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On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2021CA1142, Opinion Issued by Judge Schutz (Dunn and Grove, JJ., concurring) DISTRICT COURT, COUNTY OF DENVER District Court Judge: The Hon. A. Bruce-Jones District Court Case No. 19CV32214	
Defendants/Petitioners: MASTERPIECE CAKESHOP, INC. and JACK PHILLIPS v. **Plaintiff//Respondent:** AUTUMN SCARDINA	**Case No. 2023SC00116** Court of Appeals Case No. 2021CA1142 District Court Case No. 2019CV32214 County: Denver
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BRIEF OF *AMICUS CURIAE* THE INSTITUTE FOR FAITH AND FAMILY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the requirements of C.A.R. 28, 29, 32, and 53. I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32. I certify that this Amicus Brief in Support of Petition for Writ of Certiorari (including headings and footnotes but excluding the caption, table of contents, table of authorities, signature blocks, and certificate of service) contains 2,901 words. This brief does not exceed the word limit for a certiorari petition. C.A.R. 53(a) or an amicus brief C.A.R. 29(d). Specifically, this brief complies with the word requirements under Rule 29 because it is not longer than "one-half the maximum length authorized by these rules for a party's principal brief," (it does not exceed 4,750 words). C.A.R. 29(d).

By: /s/ J. Brad Bergford
J. Brad Bergford, #42942

Attorney for Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Institute for Faith and Family ("IFF") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the right to live and work according to conscience and faith. IFF exists to advance a culture where human life is valued, religious liberty thrives, and marriage and families flourish. See https://iffnc.com.

IFF has filed amicus briefs in similar cases, including *Masterpiece Cakeshop Ltd. v. Colorado Human Rights Commission*, 138 S. Ct. 1719 (2018); *303 Creative LLC v. Elenis*, U.S. Supreme Court, No. 21-476 (decision pending); *Arlene's Flowers, Inc.* v. *Washington*, U.S. Supreme Court, Nos. 17-108 and 19-333 (supporting Petitions for Certiorari).

SUMMARY OF ARGUMENT

The First Amendment not only protects expressive products, like Petitioner's custom-created bakery products that convey a message, but also the personal services required to create them. Creative products do not materialize out of thin air. When creative professionals decline to personally create messages that offend their convictions, they do not engage in the sort of arbitrary, invidious discrimination that

may lawfully be prohibited by anti-discrimination statutes such as the Colorado Anti-Discrimination Act (CADA), Colo. Rev. Stat. § 10-16-1501 et seq. (CADA).

It is well settled that "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 61 (2006). Forcing Jack Phillips to create a morally objectionable message is tantamount to compelled speech. Compelled speech is even more damaging than compelled silence because it coerces "free and independent" individuals "into betraying their convictions." *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 924 (Ariz. 2019) ("*B&N*"), quoting *Janus v. American Fed. of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448, 2464 (2018). In comparable recent cases, the Eighth Circuit, the Arizona Supreme Court, and a United States District Court in Kentucky all supported creative professionals: *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752-753 (8th Cir. 2018) ("*TMG*") (wedding videos); *B&N*, 448 P.3d at 914 (wedding invitations); *Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Gov't,* 479 F. Supp. 3d 543, 558 (W.D. Ky. 2020) ("*CNP*") (photography). The Arizona Supreme Court cited Justice Jackson's warning in *Barnette* about the ultimate futility of "government efforts to compel uniformity of beliefs and ideas." *B&N*, 448 P.3d at 896-897. "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters." *West*

Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 641 (1943). "It appears that the path to 'coercive elimination of dissent' is steep—and short." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1200 (2021) (Tymkovich, C.J., dissenting), quoting *Barnette*, 319 U.S. at 641.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE PERSONAL SERVICES REQUIRED TO CREATE PROTECTED EXPRESSION.

Cases involving creative professionals implicate personal services protected by the First Amendment because action is necessary to create expressive products—artwork, videos, photographs, websites, and custom-designed bakery products that express a message. The Arizona Supreme Court rejected the argument that creating custom wedding invitations "purely involves conduct, without implicating speech." *B&N*, 448 P.3d at 905. On the contrary, "[f]or such products, both the finished product *and the process of creating that product* are protected speech." *Id.* at 907 (emphasis added). Similarly, the Eighth Circuit observed that the creative activities in *TMG* "c[a]me together to produce finished videos that are media for the communication of ideas." 936 F.3d at 752 (internal citations and quotation marks omitted). The same is true for Jack Phillips' custom created cake products.

A. CADA is a content-based, viewpoint-based regulation of protected expression.

Many types of artwork have been recognized as protected expression that conveys a message—with or without words.[1] Photography often does not include words, but it is "speech when the photographer's artistic talents are combined to tell a story about the beauty and joy of marriage." *CNP,* 479 F. Supp. 3d at 557. In a case involving similar issues, now pending before the U.S. Supreme Court, the Tenth Circuit court admitted that the "creation of wedding websites is pure speech" for purposes of CADA. *303 Creative,* 6 F.4th at 1176. Custom videos are also "a form of speech . . . entitled to First Amendment protection." *TMG*, 936 F.3d at 751.

[1] *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (photographs); *CNP*, 479 F. Supp. at 555 n. 93; *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (motion pictures); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("pictures, films, paintings, drawings, engravings"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (motion pictures, music, dramatic works); *Hurley*, 515 U.S. at 569 (art, music, literature); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (books, plays, films, video games); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 924 (6th. Cir. 2003) ("music, pictures, films, photographs, paintings, drawings, engravings, prints, sculptures"); *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (paintings, drawings, original artwork); *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007) (original artwork); *Bery v. City of New York*, 97 F.3d 689, 694-96 (2d Cir. 1996) (same); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) ("art for art's sake"); *Jucha v. City of North Chicago*, 63 F. Supp. 3d 820, 825 (N.D. Ill. 2014) ("There is no doubt that the First Amendment protects artistic expression."); *VIP Prods. LLC v. Jack Daniel's Props.*, 953 F.3d 1170, 1175 (9th Cir. 2020) (dog toy that communicates a humorous message).

Marriage is "often a particularly expressive event." *Id.*, quoting *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (recognizing "untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms"). Like the creative professionals in *CNP*, *TMG*, and *303 Creative* Petitioner is engaged in protected expression. As in these cases involving wedding-related services, his religious views about marriage and sexuality undergird his objections to the message he was asked to create—specifically, that a male may transition to female.

CADA "[m]andat[es] speech that [Petitioner] would not otherwise make" and "exacts a penalty" if he refuses. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). This is the essence of content-based regulation. In *303 Creative*, the Tenth Circuit not only acknowledged the presence of creative expression, but also admitted "the Accommodation Clause *compels speech*" and "works as a *content-based* restriction." *303 Creative*, 6 F.4th at 1178 (emphasis added). And because CADA's purpose is "to remedy a long and invidious history of discrimination based on sexual orientation" (*id.*), there is a "substantial risk of excising certain ideas or viewpoints from the public dialogue." *Id.*, quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). The Tenth Circuit openly

admitted that "[*e]liminating such ideas is CADA's very purpose*." *303 Creative*, 6 F.4th at 1178 (emphasis added).

This is viewpoint discrimination on steroids—an "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). As the dissent pointed out in *303 Creative*, "the *content* of the message determines the applicability of the statute and the *viewpoint* of the speaker determines the legality of the message," so "CADA is both content-and viewpoint-based." *303 Creative*, 6 F.4th at 1202 (Tymkovich, C.J., dissenting). CADA transgresses the "bedrock principle" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Such censorship is "poison to a free society." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring). Considering the repeated attacks on free speech, "it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination." *Id*. at 2302-2303 (Alito, J., concurring).

B. The action required to create expression is entitled to First Amendment protection.

"It goes without saying that artistic expression lies within . . . First Amendment protection." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting). So does the personal labor required to create it.

CADA demands that Petitioner engage in personal services to create a message that conflicts with his conscience and personal religious belief that each person is created immutably male or female.

First Amendment protection unquestionably extends to "creating, distributing, or consuming" speech. *Brown*, 564 U.S. at 792 n. 1 (video games). "[E]ven the purest of pure speech involves physical movements and activities that could be described as conduct." Richard F. Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly Through the Lens of Telescope Media*, 99 Neb. L. Rev. 58, 70 (2020). Pictures do not paint themselves. Books do not write themselves. Abundant case law confirms this commonsense conclusion. First Amendment protection for creative products does not exist in a vacuum. For such protection to have meaning, the Constitution "must also protect the act of creating that material." *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d Cir. 2017). "The act of taking a photograph, though not necessarily a communicative action in and of itself, is a *necessary prerequisite* to the *existence* of a photograph." *Silberberg v. Bd. of Elections*, 272 F. Supp. 3d 454, 479 (S.D.N.Y. 2017) (emphasis added). *See also ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording" is protected "as a corollary of the right to disseminate the resulting recording."); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1204 (9th Cir. 2018) (creation of audiovisual

recordings is “inextricably intertwined” with the finished recording and therefore “entitled to First Amendment protection as purely expressive activity”).

Courts have applied these principles in favor of creative professionals. Producing wedding videos is protected expression. *TMG*, 936 F.3d at 756. The *TMG* plaintiffs did not merely “plant a video camera at the end of the aisle and press record”—they intended “to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage.” *Id*. at 751. Designing wedding invitations (*B&N*, 448 P.3d at 910) is also protected expression. The Phoenix Ordinance in *B&N* would have forced plaintiffs “to *personally* write, paint and create artwork celebrating a same-sex wedding . . . to design and create invitations that enable and facilitate the attendance of guests at a same-sex wedding.” 448 P.3d at 922. In Petitioner’s prior legal battle, "[f]orcing Phillips to make custom wedding cakes for same-sex marriages requires him to . . . acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated—the precise message he believes his faith forbids." *Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring in part and in the judgment).

Similar editing services are required to create other expressive products. Acts necessary to create expression—writing, painting, editing, or designing—cannot be disconnected from the finished product. As the Ninth Circuit explained, “we have

never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010). Designing a website is like "[u]sing a camera to create a photograph" or "applying pen to paper to create a writing or applying brush to canvas to create a painting." *Ex parte Thompson*, 442 S.W.3d 325, 337 (Tex. Crim. App. 2014). *"[T]he process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes*." *Id.* (emphasis added).

The state compulsion required by CADA does a grave disservice to both creative professionals and their customers. Coercion produces a counterfeit. If an artist is repelled by the message he must create and perhaps forbidden to even disclose his viewpoint to potential customers, the finished product will likely be unsatisfactory. That is one reason courts are loathe to order specific performance as a remedy for breach of a contract for personal services, especially where artistic expression is required.[2] The New York Court of Chancery, declining to compel a

[2] *See, e.g., Hamblin v. Dinneford*, 2 Edw. Ch. 529, 533-534 (N.Y. 1835) (actor); *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852) (singer); *Duff v. Russell*, 14 N.Y.S. 134 (Super. Ct. 1891) (actress/singer); *Okeh Phonograph v. Armstrong*, 63 F.2d 636 (9th Cir. 1933) (jazz player). *See also* 5A Corbin, Contracts (1964) § 1204.

singer's performance of an Italian opera, expressed concern about "what effect coercion might produce upon the defendant's singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama." *De Rivafinoli v Corsetti*, 4 Paige Ch. 264, 270 (1833). In cases about contracts for personal services, there is already a valid *contract* between parties who *voluntarily* agreed to its terms. Here, the state demands that Petitioner sign onto an unwanted contract for his personal creative services. This is unconscionable not only because it coerces facilitation of an ideological cause, but also because it allows any member of the public to coerce a particular individual into providing services—and *that* constitutes involuntary servitude, a practice this nation discarded long ago.

C. Like other speakers, creative professionals have the right to remain silent.

"When the law strikes at free speech it hits human dignity . . . when the law compels a person to say that which he believes to be untrue, the blade cuts deeper because it requires the person to be untrue to himself, perhaps even untrue to God." Duncan, *Seeing the No-Compelled-Speech Doctrine Clearly*, 99 Neb. L. Rev. at 59.

Creative professionals have the "right to remain silent" by declining to create expression that is disagreeable to them. The First Circuit considered the case of well-known actress Vanessa Redgrave, who sued the Boston Symphony Orchestra for

cancelling her scheduled appearance in the wake of protests about her political views. *Redgrave v. Boston Symphony Orchestra, Inc*., 855 F.2d 888 (1st Cir. 1988). Redgrave argued that cancelling her performance violated the Massachusetts Civil Rights Act (MCRA), which created a private cause of action for violations. *Redgrave*, 855 F.2d at 901. The Orchestra responded by asserting its own "right to be free from compelled expression," and the court agreed. "A distinguished line of cases has underscored a private party's right to refuse compelled expression." *Id*. at 905. The "typical reluctance" of courts "to force private citizens to act . . . augments its constitutionally based concern for the integrity of the artist." *Id*., citing *Lumley v. Wagner*, 42 Eng. Rep. at 693. Since private expression is encouraged and protected, the court saw "no reason why *less* protection should be provided where the artist [the Orchestra] refuses to perform; indeed, silence traditionally has been more sacrosanct than affirmative expression." *Redgrave*, 855 F.2d at 906. The Civil Rights Act could not lawfully foreclose the Orchestra's decision not to perform, because that decision was itself a constitutionally protected exercise of the right to be free of compelled speech. The same rationale applies here. The statutory rights of transgender persons, if "measured against the [Petitioner's] constitutional right against the state" (*id*. at 904) to be free of compelled expression, cannot withstand judicial scrutiny.

Enforcement of CADA against Petitioner results in compelled speech, which is anathema to the First Amendment.

II. PETITIONER'S OPERATION OF HIS BUSINESS IN ACCORDANCE WITH HIS RELIGIOUS FAITH AND CONSCIENCE IS NOT IRRATIONAL, INVIDIOUS, OR ARBITRARY.

Public accommodation laws are designed to provide a shield but increasingly morph into a sword to cut off or compel expression. Anti-discrimination laws are "weaponized" by those who support LGBT ideology "to drive religious conscientious objectors out of business and deprive them of their livelihoods." Richard F. Duncan, *A Piece of Cake or Religious Expression:* Masterpiece Cakeshop *and the First Amendment*, 10 Neb. L. Rev. Bull. 1, 22 (January 2019). Petitioner refuses to use his personal services to create a message he does not believe. His refusal is not irrational, invidious, or arbitrary "discrimination"—on the contrary, it is fully protected speech.

The First Amendment demands a clear, consistent definition for "discrimination" in this context. Declining to create or endorse a message does not constitute discrimination. "[C]ourts must more clearly evaluate when public accommodation laws have actually been violated, as opposed to when the individual or business is simply refusing to endorse a particular message." James M. Gottry, Note, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at*

First Amendment Freedom of Speech, 64 Vand. L. Rev. 961, 999 (2011). Like the wedding invitation designers in *B&N*, Petitioner does not seek "to employ the coercive apparatus of government to impose disabilities on others," but rather the "right not to engage in speech that offends [his] deeply held religious beliefs . . . one of our nation's most cherished civil liberties." *B&N*, 448 P.3d at 929.

It is the epitome of compelled speech to force Petitioner to personally create an expressive product that conveys any message that is morally offensive to him, and there is nothing "discriminatory" about his refusal to comply. This court should respect the dignity of *both* Petitioner *and* his customers.

CONCLUSION

This Court should grant the Petition for Certiorari and reverse the decision of the Colorado Court of Appeals.

RESPECTFULLY SUBMITTED this 25th day of April, 2023.

By: /s/ J. Brad Bergford
J. Brad Bergford, #42942

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I, J. BRAD BERGFORD, hereby affirm that a true and accurate copy of the AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FAITH AND FAMILY was sent electronically this day, April 25, 2023, and served via Colorado Court's E-Filing system, on the parties and/or their counsel of record as follows:

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