DATE FILED: April 27, 2023 1:30 PM
FILING ID: 6205C4892BB09
CASE NUMBER: 2023SC116

COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Petitioners: Masterpiece Cakeshop, Inc, a Colorado Corporation, and JACK PHILLIPS, an individual v. **Respondent**: AUTUM SCARDINA, an individual.	▲ COURT USE ONLY ▲
Andrew Nussbaum, #50391 Nussbaum Gleason PLLC 2 North Cascade Avenue, Suite 1430 Colorado Springs, CO 80903 Phone Number: (719) 428-4937 E-mail: andrew@nussbaumgleason.com Attorney for Amicus Curiae Truth and Liberty Coalition	Supreme Court Case No: 2023SC116

BRIEF OF AMICUS CURIAE TRUTH AND LIBERTY COALITION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief of amicus curiae complies with the applicable word limit set forth in C.A.R. 29(d) and C.A.R. 53(g), as it contains 2948 words (excluding the caption page, this certificate page, the table of contents, the table of authorities, and the signature block). Furthermore, the amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Andrew Nussbaum
Andrew Nussbaum

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Pursuant to C.A.R. 53(g), the Truth and Liberty Coalition, submits this brief as amicus curiae in support of Petitioners Masterpiece Cakeshop and Jack Phillips' Petition for Writ of Certiorari.

Statement of Interest of Amicus Curiae

Truth and Liberty Coalition, Inc. is a Colorado non-profit corporation, based in Woodland Park. The mission of Truth and Liberty Coalition is to educate, unify, and mobilize followers of the Lord Jesus Christ to stand for truth in all areas of cultural influence, including the family, church, business, education, arts and entertainment, media, and government. Truth and Liberty recognizes that modern political and cultural forces have caused many Christians to become uncertain and fearful about how to live for Christ and express their faith publicly. Truth and Liberty works therefore to encourage and equip believers to live consistently with a biblical worldview and Christ's commands by sharing Truth in all aspects of life, both public and private, both in word and action.

Truth and Liberty's interest in this case lies in ensuring that Colorado's Christians' inalienable rights to speak and live according to the Truth is respected by state authority. A troubling trend has appeared in recent years that administrative bodies and courts across Colorado and the West have gone out of their way to apply neutral procedures in non-neutral ways in suits that threaten morally orthodox Christian belief. It is imperative for Truth and Liberty's mission that Christians be allowed to defend their rights in impartial courts of law.

Questions Presented

1. Does the Colorado Anti-Discrimination Act's (CADA's) discretionary exemption of speech deemed "offensive" violate the Free Exercise Clause when that exemption has been applied to protect secular beliefs but not Christian beliefs like Petitioners'?

2. Did the court below violate the Free Exercise Clause by refusing to enforce CADA's administrative-exhaustion requirement, when it has required administrative exhaustion in cases involving secular institutions?

3. Despite CADA's strong policy favoring conciliation, did the court below create a perverse incentive for religious defendants to refuse any conciliation efforts by exposing religious institutions to private CADA enforcement actions *after* settling with the Colorado Civil Rights Commission?

Introduction

This case is many things—a layup fact pattern of government discrimination against symbolic expression, the latest episode in the ongoing crusade to punish Petitioner Jack Phillips, another example of Colorado's targeting people of faith to conform their lives and livelihoods to nascent orthodoxies[1]—but at its most basic, nuts-and-bolts-of-the-law level, this case reflects the courts

[1] *Cf e.g.*, *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1191 (10th Cir. 2021) (Tymkovich J., dissenting) ("But the majority takes the remarkable—and novel—stance that the government may force Ms. Smith to produce messages that violate her conscience."), *cert. granted in part*, 212 L. Ed. 2d 6, 142 S. Ct. 1106 (2022).

below bending the procedural rules to reach a desired result: ending Mr. Phillips's ability to make art consistent with his religious beliefs. As Chief Judge Tymkovich noted in a related context, Colorado has moved in recent years from an ethos of "live and let live" to one of "you can't say that." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1191 (10th Cir. 2021) (Tymkovich C.J., dissenting), *cert. granted in part,* 212 L. Ed. 2d 6, 142 S. Ct. 1106 (2022). This case typifies that paradigm shift.

Change the ideological valence of the facts and there is no doubt that the courts below would have rejected Respondent's claims as procedurally barred. Imagine a customer who asked for a custom cake with white frosting and red cake. The cake maker says *yes*, he can make such a cake. The customer then responds that the cake is for the Feast of the Holy Innocents and that the white frosting represents the purity of all unborn children, and the red cake reflects the murder of millions of children from abortion since the issuance of *Roe v. Wade*. The cakemaker refuses to make the cake because it is offensive to him as a person committed to a woman's ability to terminate her pregnancy.

The Court needn't guess whether the Colorado Civil Rights Division, Commission, or the courts below would've refused to prosecute such a case. They already have so refused. As Justice Gorsuch explained in his concurrence to *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commision*, 138 S. Ct. 1719, 1735 (2018) (*Masterpiece I*), William Jack requested several cakes from a Colorado baker that by their design conveyed a message disapproving of gay marriage. The baker refused to bake them because, to the baker, the message was offensive of his secular convictions.

Mr. Jack filed a charge of discrimination with the Colorado Civil Rights Division. The Colorado Civil Rights Division and Colorado Civil Rights Commission denied Mr. Jack's charge because the requested cake offended the baker. Yet this so-called "offensiveness" rule was not applied in this case.

Nor did the courts below apply CADA's requirement that, to the extent a claimant wishes to appeal a settlement between the Commission and a CADA defendant, the claimant must appeal the settlement to the Colorado Court of Appeals. At the court of appeals, the settlement would be entitled to a deferential standard of review. Here, the court below overlooked this rule, allowing Respondent to restart this case at the district court *de novo*. Not only is the lower court's disregard of the law entirely improper procedurally, it strongly disincentivizes CADA's strong policy favoring conciliation.

Amicus curiae—as a Colorado institution called to defend biblical truth in all facets of politics and culture—files this brief in support of Petitioners because it believes that all Coloradoans, including those of orthodox religious faith, are entitled to a fair and equal hearing according to CADA's settled procedural rules. The Court should grant certiorari and reverse the decision below with instructions to dismiss Respondents complaint with prejudice.

Argument

1. CADA's offensiveness exception violates the Free Exercise Clause.

In *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021), the Supreme Court held that government action that *a)* burdens religious exercise and *b)* permits for discretionary exemptions violates the Free Exercise Clause unless the government can satisfy strict scrutiny. *Fulton* concerned Philadelphia's standard foster-care contract for childcare agencies in the City, which on one hand, prohibited an agency from rejecting "a child or family including, but not limited to, . . . prospective foster or adoptive parents, for Services based upon . . . their . . . sexual orientation," while at the same time permitting the City to grant "an exception" to this prohibition in the City's "sole discretion." *Id.* at 1878. The Supreme Court explained that a system of discretionary exemptions like Philadelphia's "renders a policy not generally applicable, regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Id.* at 1879 (cleaned up). Thus, the Court ruled that "the contractual non-discrimination requirement imposes a burden on CSS's religious exercise and does not qualify as generally applicable" under *Employment Division v. Smith,* 494 U.S. 872 (1990) rendering it subject to strict scrutiny. *Id.* at 1881.

If anything, CADA's offensiveness standard is worse than the discretionary exception ruled unlawful in *Fulton* because it expressly invites consideration of whether the speech at issue is derogatory. In the William Jack cases, Mr. Jack asked three bakers to make three different cakes that

conveyed messages that expressed Mr. Jack's religiously-informed belief regarding traditional marriage. *Masterpiece Cakeshop I*, 138 S.Ct. at 1735. The baker refused to make the cakes because, in the baker's view, they cakes conveyed a "derogatory" message. *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, ¶ 63. Mr. Jack filed a charge of discrimination with the Colorado Civil Rights Division and Commission, but it and the Colorado Civil Rights Division dismissed the case, because the cakes requested by Mr. Jack were offensive to the baker's secular convictions. *Masterpiece Cakeshop I*, 138 S.Ct. at 1735

The opinion below incorrectly disregarded the Jack cases as inapposite on the ground that Mr. Jack's cakes contained symbols *and* words, whereas the cakes requested by Respondent requested symbolic decoration only. *Scardina*, 2023 COA 8, ¶¶ 63-64. This distinction is immaterial under *Fulton*, however. As *Fulton* explained, the existence of a discretionary exemption in and of itself is what triggers strict scrutiny "because [the exemption] invites the government to decide which reasons for not complying with the policy are worthy of solicitude." 141 S.Ct. at 1879. The fact that there *is* a discretionary offensiveness exception under CADA is the material issue—not how or why it was enforced.

Yet even if the court below's reading of the Jack cases was correct—that the offensiveness exception permits the Commission to dismiss cases based on a cakemaker's message-based refusal—that rule must be applied in this case. It is undisputed that the reason Mr. Phillips and Masterpiece Cakeshop refused to make Respondent's cake is because the message Respondent's cake

conveyed conflicted with Mr. Phillips' deeply held religious beliefs. *Scardina*, 2023 COA 8, ¶ 6. Under the First Amendment, that rule must be applied equally to messages the Commission views as offensive *and* messages that offend morally orthodox Christian beliefs such as Mr. Phillips's. Anything less imposes a heads-I-win-tails-you-lose standard for traditionally minded Coloradoans facing liability under CADA. That might be fine in other contexts. But because CADA's offensiveness standard has been applied to shield from liability bakers who disagree with morally orthodox Christian teaching, it must also be applied as a shield for Petitioners in this case. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) ("[R]egulations cannot be viewed as neutral [if] they single out [religious institutions] for especially harsh treatment.").

2. The court below turned CADA's administrative-exhaustion requirement on its head to reach its desired result.

The failure of the courts below to dismiss Respondent's claims because they run afoul of CADA's offensiveness exemption is reason alone to grant Petitioners' petition and reverse with instructions to dismiss with prejudice. But in addition, the court below incorrectly overlooked a similarly egregious distortion of CADA's normal procedures that in any secular context would (and have) required dismissal of a claim: CADA's requirement that, absent certain narrow exceptions, review of a final order of the Colorado Civil Rights Commission be appealed directly to the court of appeals under a deferential standard of review.

The default rule under CADA is that the Colorado Civil Rights Commission has exclusive jurisdiction over a charge of discrimination until it issues a final order regarding the complainant's

allegations. C.R.S. § 24-36-306(11), (14). Once a final order is issued, if the complainant believes they are "aggrieved by a final order of the commission," which CADA defines to include "*refusal* to issue an order," the aggrieved complainant's lone remedy is an appeal to the Colorado Court of Appeals. C.R.S. § 24-37-307(1)-(2) (emphasis added). Thus, if CADA's rules had been followed in this case, when the Commission settled the complaint with Mr. Phillips and Masterpiece below, Respondent Scardina's lone remedy was filing an appeal with the Colorado Court of Appeals, which Scardina did not do. Importantly, such an appeal would have proceeded under a standard of review highly deferential to the Commission's decision to settle the claim with Mr. Phillips and Masterpiece. *See Agnello v. Adolph Coors Co.*, 689 P.2d 1162, 1165 (Colo. App. 1984) (Commission's decision will be upheld unless it is "arbitrary.").

There are two narrow exceptions to this rule, each of which permits a claimant to file a *de novo* district-court action, neither of which is present here. First, a claimant may file a *de novo* district-court action if:

> (I) Written notice that a formal hearing will be held is not served within four hundred fifty days after the filing of the charge;
> (II) The complainant has requested and received a notice of right to sue pursuant to subsection (15) of this section; or
> (III) The hearing is not commenced within the one-hundred-twenty-day period prescribed by subsection (4) of this section.

C.R.S. § 24-36-306(11). Second, the claimant can proceed directly to district court "if his ill health which is of such a nature that pursuing administrative remedies would not provide timely and reasonable relief and would cause irreparable harm." C.R.S. § 24-36-306(14). CADA makes no other

exceptions to its requirement that a claimant must "first exhaust[] the proceedings and remedies available to him under" the Act. *Id.*

These statutorily required administrative review procedures were the rules followed in a secular dispute involving Coors in *Agnello v. Adolph Coors Co.*, 689 P.2d 1162 (Colo. App. 1984) (*Agnello I*) and *Agnello v. Adolph Coors Co.*, 695 P.2d 311 (Colo. App. 1984) (*Agnello II*). In *Agnello I*, a claimant who disagreed with a settlement reached after conciliation between the Commission and Coors, the claimant's employer, appealed directly to the court of appeals to review the reasonableness of the Commission's settlement. 689 P.2d at 1164-65. The Court rejected her appeal under the "presumption that an administrative body acts fairly." *Id.* In *Agnello II*, the claimant filed a *de novo* district-court action based on the same conduct that was settled by the Commission and Coors in *Agnello I*. The Court of Appeals affirmed dismissal on the ground that the district court lacked jurisdiction: "because conciliation efforts were successful [in *Agnello I*], the district court could not acquire jurisdiction under § 24–34–306(11), C.R.S." *Agnello II*, 695 P.2d at 313. In other words, the Court in *Agnello II* held that because the narrow exceptions in C.R.S. §§ 24-34-306(11), (14) were not present in the case, the claimant could not file a *de novo* district court action.

CADA's requirement of administrative exhaustion should have ended Respondent's case before it began. Respondent did not appeal the settlement between the Commission and Petitioners under C.R.S. § 24-37-307. And the conditions precedent to a *de novo* district court action were not present—a point which the court below conceded. *Scardina*, 2023 COA 8, ¶ 30 ("[W]e agree that

none of the conditions set forth in section 24-34-306(11) existed in this case."). Worse, Colorado courts have now applied CADA's administrative-requirement unequally. Dismissing unexhausted claims involving secular businesses, while allowing unexhausted claims involving religious individuals and institutions, is another way in which the organs of Colorado's government have gone out of their way to violate the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) ("The Free Exercise Clause protects religious observers against unequal treatment." (cleaned up)).

The court below chose to look past these requirements for two incorrect reasons. First, the court below saw *Agnello I* as distinguishable because *claimant* had "accepted the [settlement] agreement" before appealing it. *Scardina*, 2023 COA 8, ¶ 27. But that's inaccurate. *Agnello I* noted that "the *director* [of the Colorado Civil Right Division] was ultimately satisfied when she received and accepted the agreement," but that "the conciliation efforts [did] not have to satisfy" the claimant. *Agnello I*, 689 P.2d at 1165 (emphasis added). The court below thus misread *Agnello I*, a misreading which allowed it to reach the conclusion that Respondent's claims were not barred. Second, the court below relied on *Demetry v. Colorado C.R. Comm'n*, 752 P.2d 1070, 1071 (Colo. App. 1988), for the proposition that if the Commission dismisses a charge of discrimination, a claimant can proceed directly to the district court for a *de novo* determination of the case. *Scardina*, 2023 COA 8, ¶¶ 21-24. But to the extent that *Scardina* accurately characterizes the holding of *Demetry* (a non-

binding decision), *Demetry* is in direct conflict with the plain text of CADA's administrative exhaustion requirement, which must control.

3. The decision below strongly disincentivizes conciliation.

Finally, the decision of the court below creates a perverse incentive for religious institutions and individuals to refuse to engage in CADA's conciliation process so that they will be subject to only one district court action. CADA requires the director of the Colorado Civil Rights Division upon receiving a claim and determining probable cause exists to immediately thereafter "endeavor to eliminate the discriminatory or unfair practice by conference, conciliation, and persuasion and by means of the compulsory mediation." C.R.S. § 24-34-306(2)(b)(II). If conciliation is effective, the case can be resolved at the outset, without recourse to a formal hearing before the Commission, a district-court action, or appeal to the Commission. This is what happened in the *Agnello* cases. Rather than litigate the issues identified by the claimant, Coors resolved them informally without litigation, ultimately settling with the Commission. And when the claimant in *Agnello II* tried to file a *de novo* action in district court, the court dismissed the case in favor of the previous settlement that resulted from conciliation. CADA thus reflects a strong policy that alleged violations be resolved informally, through conciliation, without litigation.

But by allowing Respondent to file a *de novo* district court action, the court below has created a rule that will disincentivize conciliation in the future. In this case, Mr. Phillips could have entered into a settlement with the Commission requiring him to pay a substantial fine, only thereafter to be

faced with a second lawsuit from Respondent. If allowed to stand, no individual or entity faced with CADA liability will take the risk of conciliation because any agreement reached in conciliation will be subject to a second, *de novo* suit.

Conclusion

The decision below reflects a troubling trend of Colorado courts and administrative bodies that change the background procedural rules in cases involving religious institutions who buck new political-cultural trends. Petitioners' application should be granted and the decisions below should be reversed with a clear statement that the law's protections are not withdrawn from Coloradoans who deign to live their lives consonant with biblical truth.

DATED April 27, 2023.

Respectfully submitted,

Nussbaum Gleason PLLC

/s/ Andrew Nussbaum
Andrew Nussbaum, #50391

Counsel for Amicus Curiae