No. 16-111

IN

THE MORRIS TYLER MOOT COURT OF APPEALS AT YALE

MASTERPIECE CAKESHOP, LTD., ET AL.,
Petitioner,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,
Respondent.

On Writ of Certiorari to
Court of Appeals of Colorado

BRIEF FOR PETITIONER

ID Number: 107
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QUESTION PRESENTED

In 2012, Charlie Craig and David Mullins visited Masterpiece Cakeshop in Colorado and asked Jack Phillips, the shop's owner, to design and create a cake that would celebrate their same-sex wedding. Phillips denied their request, citing his religious beliefs, but offered to provide any other baked goods the couple might want. Craig and Mullins filed charges of discrimination based on sexual orientation against Phillips under the Colorado Anti-Discrimination Act (CADA). §§ 24-34-301 to -804, C.R.S. 2014. In response, the Colorado Civil Rights Commission issued a cease and desist order to Mr. Phillips, compelling him to comply with CADA. The question presented is as follows:

Whether applying Colorado's public accommodations law to compel the petitioner to create expression that violates his sincerely held religious beliefs about marriage and that he would otherwise not produce violates the free speech or free exercise clauses of the First Amendment.[1]

[1] The parties to the proceeding are as follows:

The Petitioners are Masterpiece Cakeshop, Ltd. and Jack C. Phillips.

The Respondents are the Colorado Civil Rights Commission, Charlie Craig, and David Mullins.

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The initial decision of the administrative law judge at the Colorado Office of Administrative Courts (Joint Appendix ("J.A.") 1-13) is unreported. The final agency cease and desist order of the Colorado Civil Rights Commission (J.A. 14-16) is also unreported. The opinion of the Colorado Court of Appeals (J.A. 17-83) upholding the agency order is reported at 370 P.3d 272. The Supreme Court of Colorado's en banc denial of certiorari (J.A. 84) is unreported.

STATEMENT OF JURISDICTION

On April 25, 2016, the Supreme Court of Colorado denied Petitioners' Petition for Writ of Certiorari, keeping in place the decision of the Colorado Court of Appeals. That decision upheld the Commission's application of CADA to Petitioners despite claims that it violates their First Amendment rights. The petition for writ of certiorari was timely filed on July 22, 2016 and thereinafter granted. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * * *" U.S. Const. amend. I.

CADA provides, *inter alia*, that:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of * * * sexual orientation * * * the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

Colo. Rev. Stat. § 24-34-601(2) (2014).

The above provisions have been included and set forth in their entirety in Petitioner's Appendix attached to this brief.

INTRODUCTION

The lower court's decision would permit states to conscript the expressive energies and creations of artists in service of government aims – even where doing so would cause the artists to violate their deeply held religious beliefs. Today we consider the First Amendment rights of a wedding cake designer, but principles in this case threaten the First Amendment rights of all types of artists who dare peddle their creations to the public.

Colorado may endeavor to prohibit discrimination in the public square. It can pass laws to limit business owners' conduct and require them to serve customers equally. But, Colorado may not trample the free speech and free exercise rights of entrepreneurs whose wares are either artistic or inherently expressive. The Commission's application of CADA in this case does just that and deserves no less than strict scrutiny. Such an application neither serves the state's anti-discriminatory interest, nor is narrowly tailored for that purpose. By declining to even consider whether Phillips's custom-designed, hand-painted cakes constituted artistic expression, misapplying the *Spence* test for expressive conduct, and dismissing the hybrid nature of Phillips's twin constitutional claims, the lower court erred. Its decision upsets the balance of individual rights, runs contrary to the Constitution, and merits reversal.

STATEMENT OF FACTS

Jack Phillips is the owner of Masterpiece Cakeshop, Ltd. ("Masterpiece") and the artistic talent behind the ornate cakes sold there. Masterpiece's website notes that "Jack Phillips creates a masterpiece. Custom designs are his specialty: If you can think it up, Jack can make it into a cake!" Masterpiece Cakeshop, http://masterpiececakes.com (last visited Sept. 30, 2017). From his single location in Lakewood, Colorado, Phillips has been making custom, award-winning cakes and baked goods for the greater-Denver area since 1993. *Id.*

Phillips is also a devout Christian. The ALJ found that Phillips has been a Christian for approximately thirty-five years and believes in Jesus Christ as his Lord and savior. J.A. 19. Phillips believes that decorating cakes is a form of expressive art, that his work and talents bring honor to God, and that creating cakes for same-sex marriages would displease God. J.A. 20.

In July 2012, Charlie Craig and David Mullins sought out one of Phillips's cakes. J.A. 19. They visited Masterpiece and requested that Phillips design and create a cake that would celebrate their same-sex wedding. Phillips declined, informing the couple that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but offering to make and sell any other types of baked goods the couple might need. The couple promptly left without discussing any further details of their wedding cake. J.A. 19-20.

Craig and Mullins later filed charges with the Colorado Civil Rights Division (Division), alleging discrimination based on sexual orientation under CADA, the state's public accommodations ordinance. The law states, in relevant part, that "[i]t is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of * * * sexual orientation * * * the full and equal enjoyment of the goods * * * of a place of public accommodation." Colo. Rev. Stat. § 24-34-601(2) (2014). After an investigation, the Division issued a notice of determination finding probable cause to credit the allegations. The couple then filed a formal complaint with the Office of Administrative Courts and in December 2013, the ALJ issued a written opinion finding in favor of Craig and Mullins. As a result, the Commission then issued a final agency order in May 2014 requiring Phillips to cease and desist. J.A. 1-13, 14-16.

Phillips appealed to the Colorado Court of Appeals which upheld the Commission's decision over both Phillips's free speech and free exercise challenges. Like the ALJ before it, the

state appellate court determined, first, that "the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings" and, second, that "CADA is generally applicable, notwithstanding its exemptions" and "does not impede the free exercise of religion." J.A. 51, 67.

Phillips again sought review in the Colorado Supreme Court, this time unsuccessfully. After his petition for certiorari was denied there in April of 2016, Phillips sought review of his constitutional claims in this Court.

SUMMARY OF ARGUMENT

The lower court's ruling in this case fully erodes the First Amendment protections of entrepreneurs and small business owners, particularly those who engage in a self-expressive, artistic craft that incidentally bears on their religious beliefs. For artists like Jack Phillips, these First Amendment concerns are particularly acute and, as will be shown, constitutionally protect his right to design cakes according to his own creative will and spiritual conscience.

First, CADA's application violates Phillips's First Amendment right to freedom of speech. At his shop, Phillips is not engaged in rote wholesale cake baking. He is in the business of creating custom masterpieces. With the cake as his canvas, Phillips creates celebratory matrimonial monuments that communicate his message of joy which he believes should surround the sacred union of one man and one woman. This type of conduct garners the highest form of free speech protection on two different grounds and deserves no less than strict scrutiny.

Most simply, Phillips's cake design is an art form, as much as "the painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll," and is "unquestionably shielded" by the Free Speech Clause. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Artistic expression like Phillips's has

routinely been accorded the highest speech protections under the First Amendment and any law that purports to regulate such activity must withstand strict scrutiny.

In the alternative, Phillips's cake art constitutes "expressive conduct" under the two-prong test established in *Spence*. In applying the *Spence* test, the lower court misconstrued the expressive conduct at issue in this case. Rather than assessing the expressivity of Phillips's cake design, the court abstracted away from the cake itself and determined that the conduct at issue was instead Phillips's general compliance with the law. As such, the lower court mistakenly determined that no reasonable wedding attendee would interpret Phillips's compliance with CADA as an expression of support for same-sex marriage. This application of the *Spence* test directly conflicts with how this Court has construed expressive conduct in similar cases. *See Hurley,* at 572-73 (assessing whether parade organizing was expressive, as opposed to compliance with an anti-discrimination law); *Texas v. Johnson*, 491 U.S. 397, 402-03 (1989) (assessing whether flag burning was expressive, as opposed to compliance with an anti-desecration statute). When this error is corrected and the *Spence* test is applied to Phillips's underlying expressive conduct, the dual-pronged requirement is met and Phillips's cake art garners strict scrutiny protection.

CADA's application in this case also violates the Court's compelled-speech doctrine. Just as New Hampshire's license plate regulation impermissibly forced state residents to express a motto against their will, the Commission has used CADA to force Phillips to express a view through his art that he conscientiously rejects. *Wooley v. Maynard,* 430 U.S. 705 (1977). Though generally applicable public accommodations laws are within the state's power, certain applications may not be permitted if they unconstitutionally trample the free speech rights of citizens. *See Hurley*, at 572-573. Where a public accommodations law stops being applied to discrimination and starts being applied to expressive speech, the Constitution rejects its enforcement.

Additionally, the fact that the state's regulation of Phillips's cake art is content-based counsels in favor of strict scrutiny. Phillips's conduct only triggered CADA's application because he chose to speak on a topic like marriage that uniquely involved a class of individuals listed on the face of the statute. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Had he opted to create cakes expressing other views, like support for gun laws, the statute would not have required him to design a wedding cake celebrating same-sex marriage. It was not until he chose to speak with his cakes in support of heterosexual marriage that he was deemed to have violated CADA. On another view, under *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781 (1988), CADA requires "speech that a speaker would not otherwise make" and impermissibly alters the content of Phillips's speech.

For all of these reasons, the lower court erred in its application of intermediate scrutiny on free speech grounds and ought to have applied strict scrutiny instead. Had it done so, it would have reached the conclusion Petitioner seeks today.

Second, CADA's application to Phillips's cake art violates the Free Exercise Clause. As a devout Christian of over thirty five years, Phillips believes his cakes bring honor to God by celebrating the matrimonial bond between man and woman. J.A. 19-20. By compelling him to create cake art celebrating same-sex marriage, the state compels him to violate his deeply held religious beliefs and violates the constitutional guarantee of free exercise.

CADA's application to Phillips garners strict scrutiny on free exercise grounds in two different ways. Historically, this Court has applied strict scrutiny to "hybrid" situations where free exercise is invoked alongside other constitutional rights such as freedom of speech. *Employment Division v. Smith*, 494 U.S. 872, 881-82 (1989). Since both Phillips's free speech and free exercise rights are implicated here, the hybrid categorization obtains and CADA's application garners strict

scrutiny. In the alternative, strict scrutiny should also be applied because CADA's application is neither neutral nor general. As applied, the law only compels cake artists who oppose same-sex marriage to create cakes that support it, while leaving cake artists who support same-sex marriage free to refuse cake jobs that express opposition. This is, almost by definition, not neutral.

Third, given that strict scrutiny applies, the state is unable to uphold its heightened burden. The stated interest of anti-discrimination is overly broad and, like the application of the anti-discrimination law in *Hurley*, is not well-served by its application to Phillips's expression. Moreover, the fact that Craig and Mullins could have easily obtained a wedding cake elsewhere in Denver suggests that the state's interest could easily be served without violating Phillips's First Amendment rights.

For the reasons stated above, the lower court's ruling is fundamentally flawed on a number of counts and deserves reversal by this Court.

ARGUMENT

I. CADA's Application Violates Phillips's First Amendment Right to Free Speech

Neither the Constitution nor this Court's jurisprudence countenances such a violation of Phillips's free speech rights. In reaching the opposite conclusion, the lower court erred. First, wedding cake design – especially that of the custom and uniquely ornate variety performed at Masterpiece Cakeshop – is art and, like "the painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll," is "unquestionably shielded" by the Free Speech Clause. *Hurley*, at 569. Moreover, even if not *artistic* expression, Phillips's design of wedding cakes constitutes "inherently expressive conduct" that falls beyond the unquestionably shielded territory of art, but is nonetheless protected. *Rumsfeld v. Forum for Academic and*

Institutional Rights, Inc. (FAIR), 547 U.S. 47, 69 (2006); *see also Spence v. Washington*, 418 U.S. 405 (1974). On either view, Phillips's cake art enjoys First Amendment protection.

As a result, CADA's application here violates this Court's compelled speech doctrine. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). By forcing Phillips to convey through his art a message he does not in good conscience support, the state has conscripted him to speak in a particular way. The state not only tells Phillips what he may and may not paint, but does so in a way that is not content-neutral on an issue that remains politically divisive. Thus, strict scrutiny applies – and the state cannot meet that standard's exacting burden.

A. Phillips's Cake Art Enjoys Free Speech Protection

The freedom of speech – to choose for oneself the messages that one conveys – is central to a democracy and is among the first in the constellation of freedoms that the Framers enshrined in the Bill of Rights. Given its importance, the constitutional guarantee of free speech is a broad one, encompassing not just words, but also other mediums of expression such as music, art and expressive conduct. *Hurley*, at 569. If Phillips' cake artistry does not fall within the ambit of this protection, a large swath of artists who also happen to be entrepreneurs will forfeit a core constitutional freedom solely by entering the public marketplace.

The Free Speech Clause shields both artistic expression and expressive conduct. Phillips's cake art is both. As an initial matter, this Court asks whether the form of expression in a given case is artistic. If it is, the Court need not press on. *See Wooley*, at 713 (determining that the display of a motto on a license plate constituted speech and declining to reach the question of whether the display was inherently expressive conduct). If the conduct at issue is not artistic, the Court then asks whether it is "inherently expressive" under the two-prong test laid down in *Spence*. 418 U.S.

405 (1974). The lower court erred by failing to even consider the first question and misconstruing the second. Under either standard, Phillips's cake art warrants protection.

i. Phillips's Custom Wedding Cake Design Is a Form of Art

Throughout this Court's jurisprudence, there is a clear presumption that certain forms of artistic expression are categorically beyond the reach of the state – regardless of how the content is perceived by others. The rule was acknowledged most explicitly by the Court in *Hurley*. There, in assessing the free speech rights of parade organizers, the Court reasoned that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, at 569 (quoting *Spence*, at 411). Phillips' cakes enjoy this same protection.

The Court has set wide bounds around what constitutes artistic expression. Beyond the more traditional "pictures, films, paintings, drawings, and engravings," *Kaplan v. California*, 413 U.S. 115, 119 (1973), the Court has also applied this protected status to other, less traditional modes of expression. *See, e.g., Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) (violent video games); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002) (virtual depictions of child pornography); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (nude dancing).

Phillips does not simply bake a cake for his customers – he designs a masterpiece. As the Masterpiece logo of a paint pad, brush, and whisk suggest, Phillips is engaged in art of the purest kind. The cake is merely his preferred medium. As a painter paints on a canvas and a musician arranges notes on a staff, Phillips sculpts, designs, and decorates cakes as his creative imagination compels him. As this Court has noted, "'the basic principles of freedom of speech and the press,

like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entertainment Merchants Ass'n*, at 790 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)); *see also Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (analogizing tattoos to other forms of artistic expression protected by the First Amendment).

Central to the protection of art is the belief that value inheres in the act of an artist expressing, irrespective of whether others ever see or understand the artist's message. *See Brown*, at 790 (emphasizing "expression" and "communicat[ing] ideas" in determining whether something was artistic). The First Amendment is just as much a protection of this expressive freedom as it is a protection of dialogic freedom. Phillips's custom wedding cakes meet this expressive standard. Functionally, Phillips creations are no less expressive than paintings on a canvas and, in many ways, are even more communicative than Pollock's paintings. Merriam-Webster defines "wedding cake" as "a usually elaborately decorated and tiered cake made for the celebration of a wedding." Merriam-Webster Online Dictionary, Wedding Cake, https://www.merriam-webster.com (last visited Oct. 4, 2017). Through the hand-crafted design of wedding cakes, Phillips creates an artistic centerpiece for matrimony that expresses a unique message of celebration that is observed and enjoyed by all attendees.

Since Phillips's custom design of wedding cakes is simply expressive art on a new and creative medium, it deserves the full Free Speech protection that this Court has afforded to similar artistic endeavors.

ii. Phillips's Custom Wedding Cake Design Is Expressive Conduct

Though the Court need not reach the question, Phillips's cake art is also inherently expressive conduct. In determining what conduct counts as expressive, the Court has asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, at 404 (quoting *Spence*, at 410-411). Phillips's cake art, contrary to the lower court's ruling, meets both of these prongs.

The lower court erred in applying the second prong of this test when it misconstrued Phillips's expression as his compliance with the law rather than his custom-made cake art. The lower court reasoned that, because no attendee at the wedding could plausibly construe Phillips's service of gay couples in compliance with CADA as somehow expressing support for same-sex marriage, Phillips's conduct could not have been expressive. J.A. 51. This analysis bakes in the answer to its own question.

When the Court has assessed other forms of expressive conduct in as applied cases, it has focused on the conduct that the application of the law restrains – not the legally required conduct of complying with the law itself. For example, in *Texas v. Johnson*, the assessed conduct was the burning of the flag – not compliance with a law prohibiting "desecration of a sacred object." *Johnson*, at 402 – 403. More similarly, in *Hurley*, the parade organizers' claims were assessed on the basis of whether the contents of the parade were expressive – not whether compliance with the anti-discrimination law sent a message. *Hurley*, at 572-73. (noting that "the state court's application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade"). Under the lower court's framing of the compelled conduct in this case, as applied challenges to facially neutral laws of the kind in *Johnson* and *Hurley* are rendered moot

because simple compliance with the law could barely ever constitute expressive conduct. This cannot be correct.

If, instead, the lower court had applied the *Spence* test to Phillips's artistic design of custom-made wedding cakes, the conduct would have been deemed expressive. First, after *Hurley*, Phillips, a creator of visual expression like the parade organizers in that case, need not prove "a narrow, succinctly articulable message" to garner constitutional protection. *Id.* at 569. Phillips need only show that wedding attendees would have taken some form of a message from his custom wedding cakes displayed at the center of the event.

By his own admission and his professed religious belief in the sanctity of marriage between one man and one woman, Phillips unquestionably intended to convey a message of support for and celebration of the institution of marriage. J.A. 20. Moreover, any attendee of a wedding who saw Phillips's ornate cake would reasonably interpret it as a celebratory contribution by the cake artist himself. Phillips, himself, contributes hours of his own labor and creativity into the expression and, though certain artistic elements of the cake may be requested by the couple, it is no less the cake designer's expression. *See Hurley*, at 573 (noting that, though the parade was comprised of many different messages from many different people, it was no less an expression by the organizers that would be interpreted by observers as such). Thus, even under the two-pronged test for expressive conduct, Phillips's custom design of wedding cakes enjoys free speech protection.

B. CADA's Application Violates Compelled-Speech Doctrine

One core principle of this Court's free speech jurisprudence is that the government may not tell people what they can and cannot say. It cannot, for example, require students to recite the Pledge of Allegiance and salute the flag in school, *Barnette*, at 642 , or force motorists to display a particular phrase on their license plates, *Wooley*, at 717 (1977). Ideas may be unpopular, or even

harmful, but "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and refuse to foster * * * an idea they find morally objectionable." *Id.*, at 715. That is precisely what the state has prevented Phillips from doing here.

Public accommodations laws like CADA pose a challenge to this principle. In *Hurley*, this Court observed that such laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley*, at 572. However, in certain applications, these laws can unconstitutionally compel speech. The Court, in *Hurley*, could not have explicated this issue any more clearly:

> In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to a parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. * * * Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.

Id. at 572-73.

Similarly, the state's application of CADA here produced an order essentially requiring Phillips to alter the expressive content of his custom cake art. Like the parade organizers, Phillips disclaims any intent to discriminate or deny service to homosexuals – he stood ready and actively offered to provide any other baked goods that the couple might need that did not express the message he opposed. J.A. 20. Phillips did not refuse to serve customers equally – he refused to express a certain message. By forcing him to say it anyway, the state unconstitutionally alters the content of his expression.

CADA's application compels Phillips's speech by "exact[ing] a penalty on the basis of the content" of his cakes. *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 256 (1974). Phillips, here,

is forced to either design and create cakes that celebrate same-sex marriage, or withdraw from the wedding cake business altogether. Though he entered the wedding cake business to make edible artistic creations that celebrated marriage as a sacred institution between one man and one woman, the state has said he cannot do that without also expressing a message with which he disagrees. Thus, the state has conscripted Phillips's artistic voice and forced him to espouse a state-sanctioned viewpoint at the cost of forfeiting some of his business. This directly violates a fundamental tenet of Free Speech jurisprudence: that the speaker, not the government, control what is said. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) ("What the Constitution says is that these judgments are for the individual to make, not for the Government for decree, even with the mandate or approval of a majority.")

C. CADA's Application is Content-Based and Garners Strict Scrutiny

CADA's application to Phillips is content-based and, contrary to the lower court's analysis under *United States v. O'Brien*, 391 U.S. 367 (1968), should be assessed under the more exacting standard of strict scrutiny. According to this Court, "government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Another standard says that regulations "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and makes it content-based. *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 795 (1988). Under either standard, CADA's application here is content based.

First, under the *Reed* standard, CADA is applied only because Phillips has chosen to speak through his art on a particular topic: marriage as between one man and one woman. Had Phillips made cakes celebrating Christmas or the passage of new gun laws, the statute would not have required him to design a wedding cake celebrating same-sex marriage. Like the content-based

classifications struck down by this Court in *Reed* and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), CADA is only applied to Phillips by virtue of his speaking on a topic like marriage that uniquely impacts a class of individuals listed on the face of the statute. In *Reed*, the law prohibited temporary directional signs toward certain kinds of events. *Reed*, at 2224. Here, CADA restricts entrepreneurial artists from selectively speaking on any issue that differentially impacts certain classes of people. CADA's application here is, thus, content based.

Secondly, under the *Riley* standard, CADA's application necessarily requires Phillips to say something he would not otherwise say and, thus, alters the content of his speech. "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Tornillo*, at 714 (quoting *Barnette*, at 637). Just as a newspaper cannot be required, by virtue of expressing some opinions, to express the opposed opinions of third-parties, *Tornillo*, at 241, Phillips cannot be compelled to celebrate same-sex marriages simply because he chooses to celebrate heterosexual marriages. By altering the content of Phillips's speech, CADA's application is also content-based.

Since CADA's application to Phillips amounts to a content-based speech regulation, the lower court erred when it failed to apply strict scrutiny to the government's action. "Content-based regulations are presumptively invalid." *R.A.V.*, at 382. Moreover, this Court has explicitly stated that "*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (citing *R.A.V.*, at 385-86) (applying strict scrutiny to a content-based regulation of free speech). Thus, even if Phillips's cake art is only expressive conduct as opposed to artistic expression, strict scrutiny is still the controlling standard because the applied regulation is content-based.

II. CADA's Application Violates the Free Exercise Clause

Phillips's refusal to celebrate same-sex marriage is deeply rooted in his Christian religious faith. He has been a Christian for over thirty-five years and believes that designing cake art that celebrates same-sex marriages would be displeasing to God. J.A. 19-20. With its cease and desist order, the Commission has told Phillips he must violate his sincere convictions. This directly contravenes the constitutional protection laid down in the First Amendment.

A. CADA is Neither Neutral nor Generally Applicable

The Supreme Court has stated that "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). But, such power is subject to limits in order to protect the religious rights of citizens. This Court has established a standard that strikes this balance; namely, that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Smith*, at 879. Where a law restricting free exercise of religion fails either of these two standards, strict scrutiny applies. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

CADA is not generally applicable or facially neutral because it makes some exceptions to its mandate, but does not extend them to Phillips's religious-based conduct. Where a state's facially neutral rule contains a "system" of individualized exceptions, the state may not refuse to extend that system of exceptions to cases of "religious hardship" without compelling reason. *Smith*, at 881-82. Here, CADA has two broad exceptions: one for churches or other places "principally used for religious purposes" and another for secular "places providing public accommodations to one sex." J.A. 10-11. The presence of these exceptions show that the government aims were

possible to obtain despite carving out exceptions and suggest that further exception for Phillips's religious-based objection would not frustrate the government's efforts.

Additionally, the law only compels cake artists who oppose same-sex marriage to create cakes that support it, while leaving cake artists who support same-sex marriage free to refuse cake jobs that express opposition. In this way, CADA is not neutrally applied to cake artists engaged in the business of selling their cakes. Since CADA's application is neither generally applicable nor neutral, strict scrutiny applies.

B. CADA's Application Violates the Hybrid-Rights Doctrine

Historically, this Court has applied strict scrutiny to "hybrid" situations where free exercise is invoked alongside other constitutional rights such as freedom of speech. *Smith*, at 881-82. Since Phillips's freedom of speech is clearly implicated here and his claims are more than plausible and, indeed, strong, CADA's application is deserving of strict scrutiny.

While the standard for precisely when a companion claim rises to the level that triggers the hybrid-rights doctrine, the lower courts have begun to set a standard that Phillips clearly passes. According to the Tenth Circuit, Phillips need only show a "fair probability, or a likelihood" of success on the companion claim to garner a hybrid categorization. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004). In the Fifth and Ninth Circuits, the complaining party need only show "a colorable claim" that the government has violated a companion right. *See Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009); *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). Under either of these standards, Phillips's free speech claim qualifies as a companion claim.

Since Phillips's properly invokes this Court's hybrid-rights doctrine for free exercise cases, the lower court erred in applying intermediate scrutiny to CADA's application.

III. CADA's Application Does Not Withstand Strict Scrutiny

As noted above, given that CADA's application to Phillips's cake art amounts to state regulation of artistic expression, a content-based regulation of expressive conduct, a hybrid regulation of free exercise coupled with a colorable claim of free speech restriction, and a neither neutral nor generally applicable regulation of free exercise, strict scrutiny applies. Strict scrutiny requires the state to prove that CADA's application in this instance "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S.Ct. at 2231 (applying strict scrutiny). This is not the first time that strict scrutiny has been applied to public accommodations laws, and neither is it the first time that such a law fails that standard. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (striking down a public accommodations law under strict scrutiny for its effect on associational freedom).

The stated interest of CADA is to prohibit discrimination against minority groups in society. However, this Court's application of strict scrutiny in the past has often required more than a blanket statement of anti-discriminatory purpose. Instead, this Court "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to how the law's purpose is "satisfied through application of the challenged law" to "the particular" person. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). This Court, in *Hurley*, did just that. There, as here, the generally applicable law was meant to prohibit discrimination, but did not survive strict scrutiny as applied when it restricted speakers' expression. 515 U.S. at 578.

Here, the Commission's application of CADA requires Phillips to violate his rights to free speech and free exercise in order to serve custom-made wedding cakes for same-sex marriages, even where he does not deny other services to homosexuals more generally. Surviving strict

scrutiny in this context is made even more difficult by the fact that Phillips was not refusing to serve homosexuals at all, but only refusing to speak a celebratory message in support of their union. Fundamentally, it is difficult to see how limiting Phillips's expression in this way furthers the state's anti-discriminatory purpose, even as broadly stated as it is.

Additionally, the fact that Craig and Mullins could have obtained a wedding cake from numerous other cakeshops in the Denver area, underscores the fact that protecting Phillips's First Amendment rights in this case would not frustrate the state's aims. As such, the cease and desist order that penalizes Phillips for his noncompliance with CADA is not narrowly tailored to advance the state's goal.

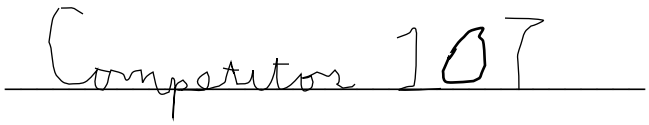
Since CADA's application in this instance neither serves a compelling government interest nor is narrowly tailored to further that interest, the Commission's order unconstitutionally violates Phillips's First Amendment rights to freedom of speech and free exercise of religion.

CONCLUSION

The decision of the Colorado Court of Appeals should be reversed.

SIGNATURES

Respectfully submitted,



Competitor ID#: 107; Submitted: 10/4/17; 4:30PM

PETITIONER'S APPENDIX

Section 24-34-601 of the 2014 Colorado Revised Statutes reads, in full:

> (1) As used in this part 6, "place of public accommodation" means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor. "Place of public accommodation" shall not include a church, synagogue, mosque, or other place that is principally used for religious purposes.
>
> (2) (a) It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or, directly or indirectly, to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.
>
> (b) A claim brought pursuant to paragraph (a) of this subsection (2) that is based on disability is covered by the provisions of section 24-34-802.
>
> (2.5) It is a discriminatory practice and unlawful for any person to discriminate against any individual or group because such person or group has opposed any practice made a discriminatory practice by this part 6 or because such person or group has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to this part 6.
>
> (3) Notwithstanding any other provisions of this section, it is not a discriminatory practice for a person to restrict admission to a place of public accommodation to individuals of one sex if such restriction has a bona fide relationship to the goods, services, facilities, privileges, advantages, or accommodations of such place of public accommodation.

The First Amendment to the United States Constitution reads, in full:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.