SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2021CA1142, Judges Schutz, Dunn, Grove DISTRICT COURT, COUNTY OF DENVER District Court Judge: The Hon. A. Bruce Jones District Court Case No. 19CV32214	**▲COURT USE ONLY▲**
Petitioners: MASTERPIECE CAKESHOP INC., and JACK PHILLIPS, and Respondent: AUTUMN SCARDINA.	
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CERTIFICATE OF COMPLIANCE	

I hereby certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 32 and 53. Including:

It contains 3,800 words, which is not more than the 3,800-word limit.

The brief complies with the standard-of-service requirements set forth in C.A.R. 25 and C.A.R. 53(h):

For each issue raised by the Appellants, the brief contains under a separate heading before the discussion of the issue, a concise statement (1) of the applicable standard of appellate review with citation to authority, and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.

/s/ Jacob P. Warner
Jacob P. Warner

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QUESTIONS PRESENTED

Petitioners Jack Phillips and Masterpiece Cakeshop (collectively, "Phillips") create custom cake art. Phillips serves everyone; he decides to create custom cakes based on *what* they express, not *who* requests them. On the day the Supreme Court announced it would hear Phillips' prior case, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), Respondent Autumn Scardina demanded that Phillips create a custom expressive cake celebrating a gender transition. Phillips politely declined because that cake's message contradicts his religious beliefs. Scardina then filed a charge under the Colorado Anti-Discrimination Act (CADA). The Colorado Civil Rights Commission dismissed the administrative complaint with prejudice. Scardina did not appeal but instead filed this suit, alleging an identical CADA claim. After a bench trial, the lower court ruled against Phillips, despite finding that the requested cake expressed a message Phillips cannot create for "for anyone." The appeals court affirmed. That decision presents three questions for review:

1. Whether Scardina's CADA claim is barred because Scardina never appealed the Commission's dismissal of the administrative complaint, as C.R.S. § 24-34-306(14) requires before suing Phillips.

2. Whether Phillips' decision not to create a custom expressive cake celebrating a gender transition that he would not create "for anyone" violated CADA's prohibition on transgender-status discrimination.

3. Whether the U.S. Constitution's First Amendment forbids CADA from punishing Phillips' decision not to create a custom cake that would express a message contrary to his religious beliefs.

DECISIONS BELOW

The Court of Appeals' decision is reproduced at Appendix ("App.") 29-76, and can be found at *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8 (Colo. App., January 26, 2023). The Denver district court's final decision is reproduced at App.01-28.

JURISDICTION

The Court of Appeals issued its decision on January 26, 2023. No petition for rehearing was filed. This Court granted an extension of time to seek certiorari through April 20, 2023.

INTRODUCTION

Petitioners Jack Phillips and Masterpiece Cakeshop sketch, sculpt, and paint custom cakes that convey messages. As part of his religious calling to love others, Phillips creates cakes for all people. His decisions always turn on *what* the cake will express, not *who* requests it. For exercising his faith this way, Colorado tried to punish Phillips twice, losing each time. The second time, Respondent Autumn Scardina intervened and also lost. Scardina continues that crusade here.

On the day the U.S. Supreme Court said it would hear Phillips' first case, Scardina called and demanded that Phillips create a custom expressive cake celebrating a gender transition. Scardina then demanded a custom cake depicting Satan smoking marijuana. Phillips declined because he would not create cakes expressing those messages for anyone. So Scardina filed a charge with the Civil Rights Division accusing Phillips of violating CADA. The Civil Rights Commission then filed a formal complaint against Phillips, Scardina intervened, and the Commission dismissed the case *with prejudice*—after Phillips' attorneys uncovered more evidence of officials' ongoing hostility toward Phillips and his faith.

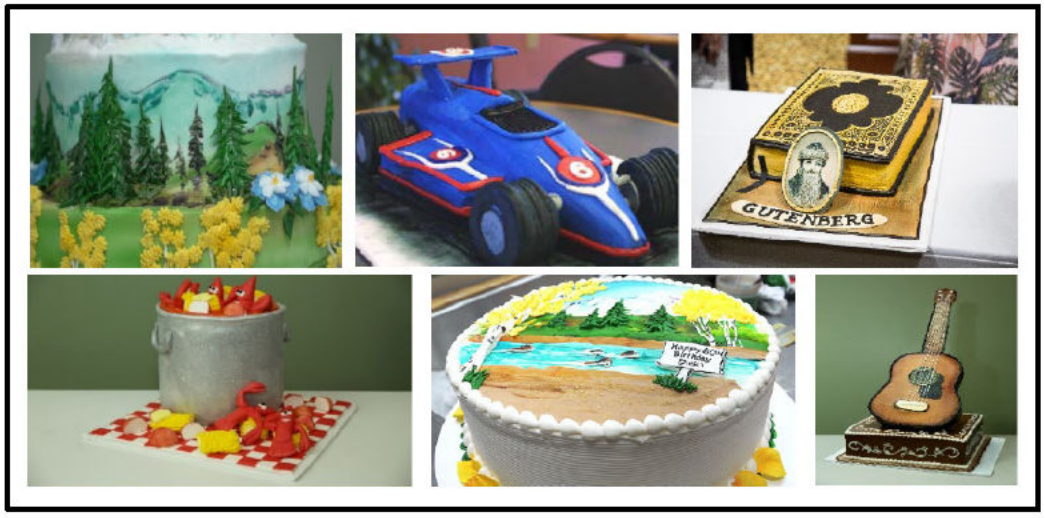
Scardina could have appealed. Instead, Scardina filed this lawsuit, recycling the same CADA claim the Commission rejected. This claim fails for several reasons: (1) Scardina did not satisfy the jurisdictional requirements; (2) Scardina failed to prove that Phillips would create the requested cake for another customer; and (3) the First Amendment protects

Phillips' religiously motivated decision not to express a message. But the trial court punished Phillips anyway. The appeals court affirmed.

The decision below conflicts with other Colorado appeals court decisions interpreting CADA's procedures. Worse, it wrongly treats Phillips' lawful, message-based decision as illegal, status-based discrimination. And it contradicts U.S. Supreme Court precedent by requiring compelled speakers to prove that third parties will attribute forced expression to them and denying Phillips a freedom that Colorado ensures for secular artists. Review is warranted.

BACKGROUND

Jack Phillips is a cake artist. He owns Masterpiece Cakeshop, where he creates cakes (like those shown below) that express messages and celebrate events. App.10-13. These cakes are his art. *Id.* Phillips creates them using art skills and tools "to express [a] message." App.11.



Phillips is also a follower of Jesus Christ. App.02. Phillips believes everything he does should glorify God. *Id.* This faith informs which cakes Phillips creates and how he treats others. App.09-10. Phillips respectfully serves everyone; he decides whether to create a custom cake based on *what* it will express, not *who* requests it. TR (03/23/21) 350:3-10; 364:23-365:20. Doing otherwise would violate his faith. *Id.*; App.09-10.

Phillips declines many custom requests. App.09-10. Without exception, he does not create Halloween cakes, cakes promoting racist or profane messages, or cakes disparaging anyone. App.10. Phillips also cannot create cakes promoting views of marriage that contradict his faith. He can't express messages that violate his faith "for anyone." App.10.

Masterpiece I

In 2012, two men asked Phillips to create a custom cake celebrating a same-sex wedding. App.03. Phillips declined because that cake's message contradicts his religious beliefs, but Phillips offered to sell the men other items or to create another cake for them. *Id.* The men refused, then filed CADA charges alleging Phillips discriminated against them because of their sexual orientation. The Division issued a probable-cause determination, and the Commission issued a formal complaint. *Id.*

Meanwhile, a religious man asked three other cake shops to create cakes criticizing same-sex marriage. *Masterpiece*, 138 S. Ct. at 1730. The shops declined because they found this message offensive; the man filed

CADA charges; but the Division found—and the Commission agreed—that the shops "lawfully" "refus[ed] service." *Id*. at 1730. The Division and Commission (collectively, "Colorado") interpreted CADA to contain an offensiveness rule, which allows shops to decline "offensive" "messages," *id*. at 1728, 1731—a rule they refused to apply in Phillips' case.

The Commission punished Phillips, and the appeals court affirmed. *Id*. at 1723, 1726-27. The U.S. Supreme Court reversed because Colorado acted with hostility toward Phillips' faith—treating Phillips worse than secular cake artists and disparaging his religious beliefs. This ruling vindicated Phillips' rights. But more trouble was brewing.

Masterpiece II

On the day the Supreme Court announced it would hear Phillips' case, Scardina called Phillips and demanded a custom cake with a "blue exterior and a pink interior" that would "celebrate" a "transition from male to female." EX (Trial) 133. Scardina later demanded another custom cake depicting Satan smoking marijuana. Phillips declined both: he cannot express those messages "for anyone." App.10.

Scardina filed a charge with the Division, alleging Phillips had discriminated based on transgender status by declining to create the custom gender-transition cake. EX (Trial) 46. Scardina admitted in the charge that the cake expressed a message:

- The cake was to have a "pink interior and blue exterior, which I disclosed was intended for the celebration of my transition from male to female." *Id.*

- "I wanted my … cake to celebrate my transition by having a blue exterior and a pink interior." EX (Trial) 133.

- "I requested that [the cake's] color and theme celebrate my transition from male to female." *Id.*

The request was a setup. Five years before, Scardina emailed Phillips twice—calling him a "bigot" and a "hypocrite." EX (Trial) 43, 44. Scardina also emailed the Commission, volunteering to become a complainant against Phillips in *Masterpiece I*. EX (Trial) 42. And as for the Satan cake, Scardina never intended to buy it. TR (03/22/21) at 80:9-14. Nor did Scardina believe Phillips would create it. *Id.* at 141:13-17. Scardina requested it to "correct" the "errors of [Phillips'] thinking." *Id.* at 141:5-8.

Despite this, within weeks of the Supreme Court deciding *Masterpiece I*, the Division found probable cause that declining Scardina's request for a gender-transition cake violated CADA. Phillips then sued Colorado in federal court. EX (Trial) 163. With this federal suit pending, the Commission issued a formal complaint, alleging Phillips had violated CADA by declining to create that cake. EX (Trial) 138. It also scheduled a formal hearing, which occurred February 4, 2019. *Id.* at 138-1.

Meanwhile, Colorado moved to dismiss Phillips' federal suit. The court denied this request—holding that Phillips had sufficiently alleged the State was prosecuting him in "bad faith" because of his "religion."

Masterpiece Cakeshop Inc. v. Elenis, 445 F. Supp. 3d 1226, 1241 (D. Colo. 2019). Two months later, after Phillips' attorneys uncovered new evidence of officials' ongoing hostility toward Phillips and his faith, Phillips and Colorado settled. TR (03/23/21) 317:11-16.

As a result, the Commission "dismissed with prejudice" the administrative case against Phillips. EX (Trial) 141. On March 22, 2019, the Commission entered a closure order. EX (Trial) 140. Though Scardina intervened in that administrative case, EX (Trial) 139, Scardina did *not* appeal but instead filed this lawsuit. App.09.

Masterpiece III

This lawsuit mimics *Masterpiece II*. Scardina alleges an identical CADA claim based on Phillips' decision not to create the same custom cake. CF 315. Under CADA, a business may not refuse service "because of" a person's "sexual orientation," including transgender status. C.R.S. § 24-34-601(2)(a); *see* C.R.S. § 24-34-301(7).

Phillips moved to dismiss, arguing the claim is procedurally barred. CF 327. No one may sue under CADA in district court "without first exhausting the proceedings and remedies available … under … part 3" of CADA, C.R.S. § 24-34-306(14)—which allows any complainant "claiming to be aggrieved by a final [Commission order], including a refusal to issue [one]," to seek appellate review. C.R.S. § 24-34-307(1)-(2). Though

Scardina never appealed the closure order in the administrative case, the court denied Phillips' dismissal motion. CF 666.

The parties then engaged in mediation. While these talks are typically confidential, Scardina revealed at trial that, during the mediation, Scardina promised Phillips that, were this suit dismissed, Scardina would call Phillips *the next day* to request *another cake* and start *another lawsuit*. TR (03/22/21) 115:7-24; TR (03/23/21) 378:11-20.

After mediation, the case went to trial, where Scardina repeatedly agreed the cake's design would have "celebrate[d]" a gender "transition by having a blue exterior and pink interior." TR (03/22/21) 188:16-189:4; *see id.* at 187:7-12. ("[T]he [cake's] color coordination … reflect[ed] … my transgender history and celebrated that history."). Scardina told Phillips this when requesting the cake. App.08. And Phillips testified that, while he serves everyone, he cannot create a custom cake expressing that message for anyone. TR (03/23/21) 350:3-352:5, 366:8-367:10. A longtime gay customer confirmed this fact at trial. TR (03/23/21) 447:10-449:13.

The court entered judgment against Phillips. It again rejected his procedural argument. App.26. Then the court held that, while Phillips would not create the requested cake "for anyone," App.10—a cake that admittedly "*symbolized* a transition from male to female," App.13, (emphasis added)—Phillips violated CADA because the cake's message is "inextricably intertwined" with Scardina's status, App.19. Declining to

speak the message itself was the problem. And to the court, the requested cake's message was obvious:

- Scardina "explained that the design was a reflection of [the] transition from male-to-female…." App.13.
- "The color pink in the custom cake represents female or woman. The color blue in the custom cake represents male or man." *Id.* (internal citations omitted).
- Scardina "testified that the requested cake design was 'symbolic of [Scardina's] transness.'" *Id.*
- Scardina "further testified, 'the blue exterior … represents what society saw [Scardina] as on the time of [Scardina's] birth' and the 'pink interior was reflective of who [Scardina is] as a person on the inside.'" *Id.*
- "The symbolism of the [cake design] is also apparent given the context of gender-reveal cakes…." App.14.

While an identical-looking cake may have no "inherent" message in another context, App.23, the requested cake can (and does) express a message in *this* "context," App.13. Phillips agrees. App.10.

The court also rejected Phillips' free-speech defense—believing "the cake design" lacked sufficient intricacy and did not convey "a message attributable" to Phillips. App.22. It then rejected Phillips' free-exercise defense—excusing CADA's unequal application to religious speakers and applying rational-basis review. App.25-26.

Phillips appealed, and the appeals court affirmed—repeating the errors below. App.29-76. Phillips timely petitions for review.

REASONS TO GRANT REVIEW

The ruling below excuses Scardina's failure to appeal the Commission's administrative order and conflicts with other appeals court decisions construing CADA's jurisdictional requirements. The ruling also wrongly treats Phillips' lawful, message-based decision as illegal, status-based discrimination. And it contradicts U.S. Supreme Court cases by requiring compelled speakers to show that third parties will attribute forced expression to them and denying Phillips a freedom that Colorado gives secular artists. Review is warranted.

I. The decision below conflicts with other appeals court decisions interpreting CADA.

The decision below interprets CADA to forbid appeals from final orders dismissing administrative complaints with prejudice after an administrative settlement. App.40-48. This jurisdictional issue was preserved and triggers de novo review. *People v. C.O.*, 406 P.3d 853, 857 (Colo. 2017); App.41-48. The lower court's ruling conflicts with *Agnello v. Adolph Coors Co.* (*Agnello I*), and *Agnello v. Adolph Coors Co.* (*Agnello II*), which held the opposite. This Court should resolve that conflict.

CADA forbids district-court suits unless the plaintiff exhausted "proceedings and remedies available" under that statute, C.R.S. § 24-34-306(14), which requires anyone "claiming to be aggrieved by a final [Commission order], including a refusal to issue [one]," to seek appellate review before suing. C.R.S. § 24-34-307(1)-(2). The Commission's dismissal

with prejudice was a final order or at least a refusal to issue one. So Scardina had to appeal it before suing in district court. But the appeals court wrongly held that the Commission's dismissal was unappealable.

That decision split the appeals court. In *Agnello I*, a complainant objected to a Commission-approved settlement and appealed early in the administrative case—after the Division issued a probable-cause determination, but before the Commission issued a notice of hearing and formal complaint. 689 P.2d 1162, 1165 (Colo. App. 1984). Though the Commission indicated that the complainant "fulfilled the requirement for full pursuit of administrative remedies," she still appealed. CF 614.

During that appeal, the complainant brought the same CADA claim in district court, and that court dismissed. *Agnello II*, 695 P.2d 311, 312 (Colo. App. 1984). It did so in part because the complainant did not exhaust CADA's procedures and remedies *since she did not complete her appeal*. *Id*. In other words, CADA not only *allowed* the complainant to appeal the Commission's order approving the settlement but *required* that appeal for exhaustion. The appeals court affirmed. *Id.* at 314.

Agnello I and *II* have been the law for decades—until the decision below. This Court should resolve the conflict. CADA respondents have no incentive to settle Commission complaints if third parties can immediately turn around and sue based on the same underlying transaction.

II. The decision below incorporated and misinterpreted federal law to hold that Phillips violated CADA.

To prove a CADA violation, Scardina must show that, "but for" Scardina's transgender status, Phillips would have created the requested cake. App.25. The trial court found that Phillips would "not create a custom cake to celebrate a gender transition for anyone" because he disagrees with its message. App.10. The appeals court wrongly treated this message-based decision as CADA-proscribed discrimination. And it did so using federal caselaw. App.58-59. This legal issue was preserved and triggers de novo review. *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000); App.58-59.

The appeals court was wrong. Its federal precedents reject distinctions between *another's status* and *her conduct*—not distinctions between *an artist's speech* and *another's status*. Courts routinely approve the latter. *See Hurley v. Irish-Am Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995) (distinguishing objection to "homosexuals" from "disagreement" with message); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 760 (8th Cir. 2019); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 910 (Ariz. 2019); *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 258 n.8 (Utah 1994); *Domen v. Vimeo, Inc.*, No. 20-616-CV, 2021 WL 4352312, at *4 (2d Cir. Sept. 24, 2021); *Frith v. Whole Foods Mkt., Inc.*, 517 F. Supp. 3d 60, 71 (D. Mass. 2021).

This distinction is crucial. On the logic below, a black artist's refusal to create a custom white-cross cake celebrating an Aryan Nation Church event would violate CADA if she would create an identical cake celebrating her own church event. That's wrong. CADA should not punish artists who serve all people but can't express every message.

III. The decision below decided constitutional issues contrary to U.S. Supreme Court precedent.

The court below punished Phillips' religiously-motivated decision not to express a message. That violates Phillips' First Amendment rights. Because the judgment below risks intruding on "free expression," this Court reviews *both* factual and legal determinations "de novo." *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 500 (Colo. App. 2010); *accord Hurley*, 515 U.S. at 567. This issue was preserved. App.63-75.

A. The decision contradicts free-speech precedent.

In addition to mistaking Phillips' message-based decision as status-based discrimination, the appeals court applied the wrong speech test. The U.S. Supreme Court has articulated a two-part inquiry for speech: (1) whether conduct "is intended to be communicative," and (2) "in context, would reasonably be understood by the viewer to be communicative." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *accord Texas v. Johnson*, 491 U.S. 397, 404 (1989). No "particularized" message is required. *Hurley*, 515 U.S. at 569; *Curious Theater Co. v. Colo. Dep't of Pub. Health & Env't*, 216 P.3d 71, 79-80 (Colo. App. 2008).

The court below wrongly applied a much stricter test with a new element, holding that the requested cake is not speech because its message "would not be attributed" to Phillips. App.71. But whether the cake is speech does not turn on whether others would attribute its message to Phillips. No one thinks a driver endorses the motto on his government-issued license plate, *Wooley v. Maynard*, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting), or a utility company writes the billing-envelope newsletters attributed to third parties, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 6-7, 15 n.11 (1986). Nor does anyone think that newspapers endorse op-eds published under someone else's name. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). But the Court protected objecting speakers in those cases anyway.

Phillips satisfies the correct test. As the trial court found, the "requested cake … *symbolized a transition from male to female*," App.13 (emphasis added). It amply justified this finding. The "color blue … represents male"; the "color pink … represents female." *Id*. The blue exterior "represents what society saw [Scardina] as [at] … birth"; the pink interior "reflect[s] who [Scardina is] as a person on the inside." *Id.* This design symbolizes Scardina's "transness," *id.*—which is clear "given the context of gender-reveal cakes." App.14. Scardina confirmed this by conveying its symbolism to Phillips when requesting the expressive cake, App.08, and then again at trial, App.13. The requested cake was speech.

Once the Court corrects this error, the path forward is clear. The U.S. Supreme Court will decide this term whether CADA may compel artists to express messages against their beliefs. *303 Creative v. Elenis*, No. 21-476 (U.S. Dec. 5, 2022). That decision would likely control here.

Artists should be free to express what they believe without fear of government punishment. But as it stands, CADA compels Ukrainian cake artists to create cakes promoting the Russian invasion and atheist cake artists to create cakes celebrating the resurrection of Christ—provided the customers request symbolism the artists would use to express other messages they support. That violates the First Amendment.

B. This decision contradicts free-exercise precedent.

The court of appeals also wrongly rejected Phillips' free-exercise defense. The court held that CADA's offensiveness rule does not protect Phillips. In *Masterpiece*, the U.S. Supreme Court recognized that Colorado interprets CADA to contain an "offensiveness" rule, allowing cake artists to decline "messages" they find "offensive." 138 S. Ct. at 1728, 1731. The State (including the appeals court) had interpreted this rule to protect three secular cake artists but wrongly denied its protection to Phillips. *Id.* at 1731. Because the State has not renounced this rule, it protects Phillips here. But the appeals court repeated its prior error, denying Phillips protection on a discriminatory basis.

The court below refused to apply CADA's offensiveness rule to protect Phillips because, in its view, the requested cake "expressed no message." App.74; *but see* App.68 (suggesting cake "convey[ed] information"); App.13 (finding "the requested cake … symbolized a transition from male to female"). But to conclude this, the court considered whether third parties would attribute the cake's message to Phillips, App.71., something it did not consider when secular artists declined cakes based on their message, *Masterpiece*, 138 S. Ct. at 1730. That unequal analysis, which is incorrect as a matter of free speech, § III.A, reflects a "disparate consideration" that violates free exercise. *Masterpiece*, 138 S. Ct. at 1732.

Phillips also faced unique CADA proceedings because of his faith. When beer companies face a CADA charge, settle with officials without complainant's consent, and are sued in district court before the complainant exhausts appeal, Colorado courts dismiss the suit for lack of jurisdiction. *See* § I; *Agnello II*, 695 P.2d at 312 (recognizing trial court dismissed because plaintiff did not exhaust through "appellate conclusions"); *id.* at 313 (district court lacked "jurisdiction" because settlement "efforts were successful"). But when Phillips faces a CADA charge, settles without complainant's consent, and is sued in district court before the complainant appeals, he's punished. The relevant difference: Phillips' faith. Such discrimination violates free exercise. *Masterpiece*, 138 S. Ct. at 1732.

This unequal treatment shows that CADA "prohibits religious conduct while permitting secular conduct that undermines the government's

asserted interests in a similar way." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021); *accord Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Likewise, CADA is not generally applicable because C.R.S. § 24-34-601(3) allows sex-based restrictions while punishing Phillips' message-based distinctions. The appeals court ignored this argument entirely. And it excused the trial court's "impermissible hostility" toward Phillips' faith, *Masterpiece*, 138 S. Ct. at 1729—wrongly inferring from his decision to avoid pronouns at trial that someone's background informs whether he will serve them, App.74, when it knew Phillips did so to respect Scardina while honoring his faith. CF 4236-47. The appellate court punished Phillips for respectful speech the U.S. Constitution protects. *See Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

Phillips has been in court over a decade defending his right—and the right of all Americans—to create freely. And he's faced hostility at nearly every turn. That must stop. People of faith—like anyone else—should be "fully welcome in Colorado's business community." *Masterpiece*, 138 S. Ct. at 1729. They should not be forced to choose between their faith and their art. *Id.* Protecting Phillips here will keep Colorado diverse and free for all.

CONCLUSION

The Court should grant this petition for review.

Respectfully submitted this 20th day of April, 2023.

By: */s/ Jacob P. Warner*

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 20th day of April, 2023, served a copy of the foregoing petition for writ of certiorari via the Colorado Courts E-Filing system, and served via the Colorado Courts E-Filing system on the parties and/or their counsel of record as follows:

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