COLORADO COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Suite 300 Denver, CO 80203	
COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202 Case No. 2013-0008	
RESPONDENTS-APPELLANTS: MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, v. PETITIONERS-APPELLEES: CHARLIE CRAIG and DAVID MULLINS.	▲ **COURT USE ONLY** ▲
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APPELLANTS' OPENING BRIEF	

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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 9493 words.

❑ It does not exceed 30 pages.

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

✓ For the party raising the issue:

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 (R.____, p.___), not to an entire document, where the issue was raised and ruled on.

❑ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

✓ 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

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STATEMENT OF THE CASE

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

In July of 2012, Complainants asked Phillips to design and create a wedding cake for their same-sex wedding. Phillips politely declined, explaining that he would gladly make them any other type of baked item they wanted but that he could not make a cake promoting a same-sex wedding because of his religious beliefs. Complainants later filed a complaint with the Colorado Civil Rights Division (Division) alleging discrimination based on sexual orientation, citing Colorado's Anti-Discrimination Act (CADA). The matter was briefed and argued to an Administrative Law Judge (ALJ) in the Office of Administrative Courts who found that Phillips violated CADA's public accommodation statute. Phillips appealed and the Commission adopted the ALJ's ruling and issued a final agency order. Phillips seeks reversal of that order.

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

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be -- I mean, we -- we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to -- to use their religion to hurt others.

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

STATEMENT OF THE FACTS

Phillips opened Masterpiece Cakeshop, Inc. over 21 years ago to pursue his life's vocation – creating outstanding one-of-a-kind cakes. (*Id*. at 789.) Phillips has worked as a cake artist for four decades. (*Id*. at 471, ¶ 27.) Decorating cakes is a form of art and creative expression. The Masterpiece Cakeshop, Inc. logo reflects this by including an artist's palette with a brush and whisk, (*id*. at 471, ¶ 29.), which appears on Phillips's storefront, business cards, and advertising. (*Id*. at

p. 469, ¶ 7, p. 471-72, ¶¶ 28-33, p. 482-85, Exs. 5-8.)

Phillips has dedicated his life's work to honoring his God. (*Id*. at 469, ¶ 7.) As a devout follower of Jesus, Phillips cannot use his gifts and artistic talents to create cakes that express messages contrary to his religious convictions. (*Id*. at 470, ¶ 21.) That is why Phillips will not create cakes celebrating same-sex unions, Halloween, or any other event that violates his conscience. (*Id*. at 475, ¶¶ 60-63.) Simply put, Phillips's work is intimately connected to his faith and he declines work that he does not believe will honor Christ. (*Id*. at 475, ¶ 62.) Phillips believes that God ordained marriage as the sacred union between one man and one woman (*id*. at 469, ¶ 12) that exemplifies the relationship of Christ and His Church. (*Id*. at 469, ¶ 13.) There are few symbols more holy and sacred in the Christian faith. Thus, Phillips politely declined to design and create a cake celebrating Complainants' same-sex wedding (*id*. at 477, ¶ 78), but assured Complainants that he would design and create any other bakery product for them. (*Id*. at 477, ¶ 79.) Phillips did not make ugly comments, question the morality of Complainants' decision to marry or utter any comment that evinced animus toward Complainants. (*Id*. at 477, ¶¶ 78-79, p. 711.) Despite the fact that Phillips's decision was based solely on the conflict between the message sent by a same-sex wedding cake and his sincerely held religious beliefs, the Commission found sexual orientation discrimination.

Although Complainants easily obtained a free wedding cake with a rainbow design from one of the many bakeries in the area, they filed a charge of discrimination with the Division in September 2012. (*Id*. at 1-2.) The Commission then filed a formal complaint against Phillips charging him with discriminating "because of ... sexual orientation." (*See id*. at p. 23-33.)

The Commission appointed an ALJ who ruled at summary judgment that Phillips violated the public accommodation statute. (*Id*. at 711.) The Commission then affirmed the ALJ's decision on May 30, 2014, and ordered Phillips to begin creating wedding cakes celebrating same-sex marriages, to provide retraining of his staff to do likewise, to change his business policies to require the creation of wedding cakes celebrating same-sex marriages, to provide quarterly reports to the Commission for two years, and to document the number of times Phillips declines to provide service to any customer for any reason. (Notice of Appeal, App. A.)

SUMMARY OF THE ARGUMENT

The Commission's final agency order compelling Phillips to make same-sex wedding cakes forces him to abandon his life's work or violate his conscience and celebrate same-sex weddings in order to make a living. This is no choice at all but a shameful and hostile use of the public accommodation statute that this court should condemn. Phillips seeks a reversal of the final agency order, because he did not violate CADA, and even if he did, applying CADA here compels him to create

unwanted expression and act against his religious convictions in violation of his rights to free speech and free exercise under the U.S. and Colorado Constitutions.

ARGUMENT

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

Standard of Review

Whether Phillips engaged in unlawful discrimination in violation of CADA is a question of law reviewed de novo. § 24-4-106(11)(e), C.R.S. 2013. Phillips preserved this issue by raising it in his cross-motion for summary judgment (Supp. PR. CF, Vol. 1, p. 428) and again in his appeal to the Commission. (*Id*. at 569.)

A. Phillips did not discriminate against anyone "because of" their sexual orientation and thus did not violate the public accommodation statute.

CADA requires proof that Phillips declined to design and create a wedding cake for Complainants "because of" their sexual orientation. § 24-34-601(2), C.R.S. 2013. It does not require businesses to always serve members of a protected class but bars them from refusing to serve someone "because of" a protected characteristic. Phillips did not decline to design and create Complainants' wedding cake because of their sexual orientation, but because of the message about same-sex marriage they wished to convey, which is deeply at odds with his religious beliefs. Phillips does not object to, nor does he refuse to serve,

homosexuals. (Supp. PR. CF, Vol. 1, p. 474, ¶ 56.) He does object to expressing a positive message about same-sex marriage, whether requested by homosexuals, heterosexuals, or others. (*Id* at. p. 476, ¶ 67.)

Despite the statute's requirement that the Commission prove discrimination was "because of" sexual orientation (§ 24-34-306(8), C.R.S. 2013), the ALJ "presumed" (Supp. PR. CF, Vol. 1, p. 714) discrimination because "[o]nly same-sex couples engage in same-sex weddings." (*Id*.) This wrongly assumes – without any supporting evidence – that only homosexual couples engage in same-sex weddings, which no law requires.[1] It also wrongly assumes that opposing same-sex marriage is based on opposition to homosexuals. Such a non-sequiter reads a *discrimination per se* standard into the statute. *See* § 24-34-601(2); *People v. Gallegos*, 109 P.3d 585, 593 (Colo. 2005) (Where a provision is clear, the plain and ordinary meaning shall be applied.).

Remarkably, the ALJ relied upon *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) – the very decision that rejected the *discrimination per se* standard. In *Bray*, pro-choice plaintiffs claimed that pro-life defendants sought to deprive pregnant women of equal protection under the law by conspiring to obstruct access to abortion clinics in violation of 42 U.S.C.S. section 1985(3). *Id.*

[1] *See, e.g.*, The Guardian, Marriage of Two Straight Men for Radio Competition Angers Gay Rights Group, *available at http://www.theguardian.com/society/2014/sep/12/marriage-two-straight-men-radio-competition-angers-gay-rights-group* (last visited Jan. 7, 2014).

at 266. The Supreme Court held that the language of section 1985(3) requires proof of a discriminatory intent or animus toward a particular class, *Bray*, 506 U.S. at 269, the same standard used in Colorado's public accommodation statute, § 24-34-601(2).

But the Supreme Court squarely rejected the *per se* rationale the ALJ advanced here. *Bray*, 506 U.S. at 271-72. It found that "[t]his definitional ploy would convert the statute into the 'general federal tort law' that it was the very purpose of the animus requirement to avoid." *Id*. at 269. The Court explained:

> [plaintiffs'] case comes down ... to the proposition that intent is legally irrelevant; that since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class. Our cases do not support that proposition ... Discriminatory purpose ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker [sic] ... selected or reaffirmed a particular course of action at least in part ***because of***, not merely in spite of, its adverse effects upon an identifiable group.

Id. at 271-72 (citations and quotations omitted) (emphasis added).

This analysis makes clear that the very essence of intent to discriminate is a desire to cause harm to an identifiable group. Without this intent, there can be no animus, and thus, no discrimination "because of" sexual orientation. No testimony or other evidence exists in the record that Phillips harbors disdain or ill will toward homosexuals. And this evidence is required to sustain the ALJ's finding of sexual

orientation discrimination. The Commission's contrary ruling, as the *Bray* Court explained lacks "common sense" and should be overturned. *Id*. at 269.

B. The ALJ and the Commission wrongly presumed that Phillips had an intent to discriminate.

The ALJ attempted to distinguish *Bray* by arguing that the demonstrators there "were motivated by legitimate factors other than ... sex." (Supp. PR. CF, Vol. 1, p. 714.) But the ALJ wholly failed to consider the "factors" that formed the basis of Phillips's decision. In fact, he ALJ never considered any "factors"—legitimate or otherwise—that informed Phillips's actions. Rather, he simply presumed discrimination without recognizing Phillips's religious belief that it is a sin for him to use his gifts, time and talents to participate in a same-sex wedding, or any other event that violates his faith. (*Id*. at 470.)

Ignoring such undisputed facts (*Id*. at 530-31) and presuming discrimination is precisely what the *Bray* Court rejected. *See Bray*, 506 U.S. at 270. The Supreme Court concluded that intent to discriminate can only be presumed where two factors are present: (1) the conduct at the root of the discrimination must be targeted and (2) the underlying conduct is engaged in "predominantly or exclusively" by a certain class of people. *Id*. The ALJ failed to apply either prong here. Indeed, the ALJ failed to make a finding at all as to the first prong. The record is devoid of evidence that Phillips targeted homosexuals as a group or that he targeted Complainants. Without such a finding, intent to discriminate under

Bray cannot be presumed. And "equating opposition to an activity that can be engaged in only by a certain class with opposition to that class leads to absurd conclusions." *Id*. at 273 n.4. Opposition to rape, as the *Bray* Court explained, would equate to "an invidious antimale animus." *Id*. Indeed, there is almost no limit to the absurdity that this analysis creates: Opposition to gambling would equate to animus toward gamblers. And opposition to in vitro fertilization would equate to animus toward infertile people.

Finally, the ALJ wrongly ignored Phillips's offer to design and create other cakes for Complainants. (Supp. PR. CF, Vol. 1, p. 711.) Animus toward homosexuals simply cannot be shown under these facts. Phillips's beliefs only prevent him from creating an expressive cake (a wedding cake) that uniquely commits Phillips to expressing support for same-sex marriages. (*Id*. at 470, ¶ 21, p. 473, ¶ 45, p. 477, ¶ 68, p. 478, ¶ 86.) Phillips thus cannot engage in *speech* endorsing same-sex marriages regardless of the sexual orientation of the persons requesting that speech. That status is simply irrelevant. The government and Complainants have thus failed to meet their burden of proving discrimination "because of" sexual orientation.

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

Standard of Review

Appellate courts reviewing compelled-speech claims must independently examine the record without deference to the lower courts on any issue, including factual findings. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995); *see also Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). Phillips preserved this issue by raising it in his cross-motion for summary judgment (Supp. PR. CF, Vol. 1, p. 448) and again in his appeal to the Commission. (*Id*. at 570.)

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

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

because he or she is paid to speak."). The First Amendment thus applies here because the items that the Commission's order would require Phillips to design and create—wedding cakes—are inherently expressive.

1. Wedding cakes constitute symbolic speech.

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

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

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

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

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

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

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

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[4] "Wedding cake," Merriam Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/wedding%20cake (last visited December 21, 2014).
[5] *See* Mich Turner, *Wedding Cakes* at cover page (2009).
[6] *Id.*

as a symbol of wealth and status.[7] Over the years, the three-tiered, round wedding cake became traditional symbols of the engagement ring, the wedding ring, and the eternity ring.[8] And if any doubt exists as to whether wedding cakes remain expressive, one need only look at the multicolor filling Complainants selected, which mirror the rainbow—a well-recognized symbol of the gay pride movement. (*Id*. at 495, 501-02.)

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

What is more, the ALJ had to acknowledge that cakes are expressive (*id*. at 718) when confronted with the government forcing a hypothetical black or Jewish cake artist to create a cake celebrating the Aryan Nations Church or a homosexual baker to design a cake celebrating the Westboro Baptist Church. *Id*. at 791. The

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

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

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

The Free Speech Clause prohibits government from turning private citizens, like Phillips, into "instrument[s] for fostering public adherence to an ideological point of view [they] find[] unacceptable," *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), regardless of what others find outrageous. And the very "point" of the compelled speech doctrine "is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574.

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

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

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

Phillips is undoubtedly the speaker when he designs and creates wedding cakes. Complainants may also be speakers with respect to certain elements under their control, such as a rainbow theme. (Supp. PR. CF, Vol. 1, p. 495.) But Phillips's creativity and artistic skill, which are "considerable," (*id.* at 716) permeate the finished cake. Phillips spends considerable time consulting with his

customers, (*id*. at 472, ¶¶ 37, 40), and sketching the design of the desired cake. (*Id*. at 473, ¶ 44.) Depending upon the design, Phillips may also transform a simple sheet cake into a sculpture. (*Id*. at ¶ 42.) Colors and decorations are forged by hand and ultimately, the cake is artfully put together. (*Id*. at ¶ 44.)

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

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

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

Speech is compelled when the government punishes private actors for refusing to engage in unwanted expression, *Wooley*, 430 U.S. at 715, or forces them to alter their expression by "accommodate[ing] another speaker's message."

Rumsfeld v. FAIR, 547 U.S. 47, 63-64 (2006) (citing *Hurley*, 515 U.S. at 559 (forcing parade organizer to include LGBT group's message violated First Amendment; *Pacific Gas*, 475 U.S. at 9 (compelling plaintiff to include opposing third-party speech in plaintiff's monthly newsletter violated First Amendment); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (right-of-reply statute in favor of third parties violates editors' right to determine a newspaper's content)). As applied here, the public accommodation statute violates the First Amendment by punishing Phillips for refusing to design and create a wedding cake that he finds morally objectionable, and by forcing him to facilitate Complainants' symbolic message.

The ALJ wrongly focused on whether Phillips's conduct in preparing a wedding cake is expressive, noting only in passing that the finished cake "does not necessarily qualify as 'speech.'" (Supp. PR. CF, Vol. 1, p. 716.) But the proper question is not whether the *conduct* in creating a cake is expressive; (*id*.) it is whether Phillips's artistic creation is expressive. *See Hurley*, 515 U.S. at 568-70 (evaluating whether the service that the complainant sought to access—the defendant's parade—was expressive); *cf. Rumsfeld*, 547 U.S. at 64 (noting "the expressive quality" of "a parade" (*Hurley*), "a newsletter" (*Pacific Gas*), and an "editorial page" (*Tornillo*)). The ALJ wrongly employed the test for expressive-conduct instead of that for compelled speech. (Supp. PR. CF, Vol. 1, p.716.)

Never has the Supreme Court treated those discrete claims the same. *Compare Rumsfeld*, 547 U.S. at 61-65 (analyzing a compelled-speech claim); *with id*. at 65-68 (analyzing an expressive-conduct claim); *accord Wooley*, 430 U.S. at 713 (treating expressive conduct differently from compelled speech).

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

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

The *Rumsfeld* Court distinguished such event announcements from

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

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

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

A compelled-speech violation also occurs when (1) the government "force[s] one speaker to host or accommodate another speaker's message" and (2) the hosting speaker's expression is "affected by the speech it [is] forced to

accommodate." *Rumsfeld*, 547 U.S. at 63. The Commission's order in this case not only directly requires Phillips to create expression, but it also mandates that he "host or accommodate another speaker's" views. *Id*. at 63.

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

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

Third, the Commission's order changes Phillips's own expression that marriage is a union between one man and one woman ordained by God, exemplified by Christ's relationship with His Church. (Supp. PR. CF, Vol. 1, p. 469, ¶¶ 12-13.) Designing and creating wedding cakes *only* for one-man-one-woman marriages powerfully communicates that is what "marriage" means to Phillips. Forcing him to create and design wedding cakes celebrating any other

type of union irreversibly alters this message and effectively requires him to disavow his religious beliefs about marriage. Phillips is "forced either to appear to agree" with the messages communicated by same-sex wedding cakes "or to respond" by clarifying his contrary views. *See Pacific Gas*, 475 U.S. at 15. The First Amendment bars the State from imposing that choice. *See Hurley*, 515 U.S. at 573 (recognizing that free speech "applies ... equally to statements of fact the speaker would rather avoid").

Moreover, Phillips cannot effectively clarify his religious views if forced to design and create same-sex wedding cakes in practice. The public accommodation statute forbids expression or communication "that indicates that ... an individual's patronage or presence at a place of public accommodation is ... unwelcome, objectionable, unacceptable or undesirable because of sexual orientation." § 24-34-601(2). The Commission likely views any expression reflecting negatively on same-sex marriage; for example, "Masterpiece Cakeshop believes that Jesus regards marriage as between a man and a woman, and anything else is sinful," (Supp. PR. CF, Vol. 1, p. 470, ¶ 15), as a violation of this vague statutory language.

Rather than celebrating or condemning the joining of two people of the same sex in marriage, Phillips would prefer to remain silent on that subject. *See Pac. Gas*, 475 U.S. at 9-10 (noting government cannot "force[] speakers to alter their

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

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

Finally, the ALJ relied on two war-powers cases (*O'Brien* and *Rumsfeld*),

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

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

The Supreme Court concluded that applying a state nondiscrimination law to require the parade organizers to engage in unwanted third-party speech that affected their message violated the First Amendment. *Id*. at 559; *see also id.* at 581 ("Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others."); *id.* at 579 ("The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some

groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.").

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

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

Standard of Review

Whether the Commission's decision forcing Phillips to design and create same-sex wedding cakes violates the Free Exercise Clause of the First Amendment of the U.S. Constitution and Article II, Section 4 of the Colorado Constitution is a question of law reviewed de novo. § 24-4-106(11)(e). Phillips preserved this issue by raising it in his cross-motion for summary judgment (Supp. PR. CF, Vol. 1, p. 456) and again in his appeal to the Commission. (*Id*. at 574.)

The U.S. Constitution and the Colorado Constitution protect the free exercise of religion. U.S. Const. amend. I; Article II, § 4 of the Colorado Constitution. Consequently, Phillips is entitled to broad protection under both state

and federal law. But the ALJ found no protection for religious conduct if it is otherwise "prohibited by law." (Supp. PR. CF, Vol. 1, p. 719.)

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

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

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

religious views abhorrent to the authorities." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Sadly, that is what happened below.

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

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

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

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

protections to require strict scrutiny.[10]

Here, the ALJ erroneously applied the *Smith* standard. But *Smith* does not govern claims under the Colorado Constitution. In fact, the ALJ wrongly relied on *Town of Foxfield v. Archdiocese of Denver*, 148 P.3d 339 (Colo. App. 2006), which involved a First Amendment claim, not a claim under the Colorado Constitution. The petition for writ of certiorari stated the issue: "Whether the ... parking ordinance is subject to strict scrutiny under the *United States Constitution*." *Town of Foxfield v. Archdiocese of Denver*, 2006 WL 3703933 (Colo. 2007) (emphasis added).

The Colorado Supreme Court has not definitively decided whether to follow *Smith*'s approach when interpreting Colorado's free exercise clause or that of a majority of states, which are more protective of religious liberty. *See Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.*, 2013 COA 20, ¶ 61, *cert. granted*, 2014 WL 1046020 (Colo. Mar 17, 2014) *argued* (Dec. 10, 2014) (certiorari not

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

sought on this issue). Thus, this court is free to apply strict scrutiny. And there are at least two compelling reasons why this Court should do so.

First, Colorado has historically applied strict scrutiny to infringements of fundamental rights. *See Engraff v. Indus. Comm'n,* 678 P.2d 564, 567 (Colo. App. 1983) (applying strict scrutiny to state statute burdening the plaintiff's federal free exercise rights under First Amendment); *see also In re E.L.M.C*, 100 P.3d 546, 552 (2006) (strict scrutiny applies to laws affecting parent-child relationship); *Tattered Cover, Inc. v. City of Thornton,* 44 P.3d 1044, 1057 (Colo. 2002) (compelling interest required when law implicates free speech rights); *In re Custody of C.M.,* 74 P.3d 342, 344 (Colo. App.2002) ("[A] "legislative enactment that infringes on a fundamental right is constitutionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible.").

Second, the Colorado Supreme Court has long recognized that it is free to give broader protection under the Colorado Constitution than is accorded by the U.S. Constitution. It has, in fact, done so with certain state constitutional rights, including freedom of speech. *Bock,* 819 P.2d at 59-60 (finding that Colorado's free speech provision provides greater protection than the First Amendment).

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

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

In this case, there is no legitimate reason – compelling or otherwise – for granting a religious exemption from the statute to other religious actors, but denying one to Phillips. Phillips's religious reasons for objecting to same-sex marriage are exactly the same and granting these groups an exception from the statute "endangers [the government's] interests" in preventing "discrimination" based on sexual orientation to an identical degree. *See Lukumi*, 508 U.S. at 543 (noting a law lacks general applicability when it "fail[s] to prohibit nonreligious

conduct that endangers [the government's] interests in a similar or greater degree"); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (same). Hence, the Ordinance is not generally applicable and is subject to strict scrutiny.

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

The State thus exempts most religious groups from the statute's restrictions on places of public accommodation. *See* § 24-34-601(1). Yet it has refused to do the same for Phillips. *See Blackhawk*, 381 F.3d at 209 (for a law to be "neutral" it must "not target religiously motivated conduct either on its face or as applied in practice"). In so doing, the State has engaged in the "differential treatment of two religions," which is not religiously neutral. *Lukumi*, 508 U.S. at 536; *see also id.* at 536 (exempting kosher slaughterhouses but not other religious killings from a ban on animal cruelty is not religiously neutral and may constitute "an independent constitutional violation").

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

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

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

Smith explained that strict scrutiny applies to laws burdening free exercise rights when another constitutional right, such as freedom of speech, freedom of association, or freedom of the press, is *also* burdened. *Smith*, 494 U.S. at 881. Phillips presents such a hybrid free-exercise and compelled speech claim here. *See*

Axson-Flynn, 356 F.3d at 1295-97. Certainly, the ALJ's decision substantially burdens the free exercise of religion and also compels artistic expression. The government and Complainants must therefore show that applying the public accommodation statute to Phillips satisfies strict scrutiny. *See Thomas v. Review Bd. of Industry Employment Security Division*, 450 U.S. 707, 718 (1981).

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

Standard of Review

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

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

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

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

In *Hurley*, for example, the Court did not evaluate the government's general interest in preventing discrimination, but its particular interest in applying the law to the parade at issue. *Id*. at 578. There, as here, the public accommodation law's purpose is "simply to require [Phillips] to modify the content of [his] own expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id*. As Complainants have explained, they "want Masterpiece Cake Shop's policy toward gay weddings to change." (Supp. PR. CF, Vol. 1, p. 499.) But this seeks "to allow exactly what the general rule of speaker's autonomy forbids." *Id*.

Moreover, "[a] law [also] cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (alterations omitted). The public accommodation statute, as explained above, exempts religious organizations and

same-sex clubs and schools from its scope. It thus fails the first prong of the compelling interest test.

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

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

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

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

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

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

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

Because all of these options are "less restrictive of speech" than forcing Phillips to engage in creative expression, "the State must use [these] alternative[s] instead." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 582 (2001). Importantly,

under strict scrutiny, courts may "not assume [such] plausible, less restrictive alternative[s] would be ineffective." *Playboy*, 529 U.S. at 824.

V. The Commission Erroneously Denied Phillips's Motions to Dismiss.

Standard of Review

Whether the Commission erred in denying Phillips's Motions to Dismiss Pursuant to C.R.C.P. 12(B)(1)(2) and (5) is a question of law reviewed de novo. § 24-4-106(11)(e). Phillips preserved this issue by raising it in his appeal to the Commission. (Supp. PR. CF, Vol.1, p. 568.)

Phillips filed two motions to dismiss on the grounds that (1) the Commission never established jurisdiction over Phillips in violation of both §§ 24-34-604, C.R.S. 2013 and 24-34-306(2)(b)(II), C.R.S. 2013, and (2) neither Phillips nor Masterpiece was served with notice of the alleged violation of the public accommodation statute in violation of § 24-34-306(2)(b)(II).

Complainants' Charge of Discrimination alleged that Masterpiece alone violated Colorado's public accommodation statute. § 24-34-601. The Charge named only Masterpiece; not Phillips. Section 24-34-604 requires that a Charge be filed within 60 days of the alleged discriminatory act "and if not so filed, it shall be barred." The ALJ lacked discretion to disregard this mandatory language in the statute. *Id.; see Wilson v. Hill*, 782 P.2d 874, 875 (Colo. App. 1989) (holding that similar language indicating "in no event later than sixty days" established a

jurisdictional requirement).

Section 24-34-306(2)(b)(II) requires that "[i]f the director ... determines that probable cause exists, the director ... shall serve the respondent with written notice stating with specificity the legal authority and jurisdiction of the commission and the matters of fact and law asserted." The Division never issued any probable cause determination to Phillips as required by the clear mandate in this statute. As such, the Commission and the ALJ never had jurisdiction over him.

The ALJ excused this failure by suggesting the "oversight" caused Phillips no prejudice. (Supp. PR. CF, Vol. 1, p. 381.) But there is a significant distinction between Masterpiece as a corporation, and Phillips, as an individual. Indeed, "[c]orporate veils exist for a reason and should be pierced only reluctantly and cautiously. The law permits the incorporation of businesses for the very purpose of isolating liabilities among separate entities." *Cascade Energy and Metals Corp. v. Banks*, 896 F.2d 1557, 1576 (10th Cir. 1990) (applying Utah law), *cert. denied*, 498 U.S. 849 (1990); *Skidmore v. Canada Life*, 907 F.2d 1026, 1027 (10th Cir. 1990) (applying Colorado Law) ("Disregarding the corporate form is a drastic remedy."). The ALJ wrongly pierced the corporate veil without justification.

Moreover, Phillips is prejudiced by the Commission's ruling because of his exposure of up to $500 in personal liability for each offense, (§ 24-34-602 (1),

C.R.S. 2013), and a potential two-year jail sentence.[11] *See Jarnagin v. Busby, Inc.*, 867 P.2d 63, 69 (Colo. App. 1993). The ALJ consequently erred in denying Respondents' motions to dismiss pursuant to C.R.C.P. 12(b)(1), (2) and (5).

Phillips filed a second motion to dismiss pursuant to C.R.C.P. 12(b)(5) because the probable cause "Determinations" issued in this case by the Director state that "Respondent has violated C.R.S. 24-34-402," which outlaws discriminatory or unfair employment practice. (Supp. PR. CF, Vol. 1, p. 0016, 0021.) There is no nexus between the Director's probable cause determinations, which rest on discriminatory employment practices, and the Charge of Discrimination that allege Masterpiece (and not Phillips) discriminated against Complainants in a place of public accommodation. *See* § 24-34-306(2)(b)(II) (requiring specific notice). The ALJ thus erred in denying Respondents' motion to dismiss.

VI. The Commission Erroneously Granted Complainants' Motion for Protective Order and Erroneously Struck Portions of Phillips's Discovery Requests.

Standard of Review

Whether the Commission erred in granting Complainants' Motion for Protective Order is a question of law reviewed for abuse of discretion. § 24-4-106

[11] When the Director issued the findings of probable cause against Masterpiece, the penalty and fine was set at 12 months in jail and/or a fine. § 24-34-602(2), C.R.S. 2012.

(11)(e); *See Mayer v. Dist. Court of County of Arapahoe*, 597 P.2d 577, 578 (Colo. 1979). Phillips preserved this issue by raising it in his appeal to the Commission. (Supp. PR. CF, Vol. 1, p. 569.)

The ALJ erred in preventing discovery by Phillips as to the type of cake Complainants wanted and the nature of their ceremony, although this evidence is highly relevant to Phillips's free speech and free exercise claims. *See, e.g.*, (*id.* at 716) ("For all Phillips knew ... Complainants might have wanted a nondescript cake.") The ALJ thus committed reversible error.

VII. The Order Requiring Phillips to Cease and Desist from Discriminating Against Complainants and Other Same-Sex Couples is Overbroad and Exceeds the Scope of Relief Authorized by COLO. REV. STAT. §§ 24-34-306(9) and 24-34-605.

Standard of Review

Whether the Commission's order requiring Phillips to cease and desist from refusing to design and create same-sex wedding cakes is overbroad and exceeds the scope of relief authorized pursuant to §§ 24-34-306(9), C.R.S. 2013 and 24-34-605, C.R.S. 2013 is a question of law reviewed de novo. § 24-4-106(11)(e). Phillips preserved this issue by raising it in his appeal to the Commission. (Supp. PR. CF, Vol. 1, p. 576.)

In *World Wide Construction Services Inc. v. Chapman*, 683 P.2d 1198 (Colo. 1984), the Colorado Supreme Court held that the Commission may only provide the remedies authorized by its enabling statute. *See Colo. Civil Rights*

Comm'n v. Travelers Ins. Co, 759 P.2d 1358, 1371 (Colo. 1988). Section 24-34-306(9) states that the Commission shall issue "an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such action as it may order in accordance" with CADA. The Commission thus has no authority to issue a cease and desist order as to unidentified non-parties.

CONCLUSION

Phillips and Masterpiece Cakeshop, Inc. 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 9th day of January, 2015.

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CERTIFICATE OF SERVICE

I certify that on this 9th day of January, 2015, a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** was filed with the Colorado Court of Appeals via ICCES and served via ICCES, on the Colorado Civil Rights Commission and the parties and/or their counsel of record as follows:

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