STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17th Street, Suite 1300 Denver, CO 80202	
CHARLIE CRAIG and DAVID MULLINS, **Complainants,** v. **MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS,** **Respondents**.	▲ **COURT USE ONLY** ▲
Attorneys for Respondents: Nicolle H. Martin, No. 28737 7175 W. Jefferson Avenue, Suite 4000 Lakewood, Colorado 80235 303.332.4547 nicolle@centurylink.net Natalie L. Decker, No. 28596 The Law Office of Natalie L. Decker, LLC 26 W. Dry Creek Cr., Suite 600 Littleton, CO 80120 (O) 303-730-3009 natalie@denverlawsolutions.com Michael J. Norton, No. 6430 Alliance Defending Freedom 7951 E. Maplewood Avenue, Suite 100 Greenwood Village, CO 80111 (O) 720-689-2410 mjnorton@alliancedefendingfreedom.org	Case Number: 2013-0008
BRIEF IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF JACK PHILLIPS'S CROSS MOTION FOR SUMMARY JUDGMENT	

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Respondents, Jack Phillips and Masterpiece Cakeshop, Inc. (Jack), by and through counsel, request that the Court DENY Complainants' Motion for Summary Judgment and GRANT Respondents' Cross Motion for Summary Judgment and as grounds therefore state as follows:

INTRODUCTION

As set forth below, Complainants and the Government improperly claim that Jack Phillips's decision to decline to design and create a wedding cake to celebrate Complainants' same-sex marriage to be consummated in Massachusetts constitutes "sexual orientation" discrimination in violation of Colorado's public accommodation statute. The Government and Complainants seek to use this statute to compel Jack Phillips to create a wedding cake for Complainants' same-sex marriage despite Jack's deeply held religious conviction that marriage is a union between one man and one woman, and that he personally would displease God by participating in and facilitating a same-sex marriage. Through this statute, the Government and Complainants seek to impose a new belief system upon Jack, one that is fundamentally at odds with his conscience and his liberty. Complainants and the Government want this Court to order Jack Phillips to "cease and desist" from holding views about marriage that they disagree with, and conform his conscience to their definition of marriage, a definition not in accord with the law of the State of Colorado and to Jack. Should Jack refuse to violate his conscience and conform his thoughts and beliefs, then, ultimately, he will be forced to go out of business. This is precisely the sort of Orwellian state from which the First Amendment shelters Jack. It is the "throw[ing] out [of] this Hobson's choice: speak or work[,]" which is not permitted "in the area of First Amendment rights." *Pred v. Bd. of Pub. Instruction of Dade Cnty., Fla.*, 415 F.2d 851, 856 (5th Cir. 1969).

Jack Phillips has been using his artistic talents to design and create wedding cakes and baked goods for the last 40 years. Jack started Masterpiece Cakeshop, Inc., 20 years ago and since that time has served thousands of customers in Colorado without regard to race, religion, sexual

orientation or any other status. Indeed, Jack serves everyone, but he does not serve all events. Jack does not create wedding cakes for same-sex weddings based on his deeply held religious beliefs about marriage, much like he does not create baked goods for Halloween because of his deeply held religious beliefs. It is undisputed that Jack has served homosexual customers in the past, creating all manner of baked goods for a variety of occasions. But a wedding is not just any occasion; it is qualitatively different than a birthday party or a baby shower. Jack believes that God has ordained that marriage is a sacred union between one man and one woman, and only those unions should be recognized as "marriage." He further believes that God would be displeased not just with a same-sex marriage, *but with him personally*, if he were to participate in and promote a same-sex marriage by creating a celebratory wedding cake. For those reasons, and those reasons only, Jack chooses not to design and create cakes for same-sex weddings, just as he chooses not to design and create Halloween goods, and also chooses to close his store on Sunday. Jack strives to honor God and does not intentionally do anything that he believes would displease God. He runs his business with that intention and goal.

UNDISPUTED FACTS

1. Jack Phillips is a Christian. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 1).
2. Jack believes in Jesus Christ as his Lord and savior. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 2).
3. Jack has been a Christian for approximately thirty-five years. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 3.
4. As a follower of Jesus Christ, Jacks' main goal in life is to be obedient to Him and His teachings in all aspects of his life. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 4).

5. Jack owns and operates Masterpiece Cakeshop, Inc. (Complainants' Mem. Law Supp. Summ. J. p.2; Resp't Aff. ¶ 5).
6. Jack desires to honor God through his work at Masterpiece Cakeshop, Inc. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 7).
7. Jack believes that God instructs: "Whatever you do, in word or in deed, do all in the name of the Lord Jesus." Col. 3:17 (NIV). (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 8).
8. Jack, and the church which he attends, believe the Bible is the inspired word of God. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶¶ 9-10).
9. Jack believes the accounts contained in the Bible are literally true and its teachings and commands are authority for him. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 11).
10. Jack believes that God created Adam and Eve, and that God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 12).
11. Jack derives this belief from the first and second chapters of *Genesis* in the Bible, as well as other passages from the Bible. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 13; Ephesians 5:21-32).
12. Jack believes the Bible teaches, "[F]rom the beginning of creation, God made them male and female, for this reason, a man will leave his father and mother and be united with his wife and the two will become one flesh. So they are no longer two, but one. Therefore, what God has joined together, let not man separate." Mark 10:6-9 (NIV). (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 14).

13. Jack believes that this is a quote from Jesus Christ which shows unequivocally that, in His own words, *He* regards marriage as between a man and a woman. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 15).

14. Jack believes that the Bible further instructs him to "flee" or run from sinful things, and particularly those relating to sexual immorality: "Flee immorality. Every other sin that a man commits is outside the body, but the immoral man sins against his own body. Or do you not know that your body is the temple of the Holy Spirit who is in you, whom you have from God, and that you are not your own? For you have been bought with a price; therefore, glorify God in your body." Corinthians 6:18, 19 (NIV). (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 16).

15. Jack believes that in 1 Thessalonians 5:22, the Bible instructs him to "reject every kind of evil." (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 17).

16. Jack believes the Bible commands him to avoid the very appearance of doing what is displeasing to God. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 18).

17. Jack believes that if he does not, *he* is displeasing to God and dishonoring Him. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶¶ 19, 67).

18. Jack believes it is also very clear that the Bible commands him to flee from sin and not to participate or encourage it in any way. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶¶ 7-20).

19. Jack believes, then, that to participate in same-sex weddings by using his gifts, time and artistic talent would violate his core beliefs, the instructions of the Bible and be displeasing to God. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 21).

20. Same-sex marriage is prohibited in Colorado, by both the Colorado Constitution and Colorado statutory law. Colo. Const. art. II, § 31 ("Only a union of one man and one

woman shall be valid or recognized as a marriage in this state."); Colo. Rev. Stat. § 14-2-104 (2013) ("A marriage is valid in this state if: . . . It is only between one man and one woman.").

21. Jack believes that decorating cakes is a form of art and creative expression, and he seeks to honor God through his artistic talents. In fact, the Masterpiece Cakeshop, Inc. logo which appears in the store, on business cards, and on advertising reflects this view. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶¶ 7, 28-33; Exs. 5-8).
22. On or about July 19, 2012, two men came to Masterpiece Cakeshop, Inc. (Complainants' Mem. Law Supp. Summ. J. p.2; Resp't Aff. ¶ 70; Complaint ¶9).
23. The two men and Jack sat down at the cake consulting table. (Complainants' Mem. Law Supp. Summ. J. p.2; Resp't Aff. ¶ 72; Complaint ¶ 11).
24. The men introduced themselves as "David" and "Charlie." (Complainants' Mem. Law Supp. Summ. J. p.2; Resp't Aff. ¶ 76; Complaint ¶ 9).
25. The two men said that they wanted a *wedding* cake for "*our wedding."* (Complainants' Mem. Law Supp. Summ. J. p.2; Resp't Aff. ¶ 77; Craig Charge of Discrim.; Mullins Charge of Discrim.).
26. Jack informed the two men that he does not create *wedding* cakes for *same-sex weddings*. (Complainants' Mem. Law Supp. Summ. J. p.2; Resp't Aff. ¶ 78; Complaint ¶ 13).
27. Jack told the two men, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." (Resp't Aff. ¶ 79).
28. Charlie Craig and David Mullins each immediately got up and left the store. (Complainants' Mem. Law. Mot. Summ. J. p.2; Resp't Aff. ¶ 80; Complaint ¶ 14).
29. They did not ask any questions, ask to sample anything, or engage in any further discussion. (Resp't Aff. ¶ 81).

30. A woman identified as Deborah Munn called the next day. (Complainants' Mem. Law Supp. Summ. J. p.3; Resp't Aff. ¶ 84).

31. Jack advised Ms. Munn that he does not create *wedding* cakes for same-sex weddings because of his religious beliefs, and also stated that Colorado does not allow same-sex marriages. Complainants' Mem. Law Supp. Summ. J. p.3; Resp't Aff. ¶ 8).

32. As a follower of Jesus, and as a man who desires to be obedient to the teaching of the Bible, Jack believes that to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a *personal endorsement* and *participation in* the ceremony and relationship that they were entering into. (Complainants' Mem. Law Supp. Summ. J. p.6; Resp't Aff. ¶ 86).

33. Jack informed the two men that he would be pleased to create any other cakes or baked goods for them, or any other same-sex couples. (Resp't Aff. ¶ 87; Complaint ¶ 21).

These are the undisputed facts in this case, and they are sufficient facts for this Court to grant summary judgment in Jack's favor.

Complainants allege that it is undisputed that they were married in Massachusetts.[1]

ARGUMENT

Summary Judgment Standard

Under C.R.C.P. 56(c), summary judgment is proper only when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The burden of establishing the

[1] Although Jack Phillips, as a result of the Court's protective order precluding discovery relating to any alleged legal marriage between Complainants, has not been able to verify this assertion, for this purposes of this motion, Jack Phillips accepts this assertion by the Complainants as true. . Jack Phillips contends this order precluding discovery constitutes reversible error and, unless otherwise set forth herein, Jack Phillips contends that any other "fact" alleged by Complainants as "undisputed" is, in fact and in law, in dispute.

nonexistence of a genuine issue of material fact is on the moving party. *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991) (en banc).

In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. *Bebo Constr. Co. v. Mattox & O'Brien, P.C.,* 990 P.2d 78, 83 (Colo. 1999). A litigant is entitled to have disputed facts determined by trial, and it is only in the clearest of cases, where no doubt exists concerning the facts, that a summary judgment is warranted. *Moses v. Moses*, 505 P.2d 1302, 1304 (Colo. 1973).

As explained below, this Court should deny Complainants' summary judgment motion. Jack did not discriminate "because of" sexual orientation, as is required for a finding of sexual orientation discrimination. The wedding ceremony that the Government and Complainants seek to compel Jack to participate in and promote with his own speech is against Colorado law – both statutory and constitutional. The Government is unconstitutionally attempting to force Jack to violate his sincerely held religious beliefs and to compel him to speak a message that is contrary to his actual beliefs.

I. Jack Phillips Did Not Possess The Required Intent To Discriminate "Because Of" Sexual Orientation, As Required For A Finding Of Sexual Orientation Discrimination.

To prove a violation of the public accommodation statute, the Complainants bear the burden of demonstrating that Jack discriminated against them either "directly or indirectly," "because of" their sexual orientation. COLO. REV. STAT. § 24-34-601 (2) (2013). The inclusion of the words, "directly or indirectly," does not alter the standard, which is that, to make out a claim of sexual orientation discrimination, one must demonstrate that service was denied "because of" the sexual orientation of the one requesting it. In other words, the statute does not require businesses

to always serve members of a protected class. Rather, it requires that they not refuse to serve someone "because of" a protected characteristic.

Complainants have not presented any evidence that Jack declined to make a wedding cake for them *because of* their sexual orientation. The *only* evidence Complainants present is that Jack declined to design and create a wedding cake for their same-sex wedding—a wedding that is not recognized in the state of Colorado. *See* Colo. Const. art. II, § 31; COLO. REV. STAT. § 14-2-104 (1) ("[A] marriage is valid in this state if: (a) It is licensed, solemnized, and registered . . . ; and (b) [i]t is only between one man and one woman," COLO. REV. STAT. § 14-2-104 (2), and "any marriage contracted within or outside this state that does not satisfy [the requirements of COLO. REV. STAT. § 14-2-104 (1)(b)] shall not be recognized as valid in this state.").

Complainants seek to have this Court impute a legal standard into the statute that does not exist; they seek to create a novel *discrimination per se* standard: "Since Complainants were refused an opportunity to shop for or purchase a wedding cake at Masterpiece Cakeshop, Respondent Masterpiece Cakeshop discriminated against them on the basis of their sexual orientation . . . ."[2] (Complainants' Mem. of Law in Supp. of Summ. J. 5) By their reasoning, declining to create a wedding cake is *ipso facto* discrimination. The statute does not allow for such a standard; it is not a strict liability statute, and this Court is not permitted to insert a standard into the statute that does not exist. *See* COLO. REV. STAT. § 24-34-601 (2) (2013); *People v. Gallegos*, 109 P.3d 585, 593 (Colo. 2005) (When interpreting plain language of statute, court must give full effect to intent of General Assembly and where provision is clear, plain and ordinary meaning shall be applied). The statute

[2] It is not correct to say, as Complainants do, that Complainants were "refused an opportunity to shop for or purchase a wedding cake at Masterpiece Cakeshop." Jack would have happily sold them a wedding cake for a legal opposite-sex wedding. For instance, if Complainants had wished to purchase a cake for a friend who was getting legally married to an opposite-sex person, Jack would have happily sold it to them. His inability to sell them a cake for *this* particular wedding celebration was not because of their sexual orientation. It was rather because of the ceremony itself and his conviction that using his talents and speech to promote such a ceremony would be dishonoring and displeasing to God. (Resp't Aff. ¶¶ 21, 67).

requires evidence that Jack declined to design and create a wedding cake for Complainants *because of* their sexual orientation. COLO. REV. STAT. § 24-34-601 (2).

Complainants cannot meet their burden of proof. The uncontroverted evidence shows that Jack did not decline to design and create a wedding cake for Complainants *because of* their sexual orientation. Rather, the evidence clearly shows that he declined to design and create a wedding cake for Complainants because of his religious beliefs about both marriage and how God will feel about him if he participates in and promotes a same-sex wedding. In other words, his decision was not motivated by any type of animus toward, or bigotry against, gay people. His decision was motivated by his unwavering Christian beliefs, which led him to decline to promote a wedding ceremony that Colorado itself does not recognize and, in fact, regards as not legal.

Without a showing of animus, Complainants' and the Government's claims must fail. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 266 (1993), is instructive. In *Bray*, a group of abortion clinic plaintiffs claimed that a group of prolife defendants sought to deprive pregnant women of their rights, privileges and equal protection under the law by conspiring to obstruct their access to abortion clinics in violation of 42 U.S.C.S. § 1985 (3). *Id.* at 266. Like the public accommodation statute in this case, § 1985 (3) makes it unlawful to conspire "for the *purpose* of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." *Id.* (emphasis added). The Supreme Court held that the language of § 1985(3) requires proof of a discriminatory intent or animus toward a particular class. *Bray,* 506 U.S. at 269. Colorado's public accommodation statute requires the same showing – proof of *intentional* discrimination ("because of"), and proof that the *legitimate, non-discriminatory* reasons for the respondent's actions are pretextual. *See Colo. Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 401 (Colo. 1997); *Bodaghi v. Dept. of Nat'l Resources*, 995 P.2d 288, 307 (Colo. 2000).

The Supreme Court squarely rejected discrimination *per se* argument that the Government and Complainants are advancing in this case. *Bray*, 506 U.S. at 269, 271-72. The Court criticized this tack finding that "[t]his definitional ploy would convert the statute into the 'general federal tort law' it was the very purpose of the animus requirement to avoid." *Id.* at 269. The Court further dismantled this approach when it stated

> [plaintiffs'] case comes down, then, to the proposition that intent is legally irrelevant; that since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class. Our cases do not support that proposition . . . Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker [sic] . . . selected or reaffirmed a particular course of action at least in part ***because of***, not merely in spite of, its adverse effects upon an identifiable group. The same principle applies to the class-based, invidiously discriminatory animus requirement of § 1985(3).

Id. at 271-72 (citations and quotations omitted)(emphasis added). The Court concluded that intent to discriminate can only be presumed where two factors are present: the conduct at the root of the discrimination must be targeted and it must be engaged in "predominantly or exclusively" by a certain class of people. *Id.* at 270. (For example, "[a] tax on wearing yarmulkes is a tax on Jews. But opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women." *Id.* at 270.) Neither factor is present in this case and thus it is improper to presume that Jack discriminated "because of" sexual orientation.

Marriage is not something exclusive or unique to any class of people, including persons with same-sex attraction. Contrary to Complainants' and the Government's assertion, marriage is not "inextricably tied to sexual orientation." (Complainants' Mem. Law Supp. Summ. J. 5) The assertion that it is closely correlated with same-sex orientation is fantasy. For thousands of years, marriage has been defined as a union between one man and one woman. Indeed, Colorado and 36

other states do not recognize same-sex marriage.[3] Colorado has recognized and reinforced this by amending the state's constitution to state that "[o]nly a union of one man and one woman shall be valid or recognized as a marriage in this state." Colo. Const. art. II, § 31. *See also* COLO. REV. STAT. § 14-2-104.

Within this framework, it defies reason to suggest that marriage is inextricably tied to being gay in Colorado. The bounds of marriage in Colorado are unequivocal and firm: Marriage is a union between one man and one woman. Jack's decision not to design and create a wedding cake that subverts this law does not amount to intent to discriminate. The record before the Court is devoid of evidence that Jack harbors class-based animus against gay people. On the contrary, the record shows that Jack and Masterpiece Cakeshop, Inc. have a long history of serving everyone, and only decline events or creations that conflict with Jack's deeply held religious beliefs. (Resp't Aff. ¶¶ 18-25, 56-69, 87).

Despite the false assertions of Complainants, Jack does not discriminate; he never has and he never will. In fact, Complainants even concede that Jack offered to create baked goods other than a wedding cake for Complainants. If Jack were discriminating because of sexual orientation, he would have refused all goods and services to Complainants. However, as Complainants agree, that is not what happened. Moreover, if Jack were discriminating against people because of their sexual orientation, he would have to have a sexual orientation litmus test for every customer that comes through his door, because sexual orientation is not an observable characteristic. Jack does not have such a litmus test because he simply does not care about the sexual preferences of his customers.

However, there are some bakery services Jack will not provide to anyone, regardless of sexual orientation. For instance, because of his religious beliefs, he will not sell cakes and baked

[3] See Reuters.com, June 26, 2013, Factbox: New Mexico, Illinois, Montana, Texas, Oklahoma, California, Florida, Louisiana, Nevada, Idaho, Arizona, Alabama, Mississippi, North Carolina, South Carolina, Georgia, Arkansas, Kansas, Tennessee, Alaska, Nebraska, Virginia, Wyoming, Michigan, Indiana, Ohio, West Virginia, Hawaii, Wisconsin, Oregon, Kentucky, Missouri, North Dakota, Pennsylvania, South Dakota and Utah do not recognize same-sex marriage.

goods that celebrate Halloween, nor will he sell cakes and baked goods on Sundays. (Resp't Aff. ¶¶ 54-55, 63-65). Jack has a sincerely held religious belief that God disapproves of Halloween. (Resp't Aff. ¶¶ 63-65). He also has a sincerely held religious belief that God will be displeased with *him* if he uses his talents to promote or endorse something that God disapproves of. (Resp't Aff. ¶¶ 19, 21-22, 67). So he does not bake goods of any kind for Halloween, even though he believes he could make more money doing so. (Resp't Aff. ¶ 64).

In the same way, Jack will not design and create cakes that celebrate and promote marriages that he believes are contrary to God's intentions for marriage. And he does not have to; for, the Constitution guarantees him the freedom to follow the dictates of his conscience and honor God. As the United States Supreme Court explained long ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." W. *Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). It does not matter that the Government might think Jack's religious views silly, or even wrong. The Government and Complainants do not get to tell Jack what he should believe. Nor do they get to "force" Jack "to confess by word *or act*" his faith in the Government's and Complainants preferred orthodoxy. Neither the Colorado Constitution nor the First Amendment will allow this. *Id. See also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1121 (10th Cir. 2013) (en banc) (ruling that not only individuals but also businesses have First Amendment conscience rights that are constitutionally protected).

It does not matter to Jack *who* asks him to bake such a cake. Jack would decline such a request no matter the race, sex, religion, or sexual orientation of the customer. (Resp't Aff. ¶¶ 67-68). So if a "straight" person wanted to purchase a cake celebrating a friend's same-sex wedding, Jack would also decline to provide it. (Resp't Aff. ¶¶ 67-68). His decision about this has absolutely

nothing to do with the sexual orientation of the customer asking for the creation. It has everything to do with the fact that the wedding cake is for a marriage that Jack believes displeases God, and further believes that *he* would be displeasing to God if he provides it.

Had the Complainants asked for a cake that said, "Happy Birthday" or, "Congratulations on Your Graduation," Jack would have gladly designed and created it for them. In fact, as stated above and as is undisputed, he specifically told them that he would create anything else for them. (Resp't Aff. ¶ 79; Complaint ¶ 21). If the Complainants had children, and requested cupcakes for a party they were throwing for their child, Jack would have gladly provided them. But the Complainants did not request cupcakes or a graduation cake or a birthday cake. They requested a *wedding* cake, and Jack cannot design and create that cake without compromising his sincerely held beliefs about God's design for marriage and his personal duty to the God he believes is the sovereign God of the universe.

Jack's decision to decline to design and create a wedding cake for Complainants, standing alone, does not amount to the necessary "animus" or "invidious" intent to make this refusal a violation of the public accommodation statute. *Bray*, 506 U.S. at 268-69. Moreover, as a matter of law and public policy, declining to design and create a wedding cake for a same-sex marriage cannot reasonably be presumed to reflect animus based on sexual orientation when Colorado itself does not recognize same-sex marriages. Thus, Complainants and the Government have failed to establish a prima facie case of discrimination *because of* sexual orientation under the public accommodation statute, thus entitling Jack Phillips to summary judgment.

A. Jack Phillips Declined to Create a Celebratory Cake Promoting and Endorsing Same-Sex Marriage For Two Reasons Only, Neither of Which Is Discriminatory Under Colorado Law.

Jack Phillips declined to design and create a wedding cake promoting and endorsing same-sex weddings, and he did so for reasons that are permitted under federal and state law.

1. Creating a Celebratory Cake Promoting and Endorsing a Same-Sex Marriage Would Cause Jack Phillips To Engage In Activity That Is Incompatible With His Religious Beliefs About Marriage and What God Expects From Him.

Jack is a devout Christian. (Resp't Aff. ¶¶ 1-2.) He belongs to a local Baptist church. Jack's church, and Jack himself, believe the Bible is the inspired word of God. (Resp't Aff. ¶¶ 9-10.) He accepts its stories as literally true and its teachings and commands as authority over him. (Resp't Aff. ¶ 11.) Jack therefore believes that God created Adam and Eve, and that God's intention for marriage is that it should be the union of one man and one woman. He derives this belief from the first and second chapters of *Genesis* and other chapters in the Bible. (Resp't Aff. ¶¶ 12-15.)

Marriage as the union of one man and one woman is also known as "complementarian" marriage because it is said that men and women complement one another because of their differences. Jack believes that the Bible teaches that the complementarian nature of marriage was designed by God to communicate something important about the nature of Christ and the Church, His bride. Just as men and women have important differences, so Jack believes Christ is different in nature than people like him who make up the Church. Jack believes that Christ is perfect, while people are not. Jack believes that Christ is fully God and fully man, while people are just people. Jack believes in these differences. Yet, despite these very real differences, Jack believes that in the Church, sinful people become "united with Christ," as the Bible says in *Philippians* 2:1. He believes this is at least part of the reason that the Bible describes marriage as a picture of Christ's relationship with the Church in *Ephesians* 5:21-33. The Bible says that just as a man and woman, who are

different in sex, become "one flesh" in marriage, so Christ and people, who are different in many respects, become united in the Church. *Ephesians* 5:31-32. Jack believes marriage was designed in part by God to communicate this message about Christ and people. Consequently, Jack believes that the complementarian nature of marriage as the union of one man and one woman is God's design for marriage and is indispensible to the institution. (Resp't Aff. ¶¶ 12-15).

Because Jack believes the complementarian nature of marriage is essential to what marriage is and what God designed it to be, Jack believes that other types of marriages, that are not the union of one man and one woman, are displeasing to God. (Resp't Aff. ¶¶ 12-15). But it is not just the "marriage" that Jack believes displeases God. Because he believes God expects him to strive to please God in the things he does, Jack believes that God will be displeased with *him*, personally, if he promotes or celebrates things that are displeasing to God. He derives this belief from Bible passages such as *1 Thessalonians* 5:22, which tells Christians to avoid the very appearance of doing what is displeasing to God, and also *Romans* 1:32, which says that God is displeased with those who give approval to things God disapproves of. (Resp't Aff. ¶¶ 18-20).

This is Jack's sincerely held religious belief. This is why he closes his store on Sundays and will not even make deliveries on that day. He believes God expects Sunday to be a day of worship and rest. So he takes the day off, so he will not be displeasing to God, and he gives his employees the day off, so that he will not cause them to be displeasing to God. This is also why Jack will not create and design Halloween-themed products or cakes with salacious messages or themes. Jack believes such things displease God, and that he would be displeasing to God if he were to create such cakes.

And this is why Jack declined to use his artistic talent to design and create a cake celebrating the Complainants' wedding. To create a cake that celebrates and endorses same-sex marriage, and treats it as if it were the same as a complementarian wedding that, by its nature, reflects something

of Christ's relationship with the Church, is simply incompatible with Jack's sincerely held religious beliefs about God's design for marriage and its importance. (Resp't Aff. ¶¶ 21, 67-68). He could not do so without violating his conscience and becoming himself guilty of displeasing God, something that, because of his religious convictions, he tries his best not to do.

2. Creating a Celebratory Cake Promoting and Endorsing a Same-Sex Marriage Would Force Jack Phillips to Engage In Speech He Does Not Want To Speak and Communicate a Message He Finds Objectionable.

Additionally, Jack declined to create a cake celebrating a same-sex marriage because of the message it would communicate. Jack does not hate gay people or harbor any ill will toward them, in fact he believes that God loves *everyone equally*. Nor does Jack oppose same-sex marriage because he wants to deprive gay couples the happiness and benefits marriage brings. Rather, as already explained, Jack has sincerely held religious beliefs that God created and intended marriage to be the union of one man and one woman in order to demonstrate important truths about Christ's relationship with the Church. Consequently, Jack does not want to create a message that promotes and endorses a different view of marriage.

There can be no question that wedding cakes are communicative. There is a reason that those getting married generally choose to celebrate with a wedding cake as opposed to, say, a lasagna. Wedding cakes have come to be understood as celebrating the joyous event of marriage. Wedding cakes communicate a message of congratulations, honor to the union of the couple and a message to all that we are married.

Cake making and decorating is its own form of art and communication.[4] Cake making dates back to at least 1175 B.C.[5] Of any form of cake, wedding cakes have the longest and richest history.

[4] *See* Toba Garrett, *Professional Cake Decorating*, 2d. edition (2012)(discusses the history of cakes and cake decorating, and provides tips for "cake artists"); Toba Garrett, *A Professional Approach: Wedding Cake Art and Design* (2010) ("Cake decorating is a labor of love and combines baking and fine art in a

In modern Western culture, the wedding cake is a central piece of the wedding and is traditionally served at the reception celebrating the union of the couple.[6] How important is a wedding cake? It is so important that one author suggests, "A memorable cake is almost as important as the bridal gown in creating the perfect wedding."[7] Because they are so important to creating the right mood of celebration, wedding cakes are uniquely personal to the couple whose union is being celebrated.[8]

From the very earliest use, wedding cakes were used to communicate a message about the wedding or the marrying couple. In Roman times, small cakes were made and then crumbled over the head of the bride.[9] This "crowning of the bride", was a symbolic request for good fortune and blessings; the contents of the cake, which were foods believed to be pleasing to the gods, would cause the gods to bless the bride with abundance. Early wedding cakes were rich fruit cakes baked with vine fruits steeped in brandy.[10] These cakes were symbols which communicated wealth, fertility, happiness, longevity, and health.[11] Even the traditional use of the color white for cakes communicates it was used as a symbol of purity and virginity; in the early 19th century, when refined sugars were more expensive and more difficult to find, the white was also a symbol communicating

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way that continues to astonish admirers."); *The Essential Guide to Cake Decorating* (Jane Price, ed., 2010)("Cake decorating is a fabulous mixture of cooking and art…"); Mich Turner, *Wedding Cakes* at cover page (2009)("A memorable cake is almost as important as the bridal gown in creating the perfect wedding."); *Id.* at 11("The wedding cake should be center stage at the reception, a star in its own right."); see generally The Culinary Institute of America, *Cake Art* (2008).

[5] *The Essential Guide to Cake Decorating* 7-11 (2010).

[6] Turner, supra note 3 at 11 ("Nowadays the wedding cake…is an important and integral part of the wedding along with the wedding dress and the bride's bouquet.").

[7] Turner, supra, note 3 at cover page.

[8] *See* Toba Garrett, *Wedding Cake Art and Design* (2010) (Master decorator, Toba Garret discusses the artistic aspect of wedding cakes and the collaboration of the "cake artist" and the couple uniting; "Designing and creating a wedding cake…is challenging … requires a great deal of skill… A wedding cake is uniquely personal because it is based on a couple's specific ideas.").

[9] *See* Turner, supra note 3 at 11.

[10] *Id.*

[11] *Id.*

wealth and status.[12] Over the years, the three-tiered round wedding cake became the traditional wedding cake as each of the round cakes were symbolic of the three rings associated with marriage. The engagement ring, the wedding ring, and the eternity ring each are represented by a tier of the three-tiered wedding cake.[13]

The wedding cakes that Jack designs and creates (Ex. 2), other celebratory cakes he creates (Ex. 3), as well as those of other cake makers (Ex4), obviously require a unique artistic talent. They are very clearly a method of communication. One need only look at the cakes themselves to immediately recognize the message that is being conveyed and the event that the cakes are celebrating. (*See* Exs. 2-4).

Because of this communicative nature of wedding cakes, Jack could not just bake a cake and pretend it did not mean anything. Jack knew better. He knew that the cake did, in fact, mean something. It meant that a wedding had occurred, a marriage had begun, and that the union of the couple should be celebrated. That is what a wedding cake communicates. (Resp't Aff. ¶ 46). After all, that was why the Complainants wanted a wedding cake – they wanted to celebrate their marriage. And it was that message that created the crisis of conscience for Jack.

It is important to remember, as already explained, that Jack would have declined to design and create a celebratory cake promoting same-sex marriage no matter who the customer was or what her sexual orientation might be. Jack is not interested in who his customers are attracted to or how they identify. When it comes to selling baked goods, whether a person identifies as "straight" or "gay" does not matter to him. All Jack is concerned about is that he not be forced to create and give voice to a message that conflicts with his sincerely held religious beliefs and places him in the position of displeasing his God. That is precisely why Jack declined to design and create the

[12] Turner, supra note 3 at 11.
[13] *The Essential Guide to Cake Decorating*, supra note 3 at 11.

celebratory cake the Complainants wanted. His decision had nothing to do with their sexual orientation but was rather because of the message he would have been forced to speak by creating it.

The Complainants wanted Jack to create a celebratory cake that would promote a message that Jack does not want to promote. Creating such a message runs counter to Jack's sincerely held religious beliefs. And he believed, and continues to believe, that it would cause him to dishonor and displease God. That is why Jack declined to create the wedding cake for the Complainants.

Jack did not discriminate "because of" sexual orientation. He declined to create the Complainants' wedding cake because doing so would violate his religious beliefs and communicate a message he did not want to give voice to. Because Jack did not discriminate "because of" anyone's sexual orientation, the Government and Complainants cannot meet their burden of proof under COLO. REV. STAT. § 24-34-601 (2) (2013). This Court should therefore deny the Government's and Complainants' motion for summary judgment and should grant summary judgment to Jack.

II. Creating a Celebratory Cake Promoting and Endorsing a Same-Sex Marriage Requires Mr. Phillips to Endorse a Ceremony That Is Illegal, Unconstitutional and Against Public Policy in the State of Colorado.

In addition, and of great import, is the fact that Colorado does not recognize same-sex marriage. In fact, same sex marriages are illegal, unconstitutional and against public policy. In 2006, Colorado citizens voted in favor of amending the state's constitution. In accordance with the will of the people of the state of Colorado, Article II, § 31 of the Colorado Constitution states: "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." Moreover, Colorado has a Uniform Marriage Act that prohibits same-sex marriage. This statutory law, which is the stated public policy for Colorado, specifically states that marriage is between one man and one woman, and that any marriages entered into that do not satisfy that requirement are

not valid in the state of Colorado. *See* COLO. REV. STAT. § 14-2-104 (1) ("[A] marriage is valid in this state if: (a) It is licensed, solemnized, and registered . . . ; and (b) [i]t is only between one man and one woman" COLO. REV. STAT. § 14-2-104 (2), and "any marriage contracted within or outside this state that does not satisfy [the requirements of COLO. REV. STAT. § 14-2-104 (1)(b)] shall not be recognized as valid in this state.").

It is nonsensical, arbitrary and capricious for the Government, and for Complainants using the strong-arm of the government, to force a private person to participate in, and compel speech endorsing and promoting, a ceremony that the state does not even recognize – and to do so under threat of civil and criminal penalties. COLO. REV. STAT. § 24-34-602 (2). The criminal penalty in COLO. REV. STAT. § 24-34-602 (2) provided for up to one year in jail and/or a fine not to exceed $300. This subsection was repealed in the last legislative session, but the repeal was not effective until April 19, 2013, long after the alleged discrimination occurred. For months, Jack lived in fear and apprehension of being prosecuted and potentially put in jail because of his beliefs about marriage.

If a same-sex couple in Colorado goes to the clerk and recorder's office located in their county of residence, which also happens to be a public accommodation under COLO. REV. STAT. § 24-34-601 (1) and applies for a marriage license, they will be denied. Indeed, Susie Swain, the Director of Recording for the Clerk and Recorder of Jefferson County, Colorado has affirmed that her office only offers marriage licenses to *opposite sex couples*. (Ex. 25). Consequently, while the State of Colorado does not allow same-sex weddings, it simultaneously seeks to force Jack to violate his conscience and participate in, and promote, a same-sex wedding. Surely, such an outrageous contradiction cannot be sustained. The Government and Complainants seek to force Jack to actively participate in and endorse the very marriage that the state declines to recognize or license. Additionally, if this Court reaches the constitutional issues raised by this case, it is preposterous for

the Government to argue that it has a compelling state interest in promoting participation in the very ceremonies which it *prohibits*, and which are in violation of the state constitution and statutory law.

It is undisputed that the public policy of the state of Colorado is that marriage is the union between only one man and one woman. This public policy has been repeatedly reaffirmed beyond amending the state constitution and the creation of statutory law stating that marriages that do not comply with that requirement are not recognized in the state of Colorado. In fact, as recently as the last legislative session which ended only five months ago, the Colorado legislature reaffirmed that the public policy of the state of Colorado is that marriage is between only one man and one woman. In fact, in recognizing civil unions, the legislature stated three times that the public policy of Colorado is that marriage is the union between one man and one woman. *See* COLO. REV. STAT. § 14-15-102 (2013) ("Legislative declaration. The General Assembly declares that the public policy of this state, as set forth in section 31 of Article II of the state constitution, recognizes only the union of one man and one woman as marriage . . . The general assembly finds that the 'Colorado Civil Union Act' does not alter the public policy of this state, which recognizes only the union of one man and one woman as marriage."); COLO. REV. STAT. § 14-15-118 (2013) ("Construction. The provisions of this article shall not be construed to create a marriage between the parties to a civil union or alter the public policy of this state, which recognizes only the union of one man and one woman as a marriage.") The Colorado Civil Union Act amended several Colorado laws, but did not amend or modify in any way the provisions of COLO. REV. STAT. § 14-2-101 (2013), et seq. It is clear that same-sex marriages remain illegal and against the unambiguous and repeatedly reaffirmed public policy of the State of Colorado.

It is undisputed that what the Complainants sought was a wedding cake to celebrate their same-sex wedding. (Complainants' Mem. Law Supp. Summ. J. p.2). Because such weddings are

illegal and against the public policy of Colorado, it cannot be the case that Jack is required by law to participate in and engage in speech promoting one. Nor can it be the case that Jack engaged in sexual orientation discrimination because he declined to do so. As the Missouri Supreme Court just explained in a decision handed down this week, it is not sexual orientation discrimination to refuse to treat someone as married when, under the law, they are not married. *Glossip v. Missouri Dep't of Transp. and Highway Patrol Employees' Retirement System*, slip op. at 2 (Missouri S. Ct., Oct 29, 2013), *available at* http://www.courts.mo.gov/file.jsp?id=67138 (last visited October 31, 2013).

This Court should grant summary judgment in favor of Jack Phillips.

III. Constitutional Guarantees Protect Jack Phillips' Right to Decline to Create a Celebratory Cake Promoting and Endorsing Same-Sex Marriage.

As explained below, applying the nondiscrimination statute to Jack in this instance raises serious constitutional infirmities. Before considering the constitutional questions, however, it is important to note that the Court need not do so; and, in fact, should not do so. The Colorado Supreme Court is clear: when it is possible to read a statute in a way that "avoid[s] potential constitutional infirmities," the court "*must*" do so. *Lopez v. People*, 113 P.3d 713, 728 (Colo. 2005) (en banc) (emphasis added). This accords proper deference to the Legislature. As the Supreme Court explained, "the legislature intends a statute to be constitutional and we should construe it in a manner avoiding constitutional infirmity, if possible." *Bd. of Directors, Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 105 P.3d 653, 656 (Colo. 2005). That is why the Supreme Court has taught that it is the courts' "duty, if possible, to give full force and effect to legislative enactments. If a reasonable interpretation, that will avoid constitutional conflict, is at hand, we should adopt it." *Town of Sheridan v. Valley Sanitation Dist.*, 137 Colo. 315, 321, 324 P.2d 1038, 1041 (1958).

As explained above, the plain meaning of the statute at issue in this case requires that, for

discrimination to occur, the sexual orientation of the customer must be the reason that a defendant declined to serve him or her. But in this case, as explained above, the sexual orientation of the customer was irrelevant to Jack. For Jack, it was not about sexual orientation but about the *event* he was being asked to participate in by creating a celebratory message for, and therefore promote. For the Government and Complainants to prevail, therefore, a meaning of the statute must be adopted that is not its plain meaning. That is to say, "because of" must be read out of the statute. Instead, the statute must be made to say that it is per se discriminatory to decline to provide something a gay customer requests. Further, the statute must be read to require something (recognizing a same-sex wedding) that the Government itself, whose statute it is, declines to do.

Reading the statute in this forced way will lead to "constitutional conflict." As the Supreme Court explained in *Town of Sheridan*, this Court should adopt the interpretation of the antidiscrimination statute that allows the court to avoid potential constitutional conflict. This Court should therefore end its analysis at this point and grant Jack's motion for summary judgment; for, Jack cannot be guilty of sexual orientation discrimination when he did not deny anyone services "because of" his or her sexual orientation.

To turn now to the constitutional questions, the Colorado public accommodations law under which the Complainants and the Government have brought their complaint is unconstitutional as applied to Jack's creation of wedding cakes. It infringes the free speech guarantees afforded by the First Amendment of the United States Constitution and by Article II, Section 10 of the Colorado Constitution. *See infra*, Part III.A. It also violates both state and federal guarantees of free exercise of religion. *See infra*, Part III.B. For these reasons, the law cannot be applied to Jack in the manner attempted in this case, and summary judgment is appropriate for him. This Court should therefore grant Jack's motion for summary judgment and deny the Complainants' motion for summary judgment.

A. Forcing Jack Phillips to Communicate a Celebratory Message About Same-Sex Marriage Infringes His State and Federal Free Speech Guarantees and Is Unconstitutional.

The state and federal constitutions both guarantee Jack, and every other person, broad free speech rights and protections. Article II, Section 10 of the Colorado Constitution states: "No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject . . . ." As broad as the protections of the First Amendment to the U.S. Constitution are, as discussed below, the free speech provision of the Colorado Constitution provides even broader liberty and protection of free speech. *Bock v. Westminster Mall Co.,* 819 P.2d 55, 59-60 (Colo. 1991) (explaining that, for more than 100 years, Colorado's free speech provision has provided greater protection than First Amendment).

With the words "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ," the framers of the Constitution established the First Amendment as a shield to protect America's most treasured and hard-fought rights. It is these rights the Government seeks to suppress by compelling Jack Phillips to make an unacceptable choice – violate his religious beliefs by speaking a message he morally disagrees with, or suffer significant pecuniary loss which will ultimately result in the loss of his business. The moral and ethical consequences of this forced choice cannot be underestimated; betrayal of one's conscience is a lie – told not only to the person seeking to compel the message, but to all those who view the government forced creation of a wedding cake. Compounding this untenable reality, Jack Phillips's wedding cake will be regarded as approval of Complainants' *political* message. (Exs. 17-19, 21-24). Photo of Complainants' cake and photo showing same-sex marriage symbol at their protest, *A Rainbow Marriage: How Did the Rainbow Become a Symbol of Gay Rights*, Slate, June 26, 2013. Mr. Phillips seeks to safeguard his constitutional rights and to protect his conscience from unjust coercion by the Government.

First Amendment protection against abridging freedom of speech extends beyond spoken or written words. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (saluting or not saluting a flag; wearing an armband; displaying a red flag, parading in uniform while displaying a swastika, music, and art all held to be speech protected by First Amendment). In fact, "the Constitution looks beyond written or spoken words as mediums of expression." *Id.* at 569. The design and creation of wedding cakes, as symbolic speech, is entitled to full First Amendment protection. *See Cressman v. Thompson*, 719 F.3d 1139, 1141 (10th Cir. 2013); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (recognizing that First Amendment protections have been specifically afforded to a variety of mediums of expression, including music, pictures, films, art, entertainment, paintings, drawings, engravings, prints, sculptures, and speech that "is carried in a form that is sold for profit") (citations omitted)). As described above, wedding cakes are artistic creations that constitute speech, just like a host of other mediums of expression recognized by courts, and specifically by the United States Supreme Court.

1. Wedding Cakes Are Speech That Communicate Positive, Celebratory Messages About Marriages.

Cakes are often a method of communication. Wedding cakes are particularly so. As described above, the history, traditions and meaning of wedding cakes demonstrate this. Wedding cakes communicate both actual speech (e.g.., the little "groom and groom" on top; any message iced on the cake; etc.) and also symbolic speech (e.g., what the cake stands for, any special attributes like rainbow colors, such as was used on the Complainants' cake as shown in Exhibits 18-19). Wedding cakes communicate a positive and celebratory message about marriage.

Jack uses his talent and creativity to create wedding cakes that convey both actual and symbolic speech. (Resp't Aff. ¶¶ 37-45). To suggest otherwise distills Jack's expressive wedding

cakes into a fungible good, void of artistic style and expression. This renders wedding cakes interchangeable from one baker to the next, and ignores the communicative nature of a wedding cake. Jack's wedding cakes convey a symbolic message about marriage, and as such, he is entitled to the full protection of the First Amendment.

Under the First Amendment, not only actual spoken speech, but also symbolic speech has long been protected by the Supreme Court. *See Hurley*, 515 U.S. at 569; *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (burning of American flag held to be protected symbolic speech), and *Spence v. Washington*, 418 U.S. 405, 420 (1974) (hanging of upside down American flag embellished with peace symbols held to be protected symbolic speech). Wedding cakes are among the scores of symbols in our daily lives that express an articulable message, worthy of First Amendment protection. The Tenth Circuit Court of Appeals recently affirmed that symbolic speech falls under the umbrella of protected speech in *Cressman v. Thompson*, 719 F.3d 1139,1154 (10th Cir. 2013)[14]. The symbolic speech recognized in *Cressman* consisted of a license plate image of a Native American warrior shooting an arrow into the sky hoping to induce the "rain god" to answer the people's prayers for rain. *Id.* at 1141-42. The *Cressman* court determined that the display of the license plate "convey[ed] a particularized message that others would likely understand." *Cressman*, 719 F.3d at 1153-54. The court therefore held that the plaintiff's complaint stated a "plausible compelled speech claim" because the image of the Native American warrior "convey[ed] a . . . message, covering up the image poses a threat of prosecution, and his only alternative to displaying the image is to pay additional fees for specialty license plates that do not contain the image." The Constitution recoils from compelled speech and protects citizens from being forced to speak when they would rather remain

[14] Cressman filed a section 1983 lawsuit against various Oklahoma State officials alleging violations of his right to freedom of speech, his right to freely exercise his religion and his due process rights, *Cressman*, 719 F.3d at 1143, when he was forced to display an image on his license plate that violated his religious beliefs. *Id.* at 1141.

silent, "regardless of whether the speech is ideological." *Id.* at 1152 (quoting *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004)).

2. The First Amendment Will Not Tolerate Government-Compelled Speech.

By its very nature, the right of free speech cannot mean that Jack must create and facilitate Complainants' speech. The very notion that Complainants and the Government can force Jack to create and design a wedding cake in violation of his deep and abiding faith is antagonistic to the very underpinnings of personal and religious liberty enshrined in the First Amendment.

Cressman, like the long line of compelled speech jurisprudence before it, stands for the principle that the First Amendment safeguards not just actual speech, but it safeguards the freedom of the mind – the right to decide whether to speak at all. *See Cressman*, 719 F.3d at 1152. Consequently, freedom of speech extends beyond spoken or written words. *See Hurley*, 515 U.S. at 574; *Pacific Gas and Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 261 (1974).

Equally critical to the right to freedom of speech is the right not to speak at all. Indeed, more than 70 years ago the Supreme Court struck down a state law compelling students to salute and pledge allegiance to the flag of the United States. *West Virginia State Board of Educ.*, 319 U.S. at 633-34 (referring to the expressive nature of symbols, the Court stated, "[s]ymbolism is a primitive but effective way of communicating ideas." *Id.* at 632). Thirty years later, the Supreme Court again reaffirmed the principles handed down in *Barnette* when it held that an individual cannot be compelled to communicate the message of another. *Wooley*, 430 U.S. at 715 (forcing a driver to display the state's message on his license plate amounted to forced speech in violation of First Amendment). Speech can be considered compelled by forcing an entity to express a message and/or punish an entity for refusing to display or engage in the unwanted message or expression. *Id.* at 715. It can also be compelled by forcing an entity to host or accommodate another's message,

thereby irreversibly altering the message of the complaining entity. "Our compelled-speech cases are not limited to the situation in which an individual must personally speak the Government's message. We have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *Rumsfeld*, 547 U.S. at 63 (citing *Hurley*, 515 U.S. at 559 (1995) (forcing parade organizer to include LGBT group's message, which organizer opposed, violated First Amendment); *Pacific Gas and Elec. Co.*, 475 U.S. at 9 (plurality opinion) (compelling plaintiff to include oppositional private speech of third-party in plaintiff's monthly newsletter violated First Amendment); *Miami Herald Publishing Co.,* 418 U.S. at 258 (right-of-reply statute violates editors' right to determine the content of their newspapers in violation of First Amendment).

The public accommodation statute, as applied to Jack, violates the compelled speech doctrine by punishing him for refusing to design and create a wedding cake that he finds morally and personally objectionable, and by forcing him to host or facilitate Complainants' symbolic message which conflicts with his sincerely held religious beliefs. (*See* Resp't Aff. ¶¶ 12-15).

Forcing Jack to provide a wedding cake for a same-sex marriage not only forces him to design and create Complainants' desired rainbow-themed message about same-sex marriage, but it also forces Jack to alter his own desired expression about marriage; namely, that it is the union of one man and one woman. It requires Jack to affirmatively create, facilitate and communicate a message about same-sex marriage that violates his conscience, goes against his sincerely held religious beliefs about marriage, and causes him to worry that God is displeased with him. Indeed, Complainants seek to compel Jack to change his views on same-sex marriage (Ex. 21). and to communicate a positive message about same-sex marriage. But the Government and Complainants cannot change Jack's beliefs about marriage, and their attempt to use the public accommodation statute to do so is abusive and unconstitutional.

Such a result runs afoul of *Pacific Gas and Elec. Co.*, 475 U.S. 1 and *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974), both of which held that the Government and its law cannot compel someone to say what they would rather not. This type of compelled speech is especially pernicious because the fallout is widespread and not limited to chilling. To be sure, Jack Phillips is faced with a choice - violate his conscience or suffer significant pecuniary loss. The First Amendment was adopted as a shield against such cruel choices. *See Hurley*, U.S. 515 at 566. The *Pacific Gas* Court was especially troubled by such implications: If the government were "freely able to compel . . . speakers to propound political messages with which they disagree," protection of a speaker "would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Pacific Gas*, 475 U.S. at 16. Furthermore, it is well-established that the First Amendment is "a value-free provision whose protection is not dependent on the truth, popularity, or social utility of the ideas and beliefs which are offered. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . ." *Meyer v. Grant*, 486 U.S. 414, 433 (1988) (citations and quotations omitted).

Moreover, Complainants wish to convey a *political* message about same-sex marriage and to force Jack to convey that same political message. According to Complainant Charlie Craig, they don't want to shut Masterpiece Cakeshop, Inc. down, they want to "change" their policy on "gay weddings." (Ex. 21). Remarkably – and significantly, Complainant did not say anything about sexual orientation; he said he wanted to change their policy on "gay weddings." The public accommodation statute most definitely was not designed to force a person to speak a political message or to change his policy on controversial ones; and further, the federal and state constitutions forbid such a purpose. There can be no doubt that the wedding cake that Complainants desired was, among other things, Complainants' political speech. One need only look at the wedding cake that they procured – the cake itself was rainbow themed, symbolic of the gay

pride movement which Complainants whole-heartedly embrace. (Exs. 17-19, 21-24). Moreover, the Complainants' ceremony and reception exactly mirror a wedding between one man and one woman (presence of family and friends, wedding arch, exchanging of vows, kiss of the united couple, toast, wedding cake, cutting of the cake, feeding cake to one another, etc). (Exs. 11-20), and the couple has made it clear that they are in favor of same-sex marriage, which is a *political* issue for them and many others. (Exs.21-24). The First Amendment protects all citizens from being forced by the government to speak someone else's message, especially when they prefer to remain silent. As the United States Supreme Court made clear in *Barnette*, the Government (and its law) is constitutionally forbidden to "force citizens to confess by word or deed" acceptance of a Government-dictated orthodoxy. Yet that is precisely what will happen if the Government and its nondiscrimination law is allowed to force Jack to design a celebratory cake for a same-sex wedding. He will be forced to "confess" by "word" (the message the cake communicates) and "deed" (his act of designing and creating the cake) that same-sex marriage is just like opposite-sex marriage—a proposition that Jack does not support and with which he vehemently disagrees.

a. The First Amendment Protects Not Only the Right to Speak, But Also the Right To Refrain From Speaking.

The United States Supreme Court has explained that "'[s]ince *all* speech inherently involves choices of what to say and what to leave unsaid,' one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say,' *id.,* at 16." *Hurley*, 515 U.S. at 573 (*quoting Pacific Gas & Electric Co.*, 475 U.S. at 11 (emphasis in original)). The State is allowed to compel speech in the "commercial advertising" realm by insisting that advertisements contain "purely factual and uncontroversial information." *Hurley*, 515 U.S. at 573 (*quoting Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). But, significantly for this case, "outside that [commercial advertising] context it may not compel affirmance of a belief

with which the speaker disagrees." *Hurley*, 515 U.S. at 573 (*citing West Virginia State Bd. of Educ.*, 319 U.S. at642).

The *Hurley* Court explained the contours of this First Amendment rule that prohibits the Government from compelling particular messages. It noted that "this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573-74 (*citing McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-342 (1995); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-798 (1988)). Significantly for the case at bar, the Court clarified that the First Amendment protection against compelled speech is enjoyed not only by "ordinary people" but also "business corporations," *Hurley*, 515 U.S. at 574, like Jack Phillips and Masterpiece Cakeshop, Inc. The "point" of protection against compelled speech, the *Hurley* Court explained, "is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Id.* at 574. (*citing Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949)). "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

Hurley is dispositive of the issue of whether a public accommodation statute can be used by the government to compel speech. A group of LGBT plaintiffs in *Hurley* sought a court order forcing a Boston parade organizer to include the LGBT contingent it its annual parade celebrating St. Patrick's Day/Evacuation Day. *Id.* at 561-63. The plaintiffs wanted to march in the parade "to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.* at 561. The parade organizer opposed the LGBT group's inclusion based on First Amendment grounds because it wished to convey "traditional religious and social values." *Id.* at 562. In rejecting the expressive

nature of a parade, the lower court in *Hurley* characterized the parade as "an open recreational event that is subject to the public accommodations law." *Id.* at 563. In a unanimous decision, the Supreme Court disagreed. The Court found the organizer's claim to the "principle of autonomy to control one's own speech is as sound as the . . . parade is expressive." *Id.* at 574. The parade organizer's expression is like that of a composer, as the organizers "select[] the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each [participant's] expression in the [organizer's] eyes comports with what merits celebration on that day." *Id.* at 574. Consequently, applying the state's nondiscrimination law to the parade organizers, to force them to engage in speech they preferred not to speak, violated the First Amendment. *Id.* at 559. As the Court explained, Government "[d]isapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others." *Id.* at 581.

As in *Hurley*, so it is in the instant case: the Government seeks to use its nondiscrimination law to force Jack to communicate a message he does not want to speak.[15] This is vastly different from most instances in which the nondiscrimination law might be enforced, which are not communicative in nature. The act of designing and creating of a wedding cake, which itself communicates, is inherently communicative, just like a parade. And so just as the Government's nondiscrimination law could not constitutionally be applied to the organizers of a parade to force them to alter their message so as to communicate something they would prefer not to communicate,

[15]The law at issue in *Hurley* was nearly identical to the nondiscrimination law at issue in this case. It provided: "Whoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation, . . . relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement…, or whoever aids or incites such distinction, discrimination or restriction, shall be punished . . . All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right." *Hurley*, 515 U.S. at 561 (*citing* Mass.Gen.Laws § 272:98 (1992)).

so Colorado's nondiscrimination law cannot constitutionally be applied to Jack to force him to design a wedding cake, and thereby speak a message, that he does not want to speak.

Finally, Complainants' and the Governments' reliance on *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) is misplaced. While this court may look to decisions from other state's courts for guidance, such guidance is not binding; and, indeed, may not even be persuasive. *See Schoen v. Schoen*, 292 P.3d 1224, 1227 (Colo. App. 2012). In the instant case, the New Mexico Supreme Court's *Elane Photography* decision should not be followed. It is at odds with the clear statement by the United States Supreme Court in *Hurley*, 515 U.S. 557, which says that a public accommodation nondiscrimination law cannot be applied when doing so forces one to alter his preferred message or speak a message he would prefer not to speak. *Accord Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). Additionally, the *Elane Photography* case was brought under New Mexico law, which does not have a constitutional provision requiring that only opposite-sex marriage be recognized, as Colorado does. It is an outlier opinion, arising from a discrimination complaint brought within a dissimilar legal context. This Court should give it no weight, but should follow the United States Supreme Court's controlling precedent in *Hurley*.

If there is any doubt about whether *Hurley* controls under the facts presented in this case, the *Cressman* case puts such doubts to rest. As outlined above, *Cressman* held that the plaintiff had stated a plausible compelled speech claim when he alleged that the display of a Native American warrior shooting an arrow into the sky on his license plate was forced speech. Importantly, *Cressman* is a 10th Circuit Court case, and its opinions interpreting federal constitutional law are far more persuasive than the opinion of an out-of-state court interpreting federal law.

b. Laws That Compel Speech Are Subject to Strict Scrutiny Review.

Laws that compel speech are subject to strict scrutiny. Because applying the Government's nondiscrimination law to Jack in this instance will substantially burden Jack's free speech rights, the Government bears the burden to demonstrate that application of the law to Jack is (1) is in furtherance of a compelling governmental interest; and is (2) the least restrictive means of furthering that compelling governmental interest. *Pacific Gas and Elec. Co.*, 475 U.S. at 912 (applying strict scrutiny review in the context of a compelled speech claim); *Lukumi*, 508 U.S. at 546 (applying strict scrutiny in the context of a free exercise claim); *see also Wooley v. Maynard*, 430 U.S. 705 (1977).

This strict scrutiny test is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (superseded by statute on other grounds unrelated to the strict scrutiny test or its articulation of it). A compelling interest is an interest of "the highest order," *Lukumi*, 508 U.S. at 546, and is implicated only by "the gravest abuses, endangering paramount interests." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). In 2011, the Supreme Court described a compelling interest as a "high degree of necessity," noting that "[t]he State must specifically indentify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n,* 131 S. Ct. 2729, 2738, 2741 (2011) (citations omitted). The "[m]ere speculation of harm does not constitute a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n,* 447 U.S. 530, 543 (1980). Moreover, the strict scrutiny standard requires a particularized focus, not just the general assertion of a compelling state interest. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006).

3. The Colorado Public Accommodations Statute Is Unconstitutional as Applied Because It Compels Jack Phillips to Speak But Lacks a Constitutionally Cognizable Justification.

The public accommodation statute, as the Government seeks to apply it in this case, requires Jack to engage in both actual and symbolic speech, as previously described. Application of strict scrutiny requires the State to show that applying the public accommodation statute in this particular instance advances an "interest[ ] of the highest order." *Lukumi*, 508 U.S. at 546. It is not sufficient for the State to establish an interest in the broader purpose of the law in general. *Hurley*, 515 U.S. at 578-79. Thus, in order to withstand strict scrutiny, this Court must find that the State has a compelling interest in forcing Jack to create a wedding cake for a same-sex wedding reception and to compel him to speak a message that violates his sincerely held religious beliefs. No such compelling interest exists in this case and thus, the public accommodation statute does not survive strict scrutiny.

B. Forcing Mr. Phillips to Communicate a Celebratory Message About Same-Sex Marriage Infringes His Free Exercise Guarantees and Is Unconstitutional.

In addition to the free exercise protections afforded by the First Amendment, Colorado's constitution provides protection for the free exercise of religion. Article II, Section 4 of the Colorado Constitution states: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion . . . ." Consequently, Jack Phillips and Masterpiece Cakeshop, Inc. are entitled to broad protection under both the state and federal constitutions. *Bock*, 819 P.2d at 59-60.

1. The Colorado Public Accommodations Statute Infringes the Federal and Colorado Free Exercise Clauses Without a Constitutionally Cognizable Justification And So Is Unconstitutional as Applied.

It is well settled that the Free Exercise Clause of the First Amendment is implicated "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. The public accommodation statute, as applied to Jack, violates his right to the free exercise of religion under the First Amendment and the Colorado Constitution. The Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST., Amend. I. Mr. Philips's "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Lukumi*, 508 U.S. at 531. Additionally, Complainants do not dispute the sincerity of Jack's religious beliefs. (Complainants' Mem. of Law in Supp. of Summ. J. 6.)

In forcing Jack to violate his conscience by creating and communicating Complainants' symbolic message, the State is burdening his free exercise of religion in accordance with his sincerely held religious beliefs.

As discussed above, the *Hurley* Court scrutinized a public accommodation statute nearly identical to the statute at issue in the instant case. *Hurley*, 515 U.S. at 561. The *Hurley* Court found that the Massachusetts public accommodation statute is "a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation." *Id.* at 578. The Court did not take issue with the government's interest in ensuring equal access to public services, (*see id.* at 578), but it did take issue with the manner in which the public accommodation statute was applied. The Court concluded that "[w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent the beneficiaries of the law choose to alter it with messages of their own." *Id.* at 578. The Court

astutely noted that a broader objective might have been at play in the Massachusetts public accommodation statute, one that sought to forbid "acts of discrimination toward certain classes . . . to produce a society free of the corresponding biases." *Id.* at 578. The Court concluded that such an objective is "decidedly fatal." *Id.* at 579. As such, the statute as applied in *Hurley* did not survive strict scrutiny, and nor can Colorado's public accommodation statute under the facts presented here.

While the State certainly has a compelling interest in making sure all citizens have access to public services and privileges, it does not have a compelling interest in forcing Mr. Phillips to violate his conscience and use his talents to create symbolic expression that conflicts with his deeply held religious beliefs. It is undisputed that Complainants easily secured a wedding cake from another Colorado bakery (Complainant's Responses to Resp't Pattern and Nonpattern Interrogs. to Complainant Charlie Craig 3 and Complainant's Responses to Resp't Pattern and Nonpattern Interrogs. to David Mullins 3 and Exs. 29-30, 17-18). Indeed, the only interest served by forcing Jack to create a wedding cake for a same-sex wedding reception is the interest in forcing him to communicate the message of another – a message that conveys approval and acceptance of same-sex marriage. *Hurley* has rejected such an interest and as such, the State's attempt to apply the public accommodation statute in a manner that forces Jack to violate his conscience must also be rejected as violative of Jack's First Amendment free exercise rights.

a. The State Constitution Provides Greater Protection Than The Federal Constitution, So This Court Should Subject the Statute to Strict Scrutiny Review.

Applying the public accommodations law would substantially burden the free exercise rights of Jack. A substantial burden on free exercise exists where the State pressures a person to violate his or her religious convictions by conditioning a benefit or right on faith-violating conduct. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707,

717-18 (1981). By forcing Jack "to choose between following the precepts of his religion and forfeiting [the right to make wedding cakes and remain in business], on the one hand, and abandoning one of the precepts of his religion in order to [maintain that right], on the other hand," this application of the public accommodation law would impose a substantial "burden upon the free exercise of religion." *See Sherbert*, 374 U.S. at 404; *see also Thomas*, 450 U.S. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

Strict scrutiny should apply to this burden on free exercise rights under the Colorado Constitution. This was the standard that prevailed for both state and federal free exercise claims until 1990, when the U.S. Supreme Court limited the federal constitutional protection in some cases, stating that "the right of free exercise [under the United States Constitution] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the grounds that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990).

In response, twenty-nine States insisted that all laws burdening their citizens' free exercise of religion must survive heightened review. Eighteen States enacted Religious Freedom Restoration Acts, which restored strict scrutiny for laws burdening the free exercise of religion.[16] Another twelve state supreme courts have interpreted their state constitutions' free exercise protections to require heightened constitutional scrutiny.[17] The Colorado Supreme Court has not definitively decided

[16] Ala. Const. art. I, § 3.01; Ariz. Rev. Stat. Ann. § 41-1493; Conn. Gen. Stat. Ann. § 52-571b; Fla. Stat. Ann. §§ 761.01-05; Idaho Code Ann. § 73-402; 775 Ill. Comp. Stat. Ann. 35/1-99; Mo. Rev. Stat. § 1.302; N.M. Stat. Ann. §§ 28-22-1 to -5; Okla. Stat. Ann. tit. 51, § 251; 71 Pa. Stat. Ann. § 2404; R.I. Gen. Laws §§ 42-80.1-1 to -4; S.C. Code Ann. §§ 1-32-10 to -60; Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001 to .012; La. Rev. Stat. Ann. § 13:5233; Tenn. Code Ann. § 4-1-407; VA. Code Ann. § 57-2.02.

[17] *Fortin v. The Roman Catholic Bishop of Portland*, 871 A.2d 1208 (Me. 2005); *Larson v. Cooper*, 90 P.3d 125, 131 (Ala. 2004); *Valley Christian School v. Mont. High School Ass'n*, 86 P.3d 554 (Mont. 2004); *Odenthal v. Minnesota Conf. of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002); *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443, 445-51 (Ind. 2001); *Humphrey v. lane*, 728 N.E.2d 1039 (Ohio 2000); *Open Door Baptist*

whether it will follow *Smith*'s approach when interpreting Colorado's free exercise clause or the twenty-nine states that have adopted an approach more protective of religious liberty. Indeed, as recently as February of 2013, the Colorado Court of Appeals recognized that no Colorado court has decided whether the federal free exercise clause is coextensive with Colorado's free exercise clause. *Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.*, Nos. 11CA1856 & 11CA1857, 2013 Colo. App. LEXIS 266, at **39 (Colo. App. 2013). Thus, this Court is free to follow the 29 other states that have chosen to subject laws that burden the religious freedom of its citizens to strict scrutiny. And there are at least two compelling reasons why Colorado should be the 30th state to apply strict scrutiny to a Free Exercise claim.

First, Colorado has historically applied strict scrutiny to infringements of fundamental rights. *See Engraff v. Indus. Comm'n,* 678 P.2d 564, 567 (Colo. App. 1983) (applying strict scrutiny to state statute burdening the plaintiff's federal free exercise rights under First Amendment). Relying on *Sherbert v. Verner*, 374 U.S. 398, 406-07, the Court of Appeals applied strict scrutiny to a law that burdened the free exercise of religion, finding that it must "do so in the least restrictive available way to achieve a compelling state interest." *Id.* at 567; *see In re E.L.M.C*, 100 P.3d 546, 552 (2006) (strict scrutiny standard applies to statutes which infringe on parent-child relationship); *Tattered Cover, Inc. v. City of Thornton,* 44 P.3d 1044, 1057 (Colo. 2002) (the state must show a compelling interest in order for a statute to withstand strict scrutiny when state action has implicated free speech rights); *In re Custody of C.M.,* 74 P.3d 342, 344 (Colo. App.2002) (a "legislative enactment that infringes on a fundamental right is constitutionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible") (citing *Evans v. Romer,* 882 P.2d 1335 (Colo.1994), *aff'd,* 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996)); *cf. Town of Foxfield v.*

Church v. Clark County, 995 P.2d 33, 39 (Wa. 2000); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 466 (N.Y. 2006); *McCready v. Hoffius*, 586 N.W.2d 723, 729 (Mich. 1998); *State v. Miller*, 549 N.W.2d 235, 238-42 (Wis. 1996); *Attorney General v. Desilets*, 636 N.E.2d 233, 235-41 (Mass. 1994).

Archdiocese of Denver, 148 P.3d 339, 346 (Colo. App. 2006) (In wake of *Smith*, strict scrutiny applies to federal free exercise claims if ordinance is not neutral or generally applicable; if it is both neutral and generally applicable, it need only be rationally related to legitimate governmental interest).

Second, the Colorado Supreme Court has long recognized that it is free to give broader protection under the Colorado Constitution than that given by the U.S. Constitution. It has in fact done so with various state constitutional rights, such as it has with free speech. *Bock v. Westminster Mall Co.,* 819 P.2d 55, 59-60. (1991) (articulating this concept and specifically finding that Colorado's free speech provision has provided greater protection than First Amendment).

b. The Statute Is Not Neutral and Generally Applicable, So It Is Subject to Strict Scrutiny Review.

In addition, strict scrutiny review is required because the Colorado public accommodations law is not neutral and generally applicable. If a law that burdens free exercise is not neutral or of general applicability, then the law must be justified by a compelling government interest, *Lukumi*, 508 U.S. at 531 (1993), and "must undergo the most rigorous of scrutiny." *Id.* at 546. In the present case, the public accommodation statute must be justified by a compelling government interest and be narrowly tailored to achieve that interest because the statute is not generally applicable.

The public accommodation statute is not generally applicable because it exempts large categories of behavior that undermine the purpose of the statute at least as much as allowing Masterpiece Cakeshop, Inc. and Jack to decline to design and create a wedding cake for a same-sex wedding. The exemptions include exemptions for both religious and non-religious behavior. For example, the public accommodation statute exempts places principally used for religious purposes. Colo. Rev. Stat. § 24-34-601 (1). This exemption permits religious organizations to refuse to provide any service to gay people in relation to a marriage ceremony, marriage reception, baptism, First Communion, Confirmation, Bar/Bat Mitzvah, Brit Milah, Friday Prayers and a litany of other events

and services. Thus, the options available to heterosexual persons are vastly greater than those available to gay persons.

Religious organizations are not the only places of public accommodation that are exempted by the statute. Places that restrict admission to individuals of one sex because of a bona fide relationship to the goods, services, advantages, etc. are exempt from the statute as well. Colo. Rev. Stat. § 24-34-601(3). Thus, places of public accommodation like all-male and all- female golf clubs, athletic clubs and schools are exempted under this statute. The broad exemptions for religious organizations, same-sex clubs, and schools illustrate that the public accommodation statute is not generally applicable and neutral. The state has carved out both secular and religious exemptions. Thus, the public accommodation statute shows a preference for religious and certain secular entities, creating large categories of behavior that are exempted from the statute. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543. Thus, although many of the exemptions apply to religious conduct, the public accommodation statute also contains other exemptions which prefer the secular to the religious and undermine the purpose of the statute. Moreover, as discussed in section II, Colorado law and public policy also undermine the purpose of the public accommodation statute. Although not specifically exempted from the statute, the State of Colorado exempts itself every time it denies a marriage license to a same-sex couple. (Ex. 25). When the State itself has decreed one man and one woman marriage to be the law of the land, it is estopped from arguing that it has a compelling interest in making sure same-sex couples have access to wedding cakes. Accordingly, the public accommodation statute is not a law of general applicability and must satisfy the requirements of strict scrutiny.

c. Strict Scrutiny Applies to Burdens on Free Exercise Rights Under the United States Constitution Because Other Constitutional Rights Are Also Burdened.

In *Employment Div. v. Smith*, the U.S. Supreme Court explained that it applies strict scrutiny to laws burdening First Amendment free exercise rights when some other constitutional right, such as freedom of speech, freedom of association and freedom of the press, is *also* burdened. *Smith*, 494 U.S. at 881. As discussed above, applying the public accommodation law here would burden the free speech rights of Jack Phillips and Masterpiece Cakeshop, Inc., in addition to violating their free exercise rights. Thus, strict scrutiny applies to the federal free exercise analysis.

Additionally, this application of the public accommodation law will burden the property rights of Jack Phillips and Masterpiece Cakeshop, Inc., under the Fifth Amendment to the United States Constitution and Article II, Sections 15 and 25 of the Colorado Constitution, both of which prohibit the taking of property by the State.[18] Because of his religious beliefs, Jack will be effectively forced, by the Government, to cease designing and creating wedding cakes altogether if the public accommodation law is applied to him in this manner. This will result in the closing of Masterpiece Cakeshop, Inc., and amounts to a taking of Jack's property.

2. The Statute Fails Strict Scrutiny Review.

In order to survive strict scrutiny, the State must demonstrate that the law furthers a "compelling state interest" and is "narrowly tailored" to that interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Narrow tailoring requires that the State employ "the least restrictive means" for achieving its compelling interest. *Thomas*, 450 U.S. at 718.

Strict scrutiny requires a *particularized* focus. *See Gonzales,* 546 U.S. at 430-31 (discussing cases showing that strict scrutiny analysis demands a particularized focus on the parties and

[18] These constitutional property rights not only bolster free exercise claims; they provide an independent constitutional reason why the public accommodations law cannot apply here.

circumstances). The relevant government interest for strict scrutiny analysis thus is not the State's general interest in prohibiting discrimination, but its particular interest in forcing Jack, personally, to design and create a wedding cake for a same-sex wedding ceremony which Colorado does not recognize. *See Attorney Gen. v. Desilets*, 418 Mass. 316, 325-26, 636 N.E.2d 233, 238 (1994) ("The general objective of eliminating discrimination . . . cannot alone provide a compelling State interest that justifies the application of that section in disregard of the defendants' right to free exercise of their religion. The analysis must be more focused."). But *this* –

forcing a private artistic cake-maker to create and design a wedding cake for a same-sex wedding, to be served in honor of such wedding – would permit exactly what the state and federal constitutions forbid. Overriding the constitutional protections in this manner is not even a legitimate interest, let alone a compelling one. The public accommodations statute, as applied to Jack Phillips and Masterpiece Cakeshop, Inc., must fail strict scrutiny.

Even if, contrary to U.S. Supreme Court guidance, the relevant interest is characterized more broadly—as ensuring that entities providing goods or services to the public treat same-sex weddings the same as opposite-sex weddings – the Complainants cannot show that the State considers this to be a compelling government interest. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (alterations omitted). Here, because same-sex couples may not marry each other in Colorado, *see* Colo. Const. art. II, Section 31, *the State and its political subdivisions* treat same-sex couples differently than opposite-sex couples for myriad marriage-related purposes when providing services to the public. The State, quite plainly then, does not consider there to be a compelling government interest in eliminating a form of differential treatment that it authorizes and practices in its own operations.

Furthermore, if the relevant interest might be characterized as ensuring that everyone has access to goods and services, applying the public accommodations statute to Jack Phillips in this instance is not the least restrictive means to achieve the interest. In fact, Complainants had no trouble obtaining a wedding cake elsewhere. Complainants stated that they had numerous offers from others to make their wedding cake, and in fact received one at no charge. It is simply not necessary to force a private citizen to utilize his artistic talents to design and create a wedding cake in order ensure that everyone has access to public accommodations. It is not narrowly tailored and fails strict scrutiny. Alternatively, if a rational basis standard of review were to be utilized in this case, Jack should still prevail as there is simply no governmental interest, compelling or otherwise, in forcing him to design and create a wedding cake for a ceremony that the state does not recognize, which is unconstitutional, and which is against the stated public policy for Colorado, which has been reaffirmed as recently as this year.

Because the law, as applied to Jack, cannot satisfy strict scrutiny review – or any other, it is unconstitutional as applied, thus warranting summary judgment for Jack Phillips and Masterpiece Cakeshop, Inc.

Conclusion

Based on the foregoing reasons, Jack Phillips and Masterpiece Cakeshop, Inc. respectfully request that this Court DENY Complainants' and the Government's Motion for Summary Judgment and GRANT Respondents' Cross Motion for Summary Judgment.

Respectfully submitted this 31st day of October, 2013.

Attorneys for Respondents Jack C. Phillips and Masterpiece Cakeshop, Inc.:

/s/ Nicolle H. Martin
Nicolle H. Martin, No. 28737

7175 W. Jefferson Avenue, Suite 4000
Lakewood, Colorado 80235
303.332.4547
nicolle@centurylink.net

/s/ Natalie L. Decker
Natalie L. Decker, No. 28596
The Law Office of Natalie L. Decker, LLC
26 W. Dry Creek Cr., Suite 600
Littleton, CO 80120
(O) 303-730-3009
natalie@denverlawsolutions.com

/s/ Michael J. Norton
Michael J. Norton, No. 6430
Alliance Defending Freedom
7951 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111
(O) 720-689-2410
mjnorton@alliancedefendingfreedom.org

CERTIFICATE OF SERVICE

I certify that on this 31st day of October, 2013, a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF JACK PHILLIPS'S MOTION FOR CROSS SUMMARY JUDGMENT Order** was filed with the Court and sent via email (by agreement of the parties) to the following:

David Mullins
Charlie Craig
c/o Sara J. Rich (via email: SRich@aclu-co.org)
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203

Charmaine Rose (via U.S. Mail)
Assistant Attorney General
Business and Licensing Section
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Stacy L. Worthington (via email: Stacy.Worthington@state.co.us)
Civil Litigation & Employment Law Section
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Amanda Goad (via email: agoad@aclu.org)
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Paula Greisen (via email: greisens@kinggreisen.com)
King & Greisen
1670 York Street
Denver, CO 80206

/s/Nicolle H. Martin
Nicolle H. Martin