NO. _______

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND
JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Jack Phillips is a cake artist. The Colorado Civil Rights Commission ruled that he engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act ("CADA") when he declined to design and create a custom cake honoring a same-sex marriage because doing so conflicts with his sincerely held religious beliefs.

The Colorado Court of Appeals found no violation of the Free Speech or Free Exercise Clauses because it deemed Phillips' speech to be mere conduct compelled by a neutral and generally applicable law. It reached this conclusion despite the artistry of Phillips' cakes and the Commission's exemption of other cake artists who declined to create custom cakes based on their message. This analysis (1) flouts this Court's controlling precedent, (2) conflicts with Ninth and Eleventh Circuit decisions regarding the free speech protection of art, (3) deepens an existing conflict between the Second, Third, Sixth, and Eleventh Circuits as to the proper test for identifying expressive conduct, and (4) conflicts with free exercise rulings by the Third, Sixth, and Tenth Circuits.

The question presented is:

> Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioner Masterpiece Cakeshop, Ltd., is a small Colorado corporation owned by Petitioner Jack Phillips, an individual and citizen of Colorado, and his wife.

Respondent Colorado Civil Rights Commission is an agency of the State of Colorado. Respondents Charlie Craig and David Mullins are individuals and citizens of Colorado.

CORPORATE DISCLOSURE STATEMENT

Petitioner Masterpiece Cakeshop, Ltd. is a Colorado corporation wholly owned by Jack Phillips and his wife. It does not have any parent companies, and no entity or other person has any ownership interest in it.

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INTRODUCTION

The First Amendment prohibits the government from telling private citizens "what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013). It is undisputed that the Colorado Civil Rights Commission (the "Commission") does not apply CADA to ban (1) an African-American cake artist from refusing to create a cake promoting white-supremacism for the Aryan Nation, (2) an Islamic cake artist from refusing to create a cake denigrating the Quran for the Westboro Baptist Church, and (3) three secular cake artists from refusing to create cakes opposing same-sex marriage for a Christian patron. App. 78a; App. 297a-App. 331a.

Neither should CADA ban Jack Phillips' polite declining to create a cake celebrating same-sex marriage on religious grounds when he is happy to create other items for gay and lesbian clients. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("[T]hose who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."). But the Commission ruled that is exactly what the law requires and the Colorado Court of Appeals upheld that mandate on appeal. In so doing, that court approved nothing less than the "outright compulsion of speech." *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557 (2005).

Jack Phillips is an artist. He has created elaborate custom cakes for over two decades. His cakes communicate the important celebratory

themes of birthday parties, anniversaries, graduations, and weddings. His faith teaches him to serve and love everyone and he does. It also compels him to use his artistic talents to promote only messages that align with his religious beliefs. Thus, he declines lucrative business by not creating goods that contain alcohol or cakes celebrating Halloween and other messages his faith prohibits, such as racism, atheism, and any marriage not between one man and one woman.

But Colorado has ordered him to create custom wedding cakes celebrating same-sex wedding ceremonies. This mandate violates one of the Free Speech Clause's essential rules: the government cannot compel a private citizen "to utter what is not in his mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). Given the exceptions to CADA that state authorities have recognized for other cake artists, including three secular cake artists who refused to create custom cakes criticizing same-sex marriage on religious grounds, the Commission's application of CADA additionally targets Phillips' religious beliefs about marriage for punishment in violation of the Free Exercise Clause.

This Court's review is needed to alleviate the stark choice Colorado offers to those who, like Phillips, earn a living through artistic means: Either use your talents to create expression that conflicts with your religious beliefs about marriage, or suffer punishment under Colorado's public accommodation law.

DECISIONS BELOW

The Colorado Court of Appeals decision is reported at 370 P.3d 272, and reprinted at App. 1-53a. The Supreme Court of Colorado's order denying the Petition for Writ of Certiorari of April 25, 2016, in which one Justice did not participate and two Justices would have granted certiorari, is not reported but is available at No. 15SC738, 2016 WL 1645027 (April 25, 2016) and reprinted at App. 54-55a.

The Administrative Law Judge's (ALJ) decision, is not reported and is reprinted at App. 61-91a (Dec. 6, 2013, No. CR 2013-0008). The Colorado Civil Rights Commission's order adopting the ALJ's opinion is not reported and is reprinted at App. 56-60a (May 30, 2014, No. CR 2013-0008).

STATEMENT OF JURISDICTION

On April 25, 2016, the Colorado Supreme Court issued an order denying Petitioners' Petition for Writ of Certiorari, thus leaving in place the Colorado Court of Appeals' decision rejecting Petitioners' claims that the application of CADA in this case violates their First Amendment rights. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISIONS

The text of the First and Fourteenth Amendments to the United States Constitution is found at App. 92a. The relevant portions of the

Colorado Anti-Discrimination Act (CADA), are set forth at App. 93-95a.

STATEMENT OF THE CASE

A. Factual Background

"The material facts are not in dispute." App. 62a. Jack Phillips opened Masterpiece Cakeshop, Inc.[1] over 22 years ago to pursue his life's vocation—creating artistic cakes. App. 274a, ¶ 6. Designing and creating specially commissioned cakes is a form of art and creative expression, the pinnacle of which is wedding cakes. App. 277-280a, ¶¶ 28-46. Phillips pours himself into their design and creation, marshaling his time, energy, and creative talents to make a one-of-a-kind creation celebrating the couple's special day and reflecting his artistic interpretation of their special bond. App. 277-280a, ¶¶ 28-47.

Phillips is also a Christian who strives to honor God in all aspects of his life, including his art. App. 274a, 281-283a, ¶¶ 7-8, 49-61. From Masterpiece's inception, Phillips has integrated his faith into his work. App. 281-282a, ¶¶ 50-57 (Phillips closes Masterpiece on Sundays, pays his employees well, and helps them with personal needs outside of work, all because of his religious beliefs).

Cake design and creation is its own art form and mode of expression. "*The Essential Guide to Cake*

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[1] For brevity's sake, Phillips and Masterpiece Cakeshop are referred to collectively as "Phillips."

Decorating 7-11 (2010). Cake making dates back to at least 1175 B.C. *Id.* Of any form of cake, wedding cakes have the longest and richest history. In modern Western culture, the wedding cake serves a central expressive component at most weddings and is traditionally served at the reception celebrating the couple's union. App. 185a. It not only communicates that the couple is now married, but forms the centerpiece of a ritual in which the couple celebrates their marriage by feeding each other cake and then sharing cake with their guests. *Id.* Only a wedding cake communicates this special celebratory message, slicing a pizza or a pot roast would not have the same effect. Wedding cakes are so essential to a modern wedding that one author suggests, "[a] memorable cake is almost as important as the bridal gown in creating the perfect wedding." *Id.* Because they are so important to creating the right celebratory mood, wedding cakes are uniquely personal to the newly married couple and require significant collaboration between the couple and the artist to create the perfect design. *Id.*

Because of the artistry associated with custom cakes, Phillips also honors God through his work by declining to use his creative talents to design and create cakes that violate his religious beliefs. App. 282-283a, ¶¶ 57-58, 62. This includes cakes with offensive written messages and cakes celebrating events or ideas that violate his beliefs, including cakes celebrating Halloween (a decision that costs him significant revenue), anti-American or anti-family themes, atheism, racism, or indecency. App. 283-284a, ¶¶ 61, 63-64. He also will not create cakes

with hateful, vulgar, or profane messages, or sell any products containing alcohol. *Id.*, ¶¶ 59, 61.

Consistent with this longstanding practice, Phillips also will not create cakes celebrating any marriage that is contrary to his understanding of biblical teaching. App. 276-277a, ¶¶ 21, 25. As a Christian, Phillips believes that God ordained marriage as the sacred union between one man and one woman, a union that exemplifies the relationship of Christ and His Church. App. 274-275a, ¶¶ 10-15. And Phillips' religious conviction compels him to create cakes celebrating only marriages that are consistent with his understanding of God's design. App. 275-277a, ¶¶ 16-22, 25. For this reason, Phillips politely declined to design and create a cake celebrating Respondents Craig's and Mullins' same-sex wedding, App. 287a, ¶ 78, but offered to make any other cake for them, *id.*, ¶ 79.

Although Respondents Craig and Mullins easily obtained a free wedding cake with a rainbow design from another bakery, App. 289-291a, they filed a charge of sexual orientation discrimination with the Civil Rights Division (the "Division"), App. 5a, ¶ 6.

The Commission found that Phillips violated the Colorado Anti-Discrimination Act ("CADA"), rejected Phillips's First Amendment defenses, and ordered him to: (1) create custom wedding cakes celebrating same-sex marriages if he creates similar cakes for one-man-one-woman marriages, (2) retrain his staff to do likewise, and (3) report to the Commission

every order he declines for any reason for a period of two years. App. 56-58a.

In contrast, while this case was still ongoing, the Commission found that three secular bakeries did not discriminate based on creed when they refused a Christian customer's request for custom cakes that criticized same-sex marriage on religious grounds. App. 293-327a. And it did so despite "creed" under CADA encompassing "all aspects of religious beliefs, observances, and practices … [including] *the beliefs or teachings of a particular religion*," 3 C.C.R. 708-1:10.2(H) (emphasis added), App. 96a. The Commission reasoned that—like Phillips—(1) the bakeries declined the request because they objected to the particular message of the cake and (2) the bakeries were willing to create other items for Christians. App. 297-331a. Unlike Phillips, the Commission exempted these secular bakeries from CADA's scope.

B. Procedural Background

On September 4, 2012, Respondents filed a charge of discrimination with the Colorado Civil Rights Division ("Division") against Phillips alleging that declining to create a wedding cake celebrating Respondents' same-sex ceremony constituted sexual-orientation discrimination in violation of CADA. App. 260-262a, 269-271a. Phillips timely responded. On May 31, 2013, the Division filed a notice of hearing and formal complaint against Phillips alleging that declining to create a wedding cake celebrating Respondents' same-sex ceremony

constituted sexual-orientation discrimination in violation of CADA. App. 62-63a.

On cross-motions for summary judgment, Phillips argued that he did not discriminate based on sexual orientation in violation of CADA because his religious objection to creating custom wedding cakes for same-sex wedding ceremonies is based on the celebratory message those cakes promote. Phillips does not object to serving all customers regardless of their sexual orientation. He simply believes that only marriage between a man and a woman should be celebrated. App. 276a. Thus, he declined to create custom art for a specific event because of the message it communicated, not because of the persons requesting it. App. 284-288a. In addition, Phillips argued that CADA should be read narrowly to avoid a constitutional violation because requiring him to create custom wedding cakes to celebrate a same-sex wedding ceremony would violate the compelled speech doctrine and his right to the free exercise of religion under the First and Fourteenth Amendments of the United States Constitution. App. 122-161a.

The administrative law judge ("ALJ") declined to interpret CADA narrowly, holding that Phillips violated CADA, and that applying CADA to require Phillips to create custom wedding cakes to celebrate same-sex wedding ceremonies did not violate the First and Fourteenth Amendments. App. 87-88a. The ALJ ordered Phillips to (1) create wedding cakes celebrating same-sex marriages if he creates similar cakes for one-man-one-woman marriages, (2) retrain

his staff to do likewise, and (3) report to the Commission every order he declines to fill for any reason for the next two years. *Id.* Phillips timely appealed these rulings to the Colorado Civil Rights Commission ("Commission"), App. 89-91a, 162-169a, 172-176a, which adopted the ALJ's opinion in full, App. 56-58a.

Phillips timely appealed the Commission's ruling to the Colorado Court of Appeals and argued that (1) he did not discriminate based on sexual orientation, (2) the order requiring him to create custom wedding cakes to celebrate same-sex wedding ceremonies violated the Free Speech Clause, and (3) requiring him to create custom wedding cakes to celebrate same-sex wedding ceremonies in violation of his conscience violated the Free Exercise Clause. App. 97a, 106a, 108-09a, 202-205a, 208-239a.

The Colorado Court of Appeals rejected a proper reading of CADA that would have allowed Phillips to decline commissions to create custom art promoting an unwelcome message, and instead held that declining to create a custom wedding cake to celebrate a same-sex wedding ceremony is unlawful sexual orientation discrimination under CADA. App. 12-22a.

The Colorado Court of Appeals then rejected Phillips's compelled-speech defense. App. 22-36a. In so doing, the court characterized the design and creation of Phillips' custom cakes as mere conduct, not pure speech. App. 30a. It subsequently held

that "the Commission's order merely requires that [Phillips] not discriminate against potential customers in violation of CADA and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections." App. 22a ¶ 45.

In reaching this conclusion, the Colorado Court of Appeals purported to apply the *Spence-Johnson* factors for determining if conduct is expressive.[2] It held that "designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it." App. 30a ¶ 62. And "to the extent the public infers from a [Phillips] wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to [Phillips]." App. 30a ¶ 62. In short, the court held that "a reasonable observer would understand that [Phillips's] compliance with the law is not a reflection of [his] own beliefs." App. 31a ¶ 64.

Finally, the Colorado Court of Appeals held that the Commission's order did not violate the Free Exercise Clause. It deemed CADA to be a neutral law of general applicability, despite the law's broad

[2] The *Spence-Johnson* test contains two parts: "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked [first] whether "[a]n intent to convey a particularized message was present, and [second] [whether] the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. State of Washington*, 418 U.S. 405, 410-11 (1974).

exceptions and the Commission's decision to target for punishment only expressive business owners who, like Phillips, oppose same-sex marriage on religious grounds. App. 36-45a.

REASONS FOR GRANTING THE WRIT

Colorado state law compels Phillips to create custom wedding cakes endorsing a view of marriage different from his own, but the First Amendment protects Phillips' right not to do so. That protection turns on two fundamental First Amendment principles: Phillips' custom wedding cakes constitute speech, and the state cannot compel an artist like Phillips to create speech. Courts have found many kinds of expression to be speech, from abstract paintings and sculpture to tattoos and custom-painted clothing. *See infra* Part II. Because such artistic expression inherently involves the "subtle shaping of thought," *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501 (1952), it deserves strong free speech protection. This Court should grant the petition for the following reasons.

First, the Colorado Court of Appeal's reasoning turns the compelled speech doctrine on its head. *All* coerced speech results from "compliance with [a] law." App. 31a ¶ 64. But instead of concluding that forcing Phillips to create art violates the Free Speech Clause, the Colorado Court of Appeals held that legal coercion robs Phillips of ownership of any message sent by his art. In other words, the court upheld the compulsion of Phillip's artistic expression *because* that speech was legally impelled. This circular logic threatens the continued vitality of the

compelled speech doctrine and directly conflicts with this Court's free speech precedent.

Second, the Colorado Court of Appeals' holding that Phillips' creative process and resulting art comprise not pure speech but conduct conflicts with rulings by the Ninth and Eleventh Circuits. Both courts of appeals have deemed the artistic process and product of "artist[s] practicing in a visual medium" to be pure speech protected by the First Amendment. *Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015). Only this Court may decide whether the Ninth and Eleventh Circuits' conclusion or the Colorado Court of Appeals' reductionist treatment of artistic expression is correct.

Third, the Colorado Court of Appeals' conclusion that Phillips' design and creation of artistic cakes is non-expressive conduct widens an existing conflict as to what legal standard controls whether Phillips' custom cakes are considered "expressive." Under the tests used by the Second and Sixth Circuits and the Colorado Court of Appeals, they may not be. But under the tests used by the Third and Eleventh Circuits, they likely are. This Court should resolve this entrenched conflict among lower courts.

Fourth, it is undisputed that CADA does not require other cake artists to create custom cakes promoting an unwelcome message. Yet the Colorado Court of Appeals upheld Respondents' determination that Phillips violated CADA by declining to create a custom cake for a same-sex wedding on religious grounds. This ruling squarely conflicts with this

Court's free exercise precedent and with decisions by the Third, Sixth, and Tenth Circuits.

I. The Colorado Court of Appeals' Reasoning Directly Conflicts with This Court's Compelled-Speech Precedent.

"The 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." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). Freedom of speech thus "includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714. This right extends "beyond written or spoken words as mediums of expression," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995), and applies both to individuals and "business corporations generally," *id.* at 574. Its function is to protect "'the sphere of intellect and spirit'" and "individual freedom of mind" that the First Amendment "'reserve[s] from all official control.'" *Wooley*, 430 U.S. at 714-15 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Under this Court's compelled-speech precedent, the state invades this freedom of mind when it forces a private citizen to speak the government's own message,[3] or when it compels a citizen to speak the

[3] *See, e.g.*, *Agency for Int'l Dev. v. Alliance for Open Soc. Int'l, Inc.*, 133 S. Ct. 2321, 2324 (2013) (private aid organizations mandated to publish a policy opposing prostitution); *Wooley*, 430 U.S. at 715 (citizens forced to display the state motto on their license plates); *Barnette*, 319 U.S. at 642 (students required to salute the flag and recite the Pledge of Allegiance).

message of a third party.[4] Yet here, the Colorado Court of Appeals held that the state may compel Phillips to create a custom wedding cake promoting a morally objectionable message.

Weddings are inherently expressive events. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("The core of the message in a wedding is a celebration of marriage and the uniting of two people in a committed long-term relationship."). And wedding cakes are one of their most recognizable celebratory features. App. 185a. Traditionally, a cake-cutting ceremony at the wedding reception expresses that the couple is now married and it is time for the celebration of their union to commence. Given Phillips' belief, "based on decent and honorable religious … premises," that God ordained marriage between a man and a woman, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), it is unsurprising that he would object to designing a custom cake for the purpose of honoring a same-sex wedding.

Even though the Colorado Court of Appeals recognized the distinct possibility that one could infer "from a [Phillips'] wedding cake a message celebrating same-sex marriage," App. 30a ¶ 62, it found no compelled speech in this case. And it did so

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[4] *See, e.g.*, *Hurley*, 515 U.S. at 572 (parade organizations required to include a LGBT contingent); *Pac. Gas & Elec. Co v. Pub. Utils. Comm'n of Cal.,* 475 U.S. 1, 5-6 (1986) (utility mandated to include a consumer group's conflicting speech in its newsletter); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspaper coerced to publish a political opponent's speech).

despite the fact that Respondents admitted at oral argument they would also hold "a fine art painter" who makes "oil paintings on commission" in violation of CADA if she declined to create paintings "that celebrates gay marriages." App. 248a. The Colorado Court of Appeals' rationale was that these artists' "compliance with the law is not a reflection of [their] own beliefs." App. 31a ¶ 64.

This conclusion is based on the unspoken assumption that any speech compelled by law is attributable to the state. But this Court's compelled-speech precedent is rooted in the opposite premise: "[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. As this Court has recognized, "[w]ere the government freely able to compel corporate speakers to propound … messages with which they disagree, [free speech] protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986).

For the compelled speech doctrine to maintain strength, it could hardly be otherwise. Compelled speech is expression mandated by law. A law forcing a private citizen to speak is thus a necessary predicate. But that is the beginning, not the end, of the compelled-speech inquiry. This Court has recognized, time and again, that private speakers

are often (if not always) intimately connected with expression the government foists upon them.

The Barnette children were unquestionably associated with a disagreeable message when West Virginia forced them to salute the American flag and say the Pledge of Allegiance. *Barnette*, 319 U.S. at 626. So too were the Wooleys when New Hampshire compelled them to bear its motto on their license plates. *Wooley*, 430 U.S. at 707. Even the professional fundraisers in *Riley* were not sufficiently distanced from compelled disclosure of the gross receipts they gave to charity to lose free speech protection because these unwelcome statements came from their own mouths. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781 (1988). More recently, this Court found that private organizations would be associated with any unwanted anti-prostitution policy they promulgated for the express purpose of receiving federal AIDS-prevention funds. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2325-26 (2013). In none of these cases was the Colorado Court of Appeals' suggested disclaimer, "the government made me do it," sufficient to avoid a violation of the Free Speech Clause.

Phillips is just as intimately connected with the message expressed by the custom same-sex wedding cakes Colorado seeks to force him to design and create as any of the speakers cited above. Indeed, Colorado requires him not only to interview the same-sex couple and develop a custom design celebrating their union, but to physically create their

wedding cake with his own two hands. Colorado thus mandates that Phillips do far more than recite an offensive message. It requires him to first research and draft that message and then bring it to life in three dimensional form using a variety of artistic techniques that range from painting to sculpture. Moreover, the Commission significantly magnified the intrusiveness of its compelled-speech order by requiring Phillips to reeducate his employees and report to the Commission every order he declines for any reason for the next two years. App. 58a.

If that is not compelled expression, nothing is. This Court has made clear that public accommodation statutes are subject to the same First Amendment bounds as all other laws. When an LGBT group sought to march as a unit in Boston's St. Patrick's Day Parade over the parade organizers' objection, this Court held that Massachusetts' public accommodation law could not be applied to grant them access. *Hurley*, 515 U.S. at 572-74. Attempts by state courts to render the parade "sponsors' speech itself to be the public accommodation" were bound to fail because the state "may not compel affirmance of a belief with which the speaker disagrees." *Id.* at 573.

Yet the Colorado Court of Appeals held that the Free Speech Clause has no bearing on the state's attempt to force Phillips to conceive and form an artistic monument to a concept of marriage he finds morally objectionable, reeducate his employees, and report any declined order to the Commission for the

next two years. And it did so based on the feeble justification that Phillips' speech is legally required. But all of the compelled speech this Court has invalidated over the last seventy years has been required by law. Under this rationale, the compelled speech doctrine would cease to exist. This Courts' review is urgently needed to revive it, particularly where, as here, Colorado compels speech in a viewpoint discriminatory manner only from cake artists who oppose same-sex marriage but not from those who support it. Under this Court's precedent, such government attempts to "prescribe what shall be orthodox in … matters of opinion or force citizens to confess by word or act their faith therein" cannot stand. *Barnette*, 319 U.S. at 642.

II. The Colorado Court of Appeals' Holding that Phillips' Art is Conduct, Not Pure Speech, Conflicts with Rulings by the Ninth and Eleventh Circuits.

Courts have found many kinds of artistic expression to be pure speech, from abstract paintings, fiction, music without words, theater, sculpture, stained-glass windows, pictures, drawings, and engravings to the sale of original artwork, movies, tattoos, custom-painted clothing, and even nude dancing.[5] But the Colorado Court of

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[5] *Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (nude dancing); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568-69 (1995) ("painting[s] of Jackson Pollock, music of Arnold Schöenberg, [and] Jabberwocky verse of Lewis Carroll."); *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (nude dancing);

Appeals ruled that Phillips' design and creation of custom wedding cakes—the highest form of his art—is not pure speech but mere conduct. *See* App. 27a ("Masterpiece's contentions involve claims of compelled expressive conduct."); App. 29a ("We begin by identifying the compelled conduct in question."). It did so despite the fact that Phillips' wedding cakes are a form of original artwork that require him to paint, draw, and sculpt various decorative elements and meld them together into a unified design that communicates a personalized celebratory message.[6]

This holding squarely conflicts with rulings by the Ninth and Eleventh Circuits. In *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010), the Ninth Circuit considered whether a city ban on tattoo parlors violated the Free Speech Clause. Answering this question required the court

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Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (theater); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (pictures, paintings, drawings, and engravings); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952) (movies); *Buehrle v. City of Key* West, 813 F.3d 973, 976 (11th Cir. 2015) (tattoos and tattooing); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (tattoos and tattooing); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (sale of original artwork); *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 96 (2d Cir. 2006) (custom-painted clothing); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924-25 (6th Cir. 2003) (sale of original artwork); *Bery v. City of N.Y.*, 97 F.3d 689, 694-96 (2d Cir. 1996) (sale of original artwork); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) (stained-glass windows).

[6] The artistic nature of Phillips' profession is amply demonstrated by popular television programs such as TLC's Cake Boss and Food Network's Ace of Cakes.

to decide whether tattoos and the process of tattooing are pure speech or simply conduct. *Id.* at 1059. Because "[t]attoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression," the Ninth Circuit ruled that "a tattoo is a form of pure expression entitled to full constitutional protection." *Id.* at 1061. It concluded that speech does not lose protection "based on the kind of surface" to which it is applied. *Id.* Accordingly, the Ninth Circuit ruled that it made no difference "that a tattoo is engrafted onto a person's skin rather than drawn on paper." *Id.*

But the *Anderson* Court did not stop there. The Ninth Circuit went on to conclude that the process of tattooing is itself pure speech activity entitled to strong free speech protection. *Id.* It reasoned that "neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." *Id.* As the Ninth Circuit explained, "the process of tattooing is not intended to 'symbolize' anything. Rather, the entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process any more than the Declaration of Independence could have been created without a goose quill, foolscap, and ink." *Id.* at 1062.

The Eleventh Circuit in *Buehrle v. City of Key West*, 813 F.3d 973, 975 (11th Cir. 2015), adopted the

Ninth Circuit's reasoning wholesale in deciding whether an ordinance strictly limiting the number of tattoo parlors violated the Free Speech Clause. The Eleventh Circuit also refused to "draw[] a distinction between the process of creating a tattoo and the tattoo itself." *Id.* at 977. It joined "the Ninth Circuit in holding that the act of tattooing is sheltered by the First Amendment, in large part because … tattooing [is] virtually indistinguishable from other protected forms of artistic expression." *Id.* at 976.

Applying the Ninth and Eleventh Circuit's analysis to the facts at hand leads to the inevitable conclusion that Phillips' custom wedding cakes and artistic design process are pure speech. Phillips' custom cakes no less than tattoos are composed of words, realistic or abstract images, symbols, or a combination of these, all of which are protected forms of pure expression. That Phillips draws, paints, and sculpts using glazing, food coloring, icing, and fondant rather than ink, oils, and stone makes no difference under the Ninth and Eleventh Circuits' analysis.

What is more, the Ninth and Eleventh Circuits would reject any artificial separation between Phillips' artistic process and the custom wedding cakes that result. The entire purpose of Phillips designing a custom wedding cake is to produce the cake and the cake cannot be created without his artistic design process. Hence, the Ninth and Eleventh Circuits would deem both Phillips' custom wedding cakes and his creative process safeguarded as pure speech.

It is impossible to reconcile the Ninth and Eleventh Circuit's analysis with the Colorado Court of Appeal's conclusion that Phillips' custom wedding cakes and creative process are mere conduct and not pure expression. The Colorado Court of Appeals evaded strong precedent against compelled speech by reducing the creative process to a series of bare actions. But painting is not merely dabbing paint on canvas, opera is not simply inhaling and exhaling notes, and making an artistic wedding cake is not just baking batter and applying icing from a tub.

Only this Court may resolve which First Amendment approach is correct. The answer will have serious ramifications not only for Phillips' cake designs but for free speech protection of the arts nationwide.

III. The Colorado Court of Appeals' Application of the *Spence-Johnson* Factors Exacerbates a Longstanding Conflict Among the Federal Courts of Appeals.

In addition to the fact that Phillips' custom wedding cakes and design process should be considered pure expression, the Colorado Court of Appeals' application of the *Spence-Johnson* factors to determine whether they qualify as expressive conduct widens an entrenched conflict among the courts of appeals. *See* App. 29a (asking whether Phillips "conveys a particularized message celebrating same-sex marriage" by complying with CADA and "whether the likelihood is great that a

reasonable observer would" understand that message and attribute it to him).

The federal courts of appeals fundamentally disagree on the extent the *Spence-Johnson* factors survive this Court's decision in *Hurley*. *See Cressman v. Thompson*, 798 F.3d 938, 955 (10th Cir. 2015) ("Our sister circuits have taken divergent approaches to reconciling *Hurley* with the requirements of the *Spence-Johnson* test."); *Cressman v. Thompson*, 719 F.3d 1139, 1150 (10th Cir. 2013) ("Federal circuit courts have interpreted *Hurley's* effect on the *Spence-Johnson* factors differently.").[7]

On one end of the spectrum, the Second Circuit holds that the *Spence-Johnson* factors remain fully intact after *Hurley*. *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 n.6 (2d Cir. 2004) ("[W]e have interpreted *Hurley* to leave intact the Supreme Court's test for expressive conduct in *Texas v. Johnson*."). The Sixth Circuit uses an intermediate approach that requires conduct to convey "a particularized message"—but not "a narrow, succinctly articulable" one—as well as a great likelihood that this message "will be understood by those who view it." *Blau v. Fort*

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[7] Although the Tenth Circuit has noted this circuit conflict, it has refused to join it. *See Cressman*, 798 F.3d at 956 ("We have thus far refrained from articulating a precise post-*Hurley* symbolic-speech test and have 'merely observe[d] that *Hurley* suggests that a *Spence-Johnson* particularized message' standard may *at times* be *too high a bar* for First Amendment protection.'" (quoting *Cressman*, 719 F.3d at 1150)).

Thomas Pub. Sch. Dist., 401 F.3d 381, 388 (6th Cir. 2005) (quotations and alterations omitted).

But the Third and Eleventh Circuits view *Hurley* as having much greater effect. The Eleventh Circuit asks whether a reasonable person would interpret conduct as expressing "*some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004). On the other end of the continuum, the Third Circuit, views the *Spence-Johnson* factors as mere "signposts rather than requirements" and holds that *Hurley* "eliminated the 'particularized message' aspect of the *Spence-Johnson* test" altogether. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002).

The Colorado Court of Appeals paid lip service to *Hurley* but treated the *Spence-Johnson* factors as largely unchanged and controlling. *Compare* App. 26a ("The message need not be narrow, or succinctly articulable." (quotation omitted), *with* App. 29-30a ("Next, we ask whether, by comporting with CADA and [creating cakes honoring same-sex marriages Phillips] conveys a *particularized message* celebrating same-sex marriage, and whether the likelihood is great that a reasonable observer would both understand the message and attribute that message to Masterpiece.") (emphasis added). Its approach thus most closely resembles that of the Second and Sixth Circuits.

Phillips has always maintained that his custom wedding cakes and artistic design process qualify as

pure speech. Regardless, Phillips' custom wedding cakes would be far more likely to receive free speech protection under the Third and Eleventh Circuits' expressive conduct tests, which do not require a particularized message, than under the Second and Sixth Circuits' and Colorado Court of Appeal's more stringent approach. Only this Court may resolve this longstanding conflict regarding *Hurley's* impact on the *Spence-Johnson* factors. It should do so before the proliferation of competing standards in lower courts expands still further.

IV. The Colorado Court of Appeals' Free Exercise Holding Directly Conflicts with this Court's Precedent and Rulings by the Third, Sixth, and Tenth Circuits.

Strict scrutiny applies under the Free Exercise Clause if a law allows for individualized exemptions or targets disfavored religious views for punishment. Colorado's application of CADA does both, yet the Colorado Court of Appeals held that Phillips' free exercise rights were not even implicated. That holding conflicts with this Court's precedent and decisions by the Third, Sixth, and Tenth Circuits.

A. Under *Smith* and *Lukumi*, Laws that Permit Individualized Exemptions or Target Religion Must Satisfy Strict Scrutiny, Not Rational Basis Review.

When a law allows for case-by-case exemptions based on "'the reasons for the relevant conduct,'" the government cannot deny a religious exemption without overcoming strict scrutiny. *Church of the*

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993) (quoting *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990)). It is undisputed that CADA allows for such individualized exceptions. Yet the Colorado Court of Appeals applied mere rational basis review to the Commission's decision to deny Phillips a religious exemption from CADA. *See* App. 49a ("Having concluded that CADA is neutral and generally applicable, we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation."). That holding conflicts with this Court's precedent.

Respondents have repeatedly affirmed, throughout this case, that CADA permits other cake artists to decline to create cakes that convey an offensive message. For example, Respondents have conceded that a baker may decline a custom order if "the design requested" violates a "tastefulness policy that applies to everyone's orders."[8] Appellees' Am. Answer Br. 12 n.5. But the State has refused Phillips' request for a religious exemption based on his particular objection to same-sex marriage.

The ALJ decision, for instance, that the Commission adopted in whole stated that CADA would allow "a black baker [to] refuse to make a cake

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[8] CADA also permits cake artists to decline a custom order for a number of other reasons, ranging from the consequential (*e.g.*, "I don't have the requisite skill") to the trivial (*e.g.*, "I don't like your political bumper sticker"). Respondents concede this by stating that "[b]usiness owners in all trades … have legal autonomy to be selective about which projects they will take on." Appellees' Am. Answer Br. 12 n.5.

bearing a white-supremacist message for a member of the Aryan Nation" and that "an Islamic baker could … refuse to make a cake denigrating the Koran for the Westboro Baptist Church." App. 78a. The ALJ reasoned that "the explicit, unmistakable, offensive message" communicated by these cakes gave "rise to the bakers' free speech right to refuse." App. 78a.

Similarly, when a Christian patron requested that three secular bakeries in Colorado—Azucar Bakery, Le Bakery Sensual, Inc., and Gateaux, Ltd.—create custom cakes disapproving of same-sex marriage on religious grounds, the Commission found no probable cause of discrimination based on creed. App. 297-331a. And it did so despite the fact that creed discrimination under CADA encompasses "all aspects of religious beliefs, observances, and practices … [including] *the beliefs or teachings of a particular religion*," 3 C.C.R. 708-1:10.2(H) (emphasis added). The Commission found an exception to CADA when the denial of a commission is "based on the explicit message that the [customer] wished to include on the cakes." App. 305a.

This offensive-message exception to CADA is expressly based on the Commission's individualized assessment of a baker's reasons for declining a cake order. If the Commission considers the denial based on the message of a cake, as it did for the African-American, Muslim, and three secular cake artists cited above, an exemption to CADA is made available. But if the Commission views the baker's rationale differently, as it did Phillips' religious

objection to creating custom cakes honoring a same-sex marriage, no exception to CADA applies.

Regardless of how Respondents characterize Phillips' religious objection, this Court's controlling precedent holds that because a system of individualized exemptions exists, Colorado cannot deny an exemption to Phillips without first hurdling strict scrutiny. *See Lukumi*, 508 U.S. at 537 ("[I]n circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" (quoting *Smith*, 494 U.S. at 884)).

Indeed, by deeming Phillips' religious reasons for declining to create a custom cake to be of less importance than those of other cake artists, the Commission "singled out" Phillips' religious practice for "discriminatory treatment." *Id.* at 538. This conclusion flows naturally from any survey of CADA's "real operation," an inquiry that *Lukumi* affirmatively requires. *Id.* at 535. In short, the Commission deemed every similarly-situated baker's objection to creating an offensive cake "message based" and thus exempt from CADA. It held only Phillips in violation of state law.

The Commission, for example, found it critically important that the three secular cake artists who refused a Christian patron's orders did so "based on the [custom cakes'] explicit message," although they were happy to create other items "ordered by Christian customers." App. 305a. Phillips explained that he too declined to create a custom same-sex

wedding cake based on its morally objectionable message and that he is happy to create other items for gay clients. App. 286-288a. After all, a wedding cake is not a passive object but a central component of the wedding reception that celebrates the couple's joining as one. Nonetheless, the Commission found Phillips in violation of CADA. The only explanation for this disparate treatment is the Commission's disapproval of Phillips' religious beliefs about same-sex marriage.

Such hostility was apparent during the proceedings in Phillips' case. One Commission member summarized the Commission's logic, during the course of an administrative hearing, as follows:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be – I mean, we – we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others.

App. 211-212a. The Commission thus disfavored Phillips' request for an exemption from CADA based on its religious nature. In so doing, the Commission violated the essential free exercise principle that "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on

conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543.

Yet the Colorado Court of Appeals ignored CADA's real operation and declined to address the evidence showing the Commission's targeting of Phillips' religious views. It held that CADA, on its face, "was not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct" and thus applied rational basis review. App. 45a. This Court alone may reestablish that the "Free Exercise Clause … extends beyond facial discrimination" and correct the Colorado Court of Appeals' fundamental error. *Lukumi*, 508 U.S. at 534.

B. The Colorado Court of Appeals' Application of *Smith* and *Lukumi* Conflicts with Rulings by the Third, Sixth, and Tenth Circuits.

The Colorado Court of Appeals' application of *Smith* and *Lukumi* directly conflicts with that of the Third, Sixth, and Tenth Circuits. In *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 360 (3d Cir. 1999) (Alito, J.), the Third Circuit encountered a police department that permitted exemptions to its "no beards" policy for medical reasons but rejected exemptions based on matters of faith. The court held that "when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny." *Id.* at 366.

The Sixth Circuit ruled similarly in *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012), a case in which a public university permitted counseling students to refer clients to other counselors for mundane reasons, such as an inability to pay, while rejecting any request for an exception founded in religious belief. This "exemption-ridden policy," in the Sixth Circuit's view, was "just the kind of state action that must run the gauntlet of strict scrutiny." *Id.* at 740.

The Tenth Circuit in *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1291 (10th Cir. 2004), considered a comparable university policy that prohibited theater students from declining to perform objectionable scripts. Instructors allowed "ad hoc" religious exemptions from this rule in some cases but not in others. *Id.* at 1298-99. Ruling that a "'system of individualized exemptions need not be a written policy, but rather the plaintiff may show a pattern of ad hoc discretionary decisions amounting to a 'system,'" the Tenth Circuit reversed the district court's grant of summary judgment and remanded for further proceedings. *Id.* at 1299.

Here, it is undisputed that the Commission permits a myriad of exceptions to CADA's nondiscrimination rule. An African-American baker may decline to create a custom cake celebrating the racist ideals of a member of the Aryan Nation. Likewise, a Muslim baker may refuse to create a custom cake denigrating his faith for the Westboro Baptist Church. Three secular cake artists may reject a Christian's custom cake order because they find his religious message critical of same-sex

marriage offensive. Respondents have also conceded that a cake artist may decline a custom order simply because it violates a general "tastefulness policy." Appellees' Am. Answer Br. 12 n.5. And this is not even to mention the categorical exemptions to CADA that permit any discrimination not based on protected grounds, no matter how irrational or petty.

In the Third, Sixth, and Tenth Circuits, Respondents' grant of ad-hoc exemptions to other cake artists and denial of one to Phillips would trigger strict scrutiny. But the Colorado Court of Appeals found that this system of individualized exemptions and targeting of Phillips' religious views made no difference under the Free Exercise Clause. This Court's review is needed to resolve this conflict, especially as free exercise analysis in Colorado's state and federal courts is now governed by different rules.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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