

**Professor William Wagner**

**Before the**

**Colorado Senate  
Judiciary Committee  
Re: Sunset Civil Rights Commission  
HB 18-1256**

**April 18, 2018**

Distinguished Members of the Committee, thank you for the opportunity to provide testimony concerning HB 18-1256.

My name is William Wagner. Before joining academia, I served as a federal judge in the United States Courts, Senior Assistant United States Attorney in the Department of Justice, and Legal Counsel at the United States Senate (Commerce Committee). I currently hold the academic rank of Distinguished Professor Emeritus after a career teaching Ethics and Constitutional Law at the University of Florida College of Law and the Law School at Western Michigan University. I presently serve as President of the Great Lakes Justice Center, an organization dedicated to promoting good governance and the Rule of Law. The Justice Center filed an amicus brief, on behalf of Christian Business Owners, in the Masterpiece Cakeshop case now pending before the U.S. Supreme Court.

My testimony focuses on why the Colorado legislature should allow the Colorado Civil Rights Commission (hereinafter the Commission) to sunset.

## INTRODUCTION

The beacon of liberty fails to shine when religious freedom dies on the pulpit of the civil authority's demands to supplant its citizens will and opinion of morality with that of its own. The promise of liberty amounts to nothing more than empty subterfuge when the State punishes its citizens for the expression and exercise of their sincerely held religious beliefs. Persecution of religious freedom and religious identity, as the Commission imposed upon Colorado citizens, must not stand in the United States. The First Amendment, federal statutes, and state statutes, promulgated in the name of religious tolerance and liberty, require sunset of the Commission's oppressive and overreaching conduct.

The Commission unapologetically contends that Colorado, through the power of the State, can compel a devout Christian baker to participate in a same-sex marriage ceremony.<sup>1</sup> If this is correct, the American experiment is effectively over. For devout religious citizens, such a rule fatally erodes religious freedom, freedom of speech, protections for property rights, and the substantive due process right of dignity, autonomy, and identity. If government can compel citizens to dishonor God or else lose their livelihoods, we are far down the road to tyranny.

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<sup>1</sup> And the same could be done to any devout Jew, or Muslim, or other person who disagrees with Respondents on this issue.

## BACKGROUND

Jack Phillips is a Christian business owner who endeavors to follow God's teachings, not just on Sundays in some of his actions, but each day in all his actions, as the Bible instructs. Mr. Phillips owns Masterpiece Cakeshop, a bakery that, *inter alia*, creates custom wedding cakes. Mr. Phillips established business practices for his bakery in accordance with his Christian faith. For example, to observe the Sabbath he does not open for business on Sundays. He pays employees generous wages and he helps with personal needs. Further, and at issue here, Mr. Phillips does not utter language, create expressions, or participate in acts, events, and ceremonies contrary to the Christian faith. He abstains from creating products that communicate profane, indecent, racist, or anti-Christian messages, or that are involved in objectionable events, such as the pagan holiday of Halloween.

Jack Phillips' Christian faith follows biblical teaching and instructs that marriage is a sacred bond exclusively between one man and one woman. Mr. Phillips' religious faith requires that he abstain from promoting, participating in, or celebrating homosexual acts, including the celebration of romantic same-sex relations in the form of a wedding ceremony. Mr. Phillips freely sells baked goods and cakes to all customers. Conflict only arises in narrow circumstances when a customer requests Phillips to create—and therefore participate in—language, acts, or events that he must avoid according to his sincerely held religious beliefs. Such a request forces him to choose between violating the precepts of his religious faith and his religious identity, or violating the Colorado Anti-Discrimination Act (“CADA”).

In July of 2012, Mr. Phillips was contacted requesting that he create a custom cake for a same-sex marriage. Phillips explained that he was unable to create the cake because participating in the event would violate his sincerely held religious beliefs. The customer timely obtained a wedding cake from a different baker, but they nonetheless filed charges of sexual orientation discrimination with the Colorado Civil Rights Commission against Mr. Phillips. On September 4, 2012, the Commission charged Masterpiece Cakeshop with violating CADA for declining to participate in the customers' same-sex wedding. Mr. Phillips' religious objection is, and always has been, based solely on religious grounds, and not on any animosity toward the customers or their sexual orientation.

The Commission prosecuted the case before an administrative law judge. The judge rejected Phillips' defense that creating a custom wedding cake, contrary to his sincerely held religious beliefs, violated his rights to religious freedom and free speech under the First and Fourteenth Amendments of the United States Constitution. The administrative law judge ordered Mr. Phillips to violate his religious beliefs and deny his religious identity by participating in same-sex weddings by baking custom cakes on demand. The administrative law judge also demanded that he train all his employees to follow the order and to report any time he or any of their employees could not fulfill a cake or bakery order for any reason. Mr. Phillip's case, and the conduct of the Commission, is now before the U.S. Supreme Court.

The conduct of the Commission is now before the U.S. Supreme Court. In my view, its conduct violated the personal liberty of Colorado citizens in several ways. The continued capability of engaging in this conduct, therefore, requires sunset. First, the First Amendment forbids the government from enacting a law that prohibits the free exercise of religion or abridges the freedom of speech. U.S. Const. amend. I. Inherent in these freedoms is the understanding that the government must allow its citizens to freely exercise and voice their religious and political beliefs without interference or punishment.

The U.S. Supreme Court affirmed this essential constitutional principal in *Cantwell v. Connecticut*, 310 U.S. 296, 300-311 (1940) to invalidate a State law prohibiting a group of Jehovah's witnesses from proselytizing door-to-door. The Court found that the First Amendment freedoms of religious exercise and free speech outweighed the State's interests in controlling solicitations and public order. *Id.* The Court championed religious and political discourse and disagreement as evidencing liberty in an enlightened society. *Id.* 310; *see also W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943).

The Commission's conduct violates the free exercise of Colorado citizens' religious faith because it forces these citizens to choose to either: (1) violate religious beliefs that are central to their religious identity, or (2) face prosecution under CADA. Under the Free Exercise Clause, the State may only pass a law that burdens religious exercise when the law is facially neutral and of general applicability. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2756 (2014). When a law specifically

burdens a particular religious belief, however, it is not neutral or generally applicable, and therefore must be “justified by a compelling governmental interest” and be “narrowly tailored to advance that interest.” *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531-32. The commission’s application of CADA is not justified by a compelling governmental interest and is not narrowly tailored. A customer’s right to purchase a custom wedding cake from a specific baker is less important than a citizen’s constitutional rights under the First and Fourteenth Amendments. The commission’s application of CADA therefore violates the constitutional rights of Colorado citizens.

The Commission’s conduct contradicts U.S. Supreme Court precedent regarding the weight accorded to free exercise and free speech concerns when these liberties conflict with a State public accommodations law. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568-81 (1995). The *Hurley* Court held that a State must not interfere with these important liberties or compel an individual to espouse a belief contrary to his or her religious beliefs “however enlightened [the] purpose may strike the government.” *Hurley*, 515 U.S. at 579. The Commission’s conduct cannot be squared with *Hurley*, and this legislative body should reassert the important constitutional principles protected by that holding by allowing sunset.

Third, the Commission’s ruling unconstitutionally infringes on the liberty and equal protection interests recognized by this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The U.S. Supreme Court acknowledged a constitutional right of personal identity for all citizens, including the right to identify by the religious beliefs and practices central to one’s identity. *Id.* at 2593, 2597; *see also Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2785-86 (Kennedy, J., concurring).

To uphold and protect the liberty rights promised to all Americans by the First and Fourteenth Amendments, this legislative body should sunset the commission.