COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202	
CHARLIE CRAIG and DAVID MULLINS, **Complainants/Appellees,** v. **MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS,** **Respondents/Appellants.**	▲ **COURT USE ONLY** ▲
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RESPONDENTS' BRIEF IN SUPPORT OF APPEAL	

I. Summary of Facts

Jack Phillips opened Masterpiece Cakeshop, Inc. over 20 years ago. He has spent 40 years working in bakeries and has become one of the top wedding cake designers in the Denver-area. ROA 454. As a devout follower of Jesus, Jack believes that he is to honor God in all he does. Jack often creates bakery designs that depict his faith. His shop displays signs portraying his reliance on God and His biblical commands. In obedience to Jesus, he foregoes potential income by closing his shop on Sundays and by declining to make goods that express messages in conflict with his religious beliefs. He sincerely believes he cannot use his design gifts and artistic talents to create cakes that express messages contrary to his religious beliefs. That is why he will not, consistent with these beliefs, create Halloween cakes or other baked products. Jack believes that God ordained marriage as the sacred union between one man and one woman and that marriage exemplifies the relationship of Christ and His followers. There are few Christian symbols more holy and sacred. For these reasons, Jack politely declined Complainants' request to create a cake to celebrate Complainants' Massachusetts wedding. Jack assured Complainants that, although his religious convictions about marriage would not enable him to create a wedding cake, he would prepare any other bakery product for them. ROA 461.

If affirmed, the ALJ's decision would compel Jack to choose between his deeply-held religious convictions and his lifelong vocation and business. That would be both unconstitutional and, given the number of bakeries in the area, unnecessary. Complainants easily secured a rainbow-designed wedding cake from another artist. ROA 499, 504. The ALJ's decision would require Jack to use his artistic talents to celebrate a same-sex marriage – a union that the State of Colorado does not recognize. As a matter of public policy,

Colorado's Constitution states that "[o]nly a union of one man and one woman shall be valid or recognized as a marriage . . . ." COLO. CONST. art. II, § 31.

II. Argument[1]

1. The ALJ Erroneously Denied Respondents' Motions to Dismiss as There was No Probable Cause Determination Against Jack and Masterpiece.

Complainants' Charge of Discrimination alleged that Masterpiece violated Colorado's public accommodation statute (C.R.S. § 24-34-601). The Charge named only Masterpiece; Jack was not named in the Charge. C.R.S. § 24-34-604 requires that such a Charge must be filed within 60 days of the alleged discriminatory act "and if not so filed, it shall be barred." The ALJ lacked discretion to disregard this mandatory language in the statute. *Id.; see Wilson v. Hill*, 782 P.2d 874, 875 (Colo. App. 1989).

Notwithstanding the absence of a probable cause finding as required by C.R.S. § 24-34-306(2)(b)(II), the ALJ excused this failure by suggesting the "oversight" caused Jack no prejudice. There is a significant distinction between Masterpiece, as a corporation, and Jack, as an individual. Moreover, Jack may be substantially prejudiced by the ALJ's finding both by personal liability exposure and by a potential two-year jail sentence.[2] *See Jarnagin v. Busby, Inc.*, 867 P.2d 63, 69 (Colo. App. 1993).

In addition, Colorado law requires the Director to identify "with specificity [in a written notice] the legal authority and jurisdiction" and "the fact and law asserted" against a respondent. C.R.S. § 24-34-306(2)(b)(II). The purported notice did not comply with this mandate as it twice referred to the wrong Colorado statute. ROA 15, 20. Once again, the ALJ improperly excused this statutory requirement by claiming it was a "typographical error"

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[1] Respondents incorporate by reference the motions and replies as set forth in the record on pages 116-118; 120-124; 130-149; 170-174; 177-201; 360-377; 391-505; 558-559; 568-596 and 681-687.

[2] When the Director issued the findings of probable cause against Masterpiece, the penalty and fine was set at 12 months in jail and/or a fine of not more than $300. C.R.S. § 34-24-602(2).

of "no legal consequence." ROA 356. The ALJ erred in denying Respondents' motions to dismiss pursuant to C.R.C.P. 12(b)(1), (2) and (5).[3]

2. The ALJ Erroneously Granted Complainants' Motion for Protective Order and Limited Masterpiece's Discovery.

The ALJ erred in granting Complainant's Motion for Protective Order preventing discovery by Masterpiece, including determining facts related to the type of cake Complainants might want and the nature of Complainants' ceremony. This discoverable evidence was highly relevant to Respondents' free speech and free exercise claims. *See Cressman v. Thompson*, 719 F.3d 1139, 1157 (10th Cir. 2013)(whether a motorist was compelled to display message at odds with his beliefs on a state issued license plate is an issue of fact). The ALJ committed reversible error by denying such discovery.

3. The ALJ Erred By Granting Complainants' Motion for Summary Judgment and Denying Respondents' Motion for Summary Judgment.

a. Jack did not discriminate "because of" sexual orientation.

A violation of the public accommodation statute requires proof that the alleged discrimination was "because of" sexual orientation. C.R.S. § 24-34-601(2). The ALJ found that he could not separate Complainants' identification as gay and their desire to celebrate same-sex marriage. ROA 601. But Colorado itself makes this distinction. Colorado has established that marriage is only the union of one man and one woman. COLO. CONST. art. II, § 31; C.R.S. § 14-2-104(1), (2). And, unlike the facts in *CLS v. Martinez*, 130 S. Ct. 2971, 2990 (2010), at issue here is the combination of Jack's exercise of his sincere religious beliefs (as conceded by Complainants, ROA 252), and Colorado's public policy about marriage, not Complainants' sexual orientation. Indeed, just as Jack was willing to serve Complainants, he has served other customers who identified themselves as gay. ROA 457. The ALJ wrongly

[3] Without waiving this argument, Respondents hereafter refer to Masterpiece and Phillips as "Jack."

suggested that Jack's objection to designing a cake for a same-sex commitment ceremony revealed his "real objection" to sexual orientation. Jack's objection lies not with a person's sexual orientation, but rather that he act in accord with his religious beliefs about the sanctity of marriage as ordained by God.[4] The ALJ characterized Jack's assertion that he did not discriminate on the basis of sexual-orientation as one that makes "little sense," because only same-sex couples engage in same sex-weddings. Yet, this assertion is factually and legally inconsistent with Colorado law.

b. The ALJ's Decision Violates the First Amendment's Compelled-Speech Doctrine and Colo. Const. art. II, Section 10.

The American tradition rests on the principle that each person must decide the ideas and beliefs deserving of expression. *Turner Broad. Sys. Inc. v. Federal Commc'ns Comm'n*, 512 U.S. 622, 641 (1994). As *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), explained, "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[5] *Id.* The Colorado Supreme Court has repeatedly held that the free-speech guarantees of the Colorado Constitution are even broader than those afforded by the First Amendment. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59-60 (Colo. 1991). Government violates the compelled-speech doctrine by requiring a person to engage in unwanted expression, *Rumsfeld v. FAIR*, 547 U.S. 47, 61 (2007), and by forcing him to facilitate Complainants' message celebrating their Massachusetts same-sex marriage.[6] Although the ALJ conceded that Jack exercises

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[4] Colorado expresses its policy regarding marriage repeatedly and unequivocally as the union between one man and one woman. COLO. CONST. art. II, § 31; C.R.S. § 14-2-04(1); C.R.S. § 14-2-104(2); C.R.S. § 14-15-102; C.R.S. § 14-15-118. It is inconceivable that a citizen of the State of Colorado could be punished for acting in accord with Colorado law.

[5] This broad protection extends to businesses and expression that is compensated. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995).

[6] *See Rumsfeld v. FAIR*, 547 U.S. 47, 61-65 (2007); *see e.g., Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20-21 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

"considerable skill and artistry," ROA 603, he erred by holding that the federal and state constitutions do not protect Jack's artistic creations as a form of speech.

i. Jack's Unique Cake Creations Are Protected Artistic Expression.

The ALJ's decision departs from established precedent that protects artistic expression.[7] The ALJ erred in concluding that the First Amendment and the Colorado Constitution would only protect Jack if the Complainants had demanded a cake with symbols or words that advocate support for same-sex marriage.[8] ROA 603. That, however, is a distinction without a difference. *Hurley* explains that First Amendment protection extends far beyond an "articulable" or "particularized" message. *Hurley*, 515 U.S. at 569-70. Otherwise, constitutional protection would "never reach the unquestionably shielded painting of Jackson Pollock [abstract expressionist], music of Arnold Schoenberg [expressionist music composer], or the Jabberwocky verse of Lewis Carroll . . . ." *Id.* The Constitution protects freedom of the mind to create abstract and even unintelligible expression. *Wooley*, 430 U.S. at 715 (quoting *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The compelled speech doctrine applies not only to Jack's original creative expression, but also to cases like this where a citizen is being forced to facilitate the message of another. *Rumsfeld*, 547 U.S. at 61-65.

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[7] *See Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568 (1995)(parades with or without words); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989)(music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981)(dance); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)(theatre); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-34 (1975)(topless dancing); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010)(tattoo and tattooing process); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007)(paintings without a particular message); *Piarowski v. Ill. Cmty. Coll. Dist.*, 759 F.2d 625, 628-32 (7th Cir. 1985)(stained windows as "art for art's sake" that did not communicate a message).

[8] As mentioned earlier, the ALJ precluded Jack's ability to inquire into these issues by barring meaningful discovery.

Merriam Webster's Dictionary defines art as "the conscious use of skill and creative imagination especially in the production of aesthetic objects."[9] Television shows like "Ace of Cakes" and "Cake Boss" confirm that bakers like Jack consider their work as an expressive art form. Such artists find inspiration and imagination from many sources including, in Jack's case, his faith. Cake artists like Jack prepare one-of-a-kind creations that are inherently expressive whether they include words or symbols or express specific, articulable political messages. This is evidenced by the rainbow-design cake ultimately selected by Complainants. ROA 478.

Jack devotes hours to meet with clients, to design a wedding cake, to sketch it out on paper, and then to sculpt and design it. ROA 456. Pictures of his cake creations demonstrate these commitments. ROA 462-64. He often is required to set up the cake at the wedding ceremony location and then to interact with those at the ceremony. ROA 456.

Wedding cakes also communicate a message of congratulations and honor to the union of the man and woman. Today, as in the past, the wedding cake is a centerpiece of the marriage ceremony and communicates a positive and celebratory message about the couple and their future. Toba Garrett, *Wedding Cake Art and Design* (2010). "A memorable cake is almost as important as the bridal gown in creating the perfect wedding." *Id.* Unlike the cases cited by the ALJ that involve prefabricated expression, the ALJ insists that Jack must use his artistic skill to actually create the unwanted expression. Even if that were not the case, the wedding cake necessarily conveys a celebratory message in support of a couple's union. This violates both components of the compelled-speech doctrine.

[9] http://www.merriam-webster.com/wdictionary/arts (last visited April 17, 2014).

ii. Neither *Rumsfeld, Wooley,* nor *Barnette* Permit the Government to Compel Jack to Create and Design a Wedding Cake.

The ALJ relied on three main cases to support his decision: *Rumsfeld, Wooley,* and *Barnette.* These cases actually support Jack. The ALJ incorrectly held that even if the public-accommodation statute impacts Jack's rights, any impact is "incidental" under *Rumsfeld.* But *Rumsfeld* dealt with the issue of judicial deference to Congress's military power in which law schools challenged a statute requiring them to provide military recruiters with the same access to students as provided to other recruiters. 547 U.S. at 51, 61-65. The ALJ ignored the fact that *Rumsfeld* specifically acknowledged that the public accommodation statute at issue in *Hurley* affected the parade organizations' expression. In contrast, the Court concluded that the law schools' hosting military recruiters "does not affect the law schools' speech because the schools *are not speaking* when they host interviews and recruiting receptions." *Id.* at 64 (emphasis added). The ALJ ignored *Rumsfeld's* discussion of *Hurley* and focused solely on the "incidental" effect of requiring law schools to post logistical information about recruiter visits. Such a requirement is hardly equivalent to Jack laboring hours to design a cake that celebrates an event that conflicts with his religious convictions and Colorado law.

The ALJ also attempted to distinguish Jack's expression from cases like *Barnette* and *Wooley* by explaining that one's free speech exercise (refusal to salute the flag and display the state's motto) did not conflict with the rights of others. However, state law rights cannot trump constitutional rights. Legislatively created "equality" rights do not justify the suppression of free expression. *Barnette*, 319 U.S. at 638. *See also Hurley*, 515 U.S. 557 (parade organizers could exclude marchers despite public accommodation law); *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (newspaper could exclude replies from candidates despite statute granting right to equal space to reply); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)(scouts could exclude certain individuals despite public accommodation statute). Jack's

creation of a wedding cake implicates his "individual freedom of mind" far more than does displaying a state-license plate or saluting a flag. *Wooley*, 430 U.S. at 714. As in *Hurley,* the government cannot use its nondiscrimination law to force Jack to create art and communicate a celebratory message he does not want to speak. Thus, the ALJ erred by not requiring the government to demonstrate that the law's application to Jack satisfied a compelling government interest and was implemented in the least restrictive means. *Pacific Gas*, 475 U.S. at 19; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).

c. The ALJ's Decision Violates the Free Exercise Clause of First Amendment of the U.S. Constitution and Colo. Const. art. II, Section 4.

Both the Colorado and United States Constitutions protect Respondents' free exercise of religion. The ALJ erroneously found no free exercise protection for religious conduct if that conduct was otherwise "prohibited by law." ROA 606. Additionally, without citing any legal authority, the ALJ asserted that Jack's decision was the same type of conduct that the U.S. Supreme Court has found subject to "legitimate regulation."[10] The ALJ applied the neutral and generally applicable standard in *Employment Division v. Smith*, 494 U.S. 872 (1990), despite the fact that *Smith* does not govern claims under the Colorado Constitution.[11] The Colorado Supreme Court has yet to decide whether to follow *Smith*'s approach or the approach of the 29 states that, either constitutionally or legislatively, apply post-*Smith* strict scrutiny standards. *See Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.*, Nos., -- P.3d--, 2013 WL 791140, at 12 (Colo. App. 2013), cert. granted, 2014 WL 1046020 (Colo. Mar 17, 2014).

[10] The Supreme Court cases that are somewhat factually similar to this case are *Hurley* and *Wooley, supra,* both of which were resolved in favor of the individual citizens' right to refuse forced participation in activities which they disagreed with, albeit on other First Amendment grounds.

[11] The ALJ erroneously relied on *Town of Foxfield v. Archdiocese of Denver*, 148 P.3d 339 (Colo. App. 2006) to support his application of *Smith*. *Foxfield* involved a First Amendment claim, not a claim under the Colorado Constitution. The petition for writ of certiorari stated the issue: "Whether the ...parking ordinance is subject to strict scrutiny under the *United States Constitution*." *Town of Foxfield v. Archdiocese of Denver*, 2006 WL 3703933 (Colo. 2007)(emphasis added).

Given that Colorado has applied strict scrutiny on other fundamental rights cases, ROA 443, and the Colorado Supreme Court has repeatedly stated that Colorado's free speech guarantees extend even broader protection than does the First Amendment, *Bock,* 819 P.2d at 59-60, the ALJ erred in not applying strict scrutiny here. Forcing Jack to create original work in violation of his conscience undoubtedly creates a substantial burden. *See Thomas v. Review Bd.,* 450 U.S. 707, 717 (1981); *Sherbert v. Verner,* 374 U.S. 398, 404 (1963); *Abdulhasseb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010). *See also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531-32, 542-43 (1993).

Moreover, as the public accommodation statute enables government officials to grant special discretionary exemptions, (C.R.S. § 24-34-601(3)[12]), it lacks neutrality and general applicability. *See Blackhawk v. Pennsylvania,* 381 F.3d 202, 209-11 (3d Cir. 2004) (Alito, J.); *Hartmann v. Stone,* 68 F.3d 973, 978 (6th Cir. 1995); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144, 167 (3d Cir. 2002). Indeed, the public accommodation statute requires a value judgment that some secular conduct deserves more protection than some religious conduct. Courts have repeatedly found that such a law is not generally applicable even when the law applied to a wide variety of secular conduct.[13] *See Fraternal Order of Police Newark v. City of Newark,* 170 F.3d 359, 365 (3d Cir. 1999). The government exempts entities with religious objections nearly identical to Jack's. The state cannot claim it has a generally applicable law when it offers the same objection to religious organizations that Jack has requested and when it has the discretion to grant ad hoc exemptions based on gender. The ALJ erred by not considering all of the exemptions in Colorado's Anti-Discrimination Act (CADA).

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[12] Colorado's public accommodations statute permits the government to subjectively exempt an entity if it determines a "bona fide" relationship exists between gender and the goods, services, facilities, privileges, advantages, or accommodations offered. C.R.S. § 24-34-601(3). The government may also exempts entities with religious objections nearly identical to Jack's, such as churches.

[13] Similarly, strict scrutiny applies because the ALJ's decision infringes on Jack's hybrid rights under the free exercise clause, free speech clause, and as a taking. *Smith,* 494 U.S. at 881-82.

d. The ALJ's recommendation is overbroad.

The ALJ's decision that Jack "[c]ease and desist from discriminating against Complainants and, in the future, other same-sex couples by refusing to sell them wedding cakes or any other product Respondents would provide to heterosexual couples" is overbroad and exceeds the Commission's authority. In *World Wide Construction Services Inc. v. Chapman,* 683 P.2d 1198 (Colo. 1984), the Colorado Supreme Court held that the Commission may only provide the remedies authorized by its enabling statute. *See Colorado Civil Rights Comm'n v. Travelers Ins. Co,* 759 P.2d 1358, 1371 (Colo. 1988). C.R.S. § 24-34-306(9) provides that the Commission shall issue "an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such action as it may order in accordance" with CADA. Thus, the Commission has no authority to issue a cease and desist order as to unidentified non-parties.

III. Conclusion

Respondents respectfully request that the Commission decline to accept the ALJ's recommendation, deny Complainants' motion for summary judgment, and grant Respondents' motion for summary judgment. ROA 391-95.

Respectfully submitted this 18th day of April, 2014.

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CERTIFICATE OF SERVICE

I certify that on this 18th day of April, 2014, a true and correct copy of Respondents' Brief in Support of Appeal was filed with the Colorado Civil Rights Commission and served on the parties or their counsel as follows:

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