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SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

On Petition for Writ of Certiorari to the
Colorado Court of Appeals
Chief Judge Loeb and Judges Taubman and Berger
Case No. 2014CA1351

Appeal from the Colorado Civil Rights Commission
Case No. CR20130008

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PETITIONERS:

MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS,

v.

RESPONDENTS:

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Supreme Court Case No.
2015SC738

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 53(c).

It contains 3,761 words (exclusive of the caption, tables, certificates, and signature blocks).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 32, and C.A.R. 53.

s/ Ria Tabacco Mar

Ria Tabacco Mar

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ISSUES PRESENTED FOR REVIEW

I. Did Masterpiece Cakeshop, Inc. and Jack Phillips violate the Colorado Anti-Discrimination Act by refusing to serve David Mullins and Charlie Craig because of their sexual orientation?

II. Do the Free Speech Clauses of the U.S. and Colorado Constitutions provide a business open to the public with a defense to discriminatory conduct prohibited by a content-neutral law?

III. Do the Free Exercise Clauses of the U.S. and Colorado Constitutions provide a business open to the public with a defense to conduct prohibited by an anti-discrimination law applicable to public accommodations?

STATEMENT OF THE CASE

Three years ago, Respondents David Mullins and Charlie Craig were planning their wedding reception in Denver. App. 94. Craig's mother, Deborah Munn, was helping the couple shop for a wedding cake. App. 69, ¶ 4; App. 94. The group visited Petitioner Masterpiece Cakeshop, Inc. ("Cakeshop"), a retail business in Colorado that provides wedding cakes and other baked goods to the public. App. 69, ¶¶ 2-4. They hoped to order a cake for Mullins and Craig's upcoming wedding reception. App. 94.

What should have been a happy occasion for the couple became an experience that was humiliating and degrading when they were turned away by the Cakeshop's owner, Petitioner Jack Phillips. When Mullins and Craig expressed interest in buying a cake for their wedding reception, Phillips immediately refused

to sell them any wedding cake. App. 94. Phillips told the couple and Munn that the Cakeshop does not provide cakes for weddings of same-sex couples. App. 69, ¶ 6. Mullins and Craig left the store with Munn before they discussed any specific cake they might have wanted to order. App. 69, ¶ 7. They were refused service simply because of who Mullins and Craig are – a same-sex couple. That is discrimination because of sexual orientation in violation of Colorado's public accommodations law, as the Colorado Civil Rights Commission ("Commission") correctly found.

The Court of Appeals affirmed, finding that the Cakeshop's refusal to serve Mullins and Craig constituted discrimination because of sexual orientation and that the First Amendment does not exempt businesses open to the public from anti-discrimination laws.

REASONS TO DENY THE WRIT

This is a straightforward enforcement action under the Colorado Anti-Discrimination Act ("CADA"). None of the factors listed in Colorado Appellate Rule 49(a), nor any other reason, warrants this Court's review. There is no split of authority among the divisions of the Court of Appeals, and there was no procedural irregularity in the proceedings below. The Court of Appeals' decision rejecting the Cakeshop's constitutional arguments against enforcement of CADA is wholly

consistent with the decisions of this Court as well as the U.S. Supreme Court. And there is no "special and important reason[]" that compels review. C.A.R. 49(a). While discrimination undoubtedly is a matter of social and legal importance, that does not mean that every instance of discrimination necessitates review by this Court. Similarly, while the freedoms of speech and religion are among our most cherished liberties, the invocation of those rights does not automatically trigger the writ of certiorari absent some special reason.

The Cakeshop's petition does not even articulate the standard for granting review by this Court, let alone attempt to satisfy it. Instead, the Cakeshop's petition amounts to reargument on the merits, but that is not a basis for granting certiorari. Even if it were, the Court of Appeals' decision should not be disturbed. The Court of Appeals faithfully applied precedent to the facts of this case. It concluded correctly that the Cakeshop and Phillips discriminated against Mullins and Craig because of their sexual orientation in violation of CADA and that no constitutional provision provides a defense to that discriminatory conduct. Courts, including the U.S. Supreme Court, have consistently rejected the argument that the First Amendment exempts businesses open to the public from commercial regulations, including anti-discrimination laws. The petition for a writ of certiorari should be denied.

I. None of the factors listed in Colorado Appellate Rule 49(a) warrants this Court's review.

The decision whether or not to grant review by the Supreme Court is a "matter of sound judicial discretion" and should not be granted unless "special and important reasons" warrant review. C.A.R. 49(a). Colorado Appellate Rule 49(a) lists several factors that "indicate the character of reasons which will be considered" in determining whether to grant a petition for writ of certiorari. None of the listed factors warrants review here.

First, Petitioners have not identified any conflicts among the divisions of the Court of Appeals, and Respondents are not aware of any. *See* C.A.R. 49(a)(3). *Second*, Petitioners have not identified any procedural irregularities "so far [outside] the accepted and usual course of judicial proceedings . . . as to call for the exercise of the Supreme Court's power of supervision." C.A.R. 49(a)(4). *Third*, Petitioners have not shown that the decision of the Court of Appeals "decided a question of substance in a way probably not in accord with applicable decisions of the Supreme Court." C.A.R. 49(a)(2). To the contrary, as further explained below, the Court of Appeals' opinion was consistent with applicable decisions of the U.S. Supreme Court, and no decision of this Court requires a different result.

Finally, Petitioners have not identified any "special and important reasons" to grant the writ. Essentially, Petitioners – dissatisfied with the result before the

Administrative Law Judge ("ALJ"), the Commission, and most recently the Court of Appeals – seek a fourth bite at the apple. That is not a basis for review by this Court. Even if it were, there is no special and important reason that warrants consideration of this case for the fourth time. The Court of Appeals' decision, like the administrative decisions it affirmed, was both correct and consistent with U.S. Supreme Court precedent.

II. The Court of Appeals correctly concluded that the Cakeshop and Phillips discriminated against Mullins and Craig because of sexual orientation in violation of CADA.

The Cakeshop's refusal to sell wedding cakes for same-sex couples constituted discrimination because of sexual orientation prohibited by CADA. *See* C.R.S. § 24-34-601(2). It is undisputed that the Cakeshop is a place of public accommodation, App. 69, ¶ 2, and that the Cakeshop routinely sells wedding cakes for heterosexual couples, App. 105, ¶ 34. Phillips agreed to sit down with Mullins and Craig to discuss the possibility of providing a cake. App. 110, ¶¶ 70-72. When he learned that Mullins and Craig were interested in ordering a cake for their wedding, however, Phillips immediately refused to serve them. App. 110, ¶¶ 76-78. In other words, all Phillips needed to know to deny Mullins and Craig the opportunity to buy a wedding cake was that they were two men planning to marry each other. That is plainly discrimination "because of" sexual orientation, as the

Court of Appeals correctly found. *See Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013) (under New Mexico public accommodations law, photography studio illegally discriminated "because of . . . sexual orientation" because "[i]t provides wedding photography services to heterosexual couples, but it refuses to work with homosexual couples under equivalent circumstances."); *see also Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (declining to distinguish between status of being gay and conduct of being in same-sex relationships). Contrary to the Cakeshop's misunderstanding of the law, Pet. 7-8, there is no statutory text or Colorado case that requires a showing of anti-gay hostility or "invidious" discrimination. CADA provides that it is unlawful to discriminate "because of" sexual orientation, C.R.S. § 24-34-601(2), and nothing more is required. *See Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 253-54 (Colo. App. 2006).

That Phillips says he would also refuse to sell wedding cakes under other circumstances, App. 104, ¶ 25, does not change the fact that the refusal to sell wedding cakes for gay couples, while selling the same product for heterosexual couples, violates CADA. *Cf. Elane Photography*, 309 P.3d at 61. CADA prohibits only discrimination because of a person's protected characteristics; it does not prohibit business decisions based on other reasons, even "petty ones." *See* Pet. 6.

Moreover, that the Commission found no probable cause to proceed on different complaints involving different facts and different bakeries, *see* App. 117-34, has no bearing on whether the Court of Appeals' decision in this case warrants review. In any event, those determinations are correct and not inconsistent with the Commission's and the Court of Appeals' decisions here. Azucar Bakery and others that were subject to complaints by William Jack did not refuse to serve Jack because he is a Christian or because of any other protected characteristic. App. 120. Rather, Azucar refused his order because cakes bearing derogatory messages about gay people are inconsistent with the bakery's standards of offensiveness, *id.*, and nothing in Colorado law prohibits that. Setting a neutral store policy that applies to all customers is something wholly different than refusing service because of a customer's protected characteristic. This case, by contrast, involves the refusal to serve customers because of their sexual orientation, which is prohibited under Colorado law.[1]

[1] Petitioners' argument that Colorado cannot enforce CADA's prohibition against sexual orientation discrimination because marriage for same-sex couples was not recognized in Colorado in 2012 is waived because they failed to raise it before the Court of Appeals. *See, e.g., Melat, Pressman & Higbie, L.L.P. v. Hanover Law Firm, L.L.C.*, 287 P.3d 842, 847 (Colo. 2012) (en banc). Even assuming this argument were properly presented, it is wrong. The Colorado legislature amended CADA in 2008 to include sexual orientation among those personal characteristics that should be irrelevant to retail business transactions and other aspects of public life. *See* 2008 Colo. Legis. Serv. Ch. 341 (S.B. 08-200). The eligibility standards

III. The Court of Appeals correctly concluded that no constitutional provision provides a defense to the Cakeshop's discriminatory conduct.

A. Enforcement of CADA does not violate constitutional free speech provisions.

The freedom of speech does not provide a commercial business with a defense to discriminatory conduct prohibited by a content-neutral law. This case is wholly unlike cases where courts have found compelled speech, such as when the government requires students to recite the Pledge of Allegiance or requires drivers to display license plates with the motto "Live Free or Die." CADA does not compel the Cakeshop to say anything; indeed, the law has nothing to do with speech at all. It simply requires the Cakeshop to offer the same goods and services it makes available to the general public to all customers. That the commercial product sold involves artistic expression does not immunize the Cakeshop from content-neutral regulations that apply to all businesses open to the public.

1. *The compelled speech doctrine does not apply.*

The compelled speech doctrine applies only in circumstances not present here: when the government forces someone to express its own specific message, or when the government forces someone to incorporate an unwanted third-party message into his or her own constitutionally protected activities. *Rumsfeld v.*

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for civil marriage in Colorado cannot diminish other protections the legislature chose to extend to gay people as a matter of public policy.

Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 63 (2006). Enforcement of CADA here fits neither of those two categories and is entirely permissible under constitutional free speech provisions.

The record makes plain that this is not a case about speech. The Cakeshop refused service to Mullins and Craig without even discussing the design of the cake they might have wanted to order, let alone any specific message they might have wanted to request. They were turned away simply because of who they are. This Court should not allow the Cakeshop to take refuge in the First Amendment, which provides no justification for violating a content-neutral law targeting discriminatory conduct.

This case does not involve a law that requires private parties to affirm or promote a specific message. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1 (1986) (rejecting state law compelling utility to include copies of particular environmentalist publication with bills sent to customers); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (rejecting state law compelling newspapers to print responses from political candidates who had been criticized in editorials). All the law requires is that any business in Colorado that provides goods or services to the general public must offer the same

goods or services to all customers, regardless of sexual orientation and other protected characteristics.

Even if baking and selling a wedding cake could be deemed to communicate a message, at most the baker acts as a conduit for any message expressed by the customer. *See, e.g.*, *Elane Photography*, 309 P.3d at 69 ("[W]edding photographers are hired by paying customers and . . . a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom)."); *Nathanson v. Mass. Comm'n Against Discrimination*, No. 199901657, 2003 WL 22480688, at *6-7 (Mass. Super. Sept. 16, 2003) (attorney could not refuse to represent prospective client based on gender because she "operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself").[2]

Moreover, the Cakeshop is free to post a notice saying that it does not endorse or support customers' events for which it provides baked goods. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (requiring shopping

[2] *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), does not require a different result. *Hurley* involved application of an anti-discrimination law to a private nonprofit group formed for the purpose of marching to make a collective point. *See id.* at 567-72. By its own terms, *Hurley* does not apply to commercial businesses open to the public.

mall to permit literature distribution on premises is not compelled speech, in part because mall owner can easily post disclaimers noting that materials distributed do not reflect its views).[3]

The Cakeshop's argument that the risk of misattribution is irrelevant, Pet. 11-12, conflates two separate lines of cases. What third-party observers would think may not have mattered in *Wooley v. Maynard*, which involved a specific government-mandated message. *See* 430 U.S. 705 (1977). But the risk (or lack of risk) of misattribution is highly relevant to whether a business like the Cakeshop is being required to speak (or not) by hosting a third-party message. *See Rumsfeld*, 547 U.S. at 64-65. Similarly, the Cakeshop's argument that a disclaimer cannot cure a compelled speech violation, Pet. 13, is misplaced. Posting a disclaimer cannot cure a compelled speech violation, but only if there was a compelled speech violation in the first place. *See PruneYard Shopping Ctr.*, 447 U.S. at 87.

The Cakeshop's hypothetical positing a state law requiring homeowners and businesses to fly the Confederate flag misses the mark. The U.S. Supreme Court has long recognized the communicative nature of flags. *See Texas v. Johnson*, 491 U.S. 397, 405 (1989). Thus, a law requiring people to fly a flag would meet the

[3] Indeed, the Cakeshop is required to post a notice saying that CADA prohibits discrimination because of protected characteristics including sexual orientation. CCRC Rule 20.1.

same fate as a law requiring people to display the state's ideological message on a license plate. *Cf. Wooley*, 430 U.S. at 715 (rejecting state law compelling drivers to "use their private property as a 'mobile billboard' for the State's ideological message" reading "Live Free or Die"); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (rejecting state law compelling public school students to recite Pledge of Allegiance). This case does not involve any government-mandated message. It involves a business's refusal to serve certain members of the public because of their sexual orientation, and there is no question that Colorado may regulate that conduct via a content-neutral law like CADA.

Finally, even if enforcement of CADA were construed as mandating speech, that speech would be incidental to the law's primary effect on conduct and, therefore, any burden would be constitutional. *See Rumsfeld*, 547 U.S. at 61-62. And even if baking and selling a cake were deemed to be expressive conduct, enforcing CADA here easily satisfies the standard set forth in *United States v. O'Brien*. *See* 391 U.S. 367, 377 (1968).[4]

[4] Enforcement of CADA also is permissible under Article II, § 10 of the Colorado Constitution. The Cakeshop offers no authority to the contrary.

2. *That the goods and services provided by a business involve artistic expression does not shield the business from enforcement of CADA.*

When a business chooses to open its doors to the public, it cannot use the First Amendment as a shield from anti-discrimination laws that apply to the commercial marketplace, even where the goods and services sold involve expression or artistry. To be sure, speech does not lose constitutional protection whenever it is created or sold for profit. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). The First Amendment provides speakers, including businesses, with autonomy to decide what to say (or not to say) as part of their own speech. But it is equally true that "[t]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

That making cakes involves expression and artistry does not mean that it cannot be regulated. *Elane Photography*, 309 P.3d at 66. Countless businesses provide goods or services that involve expression or artistry. For example, hair salons, tailors, restaurants, architecture firms, florists, jewelers, theaters, and dance schools use artistic skills when serving customers or clients. That these businesses make artistic and creative choices does not insulate them from public accommodations laws when they offer goods or services for hire to the general

public. *See, e.g., Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427, 429 (4th Cir. 2006) (applying anti-discrimination law to beauty salon providing hair styling and "makeup artistry"). The critical factor is whether the business chooses to open its doors to the public, not whether the service provider creates "fine art," Pet. 11, or is able to command a high price.

Moreover, there is nothing "uniquely expressive" about wedding cakes. Pet. 10. Many businesses covered by CADA provide services that involve design, creativity, or artistry. If extended to its logical conclusion, the Cakeshop's argument would provide a roadmap for numerous would-be discriminators to evade public accommodations laws by characterizing their goods and services as a form of expression or artistry.

B. Enforcement of CADA does not violate constitutional free exercise provisions.

Where, as here, a business discriminates in violation of CADA, the right to free exercise of religion does not constitute a defense to enforcement. Put simply, there is no constitutional right for a commercial business open to the public to turn away customers based on protected characteristics, including sexual orientation.

Under U.S. Supreme Court precedent, the federal Free Exercise Clause does not excuse a business from complying with a valid and neutral law of general applicability. *Employment Division v. Smith*, 494 U.S. 872, 885-86 (1990).

CADA is a valid and neutral law of general applicability and, therefore, subject to rational basis review under *Smith*. CADA is valid and neutral because it exists for the purpose of protecting all Colorado residents and visitors from discrimination based on disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry. *See* C.R.S. § 24-34-601(2); *Hurley*, 515 U.S. at 572 (public accommodations anti-discrimination laws "are well within the State's usual power to enact"). CADA is generally applicable because it regulates all public accommodations, including any business doing wholesale or retail sales with the public. *See* C.R.S. § 24-34-601(1).[5] Therefore, CADA is subject to rational basis review under *Smith* and easily satisfies that level of scrutiny. *See Elane Photography*, 309 P.3d at 75 (applying rational basis review and rejecting free

[5] That CADA exempts churches, synagogues, mosques, and other places principally used for religious purposes, *see* C.R.S. § 24-34-601(1), does not undermine the law's general applicability under *Smith*. Exemptions for religious organizations are aimed at accommodating, not targeting, religious freedom. *Elane Photography*, 309 P.3d at 75. Similarly, CADA's exemption allowing certain single-sex institutions, such as all-girls' schools, from the provisions barring sex discrimination, *see* C.R.S. § 24-34-601(3), does not target religion or suggest that CADA is not generally applicable. *See Elane Photography*, 309 P.3d at 74.

Moreover, the isolated comment of a single commissioner – months after the ALJ's written decision in this case, and months after the full Commission voted to adopt the ALJ's decision as its own – cannot establish that CADA or the Commission targets religiously motivated conduct. Even if it could, there is nothing biased about saying that religious practice cannot be used as a sword to harm others. *See* App. 116.

exercise challenge to enforcement of New Mexico Human Rights Act's prohibition against discrimination based on sexual orientation).

While this Court has not decided what level of scrutiny should apply to free exercise claims under the Colorado Constitution, *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 356 P.3d 833, 847 (Colo. App. 2013), *overruled on other grounds*, 351 P.3d 461 (Colo. 2015), this case is not a good vehicle to decide that question because enforcement of CADA satisfies any level of constitutional scrutiny, even strict scrutiny. Under such a standard, even if compliance with CADA could be said to substantially burden the Cakeshop's religious exercise and, thus, trigger strict scrutiny, CADA satisfies that standard as well. Religious exercise challenges to enforcement of anti-discrimination laws fail even under strict scrutiny because the government has a compelling interest in eradicating discrimination, and anti-discrimination laws are the least restrictive means of achieving that purpose. *See, e.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (rejecting religious university's Free Exercise challenge to anti-discrimination policy of the Internal Revenue Service); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (rejecting restaurant owner's Free Exercise challenge to Title II of the Civil Rights Act as "patently frivolous"); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 284 (Alaska 1994)

(rejecting landlord's Free Exercise defense to housing discrimination prohibited by state law); *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (rejecting employer's Free Exercise defense to employment and public accommodations discrimination prohibited by state law).

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be denied.

DATED this 6th day of November, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2015, a true and correct copy of the **RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** was filed using the Court's ICCES electronic filing system and/or was served via U.S. Mail, postage paid, on the following:

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