IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED,
a Colorado corporation; and
JACK PHILLIPS,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;
ANTHONY ARAGON, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
MIGUEL "MICHAEL" RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
AJAY MENON, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity; and
JOHN HICKENLOOPER, Colorado Governor, in his official capacity,

Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants (collectively, Colorado) continue to do what the Supreme Court just denounced by treating Plaintiffs Jack Phillips and Masterpiece Cakeshop (collectively, Phillips) worse than other cake shops that decline to create cakes expressing messages they deem offensive. When Colorado wants to approve such a decision, it precisely characterizes the request and its message, says that the shop won't create it for anyone, and moves on. But when Colorado wants to punish Phillips, it generally describes the requested cake (e.g., a pink and blue cake), ignores the requested message, says that Phillips will create those kinds of cakes for others, and prosecutes him. This unequal treatment—and disregard of the Supreme Court's recent ruling—must end.

ARGUMENT

I. Phillips does not seek a disfavored injunction.

The requested injunction neither alters the status quo nor is "mandatory." The status quo is "the last uncontested status between the parties." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005). That was before Colorado began its latest prosecution of Phillips for declining to create a cake that conveys messages at odds with his faith. Because Phillips wants to stop Colorado from enforcing CADA in those situations, he "seeks to preserve rather than disturb the status quo." *Id.* Moreover, Phillips's request to keep Colorado "from enforcing" CADA, Doc. 57 at 2–3, seeks a "prohibitory" injunction because it does not "affirmatively require[] the nonmovant to act" but only bars Colorado from acting. *Schrier*, 427 F.3d at 1261. In any event, Phillips meets the heightened preliminary-injunction standard, as other First Amendment litigants have, by making "a strong showing both with regard to the likelihood of success on the merits and . . . the balance of harms." *Awad v. Ziriax*, 670 F.3d 1111, 1126 (10th Cir. 2012).

II. Phillips is likely to succeed on the merits of his claims.

A. Phillips is likely to succeed on his free-exercise claim.

Colorado violates Phillips's free-exercise rights by (1) continuing to treat him unequally and (2) otherwise manifesting hostility toward him and his faith. Doc. 57 at 8–12. Colorado's response focuses mainly on issues that Phillips does not argue. For example, Colorado examines whether CADA is neutral and generally applicable *on its face*. Doc. 75 at 3. But both *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1729–32 (2018), and Phillips's arguments here focus on CADA's neutrality and general applicability *in operation*. In addition, Colorado says that Phillips argues that "the Free Exercise Clause affords [him] a private right to ignore . . . CADA," Doc. 75 at 4, and that he is "forever immune from CADA's reach," *id.* at 5. But his claim is much narrower: Colorado violates his free-exercise rights by (1) treating him worse than others who are allowed to decline to create cakes expressing messages they find offensive and (2) otherwise manifesting hostility toward him because of his faith.

1. Colorado unequally applies CADA against Phillips.

The unequal treatment that Phillips endures mirrors what the Supreme Court condemned in *Masterpiece*. *See* 138 S. Ct. at 1730–31. Denying that, Colorado manipulates the analysis just like it did in *Masterpiece*. When analyzing the requests that the three other cake shops were allowed to decline, Colorado took them as the customer presented them—as requests for specific Bible verses and "an image of two groomsmen, holding hands in front of a cross, with a red 'X' over the image." Doc. 58-32 at App.118; *accord id.* at App.123, 128. The state didn't disaggregate the components and describe them as (1) cakes with Bible verses, a cross, and people or (2) cakes with words and images. Colorado recognized that the exact request and intended message matter.

Had it generally described those requests, it would have found discrimination because those shops created other cakes with religious "themes and/or symbolism," "couple[s] embracing," and religious messages like "God Bless." *Id.* at App.119–20, 124–25, 129–30.

But here, Colorado describes the requested cakes at a high "level of generality" and "gerrymander[s]" the inquiry against Phillips. *Masterpiece*, 138 S. Ct. at 1738–39 (Gorsuch, J., concurring). It does not analyze the cake at issue in the state proceeding as requested by the customer: a cake designed with a pink interior and blue exterior to reflect and celebrate a gender transition. Rather, Colorado says that Phillips declined "a blue and pink cake," Doc. 75 at 9, or "a two-color cake," *id.* at 6. Because Phillips will design some two-color or pink and blue cakes for other customers, Colorado reasons, he discriminated based on the customer's status by not creating the requested gender-transition cake.

Failing to "apply the *same* level of generality across cases," as Colorado continues to do, violates the requirement that CADA "be applied in a manner that treats religion with neutral respect." *Masterpiece*, 138 S. Ct. at 1739 (Gorsuch, J., concurring). Applying the same level of generality here as Colorado did in the other cases, it is clear that Phillips did nothing wrong.

Colorado admits that Phillips may "decline a customer's order that it views as offensive . . . if it would similarly decline the *same order* for all customers." Doc. 75 at 10 (emphasis added). That's what happened here. No matter who orders a cake designed with a pink interior and blue exterior to reflect and celebrate a gender transition—even a non-transgender person ordering such a cake to give to a friend—Phillips will not create it. Doc. 51 ¶¶ 126–29. Colorado also concedes that Phillips may "*decline* cake orders for 'pro-transgender' designs." Doc. 75 at 17. Again, that's all Phillips did. The customer admittedly "requested that [the cake's] color and theme celebrate

[a gender] transition." Doc. 58-26 at 4. And the pro-transgender nature of the design is particularly obvious given that the transgender-pride flag is pink and blue and that the cake's design had the color symbolic of girls encircled within the color symbolic of boys. Ex. 32 at 3–4.

Even if the gender-transition cake is described using Colorado's preferred level of generality, it is still clear that Phillips does not discriminate based on status. He would create countless two-color cakes or blue and pink cakes that do not express messages in conflict with his faith for the same customer who requested the gender-transition cake. Doc. 51 ¶¶ 126–29. Phillips would even design that same customer a cake with a blue exterior and pink interior if the desired symbolism and message were different, Phillips Reply Decl. ¶ 8, such as if that customer ordered the cake for "the birthday of a child whose favorite colors are blue and pink," Doc. 75 at 7. Thus, Phillips is treating people equally; it is Colorado that is discriminating against him.

Colorado's unequal reasoning manifests itself in other ways. Unwilling to admit that its actions threaten to force Phillips to design cakes celebrating Satan, Doc. 51 ¶¶ 325–26, Colorado describes those cakes with specificity—as "featuring satanic imagery"—and suggests that he may decline to create them, Doc. 75 at 19. In addition, while Colorado absolved one of the other cake shops even though its website says that it "can design cakes that look like . . . just about anything you can imagine," Doc. 58-32 at App.124, the state argues that Phillips must lose because his website states: "If you can think it up, Jack can make it into a cake!" Doc. 75 at 29. The double-standards appear at every turn. In the end, Colorado manipulates the analysis to presume—contrary to state law, *see* Colo. Rev. Stat. § 24-34-305(3)—that Phillips violates CADA when he exercises his faith by declining to create a cake with a state-favored message. Doc. 57 at 11. This presumption shows Colorado's animus toward his religion.

2. Colorado's agents exhibit bias against Phillips.

Colorado ignores current commissioner bias supporting the free-exercise claim, including Commissioner Pocock's "cake hater" slur and Aragon's multiple manifestations of opposition to Phillips. Doc. 57 at 11–12. And contrary to Colorado's argument, there are "signs of hostility" toward Phillips's faith in the probable-cause determination and formal complaint, Doc. 75 at 8, including that Colorado issued them against Phillips when it didn't against the other shops, Doc. 51 ¶¶ 223, 242; that those documents unequivocally declare that Phillips violated CADA, *id.* at ¶¶ 218, 237–38; and that the formal complaint recites facts more favorable to the state's position than even what the complainant alleged, *id.* at ¶¶ 202–04, 230–33, 239. Phillips thus does not seek a "presumption" that the Division and Commission "will necessarily act with impermissible hostility." Doc. 75 at 5. He argues that they already have—by (among other things) not affording him the presumption of innocence that state law requires. Colo. Rev. Stat. § 24-34-305(3).

Colorado wants to pretend that the *Masterpiece* case never happened because some personnel has changed. Doc. 75 at 8. But the Court there did not care that some Division and Commission changeover occurred between the ruling in Phillips's first case and those involving the other shops. *See* Doc. 51 ¶¶ 81–82; *compare* Ex. 33 at 0015, 0020, *with* Doc. 58-32 at App.121, 126, 131. It cared that the agencies were acting inconsistently. Also, the switch in personnel is not all that Colorado implies. For example, Jennifer McPherson, the Division agent who issued the determinations exonerating the other cake shops, voted "to recommend" the pending administrative case against Phillips "for [a] hearing." Ex. 34 at 0015.

Moreover, First Amendment case law rejects state efforts to whitewash history. "[T]he world is not made brand new every morning," so courts must not "turn a blind eye to the context

in which [state action] arose." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005). That is particularly true here because Colorado has made no "curative efforts" concerning its prior hostility, let alone "purposeful," "public," and "persuasive" efforts. *Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016). On the contrary, Colorado shows not the least concern that some current commissioners have publicly impugned and opposed Phillips. At bottom, because the record establishes far more than a "slight suspicion" that Colorado continues to act with hostility toward Phillips's religious beliefs and practices, *Masterpiece*, 138 S. Ct. at 1731, he has established a free-exercise violation.

B. Phillips is likely to succeed on his free-speech claim.

1. Colorado applies CADA to unlawfully compel expression.

Colorado's "conduct vs. speech" argument will compel speech. Colorado adopts an extreme position, insisting that because CADA generally regulates "conduct," the state may apply it to compel speech. Doc. 75 at 10–12. That would expose artists and creators of expression to grave violations of their conscience. A lesbian graphic designer could be forced to create flyers promoting a religious group's event opposing same-sex marriage. Or an African American cake artist compelled to design a cross-shaped cake celebrating a white-supremacist religious group.

But Colorado's view is not the law, and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 572–73 (1995), proves it. There, the Court recognized that "the focal point" of public-accommodation statutes is to prohibit "the act of discriminating against individuals." *Id.* at 572. Yet the state violated compelled-speech principles when it applied that statute to "essentially requir[e]" the parade organizers "to alter" their messages. *Id.* The question, then, is how the law is applied in each case—not what the law typically achieves.

Indeed, strict scrutiny applies to laws that "*generally* function[] as a regulation of conduct" when the activity "triggering coverage" in a case "consists of communicating" or declining to express "a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010).

Unlike Colorado's unbounded theory, the compelled-speech protection that Phillips seeks is constrained. It applies only when (1) a customer asks Phillips to create a custom cake that itself communicates a message and (2) Phillips declines because he objects to the message (as opposed to the protected status of the customer). Doc. 57 at 18–19. Phillips does not argue that his business "as a whole" has a "constitutional immunity to practice discrimination." Doc. 75 at 11.

Colorado thinks it can punish Phillips for declining the requested gender-transition cake because he would create similar cakes if their messages were different. Doc. 75 at 9. This ignores not only what the customer said about the cake design's intended message, but also that context affects meaning. *Spence v. Wash.*, 418 U.S. 405, 410 (1974) ("[T]he context in which a symbol is used for purposes of expression is important, for the context may give [it] meaning"). Just as a cross at a Christian event means something different than one at a Klan rally, and a rainbow flag has a different meaning at a play about Noah's ark than a gay pride festival, the pink and blue design says something different at an anniversary of a gender transition than a baby shower.

Colorado's "attribution" argument conflicts with precedent and will compel speech. Colorado is wrong to suggest that Phillips's compelled-speech claim "hinges on" accepting that his custom cakes' messages are "attributable" to him. Doc. 75 at 12. Compelled-speech claims have never hinged on that. *Wooley v. Maynard*, 430 U.S. 705 (1977), held that forcing motorists to display the state motto on their license plate compelled speech even though no one would have thought that the motto was the motorists' message. Similarly, *Pacific Gas and Electric Co. v.*

Public Utilities Commission of California, 475 U.S. 1, 6–7, 15 n.11 (1986) (*PG&E*) (plurality), concluded that the state cannot force a business to disseminate a third party's newsletter, notwithstanding that the newsletter explicitly announced that it was not the business's speech.

That makes sense because the compelled-speech doctrine protects everyone's freedom of conscience to refuse to convey "an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. Forcing people to "betray[] their convictions" in that way "is always demeaning," regardless of whether others attribute the speech to them. *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018). Otherwise, the state could force authors to write books if their identity remained secret. Nothing supports such a cramped view of the First Amendment.

Colorado's attribution argument would exclude "commissioned speech" from the First Amendment. But a professional speaker "is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988). Any other view would jeopardize the freedom of not only commissioned creators of speech like artists, marketers, and graphic designers, but also newspapers, publishers, media outlets, and internet corporations that transmit speech (like articles and ads) attributed to others. And if the First Amendment doesn't protect against compelling these speakers' expression, neither would it forbid banning their speech. *See id.* at 796–97 (noting the "equivalence of compelled speech and compelled silence").

Speech is not "a mantle[] worn by one party to the exclusion of another." *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015). It "frequently encompasses . . . different parties." *Id. Riley* demonstrates this. There, a group of charities and the fundraisers who worked for them challenged a law requiring fundraisers to speak unwanted messages about the charities. Although the fundraisers were speaking on behalf of the charities, the Court recognized that the fundraisers

had "an independent First Amendment interest in the speech." *Riley*, 487 U.S. at 794 n.8. The same is true of Phillips when he creates expressive cakes for his clients.

Colorado's attribution argument relies on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60–65 (2006) (*FAIR*), and *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). Doc. 75 at 13. Those cases involved forcing groups "to provide a forum for a third party's speech." *Masterpiece*, 138 S. Ct. at 1744–45 (Thomas, J., concurring). The objecting groups were not themselves speaking. *FAIR*, 547 U.S. at 64 (schools are "not speaking when they host interviews and recruiting receptions"). Those decisions thus "do not suggest that the government can force speakers to alter their *own* message." *Masterpiece*, 138 S. Ct. at 1745 (Thomas, J., concurring). Put simply, the "[f]acilitation of speech" at issue in those cases differs markedly from the compelled "co-opt[ing]" of Phillips's "own conduits for speech." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 457 n.10 (2008).

Hurley squarely supports Phillips. Colorado dismisses *Hurley* because it involved (1) a "private" organization (2) that didn't engage in "the commercial sphere." Doc. 75 at 17–18. Neither distinction is persuasive.

First, the Court referred to the parade organizers in *Hurley* as "private" to show that they, like Masterpiece, were nongovernmental—not to suggest that they were closed to the public. On the contrary, the organizers were open to the public much like Masterpiece is: they evaluate and accept some requests to express messages. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. v. City of Bos.*, 636 N.E.2d 1293, 1296–97 (Mass. 1994) (accepting applications from the public).

Second, *Hurley* itself rejected the distinction between nonprofit and for-profit speakers. "[T]he fundamental rule . . . that a speaker has the autonomy to choose the content of his own

message" is "enjoyed by business corporations generally," *Hurley*, 515 U.S. at 573–74, including for-profit speakers that collaborate on the "item[s] featured in the[ir] communication[s]," *id.* at 570. *Hurley* applied the compelled-speech doctrine not because the case arose outside of commerce, but because the state applied the statute "in a peculiar way," "produc[ing] an order essentially requiring [a group] to alter the expressive content" of its speech. *Id.* at 572–73.

CADA is applied based on content and viewpoint. Colorado's content and viewpoint discussion ignores Phillips's actual arguments, *see* Doc. 57 at 19–20, relying instead on isolated statements from *Hurley*, 515 U.S. at 572, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987), and *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). Doc. 75 at 15, 19. But those statements reference nondiscrimination laws on their face and thus do not foreclose Phillips's as-applied speech claims. Plus, CADA discriminates in a way that the laws in those cases did not: rather than forbidding discrimination against all based on a category like gender identity, it protects only "transgender status." Colo. Rev. Stat. § 24-34-301(7). When applied to requests for expressive cakes, that discriminates based on viewpoint. Doc. 57 at 20.

Colorado itself confirms that it applies CADA based on content by insisting that Phillips violates the law *because* he will create other "two-color" and "blue and pink" cakes that express different messages. Doc. 75 at 6, 9. This is further shown by the analysis exonerating the three other cake shops, which also focused on the other messages those shops would express. Doc. 58-32 at App.119–20, 129–30 (considering the "symbolism and messages" of other cakes). A law is content based in application when its violation depends on communicative content.

Also, Colorado appears to concede that banning cakes with anti- or pro-transgender messages would be a content- and viewpoint-based regulation of speech. Doc. 75 at 16–17. But

so is what the state admittedly does here—requiring Phillips to create a pink and blue cake whose design expresses a pro-transgender message, while allowing him to decline similar or even identical cakes that express different messages.

O'Brien does not apply. Colorado says that the standard in *United States v. O'Brien*, 391 U.S. 367 (1968), applies instead of strict scrutiny. Doc. 75 at 14–16. It is wrong for three reasons. First, and most important, *Hurley* refused to apply *O'Brien*'s "intermediate scrutiny" standard when a state used a public-accommodation law to compel speech. 515 U.S. at 575. Second, *O'Brien* does not govern when a state applies its law based on content and viewpoint, as Colorado does. *Holder*, 561 U.S. at 27 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385–86 (1992)); *Masterpiece*, 138 S. Ct. at 1745–46 (Thomas, J., concurring). Third, Colorado's use of CADA against Phillips more than incidentally affects expression; it "directly and immediately" regulates it, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000), by compelling him either to create cakes conveying messages contrary to his faith or to stop designing custom expressive cakes altogether.

Colorado cannot satisfy *O'Brien* in any event because the state "burden[s] substantially more speech than is necessary to further [its] legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Colorado's interest is in prohibiting discrimination against people, not messages. But Phillips does not discriminate against people. Indeed, he would create a pink and blue cake for the same customer who complained against him if the cake's message were different. Punishing Phillips for declining messages is a vastly overbroad application of the law.

2. CADA, as applied and on its face, unlawfully restricts expression.

Colorado confusingly jumbles Phillips's as-applied challenge to CADA's publication bans with his narrow facial challenge to those bans' "unwelcome" clauses. As to the as-applied

claim, the state has one argument—that Phillips's desired post announcing that he cannot create custom cakes that express celebration for "gender transitions" or "satanic themes or beliefs," Doc. 51 ¶ 270, is akin to a "White Applicants Only" sign. Doc. 75 at 11, 20–21. Not so. The "Whites Only" sign is not protected speech because it announces the unlawful conduct of categorically excluding entire classes of people, whereas Phillips's desired post is protected speech because it conveys his constitutionally protected decision not to express certain messages for anyone.

As to Phillips's narrow facial claim, Colorado wants to reduce the "unwelcome" clauses to banning only "the equivalent" of an announcement to refuse service to an entire class of people. Doc. 75 at 20. But the publication bans elsewhere forbid that. *See* Colo. Rev. Stat. § 24-34-601(2)(a) (forbidding announcements that "services . . . will be . . . denied"). So the "unwelcome" clauses must forbid more than that. Nor does *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1, 14 (1988), or *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984), foreclose Phillips's facial claim. Neither case, as Colorado implies, challenged publication bans like the "unwelcome" clauses. Doc. 75 at 23. Finally, contrary to Colorado's suggestion, at least one court has struck down a similar publication ban on vagueness grounds. *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426, 442 (Ariz. Ct. App. 2018), *review granted* (Nov. 20, 2018).

C. Phillips is likely to succeed on his due-process claim.

Phillips has identified five factors, in addition to the Supreme Court's finding of hostility, that together establish his due-process claim. Doc. 57 at 25–29. Colorado has not refuted it.

Colorado cannot dismiss the "cake hater" comment. Colorado remarkably argues that allowing Phillips to be prosecuted before an adjudicator who has publicly called him a "hater" raises *no* due-process concerns. Doc. 75 at 25. It says that fact is "*subjective*" and irrelevant. *Id.*

But in establishing an objective analysis, the Supreme Court has not suggested that courts should ignore public remarks reflecting personal prejudice. Why would it? Such objective facts are vital when deciding, as the Court requires, whether a "potential for bias" exists. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). Notably, the *Masterpiece* Court did not ignore such comments in its free-exercise neutrality/hostility analysis. 138 S. Ct. at 1729–30.

Colorado also claims that the comment is five years old and too "stale" to matter. Doc. 75 at 25. But the disqualifying act in *Williams* occurred "almost three decades" earlier. 136 S. Ct at 1904. "[T]he passage of time do[es] not relieve" the duty "to ensure the neutrality of the . . . process." *Id.* at 1907. A potential for bias unquestionably arises when an adjudicator has publicly called the party a "hater," regardless of whether the comment occurred days or years earlier.

Colorado also suggests that the "hater" comment doesn't matter because it is "unrelated to the instant charge" before the Commission. Doc. 75 at 25–26. But the state's own conduct—delaying its action in the administrative matter until the Supreme Court ruled in Phillips's first case—shows that it considers the matters related. More important, the comment is problematic not because it shows a prejudgment of a legal issues but because it reflects personal animus.

Commissioner Aragon's statutorily imposed interests create serious due-process concerns. Colorado admits that Commissioner Aragon has statutorily prescribed pro-LGBT interests. Doc. 75 at 26. And it does not deny that those interests "will impermissibly tempt him to disregard neutrality." *Id.* (quoting Doc. 57 at 27). That underscores the due-process violation.

Colorado does not deny its discriminatory selection criteria. Phillips seeks a tribunal free from discriminatory selection criteria; he does not claim a right to adjudicators who share his "beliefs." Doc. 75 at 26. Colorado does not deny that commissioners are chosen by criteria that

"intentionally *includ[e]*" "members of protected classes" and prefer them over others. *Id.* Such requirements are the flip side of practices invalidated in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. They pose constitutional concerns that Colorado ignores. *Cf. Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013) (affirmative action policy is subject to strict scrutiny).

The same officials cannot serve as accusers and adjudicators in the same proceeding. *Williams* recently announced "the rule that . . . there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." 136 S. Ct. at 1905. Colorado says that this holding does not apply here because the decision to file charges against Phillips, unlike approving the death penalty, is not a "critical" case decision. Doc. 75 at 27. But *Williams* itself recognized that deciding whether and "what charges to bring" is a "critical decision." 136 S. Ct. at 1907.

Colorado also claims that *Williams*'s "holding is limited to a capital" case and cannot apply to administrative matters without displacing *Withrow v. Larkin*, 421 U.S. 35 (1975). Doc. 75 at 27–28. But by its own terms, *Williams*'s holding, quoted above, is not limited to capital cases. 136 S. Ct. at 1905. Nor is applying it in administrative contexts inconsistent with *Withrow*, which held that the "combination of investigative and adjudicative functions" in *the same agency* "does not, without more, constitute a due process violation," while noting that violations do occur when "special facts and circumstances" show that "the risk of unfairness is intolerably high." 421 U.S. at 58. *Williams* announced one of those "special" situations: when *the same person* acts as an adjudicator and makes a critical prosecutorial decision such as whether to file charges. 136 S. Ct. at 1905. And here, other "special" facts, such as the Supreme Court's recent finding of hostility and the "cake hater" comment, further heighten the risk of unfairness. *See* Doc. 57 at 25–28.

III. The remaining preliminary-injunction factors favor Phillips.

Irreparable harm. Colorado argues that Phillips is not suffering irreparable harm because he waited (1) a year after the private citizen filed a charge of discrimination with the state to bring this suit and (2) two months after filing this suit to bring this motion. Doc. 75 at 29. Neither time gap is problematic. First, Colorado is the one that waited a year to move forward with its administrative prosecution, and Phillips did not need to act until that occurred. Second, after this suit began, the parties entered into weeks of negotiations, and the Commission then filed its administrative complaint against Phillips, which required him to amend his claims in this case. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1211–12 (10th Cir. 2009) (months- and years-long delays attributable to "attempts to negotiate" not problematic).

Balance of equities and public interest. Colorado argues that the final two factors favor the state because enforcing CADA is in the public interest. Doc. 75 at 30. But Colorado's alleged harm is negligible because the requested preliminary injunction will minimally impact CADA's prohibition on declining requests for services. The state will be prevented from applying it only against Phillips and only when he declines a request to create an expressive cake because he objects to its message. In all other instances—when Phillips sells already-created expressive cakes or non-expressive cakes or cookies—CADA will apply with full force. In contrast, the harm to Phillips is immense. If Colorado continues to empower people to harass and create legal troubles for him by seeking custom cakes that express messages contrary to his faith, his future as a custom cake artist is in grave peril. Doc. 51 ¶¶ 302–30.

CONCLUSION

Phillips respectfully requests that this Court enter the requested preliminary injunction.

Respectfully submitted this 29th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2018, the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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Attorneys for Defendants

s/ James A. Campbell
James A. Campbell

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED,
a Colorado corporation; and
JACK PHILLIPS,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;
ANTHONY ARAGON, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
MIGUEL "MICHAEL" RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
AJAY MENON, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity; and
JOHN HICKENLOOPER, Colorado Governor, in his official capacity,

Defendants.

REPLY DECLARATION OF JACK PHILLIPS IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, JACK PHILLIPS, hereby declare as follows:

1. I am competent to testify and make this declaration based on my personal knowledge.

2. I am the owner of Masterpiece Cakeshop Incorporated.

3. On June 26, 2017, my shop was contacted by someone who requested a custom cake designed pink on the inside and blue on the outside to celebrate a gender transition. The caller told us that the design was a reflection of the fact that the caller transitioned from male to female and that the cake was to celebrate that transition. We later learned that the person's name is Autumn Scardina.

4. We declined that request because its design communicated that sex can be changed, can be chosen, and is determined by perceptions or feelings rather than biology. The cake also expressed celebration for those ideas. All of those messages conflict with my religious beliefs because I believe that sex is given by God, is biologically determined, and cannot be chosen or changed.

5. I would not create that requested cake with its requested message for anyone. For example, I would not create such a cake for a person who does not identify as transgender if that person were purchasing it to give to a friend.

6. I would create countless custom two-color cakes or blue and pink cakes for the customer who requested the gender-transition cake on June 26, 2017, so long as the requested cake does not express a message that violates my faith. For example, I would create that person a custom cake with a blue and pink bunny for a child's birthday party.

7. I would create countless custom two-color cakes or blue and pink cakes for customers who identify as transgender so long as the requested cake does not express a message that

violates my faith. For example, if a customer who identifies as transgender requests a custom cake with a blue and pink bunny for a child's birthday party, I would create it.

8. I would create a custom cake with a blue exterior and a pink interior for the customer who requested the gender-transition cake on June 26, 2017, so long as the cake does not visually represent and celebrate a gender transition or otherwise express messages that conflict with my religious beliefs. For example, if that customer requested a custom cake with a blue exterior and pink interior because that customer's favorite colors are blue and pink, I would create it.

9. I would create a custom cake with a blue exterior and pink interior for people who identify as transgender so long as the cake does not visually represent and celebrate a gender transition or otherwise express messages that conflict with my religious beliefs. For example, if a customer who identifies as transgender requests a cake with a blue exterior and pink interior because that customer's favorite colors are blue and pink, I would create it.

DECLARATION UNDER PENALTY OF PERJURY

I, JACK PHILLIPS, a citizen of the United States and a resident of the State of Colorado, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 29th day of November, 2018, at Lakewood, Colorado.

Jack Phillips
Masterpiece Cakeshop Incorporated

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED,
a Colorado corporation; and
JACK PHILLIPS,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;
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AJAY MENON, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity; and
JOHN HICKENLOOPER, Colorado Governor, in his official capacity,

Defendants.

REPLY DECLARATION OF JACOB P. WARNER IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I, JACOB P. WARNER, hereby declare:

1. I am over the age of eighteen and competent to testify, and I make this declaration based on my personal knowledge.

2. I am one of the attorneys representing Plaintiffs Masterpiece Cakeshop Incorporated and Jack Phillips in this litigation.

3. Attached as Exhibit 32 in support of Plaintiffs' Motion for Preliminary Injunction is a true and accurate copy of an article available at Smithsonian.com entitled "A Proud Day at American History Museum as LGBT Artifacts Enter the Collections." This webpage is found at https://www.smithsonianmag.com/smithsonian-institution/will-grace-affirms-role-american-history-180952400/?no-ist. I last accessed this webpage on November 29, 2018.

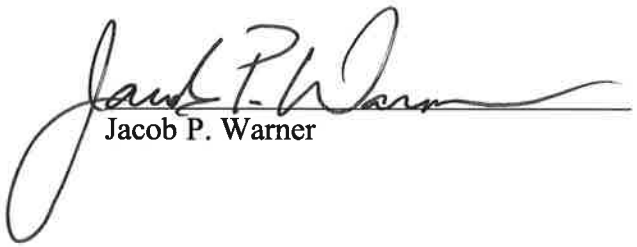
4. Attached as Exhibit 33 in support of Plaintiffs' Motion for Preliminary Injunction is a true and accurate copy of the determinations that the Colorado Civil Rights Division issued against Masterpiece Cakeshop on March 5, 2013.

5. Attached as Exhibit 34 in support of Plaintiffs' Motion for Preliminary Injunction is a true and accurate copy of the Colorado Civil Rights Division and Commission's "Case Comments" from the *Scardina v. Masterpiece Cakeshop* file. The Colorado Attorney General's Office sent me a copy of that document with a letter dated November 7, 2018.

DECLARATION UNDER PENALTY OF PERJURY

I, Jacob P. Warner, a citizen of the United States and a resident of the State of Arizona, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 29th day of November, 2018, at Scottsdale, Arizona.



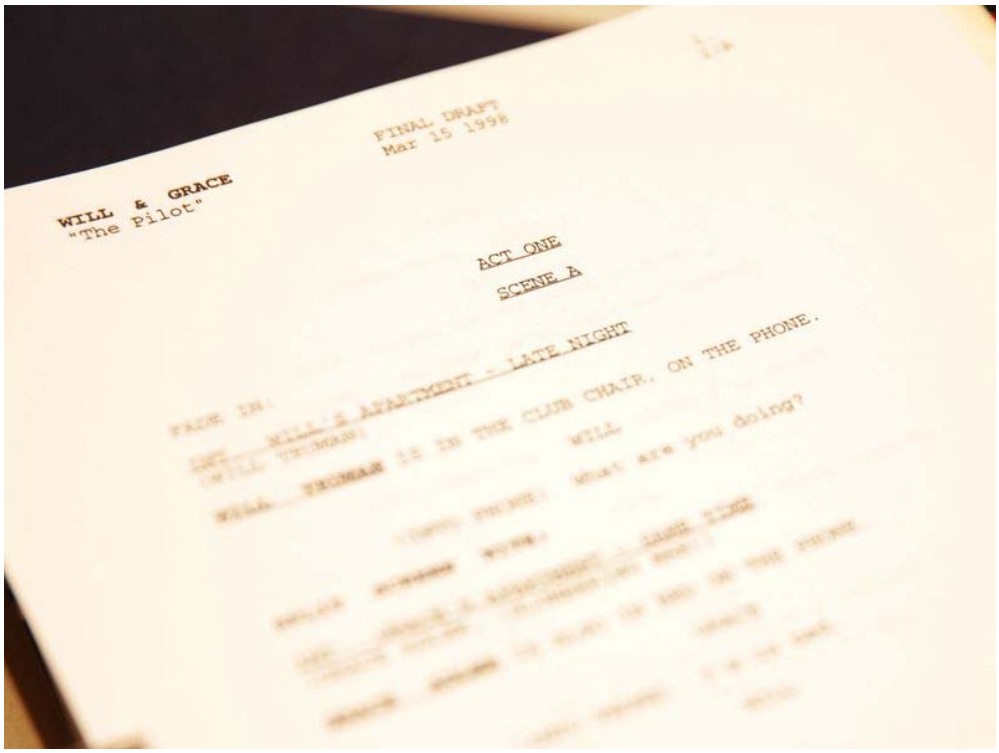
Jacob P. Warner

EXHIBIT 32

Smithsonian.com

A Proud Day at American History Museum as LGBT Artifacts Enter the Collections

The creators of “Will & Grace” and others donated objects related to gay history



The creators of "Will & Grace" donated the pilot script and other items from the show to the National Museum of American History (Max Kutner)

By Max Kutner
smithsonian com
August 19, 2014

When David Kohan and Max Mutchnick penned the pilot for "Will & Grace" a decade and a half ago, they had no idea the social implications the show would have "We were hired to write a comedy for NBC and that's what we did," Mutchnick says "That all of this happened really was a happy accident " Earlier today, Kohan and Mutchnick donated the script for that pilot and other items from their show to the National Musem of American History

The National Museum of American History hosted a donation ceremony on August 19, 2014 (Max Kutner)

Mutchnick and Kohan decided to donate around 2012, after Joe Biden spoke to the press about the show's social and cultural impact and his support for gay marriage The items had been at Emerson College, where Mutchnick attended college, but the school was looking to move the collection So Mutchnick and Kohan contacted Dwight Blocker Bowers, an entertainment curator at the American History Museum, who selected artifacts from those at Emerson "They're representative of all different things," Kohan says of the items, including "combating hatred with humor "

In attendance at today's donation ceremony were Kohan and Mutchnick's mothers "Without them, neither of us would be gay," Kohan joked after signing the deed of gift "Or funny "

"Will & Grace" debuted on NBC in 1998, only two weeks before Matthew Shepard was beaten for being gay and left to die in Laramie, Wyoming By the time the show ended its run in 2006, depictions of gay characters on television had gone from fringe or exclusively comedic to mainstream Yet Mutchnick says there is still progress to be made "I for one would like to see some gay characters swing back to the center and get out of that role of the funny neighbor," Mutchnick says "I would love to see a really fleshed out gay man or woman standing at the center of a show "

Kohan's sister, Jenji, is behind another popular television show that depicts gay characters, "Orange is the New Black "

David Kohan (right) and Max Mutchnick (left), creators of "Will & Grace," posed with their mothers at a donation ceremony at the National Museum of American History (Max Kutner)

Mutchnick has been a longtime fan of the American History Museum's collection, especially Dorothy's slippers from *The Wizard of Oz* "It was in my paperwork when I came out of the closet," Mutchnick jokes "Trip number one—the National Museum to check out the ruby slippers " In addition to the pilot script, Kohan and Mutchnick donated personal correspondence, props from the show, and an illustration of the main characters by famous caricaturist Al Hirschfeld

The "Will & Grace" items were among many related to the LGBT community that entered the museum's collections today Other artifacts included the first transgender pride flag, a tennis racket owned by transgender athlete Renée Richards, and costumes from the DC Cowboys Dance Company

"It's non-existent," says Monica Helms, who designed the transgender pride flag in 1999, about the representatation of transgender history in most museums "We have been marginalized People don't realize that we've existed We've existed all along " For the flag, Helms used the colors light blue, pink and white, symbolizing baby boys and girls and "people who are still questioning what gender they do have "

The National Museum of American History acquired the first transgender pride flag and other historic LGBT items (Max Kutner)

Helms wore her father's U S Navy baseball cap to the donation ceremony She served in the Navy in the late 1970s and began living as a woman in 1997 Following the donation, she spoke about how the rights of transgender people serving in the U S military have yet to progresses like those of gay people Currently, transgender people cannot serve openly in the military

Also donating today was David Huebner, the first openly gay ambassador in the Obama administration Huebner gave the diplomatic passports belonging to him and his husband "You really are the face and the voice of the American people," Huebner says of his time as ambassador "A lot of it is very difficult " His husband was likely the first same-sex spouse to recieve a diplomatic passport

Previous items in the museum's collection relating to the LGBT community include protest signs from the gay civil rights movement, a tennis dress belonging to Billie Jean King, and lab equipment relating to HIV and AIDS

The National Museum of American History expanded its LGBT collections, including the first transgender pride flag and Renée Richards' tennis racket (Max Kutner)

About Max Kutner

Max Kutner is a New York City-based journalist who has written for *Newsweek, Boston* magazine and Vice com He was an editorial intern for *Smithsonian* in 2014

|

EXHIBIT 33

Dora
Department of Regulatory Agencies

John W. Hickenlooper
Governor

Barbara J. Kelley
Executive
Director

Division of Civil Rights
Steven Chavez
Director of Division of Civil Rights

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http://www.dora.state.co.us/civil-rights/

Charge No. P20130008X

Charlie Craig
1401 E. Girard Pl., #9-135
Englewood, CO 80113 Charging Party

Masterpiece Cakeshop
3355 S. Wadsworth Blvd.
Lakewood, CO 80227 Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is sufficient evidence to support the Charging Party's claim of denial of full and equal enjoyment of a place of public accommodation based on his sexual orientation. As such, a **Probable Cause** determination hereby is issued.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about July 19, 2012, the Respondent, a place of public accommodation, denied him the full and equal enjoyment of a place of accommodation on the basis of his sexual orientation (gay). The Respondent avers that its standard business practice is to deny service to same-sex couples based on religious beliefs.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery that provides cakes and baked goods to the public, and operates within the state of Colorado.

The Charging Party states that on or about July 19, 2012, he visited the Respondent's place of business for the purpose of ordering a wedding cake with his significant other, David Mullins ("Mullins"), and his mother Deborah Munn ("Munn"). The Charging Party and his partner planned to travel to Massachusetts to marry and intended to have a wedding reception in Denver upon their return. The Charging Party and his significant other were attended to by the Respondent's Owner, Jack Phillips ("Phillips"). The Charging Party asserts that while viewing photos of the available wedding cakes, he informed the owner that the cake was for him and his significant other. The Charging Party states that in response, Phillips replied that his standard business practice is to deny service to same-sex couples based on his religious beliefs. The Charging Party states that based on Phillips response and refusal to provide service, the group left the Respondent's place of business.

The Charging Party states that on July 20, 2012, in an effort to obtain more information as to why her son was refused service, Munn telephoned Phillips. During this telephone conversation, Phillips stated that "because he is a Christian, he was opposed to making cakes for same-sex weddings for any same-sex couples."

The record reflects that Phillips subsequently commented to various news organizations, that he had turned approximately six same-sex couples away for this same reason. The Respondent has not argued that it is a business that is principally used for religious purposes.

Respondent Owner Jack Phillips ("Phillips") states that on July 19, 2012, the Charging Party, Mullins, and Munn visited his bakery and stated that they wished to purchase a wedding cake. Phillips asserts that he informed the Charging Party that he does not create wedding cakes for same-sex weddings. According to Phillips, this interaction lasted no more than 20 seconds. Phillips states that the Charging Party, Mullins, and Munn subsequently exited the Respondent's place of business. The Respondents avers that on July 20, 2012, during a conversation with Munn, he informed her that he refused to create a wedding cake for her son based on his religious beliefs and because Colorado does not recognize same-sex marriages.

The Respondent states that the aforementioned situation has occurred on approximately five or six past occasions. The Respondent contends that in those situations, he advised potential customers that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. Respondent owner Phillips adds that he told the Charging Party and his

partner that he could create birthday cakes, shower cakes, or any other cakes for them. The Respondent asserts that this decision rested in part based on the fact that the state of Colorado does not recognize same sex marriages.

In an affidavit provided by the Charging Party during the Division's investigation, Stephanie Schmalz ("S. Schmalz") states that on January 16, 2012, she and her partner Jeanine Schmalz ("J. Schmalz") visited the Respondent's place of business to purchase cupcakes for their family commitment ceremony. S. Schmalz states that when she confirmed that the cupcakes were to be part of a celebration for her and her partner, the Respondent's female representative stated that she would not be able to place the order because "the Respondent had a policy of not selling baked goods to same-sex couples for this type of event." Following her departure from the Respondent's place of business, S. Schmalz telephoned the Respondent to clarify its policies. During this telephone conversation, S. Schmalz learned that the female representative was an owner of the business and that it was the Respondent's stated policy not to provide cakes or other baked goods to same-sex couples for wedding-type celebrations.

S. Schmalz subsequently posted a review on the website Yelp describing her experiences with the Respondent. An individual identifying himself as "Jack P. of Masterpiece Cakeshop" posted a reply to Schmalz's review, in which he stated that "...a wedding for [gays and lesbians] is something that, so far, not even the State of Colorado will allow" and did not dispute that he refuses to serve gay and lesbian couples planning weddings or commitment celebrations.

S. Schmalz states that after learning of the Respondent's policy, she later contacted the Respondent's place of business and spoke to Phillips. During this conversation, S. Schmalz claimed to be a dog breeder and stated that she planned to host a "dog wedding" between one of her dogs and a neighbor's dog. Phillips did not object to preparing a cake for S. Schmalz's "dog wedding."

In an affidavit provided by the Charging Party during the Division's investigation, Samantha Saggio ("Saggio") states that on May 19, 2012, she visited the Respondent's place of business with her partner, Shana Chavez ("Chavez") to look at cakes for their planned commitment ceremony. Saggio states that upon learning that the cake would be for the two women, the Respondent's female representative stated that the Respondent would be unable to provide a cake because "according to the company, Saggio and Chavez were doing something 'illegal.'"

In an affidavit provided by the Charging Party during the Division's investigation, Katie Allen ("Allen") and Alison Sandlin ("Sandlin") state that on August 6, 2005, they visited the Respondent's place of business to taste cakes for their planned commitment ceremony. Allen states that upon learning of the women's intent to wed one another, the Respondent's female representative stated, "We can't do it then" and explained that the Respondent had established a policy of not taking cake orders for same-sex weddings, "because the owners believed in the word of Jesus."

Allen and Sandlin state that they later spoke directly with Phillips. During this conversation, Phillips stated that "he is not willing to make a cake for a same-sex commitment ceremony, just as he would not be willing to make a pedophile cake."

Discriminatory Denial of Full and Equal Enjoyment of Services – Sexual Orientation (gay)

To prevail on a claim of discriminatory denial of full and equal enjoyment of services, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought goods, services, benefits or privileges from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied a type of service usually offered by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his sexual orientation. The Charging Party visited the Respondent's place of business for the purpose of ordering a wedding cake for his wedding reception. The evidence indicates that the Charging Party and his partner were otherwise qualified to receive services or goods from the Respondent's bakery. During this visit, the Respondent informed the Charging Party that his standard business practice is to deny baking wedding cakes to same-sex couples based on his religious beliefs. The evidence shows that on multiple occasions, the Respondent turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. The Respondent's representatives stated that it would be unable to provide a cake because "according to the company, [the potential same-sex customers] were doing something 'illegal,'" and "because the owners believed in the word of Jesus." The Respondent indicates it will bake other goods for same sex couples such as birthday cakes, shower cakes or any other type of cake, but not a wedding cake. As such, the evidence shows that the Respondent refused to allow the Charging Party and his partner to patronize its business in order to purchase a wedding cake under circumstances that give rise to an inference of unlawful discrimination based on the Charging Party's sexual orientation.

Based on the evidence contained above, I determine that the Respondent has violated C.R.S. 24-34-402, as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(II), as re-enacted, the Parties hereby are ordered by the Director to proceed to attempt amicable resolution of these charges by compulsory mediation. The Parties will be contacted by the agency to schedule this process.

On Behalf of the Colorado Civil Rights Division

Steven Chavez, Director
or Authorized Designee

3/5/2013
Date

DORA
Department of Regulatory Agencies

John W. Hickenlooper
Governor

Barbara J. Kelley
Executive
Director

Division of Civil Rights
Steven Chavez
Director of Division of Civil Rights

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Charge No. P20130007X

David Mullins
1401 E. Girard Pl., #9-135
Englewood, CO 80113 — Charging Party

Masterpiece Cakeshop
3355 S. Wadsworth Blvd.
Lakewood, CO 80227 — Respondent

DETERMINATION

Under the authority vested in me by C.R.S. 24-34-306 (2), I conclude from our investigation that there is sufficient evidence to support the Charging Party's claim of denial of full and equal enjoyment of a place of public accommodation based on his sexual orientation. As such, a **Probable Cause** determination hereby is issued.

The Respondent is a place of public accommodation within the meaning of C.R.S. 24-34-601 (1), as re-enacted, and the timeliness and all other jurisdictional requirements pursuant to Title 24, Article 34, Parts 3 and 6 have been met.

The Charging Party alleges that on or about July 19, 2012, the Respondent, a place of public accommodation, denied him the full and equal enjoyment of a place of accommodation on the basis of his sexual orientation (gay). The Respondent avers that its standard business practice is to deny service to same-sex couples based on religious beliefs.

The legal framework under which civil rights matters are examined is as follows: The initial burden of proof rests on the Charging Party to prove his/her case. Each key or essential element ("prima facie") of the particular claim must be proven, through a majority ("preponderance") of the evidence. If the Charging Party meets this initial burden of proof, then the Respondent has the next burden of explaining, with sufficient clarity, a business justification for the action taken. This is in response to the specific alleged action named in the charge. In addition, the Respondent has the burden of production of sufficient documents and other information requested by the administrative agency during the civil rights investigation. If the Respondent offers a legitimate business reason, then the burden once again shifts back to the Charging Party to prove that this proffered legitimate business reason is a pretext for discrimination. At this stage, the Charging Party must prove, again through sufficient evidence, that the true and primary motive for the Respondent's actions is unlawful discrimination.

"Unlawful discrimination" means that which is primarily based on the Charging Party's asserted protected group or status. The Respondent's stated reasons for its actions are presumed to be true, unless and until the Charging Party, again through competent evidence found in this investigation, adequately shows that the Respondent's reason is pretext; is not to be believed; and that the Charging Party's protected status was the main reason for the adverse action taken by the Respondent. The Charging Party does not need to submit additional evidence, in response to the Respondent's position, but the available evidence must be legally sufficient so that a reasonable person would find that the Respondent intended to discriminate against the Charging Party because of his/her protected civil rights status. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997), and Ahmad Bodaghi and State Board of Personnel, State of Colorado v. Department of Natural Resources, 995 P.2d 288 (Colo. 2000).

The Respondent is a bakery that provides cakes and baked goods to the public, and operates within the state of Colorado.

The Charging Party states that on or about July 19, 2012, he visited the Respondent's place of business for the purpose of ordering a wedding cake with his significant other, Charlie Craig ("Craig"), and his mother Deborah Munn ("Munn"). The Charging Party and his partner planned to travel to Massachusetts to marry and intended to have a wedding reception in Denver upon their return. The Charging Party and his significant other were attended to by the Respondent's Owner, Jack Phillips ("Phillips"). The Charging Party asserts that while viewing photos of the available wedding cakes, he informed the owner that the cake was for him and his significant other. The Charging Party states that in response, Phillips replied that his standard business practice is to deny service to same-sex couples based on his religious beliefs. The Charging Party states that based on Phillips response and refusal to provide service, the group left the Respondent's place of business.

The Charging Party states that on July 20, 2012, in an effort to obtain more information as to why her son was refused service, Munn telephoned Phillips. During this telephone conversation, Phillips stated that "because he is a Christian, he was opposed to making cakes for same-sex weddings for any same-sex couples."

The record reflects that Phillips subsequently commented to various news organizations, that he had turned approximately six same-sex couples away for this same reason. The Respondent has not argued that it is a business that is principally used for religious purposes.

Respondent Owner Jack Phillips ("Phillips") states that on July 19, 2012, the Charging Party, Craig, and Munn visited his bakery and stated that they wished to purchase a wedding cake. Phillips asserts that he informed the Charging Party that he does not create wedding cakes for same-sex weddings. According to Phillips, this interaction lasted no more than 20 seconds. Phillips states that the Charging Party, Craig, and Munn subsequently exited the Respondent's place of business. The Respondents avers that on July 20, 2012, during a conversation with Munn, he informed her that he refused to create a wedding cake for her son based on his religious beliefs and because Colorado does not recognize same-sex marriages.

The Respondent states that the aforementioned situation has occurred on approximately five or six past occasions. The Respondent contends that in those situations, he advised potential customers that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. He adds that he told the Charging Party and his partner that he "could

create birthday cakes, shower cakes, or any other cakes." The Respondent asserts that this decision rested in part based on the fact that the state of Colorado does not recognize same sex marriages.

In an affidavit provided by the Charging Party during the Division's investigation, Stephanie Schmalz ("S. Schmalz") states that on January 16, 2012, she and her partner Jeanine Schmalz ("J. Schmalz") visited the Respondent's place of business to purchase cupcakes for their family commitment ceremony. S. Schmalz states that when she confirmed that the cupcakes were to be part of a celebration for her and her partner, the Respondent's female representative stated that she would not be able to place the order because "the Respondent had a policy of not selling baked goods to same-sex couples for this type of event." Following her departure from the Respondent's place of business, S. Schmalz telephoned the Respondent to clarify its policies. During this telephone conversation, S. Schmalz learned that the female representative was an owner of the business and that it was the Respondent's stated policy not to provide cakes or other baked goods to same-sex couples for wedding-type celebrations.

S. Schmalz subsequently posted a review on the website Yelp describing her experiences with the Respondent. An individual identifying himself as "Jack P. of Masterpiece Cakeshop" posted a reply to Schmalz's review, in which he stated that "...a wedding for [gays and lesbians] is something that, so far, not even the State of Colorado will allow" and did not dispute that he refuses to serve gay and lesbian couples planning weddings or commitment celebrations.

S. Schmalz states that after learning of the Respondent's policy, she later contacted the Respondent's place of business and spoke to Phillips. During this conversation, S. Schmalz claimed to be a dog breeder and stated that she planned to host a "dog wedding" between one of her dogs and a neighbor's dog. Phillips did not object to preparing a cake for S. Schmalz's "dog wedding."

In an affidavit provided by the Charging Party during the Division's investigation, Samantha Saggio ("Saggio") states that on May 19, 2012, she visited the Respondent's place of business with her partner, Shana Chavez ("Chavez") to look at cakes for their planned commitment ceremony. Saggio states that upon learning that the cake would be for the two women, the Respondent's female representative stated that the Respondent would be unable to provide a cake because "according to the company, Saggio and Chavez were doing something 'illegal.'"

In an affidavit provided by the Charging Party during the Division's investigation, Katie Allen ("Allen") and Alison Sandlin ("Sandlin") state that on August 6, 2005, they visited the Respondent's place of business to taste cakes for their planned commitment ceremony. Allen states that upon learning of the women's intent to wed one another, the Respondent's female representative stated, "We can't do it then" and explained that the Respondent had established a policy of not taking cake orders for same-sex weddings, "because the owners believed in the word of Jesus."

Allen and Sandlin state that they later spoke directly with Phillips. During this conversation, Phillips stated that "he is not willing to make a cake for a same-sex commitment ceremony, just as he would not be willing to make a pedophile cake."

Discriminatory Denial of Full and Equal Enjoyment of Services – Sexual Orientation (gay)

To prevail on a claim of discriminatory denial of full and equal enjoyment of services, the evidence must show that: (1) the Charging Party is a member of a protected class; (2) the Charging Party sought goods, services, benefits or privileges from the Respondent; (3) the Charging Party is otherwise a qualified recipient of the goods and services of the Respondent; (4) the Charging Party was denied a type of service usually offered by the Respondent; (5) under circumstances that give rise to an inference of unlawful discrimination based on a protected class.

The Charging Party is a member of a protected class based on his sexual orientation. The Charging Party visited the Respondent's place of business for the purpose of ordering a wedding cake for his wedding reception. The evidence indicates that the Charging Party and his partner were otherwise qualified to receive services or goods from the Respondent's bakery. During this visit, the Respondent informed the Charging Party that his standard business practice is to deny baking wedding cakes to same-sex couples based on his religious beliefs. The evidence shows that on multiple occasions, the Respondent turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception based on his religious beliefs. The Respondent's representatives stated that it would be unable to provide a cake because "according to the company, [the potential same-sex customers] were doing something 'illegal,'" and "because the owners believed in the word of Jesus." The Respondent indicates it will bake other goods for same sex couples such as birthday cakes, shower cakes or any other type of cake, but not a wedding cake. As such, the evidence shows that the Respondent refused to allow the Charging Party and his partner to patronize its business in order to purchase a wedding cake under circumstances that give rise to an inference of unlawful discrimination based on the Charging Party's sexual orientation.

Based on the evidence contained above, I determine that the Respondent has violated C.R.S. 24-34-402, as re-enacted.

In accordance with C.R.S. 24-34-306(2)(b)(II), as re-enacted, the Parties hereby are ordered by the Director to proceed to attempt amicable resolution of these charges by compulsory mediation. The Parties will be contacted by the agency to schedule this process.

On Behalf of the Colorado Civil Rights Division

Steven Chavez, Director
of Authorized Designee

3/5/2018
Date

EXHIBIT 34

Case Comments

Is Public?	Body	Created By	Created Date
	On 10/2/18 the Commission voted to set this case for hearing. Commissioner Elias will be the case liaison.	Adriana Carmona	10/3/2018 11:52 AM
	Conducted Probable Cause Review on 9/26/18. Panel: Aubrey Elenis, Jennifer McPhearson, Jenna Ambacher, [redacted]. Panel voted unanimously to recommend case for hearing.	Wesley Fry	9/27/2018 10:55 AM
	Received CP Attorney entry of appearance: John McHugh Reilly Pozner LLP www.rplaw.com 1700 Lincoln Street, Suite 3400 Denver, Colorado 80203 Main: 303.893.6100, Fax: 303.893.6110 jmchugh@rplaw.com	Adriana Carmona	8/22/2018 4:02 PM
	RP Called and wants investigator on case. Referred to Wesley Fry. 8/21/18	Robin Eskildson	8/21/2018 2:59 PM
	Conciliation was conducted today, 8-16-18, and failed. Emailed Conciliation Failure letter to both parties' attorneys. Placed case file on Wes' chair for PCR.	Jaclyn Kjellsen	8/16/2018 1:18 PM
	Provided case file to JK.	Nicole Trotta	7/9/2018 3:02 PM
	Rec'd email from CP with CP's atty info. Email from CP atty w/ available conciliation date. Response email to CP atty. Sent conciliation confirmations via email to CP atty (Scardina) and RP atty (Warner), indicating that JK will be handling the case. Reassigned conciliation to JK per ST. Conciliation: 8/16 @ 9 a.m.	Nicole Trotta	7/9/2018 3:02 PM
	Rec'd emails from RP atty (Warner) with available conciliation dates. Sent response email to Warner. Email to CP re: scheduling conciliation, req. response by COB 7/12.	Nicole Trotta	7/9/2018 1:10 PM
	Rec'd VM from RP atty (Warner) indicating he received my email about conciliation and had questions. Returned Warner's call and answered his questions: Warner indicated he hadn't received the LOD; I let him know it was mailed on 7/2 and he said he would wait to get it in the mail. Warner asked if his client had to participate in person; I told Warner that whoever has decision-making authority should participate in conciliation, so if his client grants his attorneys decision-making authority, the Respondent's attorneys may participate on his behalf. I also let Warner know that conciliation may take place in person	Nicole Trotta	7/5/2018 11:41 AM

or by phone. Warner said he would send an email to me by Monday with available conciliation dates.		
Assigned conciliation to NT. Sent email to RP atty (Warner) re: scheduling conciliation, req. response by COB 7/9.	Nicole Trotta	7/3/2018 1:21 PM
Gave file to Nicole to schedule conciliation.	Steven Taylor	7/2/2018 4:07 PM
PC case. Case file to Steve to assign case to ADR for conciliation.	Jennifer McPherson	7/2/2018 3:42 PM
LOD updated, signed 6/28/2018. Mailed to parties via U.S. mail today.	Jennifer McPherson	7/2/2018 2:07 PM
On 6/13/18 Commissioner Aragon approved 90 day CP JET. New case end date 10/13/18. Emailed notice.	Adriana Carmona	6/20/2018 1:26 PM
[redacted]. Signed LOD, entered in tracking logs, closed in CC, LOD to JM (she has file) to be forwarded for closure.	Penny Pearson	6/13/2018 3:44 PM
Emailed LOD to PP.	Wesley Fry	6/13/2018 1:05 PM
Emailed CP's JET request to Adriana. Uploaded CP JET memo to CC.	Wesley Fry	6/13/2018 12:52 PM
Spoke with Mr. Warner, who stated that the RP does not object to the CP's JET request.	Wesley Fry	6/13/2018 12:43 PM
LVM with Mr. Warner to see if his client objected to CP's request.	Wesley Fry	6/13/2018 9:18 AM
Spoke with Autumn Scardina, who requested her JET.	Wesley Fry	6/12/2018 10:34 AM
[redacted] office on 5/21/18.	Carol Fernandes	5/21/2018 9:17 AM
File to Carol to make copy for AGO.	Jennifer McPherson	5/15/2018 5:51 PM
File to JM per request.	Penny Pearson	5/15/2018 9:41 AM
request case file from Wes so a copy can be made for AGO. Request that 2nd JET be requested.	Jennifer McPherson	5/14/2018 6:08 PM
Updated information for migration.	Wesley Fry	5/7/2018 3:54 PM
Onn 3/15/18 Commissioner Aragon approved 90 day RP JET. New case end date 7/15/18. Emailed notice to all.	Adriana Carmona	3/29/2018 7:29 AM

Emailed JET request to Adriana.	Wesley Fry	3/14/2018 1:29 PM
Spoke with CP, who did not object to RP's request.	Wesley Fry	3/14/2018 1:18 PM
Spoke with Jacob Warner, who requested JET on behalf of RP.	Wesley Fry	3/12/2018 2:52 PM
Final LOD revisions made. Discussed with AW and JM; Decision made to temporarily hold off issuance. File with Wes.	Penny Pearson	2/28/2018 2:46 PM
Made revisions and returned to PP for review.	Wesley Fry	2/26/2018 9:29 AM
LOD to Wes for edits.	Penny Pearson	1/31/2018 10:39 AM
LOD to PP for review; placed file in no jets bin.	Wesley Fry	1/26/2018 8:18 AM

CONTACT:

Complainant
Autumn Scardina
7779 Everett Way
Arvada, CO 80005
autumn@scardinalaw.com
720-420-9068

CP's Attorney
Todd Scardina, Esq.
1245 E. Colfax Ave, Suite 302
Denver, CO 80218
todd@scardinafamilylaw.com

Wesley Fry 1/26/2018 8:12 AM

Respondent
Masterpiece Cakeshop Incorporated
3355 S. Wadsworth Blvd
Lakewood, CO 80227

RP's attorney
Jake Warner
Legal Counsel
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020 (Office)
480-444-0028 (Fax)
jwarner@adflegal.org

Spoke with Aubrey; will proceed with drafting of LOD with provided statements from RP.	Wesley Fry	12/20/2017 3:51 PM
Received hard copy of CP's rebuttal by mail on 11/09/17. Previously uploaded placed in Wesley's mailbox.	Melissa Sandoval	11/9/2017 12:53 PM
Received CP's Rebuttal via fax on 11/7/17 and uploaded on on this day. Fax put in Wes' mail box this day.	Carol Fernandes	11/7/2017 9:15 AM
Emailed rebuttal packet to Todd Scardina.	Wesley Fry	10/5/2017 12:02 PM
Received RP's response with evidence by FED EX 09/20/17. Uploaded into system and placed original in Wesley's mailbox.	Melissa Sandoval	9/20/2017 9:50 AM
Received RP's PS via email from Mr. Warner.	Wesley Fry	9/20/2017 7:15 AM
Spoke with RP's attorney Jake Warner from Alliance Defending Freedom; granted 30 day extension for PS until 9/19/17. Informed him that the Division did not intend to stay a decision until SC decision in other case.	Wesley Fry	8/17/2017 2:18 PM
Returned VM and email from RP's attorney Mr. Jake Warner and LVM.	Wesley Fry	8/17/2017 12:51 PM
RP Attorney (Jake Warner) called in to verify investigator -- information provided	Geraldine Arellano	8/17/2017 10:56 AM
Received RP's PS on 8/16/17, scanned in case connect and put hard copy in Wes's mail box on this day.	Carol Fernandes	8/16/2017 10:48 AM
Placed file in Wesley's mailbox with no file labels printer problems will print out labels when get new printer and give them to Investigator.	Melissa Sandoval	7/27/2017 10:23 AM
Case assigned to Wes to investigate as part of case assignments. Placed skinny file at Melissa's desk for file creation.	Steven Taylor	7/26/2017 12:54 PM
Signed COD and RFI uploaded into CaseConnect and paper copies mailed/served to all parties on 7.21.2017. File to Assignment Drawer.	David Martinez	7/21/2017 11:54 AM
Received signed COD. Placed file in DM's inbox to serve RFI.	Anna Hughes	7/21/2017 8:41 AM
Emailed draft COD to PCP cc atty.	Anna Hughes	7/11/2017 4:59 PM
Interviewed PCP. PCP clarified that her atty is Todd Scardina, and provided his email address: todd@scardinafamilylaw.com. Added interview notes to the file.	Anna Hughes	7/7/2017 12:47 PM

Contacted Sean Scardina of Scardina Law, LLC, the PCP's attorney, and requested to interview PCP. Mr. Scardina said that he would speak to his client to see if she preferred that he be present during the interview. Emailed atty and PCP my contact information and availability. Drafted COD based on SOD. Gave file to ST for review.	Anna Hughes	7/7/2017 10:45 AM
Assigned case to Anna Lisa to contact PCP and draft COD if necessary.	Steven Taylor	6/27/2017 7:50 AM