SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2014CA1351 Judges Taubman, Loeb, and Berger COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202; Case No. CR2013-0008	
Petitioners MASTERPIECE CAKESHOP, INC., and any successor entity, and JACK C. PHILLIPS, v. Respondents CHARLIE CRAIG and DAVID MULLINS.	▲ COURT USE ONLY ▲
Barry K. Arrington, #16,486 Arrington Law Firm 3801 East Florida Avenue, Suite 830 Denver, Colorado 80210 Phone Number: (303) 205-7870 FAX Number: (303) 463-0410 E-mail: barry@arringtonpc.com Attorney for *amici curiae* U.S. Justice Foundation; Public Advocate; Christians Reviving America's Values; Conservative Legal Defense and Education Fund; Institute on the Constitution; and Americans for Truth and Justice	Case Number: 2015SC738
BRIEF OF *AMICI CURIAE* U.S. JUSTICE FOUNDATION, *et al.* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*	

INTEREST OF THE *AMICI CURIAE*

Amici curiae U.S. Justice Foundation, Christians Reviving America's Values, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Public Advocate of the United States and Americans for Truth and Justice are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

Each of the *amici* was established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, and the accurate construction of state and federal constitutions and statutes, as more fully described in the motion for leave to participate as *amicus curiae*, filed today. Each organization has filed many *amicus curiae* briefs, including 12 in cases that addressed issues similar to those at issue in this case.

ARGUMENT

In the administrative proceeding below, the Commission (i) found that same-sex marriages were prohibited by a Constitutional Amendment passed by the people of Colorado and also a statute passed by the legislators of Colorado, while at the same time (ii) interpreting a public accommodations law so as to prohibit a Colorado business from refusing to participate in a ceremony celebrating a legally prohibited same-sex marriage. This interpretation of the public accommodations law has now been upheld by the court below. That decision cannot stand.

I. BOTH THE COURT OF APPEALS AND THE ALJ'S DECISIONS WERE BASED UPON AN ERRONEOUS FACTUAL FOUNDATION

The Court of Appeals ruled that, by refusing to sell a wedding cake "because of [a same sex couple's] intent to engage in a same-sex marriage ceremony," Masterpiece Cakeshop violated the Colorado Anti-Discrimination Act ("CADA"), having discriminated against the couple "because of . . . sexual orientation. *See Craig v. Masterpiece Cakeshop*, 2015 Colo. App. LEXIS 1217 at *6-7 (hereinafter "*Masterpiece*"). In issuing this ruling, the Court of Appeals committed reversible error because its opinion was at variance with the Administrative Law Judge's ("ALJ") undisputed findings of fact. The ALJ determined the following "undisputed facts":

- "Phillips has been a Christian for approximately 35 years, and believes in Jesus Christ as his Lord and savior. As a Christian, Phillips' main goal in life is to be **obedient to Jesus and His teachings** in all aspects of his life." Initial Decision of Administrative Law Judge (hereinafter "Initial Decision") at 3 (Finding no. 11) (emphasis added).
- Based on the teachings of the Bible, Phillips "believes . . . that **God's intention for marriage** is the **union of one man and one woman**." *Id.* (Finding no. 13) (emphasis added).
- Phillips "believes that the Bible commands him to **avoid doing anything that would displease God**, and **not to encourage sin** in any way." *Id.* (Finding no. 14) (emphasis added).
- "Phillips believes that decorating cakes is a form of art and creative expression, and that he can **honor God through his artistic talents**." *Id.* (Finding no. 15) (emphasis added).
- Phillips "believes that if he uses his artistic talents to participate in same-sex weddings by creating a wedding cake, he will be **displeasing God and acting contrary to the teachings of the Bible.**" *Id.* (Finding no. 16) (emphasis added).

- Phillips "advised" the mother of one of the persons in the same-sex couple "that he does not create wedding cakes for same-sex weddings **because of his religious beliefs**, and because Colorado does not recognize same-sex marriages." *Id.* (Finding no. 9) (emphasis added).

Despite these "undisputed" factual findings — that Phillips was motivated solely by his religious beliefs that if he did anything to encourage sin, it would displease God — the ALJ inexplicably and erroneously concluded that Phillips and Masterpiece refused to bake and sell a wedding cake to a same-sex couple **"because of** [that couple's] **sexual orientation**." *See* ALJ Initial Decision at 6. The Court of Appeals essentially adopted that error. *Masterpiece* at *25.

The ALJ disregarded his own findings of fact numbered 9[1] and 11 through 16, which undisputedly establish a consistent and comprehensive business policy encompassing a Biblical stand against a wide range of Biblical sins.[2] Instead, the ALJ wrested out of context Finding no. 6, that "Phillips informed [the same-sex couple] that he does not create wedding cakes for same-sex weddings," as if

[1] Finding no. 10 — that "Colorado law does not recognize same-sex marriage" in either its Constitution or statutes — addresses a different issue. In fact, it would be more accurate to state that, in both its Constitution and its statutes, Colorado prohibits same-sex marriage.

[2] To that end, and similarly undisputed, Masterpiece "declines to create cakes that convey messages that are contrary to Phillips' religious convictions, like those celebrating atheism, racism, indecency, or Halloween." *See* Appellants' Reply Br. at 6.

Masterpiece's policy of not baking a wedding cake for a same-sex couple had nothing to do with Masterpiece's comprehensive Biblically based Christian business policy. As the Petitioners' Opening Brief before the Court of Appeals below points out:

> [t]he ALJ never considered any "factors" . . . that informed Phillips's actions. Rather, he simply presumed discrimination without recognizing Phillips's religious belief that it is a **sin** for him to use his gifts, time and talents to participate in a same-sex wedding, **or any other event that violates his faith.**

Petitioners' Opening Brief in the Colorado Court of Appeals at 9 (emphasis added).

Instead of correcting the ALJ's erroneous conclusion, the Court of Appeals adopts and compounds it. First, the Court of Appeals offers a truncated summary of the ALJ's Findings nos. 9 through 16, following in the ALJ's footsteps to isolate Finding no. 6 — as if the Masterpiece decision were based solely upon the factfinder's desideratum that Phillips told the same-sex couple that he does not make cakes for same-sex weddings. *Masterpiece* at *3-4. Then, purporting to summarize the ALJ's inventory of the ALJ's undisputed "material facts," the Court of Appeals misstates Finding no. 6. Instead of actually quoting the ALJ's finding that "Phillips informed Complainants that he does not create wedding cakes for same-sex weddings" (ALJ Initial Decision at 2), the Court of Appeals skewed the finding to read: "Masterpiece and Phillips admitted . . . that they refused to sell

[the same-sex couple] a cake **because** of their intent to engage in a same-sex marriage ceremony." *Masterpiece* at *7 (emphasis added). Lastly, having misstated this undisputed fact, the Court of Appeals prejudicially narrowed the question to whether discriminating against someone on the basis of same-sex marriage was equivalent to discrimination against that someone "because" of that person's sexual orientation. *See Masterpiece* at *30-43.

However, on the facts as found by the ALJ, the threshold question is quite different: Whether Masterpiece's Biblically based Christian business policy — committing Phillips not to displease God by engaging in any act that encourages sin, including same-sex marriage — constituted either *per se* "sexual orientation" discrimination, or a pretext for an act discriminating against the same-sex couple "because of" their sexual orientation. The facts demonstrate that the decision made was neither. Having failed to base its decision on the facts as actually found by the ALJ, the Court of Appeals failed properly to determine the legality of the ALJ's ruling.

II. THE COURT OF APPEALS' DECISION VIOLATES MASTERPIECE'S AND PHILLIPS' FREE EXERCISE OF RELIGION

The ALJ found that, as a matter of fact, Phillips (i) would make the same-sex couple "birthday cakes, shower cakes, [and] sell [them] cookies and brownies,"

but (ii) would not make "cakes for same-sex weddings." Initial Decision at 2. For the purpose of applying the constitutional guarantee of free exercise of religion, the ALJ erroneously assumed that this distinction made no difference, the Commission having jurisdiction of all bakery products under a religiously neutral health, safety, and welfare regulation of general applicability. *See* Initial Decision at 9-12. The Court of Appeals agreed, finding that "CADA is a neutral law of general applicability" under *Emp't Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), and concluded there is no violation of Masterpiece's or Phillips' free exercise of religion. *Masterpiece* at *74, 78-80. The ALJ and the Court both erred, having failed to apply the threshold jurisdictional test reserved by *Smith*, and unanimously affirmed in *Hosanna Tabor Lutheran Church v. EEOC*, 556 U.S. ___, 132 S.Ct. 694 (2012).

Before reaching the question whether the Colorado law banning discrimination because of sexual orientation is a law of general applicability, the Court of Appeals must first have ascertained whether the conduct outlawed falls within the category of the "exercise of religion," and therefore, outside the jurisdiction of the State. *See Hosanna-Tabor*, 132 S.Ct. at 707. To that end, in *Smith*, before addressing the issue of the general applicability of a law, Justice Scalia itemized a number of such jurisdictionally out-of-bound categories,

beginning with "belief and profession [of belief]" and extending to "proselytizing [and] abstaining from certain foods or certain modes of transportation." *Id.* at 877. If a law were applied to any of these categories of conduct, then no regulation of such conduct would be permitted. *See Hosanna-Tabor* at 704-05.

Although the Court of Appeals acknowledged that the free exercise guarantee precludes the State from taking jurisdiction over "belie[f] and profess[ion] [of] whatever religious doctrine one desires," and even from the "performance of (or abstention from) physical acts," the Court below failed to apply this threshold jurisdictional test to Phillips's decision to abstain from baking a cake for a wedding ceremony which, by its very nature and purpose, is a proselytizing observance, whether it be religious or secular, traditionally accompanied by a commitment of those in attendance to support the newlyweds in the days, weeks, and months to come.

Quoting the Supreme Court's decision in *Obergefell v. Hodges*, 192 L.Ed.2d 609 (2015), the Court of Appeals observed that: "The **nature of marriage** is that, through its **enduring bond**, two persons together can find other freedoms, such as **expression, intimacy, and spirituality**." *Masterpiece* at *33 (emphasis added). Although a marriage may be a private matter before a justice of the peace, a wedding ceremony, according to the *Obergefell* Court, is a public profession, a

proselytizing celebration, "transcendent," "sacred," "unique," "[r]ising from the most basic human needs . . . essential to our most profound hopes and aspirations." *Obergefell* at 619. Thus, the *Obergefell* majority celebrates that:

> [c]hoices about marriage shape an individual's destiny . . . because '[marriage] fulfils yearnings for security, safe haven, and connection that **express our common humanity,** . . . an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.'

Obergefell at 625 (emphasis added).

In sum, Masterpiece's categorical distinction, on the one hand, of a willingness to sell brownies and cupcakes to a same-sex couple, but on the other, not to make and sell a cake in celebration of the union of that same-sex couple, is that the former involves an **ordinary business transaction**, while the latter is promoting **a proselytizing ceremony** expressing "the highest ideals of love, fidelity, devotion, sacrifice, and family." *Obergefell* at 635. As Justice Kennedy observed in *Obergefell*:

> The First Amendment ensures that religious . . . persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Obergefell at 634.

The Court of Appeals confirmed that it fully understood the celebratory and ceremonial nature of a wedding by affirming the Commission's order that Phillips

"retrain[] his staff [and] change his business policies" to conform to the State's anti-discriminatory policies, including "requir[ing] the creation of **wedding cakes celebrating same-sex marriages**." Appellants' Opening Brief at 5 (emphasis added). If Phillips is required to undergo "retraining" calculated to persuade him to "celebrate" a "family structure" diametrically opposed to the one that he "reveres," and if Phillips is required to use his artistic gift to make a cake to assist in a "celebration" of same-sex marriage, directly contrary to a "central" tenet of his religious faith, as the Court of Appeals says that he must, then Justice Kennedy's promise of freedom to profess one's deeply held views in *Obergefell* will prove to be nothing but a mockery. *See Obergefell* at 634.

III. THE COURT OF APPEALS' DECISION ERRONEOUSLY APPLIED THE SUPREME COURT'S "COMPELLED" SPEECH DOCTRINE.

The Court of Appeals relied solely upon the Supreme Court's "compelled speech" doctrine, concluding that, because a wedding cake is not "inherently expressive," there was no violation of Masterpiece's First Amendment rights. *See Masterpiece* at *42-73. That conclusion, in turn, was based upon the Court's opinion that whatever message might be proclaimed in a wedding cake without words, the burden was upon Masterpiece to demonstrate that "a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an endorsement of same-sex marriage . . ." *Masterpiece* at *66.

But Masterpiece's First Amendment rights are not dependent upon what a third party, reasonable or otherwise, would infer. Rather, those rights are determined by the First Amendment's jurisdictional principle that bars the Colorado Civil Rights Commission from discriminating against a person who holds a viewpoint different from that which prevails on the Commission. As the petitioners have documented in both their opening and reply briefs, there is ample evidence that the Commission has engaged, and will continue to engage, in viewpoint discrimination against Masterpiece and Phillips because of their contrary views. *See* Appellants' Opening Brief at 2-3[3]; Appellants' Reply Brief at 3-5. Such viewpoint discrimination is a *per se* violation of the First Amendment. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *Lamb's Chapel v. Central Moriches Union Free School Dist.*, 508 U.S. 384 (1993). Once viewpoint discrimination has been established, then a court need not make

[3] The Commission's impartiality is in serious question. In its public deliberations, its members virtually ignored Phillips' constitutional defenses. *See* Supp. PR. CF, Vol. 2, p. 877. As petitioners pointed out in their opening brief in the Court of Appeals, on Phillips' motion to stay its order, one Committee member candidly revealed his intolerance of and prejudice against religion when he stated: "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be – I mean, we – we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others." Appellants' Opening Brief at 3.

any further inquiry. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001).

IV. CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully request the Court to grant Petitioner's petition and issue its Writ of *Certiorari* in this matter.

/s/ Barry K. Arrington

Barry K. Arrington

Herbert W. Titus, Esq.
William J. Olson, Esq.
John S. Miles, Esq.
Jeremiah Morgan, Esq.
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

Michael Connelly, Esq.
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065

CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of October, 2015, a true and correct copy of the foregoing was served via ICCES on the following:

Nicolle H. Martin, Esq.
7175 W. Jefferson Avenue, Suite 4000
Lakewood, CO 80235

Michael J. Norton, Esq.
Alliance Defending Freedom
7951 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111

Mark Silverstein, Esq.
Sara J. Neel, Esq.
ACLU Foundation of Colorado
303 E. 17th Avenue, Suite 350
Denver, CO 80203

Stacy L. Worthington, Esq.
Charmaine Cheung Rose
Civil Litigation & Employment Law Section
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Paula Greisen, Esq.
King & Greisen, LLC
1670 York Street
Denver, CO 80206

And mailed to the following:

Colorado Civil Rights Commission
Department of Regulatory Agencies
1560 Broadway, Suite 1050
Denver, CO 80202

Jeremy D. Tedesco, Esq.
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260

Ria Tabacco Mar, Esq.
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

/s/ Barry K. Arrington

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Barry K. Arrington