

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-CV-02074-WYD

MASTERPIECE CAKESHOP INCORPORATION, a Colorado corporation, et al.  
Plaintiffs

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity, et al.,  
Defendants.

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**NON-PARTY AUTUMN SCARDINA’S MOTION TO INTERVENE REGARDING  
PLAINTIFFS’ REQUEST FOR PRELIMINARY INJUNCTION**

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Ms. Autumn Scardina is the complainant and a party to the State Civil Rights Proceeding that Plaintiffs are attempting, by their January 18 motion for preliminary injunction, to halt. Because she meets all of the requirements for intervention as a matter of right and permissive intervention, non-party Autumn Scardina respectfully moves under Fed. R. Civ. P. 24 to intervene with respect to Plaintiffs’ request for preliminary injunction and the scheduled evidentiary hearing regarding the same. A copy of Ms. Scardina’s Opposition to Plaintiffs’ Motion for Preliminary Injunction is attached as Exhibit A. Fed. R. Civ. P. 24(c).

**INTRODUCTION**

Plaintiffs refused to bake a birthday cake designed in a personally significant way for Ms. Scardina solely because she is transgender. Plaintiffs do not, and cannot, claim that they refuse to make custom birthday cakes with personally significant designs for other customers. In fact, they advertise they do so on their website. Nonetheless, Plaintiffs assert that they cannot be required to comply with Colorado’s anti-discrimination law because of their religious beliefs, an argument that the United States Supreme Court has time and again rejected. Plaintiffs now ask

this Court to enjoin enforcement of Colorado's anti-discrimination act against them on the theory that enforcement of a neutrally-applicable law must be motivated by anti-religious bias.

Specifically, Plaintiffs seek to enjoin further action in the already-commenced State Civil Rights Proceeding to determine whether Plaintiffs violated Colorado's public accommodation law.

Ms. Scardina, the complainant in the State Civil Rights Proceeding, seeks to intervene in this action to protect her interest in prosecuting her claims against Plaintiffs for violations of her rights under Colorado law. Ms. Scardina meets all of the requirements for intervention as of right under Rule 24(a)(2) and permissive intervention under 24(b)(1). Specifically, Ms. Scardina's motion is timely filed within three weeks after Plaintiffs filed their motion for preliminary injunction and within the deadline for responses to that motion. Ms. Scardina has an interest in the subject matter of Plaintiffs' motion; specifically she is the complainant and a party to the State Civil Rights Proceeding that Plaintiffs seek to enjoin. Plaintiffs' motion may impair or impede Ms. Scardina's right to pursue her claims, and the current Defendants cannot adequately represent Ms. Scardina's personal interests. Finally, Ms. Scardina has a claim or defense that raises a common question of law and fact and no prejudice will result from her intervention. Thus, Ms. Scardina requests this Court grant her motion to intervene with respect to Plaintiffs' motion for preliminary injunction and the related evidentiary hearing.

### **ARGUMENT**

Intervention "contemplates that a non-original party may participate as a party in order to protect some right or interest alleged to be affected by that litigation." *S.E.C. v. Nacchio*, 2005 WL 1799372, at \*3 (D. Colo. July 28, 2005). The Tenth Circuit takes a "liberal approach to intervention and thus favors the granting of motions to intervene." *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017). Under Rule 24, upon a timely motion, the Court "must permit

anyone to intervene who ... claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(1)(a)(2). Thus, the Tenth Circuit recognizes the following requirements for intervention under Rule 24(1): (1) the application is timely; (2) the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) the applicant's interest may as a practical matter be impaired or impeded; and (4) the applicant's interest is not adequately represented by existing parties. *W. Energy All.*, 877 F.3d at 1164. Separately, Rule 24 permits intervention where: (1) the applicant has a claim or defense that shares with the main action a common question of law or fact; and (2) intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(1)(A), (3).<sup>1</sup>

**I. Ms. Scardina Is Entitled to Intervene as of Right.**

As an initial matter, Ms. Scardina is entitled to intervene as of right under Rule 24(a)(2) as all four requirements for such intervention are met.

**A. Factual Background in Support of Intervention**

On June 26, Ms. Scardina called Plaintiff Masterpiece Cakeshop to request a birthday cake. Ex. B (Statement of Ms. Scardina) ¶¶ 4.d-g; ECF No. 51 (Amended Compl.) ¶ 203. Ms. Scardina requested a pink cake with blue icing. Ex. B ¶¶ 4.j-k; ECF No. 51 ¶ 186. That design has personal significance to Ms. Scardina because it reflects her status as a transgender female. Ex. B ¶ 4.l; ECF No. 51 ¶ 186. Initially, a representative from Masterpiece Cakeshop indicated they would be able to prepare a cake for Ms. Scardina in the design she had requested. Ex. B

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<sup>1</sup> Counsel for Ms. Scardina conferred with counsel for Plaintiffs and Defendants concerning the relief requested by this motion. Plaintiffs stated they opposed and Defendants stated they take no position.

¶ 4.k. After Ms. Scardina explained the personal significance of the requested design and identified herself as a transgender female, Masterpiece Cakeshop refused to prepare the cake. Ex. B ¶ 4.m; ECF No. 51 ¶ 191. Masterpiece Cakeshop and Phillips have sought to justify their refusal to provide the requested cake to Ms. Scardina because Mr. Phillips objects to the very concept of being transgender. ECF No. 52-1 (Decl. of Phillips) ¶ 16. In fact, Masterpiece Cakeshop and Phillips routinely refer to Ms. Scardina’s requested birthday cake as a “gender-transition cake.” *See* ECF No. 104. Neither Masterpiece Cakeshop nor Mr. Phillips contends that a pink cake with blue frosting has any inherent public meaning or any personal meaning to them.

Ms. Scardina filed a charge of discrimination against Masterpiece Cakeshop on July 20, 2017. Ex. C (Charge of Discrimination). On June 24, 2018, the Colorado Civil Rights Division issued a probable-cause determination against Plaintiffs. On October 9, the Colorado Civil Rights Commission filed a Notice of Hearing and Formal Complaint (the “State Civil Rights Proceeding”). Ex. D. Ms. Scardina is the named complainant in the State Civil Rights Proceeding and has intervened in that action without opposition from Masterpiece Cakeshop or Phillips. *Id.*; Ex. E (motion for intervention). The State Civil Rights Proceeding commenced on Monday, February 4. Plaintiffs filed a motion for preliminary injunction on January 18 seeking to “forbid further action” in the State Civil Rights Proceeding. ECF No. 104 at 9.

B. Ms. Scardina’s Motion to Intervene is Timely

While the question of timeliness is evaluated “in light of all of the circumstances,” the Tenth Circuit looks particularly to “(1) the length of time since the movants knew of their interests in the case; (2) prejudice to the existing parties; and (3) prejudice to the movants.” *W. Energy All.*, 877 F.3d at 1164. The timeliness requirement does not function to punish the intervenor based on when a motion is filed, but rather to “guard against prejudicing the original parties by failing to apply sooner.” *Utah Ass’n of Cnty. v. Clinton*, 255 F.3d 1246, 1250 (10th

Cir. 2001) (application for intervention filed three years after complaint was timely); *see also* Wright & Miller, Fed. Prac. & Proc. § 1916, at 425-426 (“[T]he mere lapse of time by itself does not make an application untimely.”). Further, Courts should analyze the question of timeliness to “discourage premature intervention that wastes judicial resources. *Utah Ass’n of Cntys.*, 255 F.3d 1251 n.2 (internal citation and quotation marks omitted).

Here, Ms. Scardina’s application is timely. The original complaint was filed on August 14. ECF No. 1. The operative complaint, however, was filed October 23. ECF No. 51. Defendants sought dismissal of all claims asserted in the Amended Complaint which was granted in part and denied in part on January 4. ECF No. 94. Plaintiffs’ current motion for preliminary injunction, which seeks to prevent resolution of Ms. Scardina’s claims against Plaintiffs, was not filed until January 18. ECF No. 104. Ms. Scardina reasonably waited for resolution of Defendants’ motion to dismiss and the filing of Plaintiffs’ motion for preliminary injunction in order to ascertain whether intervention would be necessary. *See Utah Ass’n of Cntys.*, 255 F.3d at 1251 n.2 (noting that a decision to wait until after resolution of a motion to dismiss indicated “the motion to intervene was not untimely” because “Courts should discourage premature intervention that wastes judicial resources.”). Nor can there be any prejudice to the parties. Ms. Scardina seeks to intervene with respect to the Plaintiffs’ request for preliminary injunction and has attached a short opposition to that motion. Ex. A; *see* Fed. R. Civ. P. 24(c). This motion to intervene and accompanying pleading have been filed on the deadline for filings in opposition to Plaintiffs’ motion for preliminary injunction. ECF No. 102. Finally, the prejudice to Ms. Scardina in denying intervention would be significant since, if granted, a preliminary injunction would prevent Ms. Scardina from pursuing her claims against Plaintiffs in the State Civil Rights Proceeding until final resolution of this case, which could take years.

C. Ms. Scardina Has an Interest in the Subject of the Lawsuit

A movant has an interest in the subject of the lawsuit if the interest “would be impeded by the disposition of the action.” *W. Energy All.*, 877 F.3d 1157, 1165 (quotation marks and citation omitted). Ms. Scardina has a clear and unequivocal interest in this litigation. Ms. Scardina has been granted the right, without objection from Plaintiffs, to participate in the State Civil Rights Proceeding. Ex. F; *see also* C.R.S. § 24-34-306; 3 CCR § 708-1 (2017) Rule 10.8(A)(5) (stating that at “the discretion of the administrative law judge, the complainant shall be permitted to intervene through counsel to present evidence and to examine and cross examine witnesses”). In fact, she is the named complainant in the State Civil Rights Proceeding that the Plaintiffs are attempting to enjoin. *See* Ex. D; ECF No. 104 at 9. This Court has recognized more attenuated interests as sufficient under Rule 24. *See, e.g. Nacchio*, 2005 WL 1799372, at \*3 (government’s interest in preventing discovery in a civil action from impacting criminal action sufficient for intervention).

D. Ms. Scardina’s Interest May Be Impaired or Impeded

The third requirement, that the applicant’s identified interest “may be impaired or impeded by the pending litigation” presents a “minimal burden.” *W. Energy All.*, 877 F.3d at 1167. All that is required is that “it is possible that the interests they identify will be impaired.” *Id.* Here, it is at least possible that the Court may grant Plaintiffs’ motion for preliminary injunction, which would halt the State Civil Rights Proceeding and thus “impair or impede” Ms. Scardina’s right to pursue her claims against Plaintiffs in that proceeding.

E. Ms. Scardina’s Interests Are Not Adequately Represented by the Current Parties

As with the prior factor, the burden to satisfy the condition that the presently named parties cannot adequately represent the applicant’s interests is “minimal” and the “possibility of divergence of interest need not be great in order to satisfy the burden[.]” *W. Energy All.*, 877

F.3d at 1168. “[A]ny doubt regarding adequacy of representation should be resolved in favor of the proposed intervenor.” Moore’s Fed. Prac. § 24.03[4][a], at 24-49. The Tenth Circuit has repeatedly held that government agencies “must represent the public interest which may differ from the applicant’s particular interest.” *Utah Ass’n of Cnty.*, 255 F.3d at 1255; *W. Energy All.*, 877 F.3d at 1168 (“Also, we have held that the government cannot adequately represent the interests of a private intervenor *and* the interests of the public.”) (emphasis in original); *Nat’l Farm Lines v. Interstate Commerce Comm’n*, 564 F.2d 381, 384 (10th Cir. 1977) (“an agency seeking to protect both the public interest and the interest of a private intervenor undertakes a task which is on its face impossible”).

Here, the Defendants must “consider multiple interests,” *W. Energy All.*, 877 F.3d at 1169, in this litigation. The Defendants represent the public interest and thus cannot adequately represent Ms. Scardina’s private interest. *Id.* at 1168. Further, Defendants have an institutional interest because they are specifically accused of violating Plaintiffs’ constitutional rights. ECF No. 51. It is certainly possible that Defendants’ interests in defending against allegations of religious bias may diverge from Ms. Scardina’s interest in a just and speedy resolution of her claims against the Plaintiffs. Thus Ms. Scardina has met the “minimal” burden of showing that the parties do not adequately represent here interests.

Finally, a copy of Ms. Scardina’s opposition to Plaintiffs’ motion for preliminary injunction is attached as Exhibit A. Fed. R. Civ. P. 24(c).

## **II. Permissive Intervention is Appropriate**

Should the Court determine that intervention under Rule 24(a)(2) is not required, Ms. Scardina easily meets the requirements for permissive intervention under Rule 24(b)(1).

A. Ms. Scardina's Claim Shares Commons Questions of Law and Fact with this Proceeding

While permissive intervention only requires a “common question of law or fact,” Ms. Scardina’s claim in the State Civil Rights Proceeding shares a multitude of common questions of law and fact with this proceeding. The facts concerning Ms. Scardina’s request for a birthday cake in a design with personal significance is common to both actions. *See* ECF No. 51. Similarly, Plaintiffs’ opening statement in the State Civil Rights Proceeding indicates they intend to raise and argue the same defenses in that case as they intend to argue here. *See, e.g.*, ECF No. 104 (asserting first amendment defenses). Ms. Scardina, like Defendants, intends to argue that the State Civil Rights Proceeding does not infringe on any of Plaintiffs’ rights. This more than satisfies the requirement of a common question of law or fact. *See, e.g., Am. Tradition Inst. V. Epel*, 2012 WL 5290265, at \*1 (D. Colo. Oct. 26, 2012) (“Movants seek to defend the constitutionality of [a statute], which is the same defense the Government ... [has] raised. Accordingly, ... Movants have a defense in common with the existing parties.”).

B. Intervention Will Not Cause Undue Delay or Prejudice

Finally, permitting intervention will not cause undue delay or prejudice. Ms. Scardina seeks to intervene for the purpose of opposing Plaintiffs’ January 18 motion for preliminary injunction. ECF No. 104. This motion and the accompanying opposition to Plaintiffs motion are filed within the deadline for Defendants to oppose Plaintiffs preliminary injunction motion. ECF No. 102. Plaintiffs will have the same amount of time to address Ms. Scardina’s opposition as they will Defendants’. *Id.* Further, the evidentiary hearing on Plaintiffs’ motion is not set until March 14 and Ms. Scardina will be fully prepared to participate on that date.

## CONCLUSION

Because Ms. Scardina meets the requirements for intervention as of right and permissive intervention, she respectfully requests the Court grant her leave to intervene with respect to Plaintiffs' motion for preliminary injunction and the related evidentiary hearing.

Dated this 8th day of February, 2019.

*s/ John M. McHugh*

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# **EXHIBIT A**

**IN THE UNITED STATES DISTRICT COURT  
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AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity, et al.,  
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**AUTUMN SCARDINA’S OPPOSITION TO  
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

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Intervenor Autumn Scardina respectfully submits this opposition to Plaintiffs Masterpiece Cakeshop, Inc.’s and Jack Phillips’ (collectively “Masterpiece Cakeshop”) Motion for Preliminary Injunction (ECF No. 104).

**INTRODUCTION**

Plaintiffs refused to bake a simple birthday cake designed in a personally significant way for Ms. Scardina solely because she is transgender. Plaintiffs do not, and cannot, claim that they refuse to make custom birthday cakes with personally significant designs for other customers. In fact, they advertise they do so on their website. Nor do Plaintiffs contend they would refuse to sell a pink cake with blue frosting to any other customer. In fact, they admit they make the same cake for different customers. ECF No. 83-1 ¶ 8. Nonetheless, Plaintiffs assert that they cannot be required to comply with Colorado’s anti-discrimination law because of their religious beliefs, an argument that the United States Supreme Court has time and again rejected. Plaintiffs now ask this Court to enjoin enforcement of Colorado’s anti-discrimination act against them on the theory that enforcement of a neutrally-applicable law must be motivated by anti-religious bias.

Specifically, Plaintiffs seek to enjoin further action in the already-commenced State Civil Rights Proceeding to determine whether Plaintiffs violated Colorado's public accommodation law.

Masterpiece Cakeshop has failed to carry its burden to show that all four factors required for a preliminary injunction weigh in its favor. The injunction it seeks would alter the status quo and is, therefore, particularly disfavored. Masterpiece Cakeshop is unlikely to succeed on its free exercise, free speech, or due process challenges to Colorado's enforcement of CADA.

Masterpiece Cakeshop has failed to show that in making a probable cause finding or in filing an action, Colorado's Civil Rights Division or Commission acted with religious animus.

Masterpiece Cakeshop's argument depends on the Court accepting that being affiliated with LGBT rights organizations denotes improper anti-religious bias. Similarly, Masterpiece Cakeshop has failed to show that enforcement of CADA against it is selective or unequal.

Masterpiece Cakeshop's attempt to boot strap a failing free exercise claim into something cognizable through the "hybrid rights" doctrine similarly fails.

Masterpiece Cakeshop's free speech claims also lack merit. Making a pink cake with blue icing is not artistic expression; otherwise all decorated food items are artistic expression.

Similarly, a pink cake with blue icing is not symbolic speech because it does not convey any particular message and any "reasonable observer" would not assign to a pink cake with blue frosting the specific, personal symbolism it carries for Ms. Scardina. Nor would an objective, reasonable audience assume that any message portrayed could be ascribed to a baker any more than they would ascribe the personal significance of any cake made by Masterpiece Cakeshop to the bakery rather than the customer. Because CADA is a neutral law of general applicability, it does not discriminate based on content or viewpoint and any incidental impact on expression is constitutionally permissible to achieve compelling state interests of the highest order. Similarly

unavailing is Masterpiece Cakeshop's due process claim. Masterpiece Cakeshop has failed to meet the objective standard and continues to rely on, and misstate, private comments by two commissioners years before they were appointed and years before Masterpiece Cakeshop refused to serve Ms. Scardina based on her transgender status.

Finally, Masterpiece Cakeshop pays minimal lip-service to the remaining three criteria, dedicating two pages and no actual evidence to argue that these factors favor the issuance of a preliminary injunction. Rather, Masterpiece Cakeshop's arguments reveal that, if ever, a preliminary injunction could only be sought after a determination was made in the State Civil Rights Proceeding. Masterpiece Cakeshop's irreparable injury and balance of equities arguments both assume that Colorado will require Masterpiece Cakeshop to make a pink cake with blue frosting for Ms. Scardina. Masterpiece Cakeshop's speculation is insufficient to warrant the extreme remedy of a preliminary injunction.

### **STATEMENT OF FACTS**

On June 26, Ms. Scardina called Masterpiece Cakeshop to request a birthday cake. Ex. 1 (Statement of Ms. Scardina) ¶¶ 4.d-g; ECF No. 51 (Amended Compl.) ¶ 203. Ms. Scardina requested a pink cake with blue icing. Ex. 1 ¶¶ 4.j-k; ECF No. 51 ¶ 186. That design has personal significance to Ms. Scardina because it reflects her status as a transgender female. Ex. A ¶ 4.l; ECF No. 51 ¶ 186. Initially, a representative from Masterpiece Cakeshop indicated they would be able to prepare a cake for Ms. Scardina in the design she had requested. Ex. 1 ¶ 4.k. After Ms. Scardina explained the personal significance of the requested design and identified herself as a transgender female, Masterpiece Cakeshop refused to prepare the cake. Ex. 1 ¶ 4.m; ECF No. 51 ¶ 191. Masterpiece Cakeshop has sought to justify their refusal to provide the requested cake to Ms. Scardina because Mr. Phillips objects to the very concept of being transgender. ECF No. 52-

1 (Decl. of Phillips) ¶ 16. In fact, Masterpiece Cakeshop in its motion routinely refers to Ms. Scardina’s requested birthday cake as a “gender-transition cake.” *See* ECF No. 104.

Ms. Scardina filed a charge of discrimination against Masterpiece Cakeshop on July 20, 2017. Ex. 2 (Charge of Discrimination). On June 24, 2018, the Colorado Civil Rights Division issued a probable-cause determination against Plaintiffs. There was no media coverage of either event. However, when Masterpiece Cakeshop instigated this lawsuit, it immediately issued a press release and voluntarily appeared on multiple television shows. *See* <http://www.adfmedia.org/News/PRDetail/10601> On October 9, the Colorado Civil Rights Commission filed a Notice of Hearing and Formal Complaint (the “State Civil Rights Proceeding”). Ex. 3. The State Civil Rights Proceeding commenced on Monday, February 4.

### ARGUMENT

“[I]t is a general rule that [religious and philosophical objections] do not allow business owners and other actors in the economy and in society to deny protected persons **equal access to goods and services** under a neutral and generally applicable public accommodations law.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (citing *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968)); *see also* *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995) (“Provisions like these are well within the State’s usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.”).<sup>1</sup> Thus, the Supreme Court in *Masterpiece Cakeshop* noted that it is “unexceptional that Colorado law can protect [LGBT] persons, just as it can protect

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<sup>1</sup> Unless otherwise indicated, all emphasis is added.

other classes of individuals, in acquiring **whatever products and services they choose** on the same terms and conditions as are offered to other members of the public.” 138 S. Ct. at 1728.

Because a “preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal.” *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (quotation marks omitted). Thus, Masterpiece Cakeshop bears the burden of proof and must show that each factor tips in its favor. *See Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003). A request, like Masterpiece Cakeshop’s, for preliminary injunction that seeks to “alter the status quo” is “specifically disfavored” and “must be more closely scrutinized to assure that the exigencies of the case support granting of a remedy that is extraordinary even in the normal course.” *Schrier*, 427 F.3d at 1259. While Masterpiece Cakeshop correctly identifies the requirements of a preliminary injunction, ECF No. 104 at 8, it has failed to carry its burden justifying entry of such a “specifically disfavored” and “extraordinary” remedy.

#### **I. Masterpiece Cakeshop Seeks an Injunction that Would Alter the Status Quo**

The Tenth Circuit has determined that whether or not an injunction is mandatory and would maintain or alter the status quo “depends on whether the status quo is a condition of action or a condition of rest.” *O Centro Espirita Beneficiente Uniao Do Vegetel v. Ashcroft*, 389 F.3d 973, 979 (10th Cir. en banc) (Murphy, J. concurring) (citing *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 830 n.21 (D.C. Cir. 1984)).<sup>2</sup> Thus the Tenth Circuit held in *O Centro* that enforcement of the law is the status quo, specifically rejecting the movant’s claim that its prior violation of the law, which had been ongoing for years, was the appropriate status quo. *Id.* at 980 (“The status quo *in fact* in this case is the enforcement” of federal law.); *see also Premium Tobacco Stores v. Fisher*, 51 F. Supp. 2d 1099, 1104 (D. Colo. 1999) (“These

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<sup>2</sup> “Although this en banc decision was highly fragmented, this portion of Judge Murphy’s concurrence represents the opinion of a majority of the court.” *Doubleclick, Inc. v. Paikin*, 402 F. Supp. 2d 1251, 1255 n.1 (D. Colo. 2005).

state statutes carry a high presumption of validity for many of the reasons articulated in *Younger*. As such, the status quo at this time is the state’s enforcement of its own statutes.”).

Here, under the Tenth Circuit’s holding in *O Centro*, the status quo is the State’s enforcement of CADA. Masterpiece Cakeshop’s contrary argument, that the status quo is prior to the State’s enforcement, is the same logic rejected by the Tenth Circuit in *O Centro*. ECF No. 104 at 8; 389 F.3d at 980-81. As the Tenth Circuit explained, the “last peaceable uncontested status” between the parties was the movant’s “compliance with” the applicable law. 389 F.3d at 981. To hold otherwise would be to allow Masterpiece Cakeshop to wrap its illegal conduct “in a cloak of status quo.” *Id.*

**II. Masterpiece Cakeshop is Unlikely to Succeed on the Merits because the Supreme Court Reaffirmed that Laws of General Applicability Do Not Violate the First or Fourteenth Amendments**

“[I]t is a general rule that [religious and philosophical objections] do not allow business owners and other actors in the economy and in society to deny protected persons **equal access to goods and services** under a neutral and generally applicable public accommodations law.” *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727. Thus, according to the Supreme Court, it is “unexceptional” that Colorado can protect Ms. Scardina and other transgender individuals “just as it can protect other classes of individuals, in acquiring **whatever products and services they choose** on the same terms and conditions as are offered to other members of the public.” 138 S. Ct. at 1728.

A. **Masterpiece Cakeshop Has Failed to Show the Commission Acted out of Hostility to Phillips’ Religious Beliefs**

CADA is a “valid and neutral law of general applicability.” *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872, 879 (1990) (quotation marks omitted). As such, enforcement of CADA does not violate the First Amendment where, as here, the law imposes a

burden on the exercise of religion that is “merely the incidental effect of a generally applicable and otherwise valid provision[.]” *Id.* at 878. Indeed, the Supreme Court has previously described a free-exercise challenge to a public accommodation law as “patently frivolous.” *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968) (cited approvingly by *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727). In support of its as applied challenge, Masterpiece Cakeshop makes three arguments in an attempt to show that the enforcement of a neutral law of general applicability against him must be motivated by religious hostility. ECF No. 104 at 9-15. All of these arguments lack merit.

As an initial matter, Masterpiece Cakeshop relies heavily on the Supreme Court’s decision regarding another enforcement action. In addition to ignoring that the current Commission is comprised of different members and are seeking to enforce CADA on a different issue than presented to the Supreme Court, Masterpiece Cakeshop ignores a critical factual difference between these cases. In *Masterpiece Cakeshop Ltd.*, the Supreme Court placed heavy emphasis on the fact that Masterpiece Cakeshop refused to make a wedding cake for a LGBT couple when Colorado itself forbade such marriages. 138 S. Ct. at 1728 (“Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable[.]”).

Here, Masterpiece Cakeshop cannot rely on any such legal ambiguity. In 2017, Colorado law not only recognized transgender individuals as a protected class, it explicitly permitted them to change their gender designation on their official government documents, as did the United States government. *See, e.g.*, C.R.S. § 25-12-115 (permitting a transgender individual to change the gender marker on their birth certificate); Colo. Dep’t of Rev.’s form DR 2083 (permitting a transgender individual to update their gender marker on a driver’s license); U.S. Dep’t of State

Form DS-11 (permitting a transgender individual to update their gender marker on their passport).

*i. Masterpiece Cakeshop Has Failed to Show Bias by the Commission*

The conduct of government officials comes with a “presumption of legitimacy[.]” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). Contrary to this presumption, Plaintiffs ask this Court to presume that the current Commissioners acted with impermissible animus based largely on the conduct of past commissioners in a different case. ECF No. 104 at 13-14. When it comes to the current commissioners, Plaintiffs can only point to ambiguous public statements by two commissioners made years before they were appointed commissioners and before this case arose. ECF No. 104 at 13. The Supreme Court however, has recently rejected the use of pre-office public statements as evidence of improper bias in subsequent official conduct. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2417-18 (2018). Further, the “evidence” of bias offered by Masterpiece Cakeshop is frivolous. For example, Masterpiece Cakeshop points to Commissioner Aragon’s service with the “National LGBTQ Task Force” and a social-media post showing the White House lit in rainbow colors as evidence of impermissible bias. ECF No. 104 at 13. As an initial matter, Plaintiffs misrepresent the post from Commissioner Aragon, claiming that it “demonstrate[s Commissioner Aragon’s] personal opposition to Phillips’ religious exercise[.]” *Id.* The text of the post at issue belies any such suggestion:



ECF No. 104-29 at 2. Nothing in this statement contains any hostility towards Masterpiece Cakeshop or Phillips’ religion.

Further, while it is true that the National LGBTQ Task Force filed an amicus brief in the *Masterpiece Cakeshop, Ltd.* case, Masterpiece Cakeshop can point to no argument made in that brief and no statements made by Commissioner Aragon specifically that evidences religious bias. Similarly unavailing is the reference to Commissioner Pocock’s comment made regarding testimony before the Senate Judiciary Committee regarding SB-11 (which eventually became Colorado’s Civil Unions Act). Instead of presenting any evidence that the Commission’s official action in this case was motivated by anti-religious views, Masterpiece Cakeshop relies on the tired and meritless suggestion that support for LGBT rights is inconsistent with respect for religious rights. ECF No. 104 at 7 (noting that past and current Commissioners have been associated with One Colorado, an LGBT rights organization); *but see Blank v. Sullivan &*

*Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975) (rejecting argument that a judge’s prior engagement in civil rights litigation was evidence of impermissible bias); ECF No. 112 (denying with prejudice Plaintiffs’ request to depose the individual commissioners about “their personal feelings about religion, gay rights, and the topics that underlie” the issues in the case).

ii. *The State Is Treating Phillips Equally*

Similarly unavailing is Masterpiece Cakeshop’s reliance on the Supreme Court’s observations regarding the Commission’s enforcement decisions with respect to bakeries that refused to make anti-LGBT cakes for a customer. ECF No. 10-13. Contrary to Masterpiece Cakeshop’s argument, the Supreme Court did not hold that future enforcement of CADA against Masterpiece Cakeshop could not be legitimately pursued in light of the decisions regarding other bakeries. On the contrary, the Supreme Court explicitly recognized that a “principled distinction” between such cases was possible but that the State had failed to make such a distinction *in that case*. 138 S. Ct. at 1731; *see also id.* at 1733 (Kagan, J. concurring) (“a proper basis for distinguishing the cases was ... obvious. ... The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple.”).

Further, there is no dispute that Masterpiece Cakeshop would have made *the exact same physical cake* (design and all) for other customers that it refused to make for Ms. Scardina. ECF No. 83-1 ¶ 8. Nor is there any dispute that Masterpiece Cakeshop will make custom birthday cakes with personally-significant designs for other customers. Masterpiece Cakeshop only refused to make this cake for Ms. Scardina because of her status as a transgender female. The

Supreme Court reaffirmed in *Masterpiece Cakeshop, Ltd.* that religious beliefs do not allow “business owners ... to deny protected persons **equal access to goods and services**” and that it is “unexceptional” that Colorado can protect LGBT individuals “in acquiring **whatever products and services they choose** on the same terms and conditions as are offered to other members of the public.” 138 S. Ct. at 1727-28. The Supreme Court’s affirmance of the propriety and “unexeptional” nature of anti-discrimination laws must mean that a baker cannot refuse to provide the exact same physical cake he would make for any cisgender, heterosexual client but refuse to provide that cake to a transgender individual because he does not believe in her identity.

To avoid this conclusion, *Masterpiece Cakeshop* repeatedly refers to Ms. Scardina’s requested birthday cake as a “gender-transition cake.” *See, e.g.* ECF No. 104 at 17-20. However, defining the type of cake according to personal significance of the design to Ms. Scardina would, in effect, exempt cake bakers from CADA totally. ECF No. 104 at 11-12. For example, a baker could refuse to make a birthday cake for the child of gay parents if the baker does not believe in parenting by same-sex couples. Similarly, a baker could refuse to sell black and white cookies to an interracial couple if the baker believed that interracial marriage is a sin and that the design of the cookie evidenced support for their marriage. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967) (quoting the trial court’s opinion that interracial marriage was contrary to God’s intent).

It is difficult to imagine *any* instance in which *Masterpiece Cakeshop*, or any other baker, could not permissibly refuse to serve any protected individuals under such a standard. Instead, this construction would create a “community-wide stigma inconsistent with the history and dynamics of civil rights laws **that ensure equal access to goods, services, and public accommodations**,” *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727, because while cisgender,

heterosexual individuals would be free and encouraged to discuss the meaning of their design with Masterpiece Cakeshop, LGBT individuals would have to choose to either hide their identity and the personal significance of any design or face denial of service. Defining the requested cake in a way that would always permit Masterpiece Cakeshop to refuse service to LGBT individuals when the exact same physical cake would be made for non-LGBT individuals is the antithesis of the Supreme Court's decades-long recognition of the validity of public accommodation laws.

Indeed, while Masterpiece Cakeshop cites to Justice Gorsuch's concurrence in *Masterpiece Cakeshop, Ltd.* in support of its argument regarding the proper definition of the cake at issue, ECF No. 104 at 12, Justice Gorsuch's view that the cake at issue should be defined as a "cake for a same-sex wedding" is wholly contrary to the Supreme Court's holding in *Obergefell v. Hodges* which refused to define the right at issue a right to "same sex" marriage. 135 S. Ct. 2584, 2597-99 (2015); *see also Kitchen v. Herbert*, 755 F.3d 1193, 1209 (10th Cir. 2014) (same). Similarly unavailing is Masterpiece Cakeshop's citation to this Court's ruling on Defendants' motion to dismiss. In that context, the Court is required to draw all inferences in favor of Plaintiffs. No such standard applies here.

iii. *Masterpiece Cakeshop's "Hybrid Rights" Argument Fails as a Matter of Law*

Finally, Masterpiece Cakeshop attempts to avoid application of the Supreme Court's rule under *Employment Division v. Smith* by invoking the "hybrid rights" doctrine. ECF No. 104 at 14-15. However, the Tenth Circuit only recognizes the hybrid-rights exception where the independent companion claim possesses a "fair probability, or a likelihood" of success on the merits. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006). The hybrid rights exception does not "convert an invalid free-speech claim ... into a valid free-speech claim" merely by joining with a free exercise claim that was foreclosed by *Employment*

*Division v. Smith. Watchtower Bible & Tract Soc’y of N.Y. v. Village of Stratton*, 536 U.S. 150, 171 (Scalia, J., concurring).

B. Enforcement of CADA Does Not Violate Masterpiece Cakeshop’s Free Speech Rights

“[I]t has never been deemed an abridgement of freedom of speech ... to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means” of speech. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (citation omitted) (“*FAIR*”). Thus even if a “considerable amount” of protected First Amendment activity occurs in an establishment, it “does not afford the entity as a whole any constitutional immunity to practice discrimination.” *N.Y. State Club Ass’n, Inc. v. City of N.Y.*, 487 U.S. 1, 12-13 (1988); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-29 (1984); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). If what “is being regulated” is “business or commercial practices,” then the regulation does not infringe upon First Amendment rights. *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 139 (1969). As the Tenth Circuit recently explain, the “First Amendment does not—and cannot—protect organizations from having to make any and all statements ‘they wish to avoid.’” *Little Sister of the Poor Home for the Aged, Denver Colo. v. Burwell*, 794 F.3d 1151, 1204 (10th Cir. 2015) (vacated and remanded on other grounds *Zubik v. Burwell*, 136 S. Ct. 1557 (2016)). This case falls squarely into the long-line of Supreme Court cases rejecting the notion that because regulated conduct may contain an element of speech, it is immunized from anti-discrimination laws. Because CADA regulate conduct not speech, Masterpiece Cakeshop’s argument fails.

i. *A Pink Cake with Blue Icing Is Not Speech*

Masterpiece Cakeshop asks this Court to make a rather remarkable and expansive ruling – that a pink cake with blue icing is “artistic expression.” ECF No. 104 at 17. None of the cases

cited by Masterpiece Cakeshop hold such an expansive view. *See Buehrle v. City of Key West*, 813 F.3d 973 (11th Cir. 2015) (city cannot ban tattoo parlors); *Cressman v. Thompson*, 798 F.3d 938 (10th Cir. 2015) (*Cressman II*) (image of Native American shooting an arrow is symbolic speech). Ruling that decorating a pink cake with blue icing is artistic expression would render every decorated item sold at Masterpiece Cakeshop speech (and thus permit Masterpiece Cakeshop to refuse to sell any decorated item to LGBT individuals). Indeed, everything sold at the cake counter at any grocery store would qualify as speech and an entire industry would be exempt from CADA.

ii. *The Personal Significance of the Design of the Birthday Cake Is Not Attributable to Masterpiece Cakeshop*

Similarly unavailing is Masterpiece Cakeshop's contention that a pink cake with blue icing qualifies as symbolic speech. To the contrary, decorating a pink cake with blue icing meets neither of the requirements for symbolic speech. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989). *First*, Masterpiece Cakeshop has failed to show it meets the requirement of "an intent to convey a particularized message was present[.]" *Id.* Masterpiece Cakeshop's sole argument is the claim that because it alleges this is a compelled speech case, that requirement is met. ECF No. 104 at 18 (citing *Cressman v. Thompson*, 719 F.3d 1139, 1154 n.15 (10th Cir. 2013) (*Cressman I*)). *Cressman I* however deals with a motion to dismiss and specifically notes that the district court was required accept the plaintiff's allegations that "the license plate image conveys a particularized message" as true. *Cressman I*, 719 F.3d at 1153-54. Applying that standard in a preliminary injunction setting would effectively eliminate the first prong and allow a plaintiff to avoid its burden simply based on its allegation. Masterpiece Cakeshop cites no case for that proposition.

*Second*, Masterpiece Cakeshop has failed to show that “the likelihood [is] great that the message would be understood by those who viewed it.” *Johnson*, 491 U.S. at 404. As an initial matter, the second prong of the *Johnson* test is a reasonable, objective standard, not a subjective standard. *Cressman II*, 798 F.3d at 958 (applying a “reasonable observer” test). Masterpiece Cakeshop presents no evidence that a “reasonable observer” of a pink cake with blue frosting would identify it as celebrating transgender identity. Masterpiece Cakeshop does not contend that a pink cake with blue frosting has any inherent public meaning. In fact, Masterpiece Cakeshop initially agreed to make the requested birthday cake with the requested design precisely because there is no inherent meaning to the design. Ex. 1 ¶ 4.k; ECF No. 51 ¶ 191 (admitting that Masterpiece Cakeshop only refused to make the cake after Ms. Scardina had identified the personal significance of the design); *see also* ECF No. 83-1 ¶ 8 (stating that Masterpiece Cakeshop would bake an identical cake for another customer).

Rather than showing an objective, “reasonable observer” would understand a pink cake with blue icing to celebrate transgender status, Masterpiece Cakeshop simply attempts to conflate the personal, subjective symbolism assigned by Ms. Scardina with what an objective “reasonable observer” would understand. In doing so, however, Masterpiece Cakeshop invents facts to fit its narrative. Masterpiece Cakeshop contends that the appropriate context is a “celebration of the anniversary of [Ms.] Scardina’s gender transition[.]” ECF No. 104 at 18. Not surprisingly, Masterpiece Cakeshop provides no factual citation to support its claim that the birthday cake was ordered for a “celebration of the anniversary of [Ms.] Scardina’s gender transition.” As a factual matter, Ms. Scardina ordered the cake for her birthday. Ex. 1 ¶¶ 4.d-g; ECF No. 51 ¶ 203. That she chose a design that celebrated her status as a transgender female, does not transform her birthday party into a “celebration of the anniversary of [her] gender

transition.” The Court need look no farther than Masterpiece Cakeshop’s own exhibits to see the fallacy of this argument. Does designing a birthday cake with a sunflower transform the birthday party into a celebration of sunflowers? ECF No. 104-4 at 12. Or a birthday cake with a yellow submarine transform the birthday party into a celebration of the Beatles? ECF No. 104-4 at 13.

The examples of birthday cakes Masterpiece Cakeshop advertises also confirm that any message a pink and blue cake may contain is not attributable to the bakery. It is a fair inference that a customer ordered a birthday cake in the shape of a sunflower because that flower is the customer’s favorite. ECF No. 104-4 at 12. No reasonable observer would assume it is also Mr. Phillips’ favorite flower. Similarly, reasonable observers would not assume that the bakery had any particular views on the importance of yellow submarines. ECF No. 104-4 at 13. Or that Masterpiece Cakeshop has any particular affinity for lobsters, horses, guitars, rubber duckies, beehives, racecars, etc. *See id.* at 8-13. *See FAIR*, 547 U.S. at 64-65; *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1996); *Elane Photography, LLC v. Willcock*, 309 P.3d 53, 69 (N.M. 2013) (“Reasonable observers are unlikely to interpret Elane Photography’s photographs as an endorsement of the photographed events.”) *cert. denied* 572 U.S. 1046.

iii. *The Supreme Court Has Confirmed that Non-Discrimination Laws May Constitutionally Have an Incidental Effect on Expression*

Even if the Court were to expand the First Amendment to hold that making a pink cake with blue icing has expressive aspects, any effect on such aspects is permissible. *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”). Here, there can be no doubt that the act of selling a cake to Ms. Scardina includes

commercial, non-speech elements. Nor is there any doubt that CADA is within the constitutional power of the government and serves an important government interest. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727-28; *Roberts*, 468 U.S. at 624 (“eliminating discrimination and assuring its citizens equal access to publicly available goods and services ... plainly serves compelling state interests of the highest order”).

*iv. CADA Does Not Compel Speech and Is Viewpoint Neutral*

Masterpiece Cakeshop’s claim that enforcement of CADA in this context would involve compelled speech fails for the reasons set forth above: (1) CADA regulates commercial conduct, not speech; and (2) a pink cake with blue icing is not speech and is not attributable to Masterpiece Cakeshop. In fact, Masterpiece Cakeshop does not cite a single case, from any jurisdiction, that has held that application of a non-discrimination law in a commercial context violates the First Amendment. Masterpiece Cakeshop relies exclusively on *Hurley* which is inapposite. *First*, *Hurley* involved a purely private organization not engaged in commerce. *Second*, application of the non-discrimination law was found improper because it would alter the parties’ pre-existing expression. 515 U.S. at 572. Requiring Masterpiece Cakeshop to sell a pink cake with blue icing to Ms. Scardina, as it would to any other customer, does not “alter” any pre-existing expression by Masterpiece Cakeshop. Further, CADA, like other public accommodation laws, is content and viewpoint neutral. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1728 (describing CADA as a “generally applicable statute regulation of businesses that serve the public”); *Hurley*, 515 U.S. at 572; *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”). Finally, even if CADA were required to meet strict scrutiny (it does not), it would because the Supreme Court has already held that “eliminating discrimination and assuring

its citizens equal access to publicly available goods and services ... plainly serves compelling state interests of the highest order[.]”*Roberts*, 468 U.S. at 624.

C. Enforcement of CADA Does Not Violate Masterpiece Cakeshop’s Due Process Rights

As with its Free Exercise and Free Speech claims, Masterpiece Cakeshop’s due process claim is meritless. *First*, Masterpiece Cakeshop again attempts to equate this Court’s determination of a motion to dismiss with actual factual findings by this Court. ECF No. 104 at 26. While the Court was required to treat Masterpiece Cakeshop’s allegations as true for a motion to dismiss, it is not required to do so in a preliminary injunction setting and allegations are not evidence. *Second*, the objective standard required by *Williams* asks whether “the average [commissioner] in his [or her] position is ‘likely’ to be neutral, or whether there is an unconstitutional potential for bias.” *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). The Supreme Court has already rejected that merely imbuing the same administrative agency with “investigative and adjudicative functions” does not “constitute a due process violation[.]” *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). Masterpiece Cakeshop, far from showing any “objective” criteria focuses again on an almost-six-year-old social media post that occurred long before the commissioner at issue was appointed or before Ms. Scardina filed her claim. ECF No. 104 at 27. Similarly unavailing is Masterpiece Cakeshop’s contention that Commissioner Aragon’s social media post shows any type of bias against it, nor does Masterpiece Cakeshop’s contorted argument that because Mr. Aragon is the LGBT Liaison to Denver’s Mayor means that his role in representing “government interests” is limited to “pro-LGBT interests.” *Id.* Again, Masterpiece Cakeshop relies on the fallacious suggestion that pro-LGBT and pro-religious liberty are mutually exclusive. Finally, the argument that because Colorado law mandates that members of a protected class be *included* in the Commission does not mean the Commission is chosen by

“discriminatory criteria.” ECF No. 104 at 28. The only authority Masterpiece Cakeshop even tries to invoke is *Batson* which stands for the opposite proposition – it is unconstitutional to intentionally *exclude* protected classes. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). *Batson* does not stand for the proposition that intentionally *including* protected classes is a constitutional violation.

**III. Masterpiece Cakeshop Has Failed to Show the Remaining Factors Weigh in Its Favor**

Masterpiece dedicates a mere two pages of its 30-page brief to arguing that the remaining *three* factors required for a preliminary injunction weigh in its favor. None of them do.

**A. The State Civil Rights Proceeding Would Not Irreparably Harm Masterpiece Cakeshop**

Masterpiece Cakeshop claims that even allowing the State Civil Rights Proceeding to continue constitutes irreparable harm, but the harm identified would not occur until a decision on the merits. ECF No. 104 at 28-29 (claiming that requiring Masterpiece Cakeshop to provide the requested cake would violate its constitutional rights). Masterpiece Cakeshop’s assumption that its conduct does in fact violate CADA is not evidence of irreparable injury from the proceeding. Since the injury identified depends on an adverse determination, a preliminary injunction against enforcement of that potential determination would only be appropriate, if ever, when a determination is made. Masterpiece Cakeshop must show actual evidence to support its preliminary injunction, not mere speculation. *Heideman*, 348 F.3d t 1189 (“To constitute irreparable harm, an injury must be certain, great, actual and not theoretical.”).

Similarly, Masterpiece Cakeshop’s claim that permitting the State Civil Rights Proceeding to go forward would “empower[]” people to harass Masterpiece Cakeshop is not supported by anything more than the argument. Though uncited, Mr. Phillips has claimed that media attention increases calls Masterpiece Cakeshop receives that he considers harassing. ECF

No. 52-1 ¶ 17. Masterpiece Cakeshop’s attempt to invoke this harassment as irreparable harm is ironic. No media covered the filing of Ms. Scardina’s complaint against Masterpiece Cakeshop or the probable cause finding. Media coverage of this case began when Masterpiece Cakeshop filed this complaint, issued a press release, and voluntarily appeared on multiple television shows to promote its message. <http://www.adfmedia.org/News/PRDetail/10601>. Having sought and secured media attention, Masterpiece Cakeshop now attempts to invoke the consequences of its own actions as “irreparable harm.”

B. The Balance of Equities and Public Interest Favor Enforcement of CADA

CADA is presumptively constitutional, as affirmed by the Supreme Court. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1278 (it is “unexceptional that Colorado law can protect [LGBT] persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public”); *Eaton v. Jarvis Prods. Corp.*, 965 F.2d 922, 929 (10th Cir. 1992) (“We must presume that a state statute is constitutional.”). Like its irreparable injury argument, Masterpiece Cakeshop’s equities argument assumes what the determination of the State Civil Rights Proceeding will be. ECF No. 104 at 29 (claiming that the injunction would “prevent Colorado from *punishing* Phillips”). But the balance of equities depends on the current, not potential outcome of the proceeding sought to be enjoined.

Similarly, the public interest is in enforcing CADA. *Roberts*, 468 U.S. at 624 (“eliminating discrimination and assuring its citizens equal access to publicly available goods and services ... plainly serves compelling state interests of the highest order”). Further, the public interest favors a speedy and just resolution of the State Civil Rights Proceeding where Masterpiece Cakeshop can present the same constitutional defenses it seeks to present here. *Ohio Civil Rights Com’n v. Dayton Christian Schs.*, 477 U.S. 619, 629 (1986).

## CONCLUSION

Because Masterpiece Cakeshop has failed to carry its burden to show that all four preliminary injunction factors weigh in its favor, Intervenor Autumn Scardina respectfully requests the Court deny the Masterpiece Cakeshop's motion for preliminary injunction.

Dated this 8th day of February, 2019.

*s/ John M. McHugh*

John M. McHugh

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*Attorneys for Autumn Scardina*



# **EXHIBIT 1**

WITNESS 2:

Autumn Scardina

7779 Everett Way, Arvada, CO 80005

(818) 205-5560

(720) 838-3717

I, Autumn Scardina, hereby submit the following statement in support of the Rebuttal Statement in Case Number CP2017011310, Scardina V. Masterpiece Cakeshop:

1. I am the claimant in this matter.
2. My birthday is July 6, 1978.
3. On July 6, 2010, I came out as transgender.
4. On June 26, 2017, the following events occurred:
  - a. In the afternoon, I was a passenger in my brother's car.
  - b. I had wanted to celebrate my birthday with a custom cake.
  - c. I had heard about Masterpiece Cakeshop and wanted to see if they would make a custom cake for my birthday.
  - d. I googled Masterpiece Cakeshop's information from my smartphone and called to inquire about a custom birthday cake.
  - e. The individual identified herself as someone associated with Masterpiece Cakeshop and asked how she could help me.
  - f. I began by asking if they made custom birthday cakes. The individual responded that they did prepare custom birthday cakes.
  - g. They asked me when my birthday was, and I explained it was on July 6, 2017 and I inquired if that would give them enough time. They indicated that would be fine.
  - h. They then asked how big of a cake I would need.
  - i. I explained that it would probably need to serve 6-8 people.
  - j. I then explained that I wanted a cake with blue exterior and pink interior. I asked if they could prepare a cake with blue frosting and pink cake.
  - k. They indicated that they could prepare such a cake.
  - l. I thanked them and explained that the design was a reflection of the fact that I transitioned from male-to-female and that I had come out as transgender on my birthday.
  - m. At this point, Masterpiece indicated they would not be able to prepare my cake. The person indicated that they did not prepare such cakes and I believe she mentioned her religious beliefs.
  - n. I started to become upset and indicated I would put the phone on speakerphone so my brother, Todd Scardina, could hear her portion of the conversation.
  - o. I then asked her to confirm that she was refusing to prepare the cake for me.
  - p. She indicated they do not prepare cakes for "sex changes." I explained it was for my birthday, not a sex change, and she stated that Masterpiece Cakeshop said "we don't make cakes for that" and the phone went dead.
  - q. I call Masterpiece Cakeshop immediately thereafter.

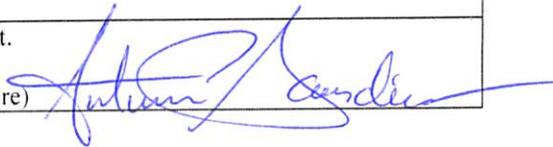
- r. This call was placed on speakerphone.
- s. I indicated that I had just called and the phone was disconnected.
- t. I requested the individuals name. The individual refused to provide her name.
- u. I explained again that I was calling to order a birthday cake and that I wanted it to be blue on the outside and pink on the inside because my birthday was the same day as the day I came out as transgender.
- v. Masterpiece Cakeshop again declined to take my order, stating that it would violate their religious beliefs.
- w. I asked how a blue cake with pink interior would offend anyone's religion, and the call was terminated by Masterpiece Cakeshop.



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Autumn Scardina

# **EXHIBIT 2**

<b>CHARGE OF DISCRIMINATION</b>		CCRD Charge No. CP2018011310
The Privacy Act of 1974 affects this form. See Privacy Act Statement before completing this form.		
<i><b>COLORADO CIVIL RIGHTS DIVISION</b></i>		
Name <i>(Charging Party)</i> Autumn Scardina		(Area Code) Telephone (818) 205-5560
Street Address 7779 Everett Way	City, State, and Zip Code Arvada, CO 80005	County Jefferson
Name of Place of Public Accommodation <i>(Respondent)</i> Masterpiece Cakeshop Incorporated		(Area Code) Telephone (303) 763-5754
Street Address 3355 S. Wadsworth Blvd	City, State, and Zip Code Lakewood, CO 80227	County Jefferson
Discrimination Based on: Sex (Female); Transgender (Gender Identity)		Date Most Recent Discrimination Occurred June 26, 2017
<p><b>I. Jurisdiction:</b> The Colorado Civil Rights Division has jurisdiction over the subject matter of this charge; that each named Respondent is subject to the jurisdiction of the Colorado Civil Rights Division and is covered by the provisions of the Colorado Revised Statutes (C.R.S. 1973, 24-34-301, et. seq.), as reenacted.</p> <p><b>II. Personal Harm:</b> That on or about June 26, 2017, I was denied full and equal enjoyment of a place of public accommodation based on my sex (female) and/or transgender (gender identity).</p> <p><b>III. Respondent's Position:</b> N/A</p> <p><b>IV. Discrimination Statement:</b> I believe I was unlawfully discriminated against because: of my protected class (es) in violation of the Colorado Anti-Discrimination Act (CADA). 1.) On or about June 26, 2017, I was denied full and equal enjoyment of a place of public accommodation. Specifically, the Respondent refused to prepare my order for a cake with pink interior and blue exterior, which I disclosed was intended for the celebration of my transition from male to female. Furthermore, the Respondent indicated to me that to prepare such a cake would be against their religious beliefs. 2.) I believe I was discriminated against because of my protected class (es).</p> <p><b>V. WHEREFORE:</b> The Charging Party prays that the Colorado Civil Rights Division grant such relief as may exist within the Division's power and which the Division may deem necessary and proper.</p>		
I declare under penalty of perjury that the foregoing is true and correct.		
Date <u>7/20/17</u>	Charging Party/Complainant (Signature) 	

ATTACHMENT A – WITNESS STATEMENTS

WITNESS 1:

Todd Scardina

301 S. Ogden Street, Denver, CO 80209

(720) 838-3717

I, Todd Scardina, hereby submit the following statement in support of the Rebuttal Statement in Case Number CP2017011310, Scardina V. Masterpiece Cakeshop:

1. I am the younger brother to the claimant in this matter, Autumn Scardina.
2. My sister and I are both attorneys in Colorado and partners at the law firm named Scardina Law, LLC.
3. On June 26, 2017, the following events occurred:
  - a. In the afternoon, I was driving my car with Ms. Scardina in the front passenger seat. My sister reminded me that her birthday was coming up on July 6, 2017 and indicated that she would like to celebrate her birthday with a custom cake.
  - b. She indicated she would like Masterpiece Cakeshop to prepare the cake and I observed her google their information from her smartphone.
  - c. At first, I could only overhear Ms. Scardina's portion of the telephone call as the phone was not on speakerphone. The initial conversation was as follows:
    - i. Ms. Scardina inquired about whether Masterpiece Cakeshop prepared custom birthday cakes.
    - ii. Ms. Scardina explained that her birthday was coming up on July 6, 2017 and asked if they could prepare it on time.
    - iii. Ms. Scardina indicated that she would need a cake that would serve approximately 6-8 people.
    - iv. Ms. Scardina began to discuss the design for the cake and requested that the cake have pink interior and blue exterior.
    - v. Ms. Scardina then explained the design was to celebrate her birthday which coincided with the day she came out as transgender.
    - vi. Up through this point in the conversation, my sister's demeanor was calm, friendly, and polite.
    - vii. At this point in the conversation, I observed my sister's demeanor change. She appeared not to believe what was being said on the phone and indicated to me and the person on the phone that she would put the phone on speaker for me to hear. She then put the call on her phone's speakerphone.
  - d. The following portions of the conversation were on speakerphone and observed directly by me:
    - i. Ms. Scardina asked for the person at Masterpiece Cakeshop to confirm that she was refusing to make the cake as requested. The individual from Masterpiece

- Cakeshop responded by indicating that “they do not make cakes to celebrate sex-changes”.
- ii. Ms. Scardina responded by explaining it is not a cake to celebrate sex-changes but a custom birthday cake that would celebrate both the date of her birth and the date she came out as transgender.
  - iii. Masterpiece Cakeshop said “we don’t make cakes for that” and the phone went dead.
- e. I then observed Ms. Scardina call Masterpiece Cakeshop immediately thereafter. This call was placed on speakerphone and I witnessed the following conversation:
- i. Ms. Scardina indicated that she had called and the phone was disconnected.
  - ii. Ms. Scardina requested the individuals name, as she appeared upset that she had been disconnected previously. The individual refused to provide her name.
  - iii. Ms. Scardina explained again that she was calling to order a birthday cake and that she wanted it to be blue on the outside and pink on the inside because her birthday was the same day as she came out as transgender.
  - iv. Masterpiece Cakeshop again declined to take the order stating that it would violate their religious beliefs. Ms. Scardina asked how a blue cake with pink interior would offend anyone’s religion, and the call was terminated by Masterpiece Cakeshop.
- f. My sister was very upset with the interaction. She was emotionally distraught and frustrated with the lacking respect and service from Masterpiece Cakeshop.

  
\_\_\_\_\_  
TODD SCARDINA

11/6/2017

WITNESS 2:

Autumn Scardina

7779 Everett Way, Arvada, CO 80005

(818) 205-5560

(720) 838-3717

I, Autumn Scardina, hereby submit the following statement in support of the Rebuttal Statement in Case Number CP2017011310, Scardina V. Masterpiece Cakeshop:

1. I am the claimant in this matter.
2. My birthday is July 6, 1978.
3. On July 6, 2010, I came out as transgender.
4. On June 26, 2017, the following events occurred:
  - a. In the afternoon, I was a passenger in my brother's car.
  - b. I had wanted to celebrate my birthday with a custom cake.
  - c. I had heard about Masterpiece Cakeshop and wanted to see if they would make a custom cake for my birthday.
  - d. I googled Masterpiece Cakeshop's information from my smartphone and called to inquire about a custom birthday cake.
  - e. The individual identified herself as someone associated with Masterpiece Cakeshop and asked how she could help me.
  - f. I began by asking if they made custom birthday cakes. The individual responded that they did prepare custom birthday cakes.
  - g. They asked me when my birthday was, and I explained it was on July 6, 2017 and I inquired if that would give them enough time. They indicated that would be fine.
  - h. They then asked how big of a cake I would need.
  - i. I explained that it would probably need to serve 6-8 people.
  - j. I then explained that I wanted a cake with blue exterior and pink interior. I asked if they could prepare a cake with blue frosting and pink cake.
  - k. They indicated that they could prepare such a cake.
  - l. I thanked them and explained that the design was a reflection of the fact that I transitioned from male-to-female and that I had come out as transgender on my birthday.
  - m. At this point, Masterpiece indicated they would not be able to prepare my cake. The person indicated that they did not prepare such cakes and I believe she mentioned her religious beliefs.
  - n. I started to become upset and indicated I would put the phone on speakerphone so my brother, Todd Scardina, could hear her portion of the conversation.
  - o. I then asked her to confirm that she was refusing to prepare the cake for me.
  - p. She indicated they do not prepare cakes for "sex changes." I explained it was for my birthday, not a sex change, and she stated that Masterpiece Cakeshop said "we don't make cakes for that" and the phone went dead.
  - q. I call Masterpiece Cakeshop immediately thereafter.

- r. This call was placed on speakerphone.
- s. I indicated that I had just called and the phone was disconnected.
- t. I requested the individuals name. The individual refused to provide her name.
- u. I explained again that I was calling to order a birthday cake and that I wanted it to be blue on the outside and pink on the inside because my birthday was the same day as the day I came out as transgender.
- v. Masterpiece Cakeshop again declined to take my order, stating that it would violate their religious beliefs.
- w. I asked how a blue cake with pink interior would offend anyone's religion, and the call was terminated by Masterpiece Cakeshop.



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Autumn Scardina

# **EXHIBIT 3**

STATE OF COLORADO COLORADO CIVIL RIGHTS COMMISSION	^ COURT USE ONLY ^
AUTUMN SCARDINA, Complainant,  v.  MASTERPIECE CAKESHOP INCORPORATED and JACK PHILLIPS, Respondents.	
<b>NOTICE OF HEARING AND FORMAL COMPLAINT</b>	

Charge No. CP2018011310  
 Case Number: CR 2018\_\_\_\_\_

**YOU ARE HEREBY NOTIFIED** pursuant to § 24-34-306(4) C.R.S., that a hearing will be held before an Administrative Law Judge at 9:00 a.m. on **Monday February 4, 2019** on the fourth floor at the Office of Administrative Courts, 1525 Sherman Street, Denver, Colorado 80203, to determine whether Respondents violated § 24-34-601 *et seq.*, C.R.S. (2018) by denying Complainant Autumn Scardina (Scardina) the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations at its place of public accommodation because of Scardina’s sexual orientation (transgender status).

Pursuant to the authority set forth in §§ 24-34-305(1)(d) and 24-34-306(4), C.R.S. (2018), the Colorado Civil Rights Commission (Commission), having determined that the circumstances warrant a hearing, hereby charges and alleges as follows:

1. Respondent, Masterpiece Cakeshop Incorporated (Masterpiece or “the bakery”), is a bakery that engages in sales of goods and services to the public. Masterpiece is a place of public accommodation as defined by § 24-34-601(1), C.R.S., and is therefore subject to the jurisdiction of the Commission.

2. Respondent, Jack Phillips (Phillips) is the owner and operator of Masterpiece, and is a person as defined by §24-34-301(5)(a), C.R.S. As Masterpiece’s owner, Phillips is responsible for providing the full and equal enjoyment of its goods and services to the public regardless of protected class, and is therefore subject to the jurisdiction of the Commission.

3. Timeliness and all other jurisdictional and procedural requirements of title 24, article 34, parts 3 and 4 have been satisfied.

4. Upon information and belief, on June 26, 2017, Scardina contacted Masterpiece by telephone to order a cake to celebrate her birthday. Scardina asked if the bakery sold made-to-order birthday cakes. The individual on the phone answered in the affirmative and asked for the date of her birthday. Scardina responded that it was on July 6th and asked if that would be enough time to make the cake. Masterpiece's representative indicated that that the bakery could accommodate that timing.

5. Upon information and belief, Scardina requested a cake with a blue exterior and a pink interior, and indicated that she would need a cake big enough to serve 6-8 people.

6. Upon information and belief, Masterpiece's representative stated that the bakery would make the cake as requested by Scardina. Scardina then mentioned that the design was a reflection of the fact that she had transitioned from male to female and that she had come out as transgender on her birthday. Masterpiece's representative then stated that the bakery would not make the cake as requested by Scardina because it does not make cakes to celebrate a sex-change and terminated the call.

7. Upon information and belief, Scardina called Masterpiece back and spoke to a different individual about the exchange that took place during her initial call and confirmed that the cake she had ordered was to celebrate her birthday. Masterpiece's representative responded that the bakery would not make a cake for Scardina and terminated the call.

8. On July 20, 2017, Scardina filed a charge of discrimination with the Colorado Civil Rights Division alleging that Respondents discriminated against her in a place of public accommodation based on her sex (female) and/or sexual orientation (transgender status).

9. During the Colorado Civil Rights Division's investigation of the charge, Phillips affirmed his employees' decision to not fulfill Scardina's order, and cited his religious beliefs as the reason why the bakery would not do so.

10. Upon information and belief, the bakery sells made-to-order birthday cakes to non-transgendered individuals.

11. On June 28, 2018, following the investigation, the Division Director's authorized designee found probable cause for crediting the allegations of the charge

that Masterpiece discriminated against Scardina in a place of public accommodation based on her sexual orientation (transgender status).

12. As required by § 24-34-306(2)(b)(II), C.R.S. (2018), the Division Director's authorized designee ordered the parties to attempt amicable resolution of the charge by compulsory mediation.

13. Upon information and belief, efforts to resolve the matter amicably through the ordered mediation have been unsuccessful.

14. On October 2, 2018, the Commission voted to notice this matter for a hearing and to file this formal complaint.

15. The Commission alleges that Masterpiece denied service to Scardina based on her sexual orientation (transgender status), as defined by § 24-34-301(7), C.R.S. (2018), in a violation of § 24-34-601(2)(a), C.R.S. (2018).

16. The Commission further alleges that Masterpiece is not a place that is principally used for religious purposes, as contemplated by § 24-34-601(1), C.R.S. (2018).

The Commission seeks the following relief:

1. That Masterpiece and Phillips be ordered to allow Scardina and all customers that seek goods and services from the bakery, the full use and enjoyment of the goods, services, facilities, privileges, advantages, and/or accommodations of this place of public accommodation, regardless of their sexual orientation.

2. That Masterpiece and Phillips be ordered to cease and desist their practices of discriminating against persons based on their sexual orientation and to immediately discontinue their policy and practice of refusing to provide goods and services to persons due to their sexual orientation.

3. That Masterpiece and Phillips be ordered to adopt a corrective policy which will allow Scardina and other similarly situated persons the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations provided by the bakery regardless of their sexual orientation.

4. That Masterpiece and Phillips be ordered to report to the Commission all remedial action taken to eliminate the discriminatory practices until such time as it has been established that all discriminatory practices have ceased.

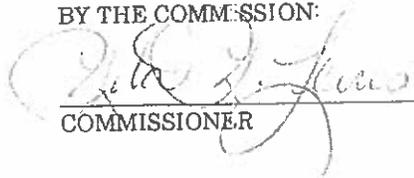
5. That Masterpiece and Phillips be ordered not to retaliate against Scardina in any way.

6. That Masterpiece and Phillips be ordered to provide any other relief which may be available to Scardina by virtue of operation of law and any other relief the Commission deems just and proper.

Masterpiece and Phillips may file a verified answer prior to the date of the hearing. The hearing will be conducted pursuant to sections 24-34-306 and 24-4-105, C.R.S. (2018). Failure to answer the complaint at hearing may result in entry of default judgment against Masterpiece and Phillips.

Dated this 9<sup>th</sup> day of October, 2018.

BY THE COMMISSIONER:



Handwritten signature of the Commissioner in cursive script, written over a horizontal line.

COMMISSIONER

**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **NOTICE OF HEARING AND FORMAL COMPLAINT** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 9 day of October, 2018 addressed as follows:

Autumn Scardina  
7779 Everett Way  
Arvada, CO 80005

John McHugh  
Reilly Pozner LLP  
1700 Lincoln Street, Suite 3400  
Denver, CO 80203

Masterpiece Cakeshop, Incorporated  
3355 S. Wadsworth Blvd., H-117  
Lakewood, CO 80227

Jacob Warner, Esq.  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> St.  
Scottsdale, AZ 85260

By interdepartmental mailing services, copies were sent to:

Matthew Azer  
Director/Chief ALJ  
Office of Administrative Courts  
1525 Sherman St, 4th Floor  
Denver, CO 80203

Michelle Brissette Miller  
First Assistant Attorney General  
Employment/Personnel & Civil Rights Unit  
Civil Litigation & Employment Law Section  
1300 Broadway, 10th Floor  
Denver, CO 80203

By Hand Delivery for filing on October 9, 2018:

Office of Administrative Courts  
1525 Sherman St, 4th Floor  
Denver, CO 80203

Adriana Camonca

# **EXHIBIT B**

WITNESS 2:

Autumn Scardina

7779 Everett Way, Arvada, CO 80005

(818) 205-5560

(720) 838-3717

I, Autumn Scardina, hereby submit the following statement in support of the Rebuttal Statement in Case Number CP2017011310, Scardina V. Masterpiece Cakeshop:

1. I am the claimant in this matter.
2. My birthday is July 6, 1978.
3. On July 6, 2010, I came out as transgender.
4. On June 26, 2017, the following events occurred:
  - a. In the afternoon, I was a passenger in my brother's car.
  - b. I had wanted to celebrate my birthday with a custom cake.
  - c. I had heard about Masterpiece Cakeshop and wanted to see if they would make a custom cake for my birthday.
  - d. I googled Masterpiece Cakeshop's information from my smartphone and called to inquire about a custom birthday cake.
  - e. The individual identified herself as someone associated with Masterpiece Cakeshop and asked how she could help me.
  - f. I began by asking if they made custom birthday cakes. The individual responded that they did prepare custom birthday cakes.
  - g. They asked me when my birthday was, and I explained it was on July 6, 2017 and I inquired if that would give them enough time. They indicated that would be fine.
  - h. They then asked how big of a cake I would need.
  - i. I explained that it would probably need to serve 6-8 people.
  - j. I then explained that I wanted a cake with blue exterior and pink interior. I asked if they could prepare a cake with blue frosting and pink cake.
  - k. They indicated that they could prepare such a cake.
  - l. I thanked them and explained that the design was a reflection of the fact that I transitioned from male-to-female and that I had come out as transgender on my birthday.
  - m. At this point, Masterpiece indicated they would not be able to prepare my cake. The person indicated that they did not prepare such cakes and I believe she mentioned her religious beliefs.
  - n. I started to become upset and indicated I would put the phone on speakerphone so my brother, Todd Scardina, could hear her portion of the conversation.
  - o. I then asked her to confirm that she was refusing to prepare the cake for me.
  - p. She indicated they do not prepare cakes for "sex changes." I explained it was for my birthday, not a sex change, and she stated that Masterpiece Cakeshop said "we don't make cakes for that" and the phone went dead.
  - q. I call Masterpiece Cakeshop immediately thereafter.

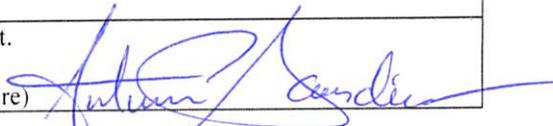
- r. This call was placed on speakerphone.
- s. I indicated that I had just called and the phone was disconnected.
- t. I requested the individuals name. The individual refused to provide her name.
- u. I explained again that I was calling to order a birthday cake and that I wanted it to be blue on the outside and pink on the inside because my birthday was the same day as the day I came out as transgender.
- v. Masterpiece Cakeshop again declined to take my order, stating that it would violate their religious beliefs.
- w. I asked how a blue cake with pink interior would offend anyone's religion, and the call was terminated by Masterpiece Cakeshop.



---

Autumn Scardina

# **EXHIBIT C**

<b>CHARGE OF DISCRIMINATION</b>		CCRD Charge No. CP2018011310
The Privacy Act of 1974 affects this form. See Privacy Act Statement before completing this form.		
<i>COLORADO CIVIL RIGHTS DIVISION</i>		
Name <i>(Charging Party)</i> Autumn Scardina		(Area Code) Telephone (818) 205-5560
Street Address 7779 Everett Way	City, State, and Zip Code Arvada, CO 80005	County Jefferson
Name of Place of Public Accommodation <i>(Respondent)</i> Masterpiece Cakeshop Incorporated		(Area Code) Telephone (303) 763-5754
Street Address 3355 S. Wadsworth Blvd	City, State, and Zip Code Lakewood, CO 80227	County Jefferson
Discrimination Based on: Sex (Female); Transgender (Gender Identity)		Date Most Recent Discrimination Occurred June 26, 2017
<p><b>I. Jurisdiction:</b> The Colorado Civil Rights Division has jurisdiction over the subject matter of this charge; that each named Respondent is subject to the jurisdiction of the Colorado Civil Rights Division and is covered by the provisions of the Colorado Revised Statutes (C.R.S. 1973, 24-34-301, et. seq.), as reenacted.</p> <p><b>II. Personal Harm:</b> That on or about June 26, 2017, I was denied full and equal enjoyment of a place of public accommodation based on my sex (female) and/or transgender (gender identity).</p> <p><b>III. Respondent's Position:</b> N/A</p> <p><b>IV. Discrimination Statement:</b> I believe I was unlawfully discriminated against because: of my protected class (es) in violation of the Colorado Anti-Discrimination Act (CADA). 1.) On or about June 26, 2017, I was denied full and equal enjoyment of a place of public accommodation. Specifically, the Respondent refused to prepare my order for a cake with pink interior and blue exterior, which I disclosed was intended for the celebration of my transition from male to female. Furthermore, the Respondent indicated to me that to prepare such a cake would be against their religious beliefs. 2.) I believe I was discriminated against because of my protected class (es).</p> <p><b>V. WHEREFORE:</b> The Charging Party prays that the Colorado Civil Rights Division grant such relief as may exist within the Division's power and which the Division may deem necessary and proper.</p>		
I declare under penalty of perjury that the foregoing is true and correct.		
Date <u>7/20/17</u>	Charging Party/Complainant (Signature) 	

ATTACHMENT A – WITNESS STATEMENTS

WITNESS 1:

Todd Scardina

301 S. Ogden Street, Denver, CO 80209

(720) 838-3717

I, Todd Scardina, hereby submit the following statement in support of the Rebuttal Statement in Case Number CP2017011310, Scardina V. Masterpiece Cakeshop:

1. I am the younger brother to the claimant in this matter, Autumn Scardina.
2. My sister and I are both attorneys in Colorado and partners at the law firm named Scardina Law, LLC.
3. On June 26, 2017, the following events occurred:
  - a. In the afternoon, I was driving my car with Ms. Scardina in the front passenger seat. My sister reminded me that her birthday was coming up on July 6, 2017 and indicated that she would like to celebrate her birthday with a custom cake.
  - b. She indicated she would like Masterpiece Cakeshop to prepare the cake and I observed her google their information from her smartphone.
  - c. At first, I could only overhear Ms. Scardina's portion of the telephone call as the phone was not on speakerphone. The initial conversation was as follows:
    - i. Ms. Scardina inquired about whether Masterpiece Cakeshop prepared custom birthday cakes.
    - ii. Ms. Scardina explained that her birthday was coming up on July 6, 2017 and asked if they could prepare it on time.
    - iii. Ms. Scardina indicated that she would need a cake that would serve approximately 6-8 people.
    - iv. Ms. Scardina began to discuss the design for the cake and requested that the cake have pink interior and blue exterior.
    - v. Ms. Scardina then explained the design was to celebrate her birthday which coincided with the day she came out as transgender.
    - vi. Up through this point in the conversation, my sister's demeanor was calm, friendly, and polite.
    - vii. At this point in the conversation, I observed my sister's demeanor change. She appeared not to believe what was being said on the phone and indicated to me and the person on the phone that she would put the phone on speaker for me to hear. She then put the call on her phone's speakerphone.
  - d. The following portions of the conversation were on speakerphone and observed directly by me:
    - i. Ms. Scardina asked for the person at Masterpiece Cakeshop to confirm that she was refusing to make the cake as requested. The individual from Masterpiece

- Cakeshop responded by indicating that “they do not make cakes to celebrate sex-changes”.
- ii. Ms. Scardina responded by explaining it is not a cake to celebrate sex-changes but a custom birthday cake that would celebrate both the date of her birth and the date she came out as transgender.
  - iii. Masterpiece Cakeshop said “we don’t make cakes for that” and the phone went dead.
- e. I then observed Ms. Scardina call Masterpiece Cakeshop immediately thereafter. This call was placed on speakerphone and I witnessed the following conversation:
- i. Ms. Scardina indicated that she had called and the phone was disconnected.
  - ii. Ms. Scardina requested the individuals name, as she appeared upset that she had been disconnected previously. The individual refused to provide her name.
  - iii. Ms. Scardina explained again that she was calling to order a birthday cake and that she wanted it to be blue on the outside and pink on the inside because her birthday was the same day as she came out as transgender.
  - iv. Masterpiece Cakeshop again declined to take the order stating that it would violate their religious beliefs. Ms. Scardina asked how a blue cake with pink interior would offend anyone’s religion, and the call was terminated by Masterpiece Cakeshop.
- f. My sister was very upset with the interaction. She was emotionally distraught and frustrated with the lacking respect and service from Masterpiece Cakeshop.

  
\_\_\_\_\_  
TODD SCARDINA

11/6/2017

WITNESS 2:

Autumn Scardina

7779 Everett Way, Arvada, CO 80005

(818) 205-5560

(720) 838-3717

I, Autumn Scardina, hereby submit the following statement in support of the Rebuttal Statement in Case Number CP2017011310, Scardina V. Masterpiece Cakeshop:

1. I am the claimant in this matter.
2. My birthday is July 6, 1978.
3. On July 6, 2010, I came out as transgender.
4. On June 26, 2017, the following events occurred:
  - a. In the afternoon, I was a passenger in my brother's car.
  - b. I had wanted to celebrate my birthday with a custom cake.
  - c. I had heard about Masterpiece Cakeshop and wanted to see if they would make a custom cake for my birthday.
  - d. I googled Masterpiece Cakeshop's information from my smartphone and called to inquire about a custom birthday cake.
  - e. The individual identified herself as someone associated with Masterpiece Cakeshop and asked how she could help me.
  - f. I began by asking if they made custom birthday cakes. The individual responded that they did prepare custom birthday cakes.
  - g. They asked me when my birthday was, and I explained it was on July 6, 2017 and I inquired if that would give them enough time. They indicated that would be fine.
  - h. They then asked how big of a cake I would need.
  - i. I explained that it would probably need to serve 6-8 people.
  - j. I then explained that I wanted a cake with blue exterior and pink interior. I asked if they could prepare a cake with blue frosting and pink cake.
  - k. They indicated that they could prepare such a cake.
  - l. I thanked them and explained that the design was a reflection of the fact that I transitioned from male-to-female and that I had come out as transgender on my birthday.
  - m. At this point, Masterpiece indicated they would not be able to prepare my cake. The person indicated that they did not prepare such cakes and I believe she mentioned her religious beliefs.
  - n. I started to become upset and indicated I would put the phone on speakerphone so my brother, Todd Scardina, could hear her portion of the conversation.
  - o. I then asked her to confirm that she was refusing to prepare the cake for me.
  - p. She indicated they do not prepare cakes for "sex changes." I explained it was for my birthday, not a sex change, and she stated that Masterpiece Cakeshop said "we don't make cakes for that" and the phone went dead.
  - q. I call Masterpiece Cakeshop immediately thereafter.

- r. This call was placed on speakerphone.
- s. I indicated that I had just called and the phone was disconnected.
- t. I requested the individuals name. The individual refused to provide her name.
- u. I explained again that I was calling to order a birthday cake and that I wanted it to be blue on the outside and pink on the inside because my birthday was the same day as the day I came out as transgender.
- v. Masterpiece Cakeshop again declined to take my order, stating that it would violate their religious beliefs.
- w. I asked how a blue cake with pink interior would offend anyone's religion, and the call was terminated by Masterpiece Cakeshop.



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Autumn Scardina

# **EXHIBIT D**

STATE OF COLORADO COLORADO CIVIL RIGHTS COMMISSION	^ COURT USE ONLY ^
AUTUMN SCARDINA, Complainant,  v.  MASTERPIECE CAKESHOP INCORPORATED and JACK PHILLIPS, Respondents.	
<b>NOTICE OF HEARING AND FORMAL COMPLAINT</b>	

Charge No. CP2018011310  
 Case Number: CR 2018\_\_\_\_\_

**YOU ARE HEREBY NOTIFIED** pursuant to § 24-34-306(4) C.R.S., that a hearing will be held before an Administrative Law Judge at 9:00 a.m. on **Monday February 4, 2019** on the fourth floor at the Office of Administrative Courts, 1525 Sherman Street, Denver, Colorado 80203, to determine whether Respondents violated § 24-34-601 *et seq.*, C.R.S. (2018) by denying Complainant Autumn Scardina (Scardina) the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations at its place of public accommodation because of Scardina’s sexual orientation (transgender status).

Pursuant to the authority set forth in §§ 24-34-305(1)(d) and 24-34-306(4), C.R.S. (2018), the Colorado Civil Rights Commission (Commission), having determined that the circumstances warrant a hearing, hereby charges and alleges as follows:

1. Respondent, Masterpiece Cakeshop Incorporated (Masterpiece or “the bakery”), is a bakery that engages in sales of goods and services to the public. Masterpiece is a place of public accommodation as defined by § 24-34-601(1), C.R.S., and is therefore subject to the jurisdiction of the Commission.

2. Respondent, Jack Phillips (Phillips) is the owner and operator of Masterpiece, and is a person as defined by §24-34-301(5)(a), C.R.S. As Masterpiece’s owner, Phillips is responsible for providing the full and equal enjoyment of its goods and services to the public regardless of protected class, and is therefore subject to the jurisdiction of the Commission.

3. Timeliness and all other jurisdictional and procedural requirements of title 24, article 34, parts 3 and 4 have been satisfied.

4. Upon information and belief, on June 26, 2017, Scardina contacted Masterpiece by telephone to order a cake to celebrate her birthday. Scardina asked if the bakery sold made-to-order birthday cakes. The individual on the phone answered in the affirmative and asked for the date of her birthday. Scardina responded that it was on July 6th and asked if that would be enough time to make the cake. Masterpiece's representative indicated that that the bakery could accommodate that timing.

5. Upon information and belief, Scardina requested a cake with a blue exterior and a pink interior, and indicated that she would need a cake big enough to serve 6-8 people.

6. Upon information and belief, Masterpiece's representative stated that the bakery would make the cake as requested by Scardina. Scardina then mentioned that the design was a reflection of the fact that she had transitioned from male to female and that she had come out as transgender on her birthday. Masterpiece's representative then stated that the bakery would not make the cake as requested by Scardina because it does not make cakes to celebrate a sex-change and terminated the call.

7. Upon information and belief, Scardina called Masterpiece back and spoke to a different individual about the exchange that took place during her initial call and confirmed that the cake she had ordered was to celebrate her birthday. Masterpiece's representative responded that the bakery would not make a cake for Scardina and terminated the call.

8. On July 20, 2017, Scardina filed a charge of discrimination with the Colorado Civil Rights Division alleging that Respondents discriminated against her in a place of public accommodation based on her sex (female) and/or sexual orientation (transgender status).

9. During the Colorado Civil Rights Division's investigation of the charge, Phillips affirmed his employees' decision to not fulfill Scardina's order, and cited his religious beliefs as the reason why the bakery would not do so.

10. Upon information and belief, the bakery sells made-to-order birthday cakes to non-transgendered individuals.

11. On June 28, 2018, following the investigation, the Division Director's authorized designee found probable cause for crediting the allegations of the charge

that Masterpiece discriminated against Scardina in a place of public accommodation based on her sexual orientation (transgender status).

12. As required by § 24-34-306(2)(b)(II), C.R.S. (2018), the Division Director's authorized designee ordered the parties to attempt amicable resolution of the charge by compulsory mediation.

13. Upon information and belief, efforts to resolve the matter amicably through the ordered mediation have been unsuccessful.

14. On October 2, 2018, the Commission voted to notice this matter for a hearing and to file this formal complaint.

15. The Commission alleges that Masterpiece denied service to Scardina based on her sexual orientation (transgender status), as defined by § 24-34-301(7), C.R.S. (2018), in a violation of § 24-34-601(2)(a), C.R.S. (2018).

16. The Commission further alleges that Masterpiece is not a place that is principally used for religious purposes, as contemplated by § 24-34-601(1), C.R.S. (2018).

The Commission seeks the following relief:

1. That Masterpiece and Phillips be ordered to allow Scardina and all customers that seek goods and services from the bakery, the full use and enjoyment of the goods, services, facilities, privileges, advantages, and/or accommodations of this place of public accommodation, regardless of their sexual orientation.

2. That Masterpiece and Phillips be ordered to cease and desist their practices of discriminating against persons based on their sexual orientation and to immediately discontinue their policy and practice of refusing to provide goods and services to persons due to their sexual orientation.

3. That Masterpiece and Phillips be ordered to adopt a corrective policy which will allow Scardina and other similarly situated persons the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations provided by the bakery regardless of their sexual orientation.

4. That Masterpiece and Phillips be ordered to report to the Commission all remedial action taken to eliminate the discriminatory practices until such time as it has been established that all discriminatory practices have ceased.

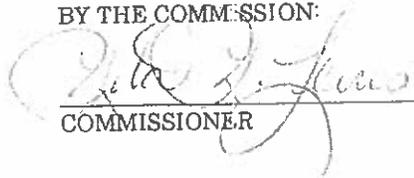
5. That Masterpiece and Phillips be ordered not to retaliate against Scardina in any way.

6. That Masterpiece and Phillips be ordered to provide any other relief which may be available to Scardina by virtue of operation of law and any other relief the Commission deems just and proper.

Masterpiece and Phillips may file a verified answer prior to the date of the hearing. The hearing will be conducted pursuant to sections 24-34-306 and 24-4-105, C.R.S. (2018). Failure to answer the complaint at hearing may result in entry of default judgment against Masterpiece and Phillips.

Dated this 9<sup>th</sup> day of October, 2018.

BY THE COMMISSIONER:



Handwritten signature of the Commissioner in cursive script, written over a horizontal line.

COMMISSIONER

**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **NOTICE OF HEARING AND FORMAL COMPLAINT** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 9 day of October, 2018 addressed as follows:

Autumn Scardina  
7779 Everett Way  
Arvada, CO 80005

John McHugh  
Reilly Pozner LLP  
1700 Lincoln Street, Suite 3400  
Denver, CO 80203

Masterpiece Cakeshop, Incorporated  
3355 S. Wadsworth Blvd., H-117  
Lakewood, CO 80227

Jacob Warner, Esq.  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> St.  
Scottsdale, AZ 85260

By interdepartmental mailing services, copies were sent to:

Matthew Azer  
Director/Chief ALJ  
Office of Administrative Courts  
1525 Sherman St, 4th Floor  
Denver, CO 80203

Michelle Brissette Miller  
First Assistant Attorney General  
Employment/Personnel & Civil Rights Unit  
Civil Litigation & Employment Law Section  
1300 Broadway, 10th Floor  
Denver, CO 80203

By Hand Delivery for filing on October 9, 2018:

Office of Administrative Courts  
1525 Sherman St, 4th Floor  
Denver, CO 80203

Adriana Camonca

# **EXHIBIT E**

STATE OF COLORADO COLORADO CIVIL RIGHTS COMMISSION	<b>▲ COURT USE ONLY ▲</b>
AUTUMN SCARDINA, Complainant  v.  MASTERPIECE CAKESHOP INCORPORATED, And JACK PHILLIPS, Respondents	Charge No. CP2018011310  Case Number: CR 2018 ____
<b>UNOPPOSED MOTION FOR LEAVE TO INTERVENE</b>	

Complainant, Autumn Scardina, pursuant to 3 CCR § 708-1 (2013) Rule 10.8(A)(5), moves for leave to intervene, and as grounds therefore, states as follows:

1. Rule 10.8(A)(5) provides that at “the discretion of the administrative law judge, the complainant shall be permitted to intervene through counsel to present evidence and to examine and cross examine witnesses.” 3 CCR § 708-1 (2017) Rule 10.8(A)(5)
2. Complainant seeks to intervene and be represented by counsel during the proceedings in this matter.
3. Undersigned counsel certifies that he has conferred with counsel for the Attorney General’s office in support of the complaint, and counsel for the Respondents, regarding this motion and neither object to this motion.
4. The name of intervening counsel are:

John M. McHugh  
Reilly Pozner LLP  
1700 Lincoln Street, Suite 3400  
Denver, CO 80203  
(303) 893-6100  
[jmchugh@rplaw.com](mailto:jmchugh@rplaw.com)

Paula Greisen  
King & Greisen  
1670 York St.  
Denver, CO 80206  
(303) 298-9878  
greisen@kinggreisen.com

WHEREFORE, Complainant respectfully requests leave to intervene in the above caption case.

Dated this 18th day of October, 2018.

Respectfully submitted

John M. McHugh

John M. McHugh  
Reilly Pozner LLP  
1700 Lincoln Street, # 3400  
Denver, CO 80203  
[jmchugh@rplaw.com](mailto:jmchugh@rplaw.com)

### **CERTIFICATE OF SERVICE**

I hereby certify that on October 18, 2018, a true and correct copy of the Motion for Leave to Intervene was served via U.S. Mail, postage prepaid, on the following:

Masterpiece Cakeshop, Incorporated  
3355 S. Wadsworth Blvd., H-117  
Lakewood, CO 80005

Jacob Warner, Esq.  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
Scottsdale, AZ 85260

Matthew Azer  
Director/Chief ALJ  
1525 Sherman St., 4<sup>th</sup> Floor  
Denver, CO 80203

Michelle Brissette Miller  
First Assistant Attorney General  
Employment/Personnel & Civil Rights Unit  
Civil Litigation & Employment Law Section  
1300 Broadway, 10<sup>th</sup> Floor  
Denver, CO 80203

Office of Administrative Courts  
1525 Sherman St., 4<sup>th</sup> Floor  
Denver, CO 80203

s/ John M. McHugh

John M. McHugh

# **EXHIBIT F**

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	▲ COURT USE ONLY ▲
<b>AUTUMN SCARDINA,</b> Complainant,  vs.  <b>MASTERPIECE CAKESHOP INCORPORATED and</b> <b>JACK PHILLIPS,</b> Respondents.	
<b>ORDER GRANTING MOTION TO INTERVENE</b>	

Complainant, through counsel, has filed an Unopposed Motion for Leave to Intervene. The motion was served on all parties by mail on October 18, 2018 and indicates it is unopposed by legal counsel for the Respondents and Counsel in Support of the Complaint. Pursuant to Colorado Civil Rights Commission Rule 10.8(A)(5) and (B), 3 CCR 708-1, a complainant may intervene at the discretion of the Administrative Law Judge either in person or by counsel. Based on a review of the unopposed motion and the case filings in this matter, it is hereby ordered that:

The Complainant's Motion for Leave to Intervene is granted. Complainant's private counsel shall be permitted to present oral testimony or other evidence and to examine and cross-examine witnesses at the hearing on the merits in this matter.

Dated this 24<sup>th</sup> day of October, 2018.

/s/ MICHELLE A. NORCROSS  
 Supervising Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above **ORDER GRANTING MOTION TO INTERVENE** was served by placing the same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

John M. McHugh, Esq.  
Reilly Pozner, LLP  
1700 Lincoln Street, Suite 3400  
Denver, CO 80203

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

Jacob Warner, Esq.  
Alliance Defending Freedom  
15100 N. 90<sup>th</sup> Street  
Scottsdale, AZ 85260

and was served by courier pickup on: Michelle Brissette Miller, First Assistant Attorney General, Civil Litigation Section, 1300 Broadway, 10<sup>th</sup> Floor, Denver, CO 80203; on this 30<sup>th</sup> Day of October 2018.

    /s\ Marc Marcel      
Office of Administrative Courts