #36904 American Civil Liberties Union Foundation of Colorado 303 E. 17th Avenue, Suite 350 Denver, CO 80203 Telephone: (303) 777-5482 Paula Greisen, #19784 Dana Menzel, #34008 King & Greisen, LLC 1670 York St. Denver, CO 80206 Phone: (303) 298-9879	

COMPLAINANTS' OPPOSITION TO RESPONDENTS' APPEAL

SUMMARY OF RELEVANT FACTS AND ARGUMENT

In the summer of 2012, Complainants David Mullins and Charlie Craig were making plans to marry one another in Massachusetts, then celebrate with friends and family at a reception back home in the Denver area. CRAIG0028. On July 19, 2012, David and Charlie, together with Charlie's mother, visited Masterpiece Cakeshop with the purpose of seeking to order a wedding cake for their reception. *Id.*; CRAIG0003.

When David and Charlie communicated to Masterpiece owner Jack Phillips that the two of them were getting married, Phillips refused to sell them a wedding cake, citing a store policy against providing cakes or other baked goods for weddings and commitment ceremonies celebrated by same-sex couples. CRAIG0003. Phillips admits that he and Masterpiece Cakeshop have turned away other same-sex couples for the same reason. CRAIG0005.

These undisputed facts show that Respondents discriminated against Complainants because of their sexual orientation, and their constitutional defenses fail as detailed below. Selling a cake does not require a commercial wedding cake baker to endorse or participate in anyone's wedding, and while religious freedom is an important American value, it does not justify violation of longstanding, broadly applicable laws against discrimination.

ARGUMENT

I. The ALJ Correctly Denied Respondents' Motions to Dismiss

Administrative Law Judge Robert Spencer ("ALJ") correctly denied Respondent Jack Phillips' initial motion to dismiss related to the naming of Phillips as well as Masterpiece Cakeshop, Inc. as defendants, and Respondents' subsequent motion to dismiss related to statutory citations in the Charge of Discrimination. Both Respondents had ample notice of the charge of discrimination Mr. Mullins and Mr. Craig filed and the nature of the allegations in the

complaints. Denial of the motions to dismiss was appropriate, for reasons detailed more extensively in the brief submitted by Counsel for the Complaint.

II. The ALJ Properly Rejected Respondents' Attempt to Seek Overbroad and Irrelevant Discovery

By order dated October 9, 2013, the ALJ correctly granted Complainants' motion for a protective order against several irrelevant and overbroad discovery requests from Respondents. The information sought in several of Respondents' discovery requests, particularly details as to the wedding and reception that Complainants 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 are 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).

III. The ALJ Properly Entered Summary Judgment Against Respondents

A. Respondents discriminated "because of" sexual orientation

In refusing to sell Mr. Mullins and Mr. Craig a wedding cake, Respondents Jack Phillips and Masterpiece Cakeshop discriminated against them "because of" sexual orientation and thus in violation of Colorado's Anti-Discrimination Act ("CADA"). C.R.S. § 24-34-601(2). Phillips informed Complainants that he was unwilling to provide the service they sought as soon as he heard that they were a same-sex couple planning to marry one another. There was no discussion of the flavor, visual design, or any other characteristics of the cake they wanted. Phillips based his refusal to sell a wedding cake on who his prospective customers were, in clear contravention of CADA.

Respondents contend to no avail that their policy of selling wedding cakes for the celebrations of opposite-sex couples and refusing to do so for the celebrations of same-sex

couples is not discrimination because of sexual orientation. But as the ALJ recognized, to refuse sales of cakes for the weddings of same-sex couples means to refuse service on the basis of sexual orientation, given the inextricable link between identifying as gay or lesbian and marrying a person of the same sex. The Supreme Court of the United States has noted that an "intent to disfavor" a particular group of people "can readily be presumed" where a policy targets activities "engaged in exclusively or predominantly" by that group of people, as for example a "tax on yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Ctr.*, 506 U.S. 263, 270 (1993). In a case similar to this one, the New Mexico Supreme Court rejected a photography studio's claim that it could refuse to photograph the weddings and commitment ceremonies of same-sex couples without discriminating "because of...sexual orientation," since "[t]o allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose..." of New Mexico's law against sexual orientation discrimination in public accommodations. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013), *cert. denied*, 2014 WL 1343625 (U.S. Apr. 7, 2014); *see also Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2990 (2010) (noting that U.S. Supreme Court has "declined to distinguish between status and conduct" when evaluating discrimination against gays and lesbians, citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); *Bray*, 506 U.S. at 270).

Respondents' claim that they are willing to sell non-wedding-related baked goods to gay customers cannot save their discriminatory wedding cake policy. The New Mexico Supreme Court also rejected this argument in *Elane Photography*, observing by analogy that a restaurant where a protected class of people could not order entrees would obviously be engaging in prohibited public accommodations discrimination, even if it allowed members of that group to sit in the dining room and order appetizers. *Elane*, 309 P.2d at 62. Allowing Respondents to pick

and choose which of its goods and services were available to gay and lesbian customers would render CADA meaningless.

Finally, Respondents cannot salvage their discriminatory policy by invoking the laws that presently bar same-sex couples from civil marriage in Colorado. Colorado has no law or public policy barring same-sex couples from celebrating their love and commitment before friends and family, as Mr. Mullins and Mr. Craig were preparing to do in July 2012. Colorado's Legislature confirmed that marriage eligibility and equal market participation are separate issues when it added sexual orientation to CADA.[1] Respondents have refused service both to gay Coloradans who were planning to marry legally in another jurisdiction, and to a lesbian couple who sought to order cupcakes and serve them at a "family commitment ceremony" not tied to a formally sanctioned wedding. *See* CRAIG0018-19. Respondents also conceded at oral argument that they would refuse service to couples planning to enter a Colorado civil union. CRAIG0669-0671. In each instance, the conduct to which Respondents object is entirely legal and their refusal of service because of customers' sexual orientation violates CADA.

B. Enforcing CADA here does not infringe Respondents' free expression rights

When a retail business opens its doors to the public, it commits to provide goods and services in accordance with applicable law, and neither the business nor its proprietor engages in constitutionally protected speech by taking and filling customers' orders. CADA does not require Respondents to communicate a government message against their will or to incorporate

[1] Colorado has barred public accommodations discrimination against members of protected classes since 1895. *See Darius v. Apostolos*, 68 Colo. 323, 324 (1919). The legislature amended CADA to include sexual orientation in 2007, subsequent to the 2006 passage of the constitutional amendment regarding civil marriage for same-sex couples. The legislature in 2013 via the Colorado Civil Union Act affirmed that Colorado public policy is to treat gay couples and families with equal dignity and respect. *See* C.R.S. § 14-15-102 (one of the Act's stated purposes was to "protect individuals who are or may become partners in a civil union against discrimination in employment, housing, and in places of public accommodation.").

elements they disagree with into their own inherently expressive activity. Accordingly, enforcing CADA here does not violate Respondents' free expression rights.

The Supreme Court addressed this issue in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). There, the Court held that a private group organizing a parade could exclude a gay organization without violating the Massachusetts law against sexual orientation discrimination in public accommodations, while affirming the validity of that statute in other contexts:

> 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 statutes is]...on the act of discrimination against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.... On its face, the 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 567-578. The Court contrasted the parade, a private vehicle for its organizers' expressive messages, with retail businesses' commitment to serve the public. Here, Respondents seek to engage in an "act of discrimination against individuals in the provision of publicly available goods," in violation of just the type of law the *Hurley* Court deemed constitutionally valid.

Respondents mischaracterize the scope of constitutional protections against "compelled speech." The compelled speech doctrine applies only in limited circumstances not present here: when government forces citizens to express its own specific message, or when government forces citizens to incorporate undesired elements into their own constitutionally protected expressive activities. Enforcement of CADA fits neither of these descriptions.

Respondents' reliance on *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wooley v. Maynard,* 430 U.S. 705 (1977), is misplaced. The policy deemed unconstitutional in *Barnette* required West Virginia students literally to speak not only a specific message chosen by the government, but one that entailed "affirmation of a belief and an attitude of mind." 319 U.S. at 633. Similarly, in *Wooley*, the Supreme Court found that a driver had a constitutional right to object to the slogan then mandated for display on all New Hampshire license plates, since this policy effectively required every citizen to "use their private property as a mobile billboard for the state's ideological message." 430 U.S. at 715. These cases, which cabined the power of the state to compel its citizens to directly communicate a specific message, differ dramatically from the present case, in which the proprietor of a retail business objects to the broad mandate in Colorado's anti-discrimination law that all goods and services he makes available to any customers must be available to gay and lesbian Coloradans.

The other prong of the compelled speech doctrine also does not apply here. In *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court struck down a Florida law compelling newspapers to print responses from political candidates who had been criticized in editorials. In *P.G. & E. v. Public Utilities Comm'n of California,* 471 U.S. 1 (1986), the Court rejected a law requiring utilities to mail their customers copies of a particular environmentalist publication. In cases like these, government entities impermissibly compelled speech when they mandated expression from private entities by dictating the speaker and viewpoints. In contrast, Colorado's nondiscrimination statute does not require any private entity to espouse a particular government message, or to relay expression on particular viewpoints from particular third parties. Respondents' objections to the messages they feel are conveyed through cakes ordered for same-sex couples' weddings, and to the legal requirement that a baker choosing to sell

wedding cakes do so without regard for the gender and sexual orientation of the people marrying, do not convert the broadly applicable CADA into a narrow mandate for anyone to communicate a particular message or viewpoint. *See also Rumsfeld v. FAIR*, 547 U.S. 47, 61-62 (2006) (rejecting law schools' argument that requiring them to permit military recruiting on campus violated the compelled speech doctrine, because "[t]he compelled speech to which the law schools point [such as e-mail announcements of interview times] is plainly incidental to the [statute]'s regulation of conduct").

Respondents' efforts to characterize the production and delivery of a wedding cake as constitutionally protected expression elide the important distinction between initiating a creative project of one's own accord, and filling a customer order as a retail service provider. Colorado's public accommodation law covers "any business offering wholesale or retail sales to the public" and thus includes many establishments whose services entail creativity and artistry. *See* C.R.S. § 24-34-601(1). Service providers like bakers are paid to convey their customers' messages, and the fruits of their labors in commercial contexts are not expressions of their own messages.[2]

Finally, even if CADA were viewed as burdening Respondents' First Amendment rights, the statute would pass constitutional muster. CADA neither targets expressive activities for regulation, nor exempts businesses whose work entails an expressive aspect. C.R.S. § 24-34-101 *et seq*; *see Arcara v. Cloud Books*, 478 U.S. 697,706-7 (1986) (noting that application of "least restrictive means" test is warranted only where statute singles out those engaged in expressive activity or targets conduct with a significant expressive element); *see also O'Brien,* 391 U.S. at 377 (A "government regulation [affecting individual conduct with both speech and non-speech

[2] Respondents' reliance on language in *Hurley* regarding First Amendment protection of the works of artists like Jackson Pollock and Arnold Schöenberg is misplaced. The *Hurley* Court observed that art can convey constitutionally protected messages no matter how abstract or expressionist (rather than concrete and literal) they are. *See* 515 U.S. at 669. It did not address the important distinction between an artist's independently undertaken projects subsequently offered for sale and work performed on commission for a client.

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.").

C. Enforcing CADA does not infringe Respondents' Free Exercise rights

The ALJ correctly determined that enforcement of CADA here does not violate Respondents'[3] right to free exercise of religion. In *Employment Division v. Smith,* the Supreme Court affirmed that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. 872, 879 (1990) (internal quotations omitted). CADA, which bars discrimination on the basis of sexual orientation and several other protected characteristics across a wide variety of public accommodations and other contexts in Colorado, is a valid and neutral law of general applicability. *See* C.R.S. § 24-34-301 *et seq.* Thus, it need only rationally relate to a legitimate governmental interest. *See Employment Div.*, 494 U.S. at 879-80; *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 649 (10th Cir. 2006). CADA bears a rational relationship to state interests in eradicating discrimination and securing equal market access for all Coloradans, and thus its enforcement does not violate Respondents' Free Exercise rights under the U.S. Constitution.

Respondents contend erroneously that exceptions to CADA render it something other than a valid and neutral law of general applicability. In reality, the public accommodations provision of CADA has only two exceptions: one allows types of establishments that have

[3] Complainants contest that Respondent Masterpiece Cakeshop, Inc., can assert claims related to the free exercise of religion, but the analysis here is the same whether or not it applies solely to Respondent Phillips.

traditionally been gender-segregated to remain so without constituting sex discrimination, while the other exempts churches, mosques, synagogues, and other places "principally used for religious purposes." C.R.S. § 24-34-601(1) and (3). These broad, viewpoint-neutral exceptions clearly do not constitute a "system of individual exceptions" that would negate the general applicability of CADA under *Employment Division*. 494 U.S. at 884. They also do not evince intent to target religious conduct; to the contrary, the latter exception affirms faith communities' right to worship as they choose, and thus highlights the distinction between a commercial bakery that is subject to CADA and a house of worship that would not be.

While strict scrutiny does not apply under the U.S. Constitution for the above reasons, and courts have not definitively ruled on whether the Colorado Constitution requires strict scrutiny for religious exercise claims, CADA nonetheless would pass strict scrutiny even if it did apply. First, CADA furthers a "compelling state interest." *See Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 553 (1993). The U.S. Supreme Court, in noting that a Minnesota anti-discrimination statute "plainly serves compelling state interests of the highest order," recognized that discrimination "both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984); *see also Bd. 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); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 250 (1964) (public accommodations laws "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'"); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 283 (Alaska 1994) (noting state has

interests both in "preventing acts of discrimination based on irrelevant characteristics" and in ensuring access for all members of the public).

Further, uniform enforcement of antidiscrimination laws such as CADA is the "least restrictive means" of achieving Colorado's interest in averting the social harms of discrimination. *Lukumi*, 508 U.S. at 578. Governments have recognized that discrimination, regardless of motivation, is a social evil that must be prohibited in all forms. Even if one family is turned away because of who they are, society suffers, as the state's interest in eradicating discrimination "does not involve a numerical cutoff below which the harm is insignificant." *Id.* at 282-83. Accordingly, CADA meets both prongs of the strict scrutiny test.

D. The Relief Ordered by the ALJ was Appropriate

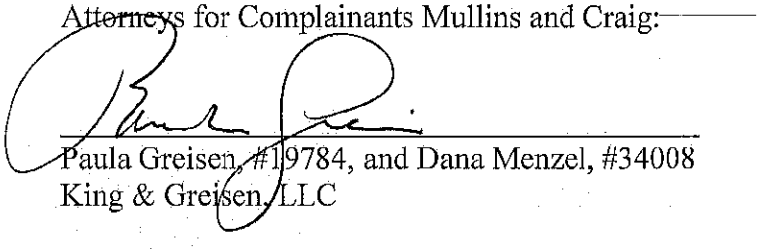
Respondents' objection to the injunctive relief provision in the ALJ's Initial Decision is unfounded, as detailed in the brief submitted by Counsel for the Complaint.

CONCLUSION

For the reasons stated above and in accordance with the ALJ's December 6, 2013 decision, Complainants respectfully ask the Colorado Civil Rights Commission to grant their motion for summary judgment and deny Respondents' motion for summary judgment.

Respectfully submitted this 2nd day of May, 2014.

Attorneys for Complainants Mullins and Craig:



Paula Greisen, #19784, and Dana Menzel, #34008
King & Greisen, LLC

Amanda C. Goad, *pro hac vice*
American Civil Liberties Union Foundation

Mark Silverstein, #26979, and Sara R. Neel, #36904
ACLU Foundation of Colorado

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2014, a true and correct copy of the COMPLAINANTS' OPPOSITION TO RESPONDENTS' APPEAL was filed with the Colorado Civil Rights Commission and served on the parties or their counsel as follows:

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

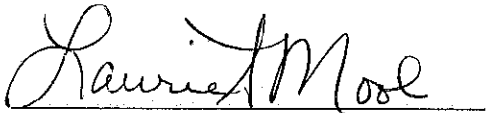
Stacy L. Worthington (via email: Stacy.Worthington@state.co.us)
Civil Litigation & Employment Law Section
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Nicolle H. Martin (via email: nicolle@centurylink.net)
7175 W. Jefferson Avenue, Suite 4000
Lakewood, CO 80235

Natalie L. Decker (via email: natalie@denverlawsolutions.com)
The Law Office of Natalie L. Decker, LLC
26 W. Dry Creek Circle, Suite 600
Littleton, CO 80120

Michael J. Norton (via email: mjnorton@alliancedefendingfreedom.org)
Alliance Defending Freedom
7951 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111

Kristen K. Waggoner (via email: kwaggoner@alliancedefendingfreedom.org)
Alliance Defending Freedom
14241 N.E. Woodinville-Duvall Rd. No. 488
Woodinville, WA 98072



Laurie A. Mool, Paralegal
King & Greisen, LLP