

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

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED,  
a Colorado corporation; and  
JACK PHILLIPS,

*Plaintiffs,*

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;  
ANTHONY ARAGON, as member of the Colorado Civil Rights Commission, in his official and individual capacities;  
MIGUEL “MICHAEL” RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official and individual capacities;  
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official and individual capacities;  
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official and individual capacities;  
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official and individual capacities;  
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official and individual capacities;  
AJAY MENON, as member of the Colorado Civil Rights Commission, in his official and individual capacities; and  
PHIL WEISER, Colorado Attorney General, in his official capacity,

*Defendants.*

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**PLAINTIFFS’ RESPONSE IN OPPOSITION TO AUTUMN SCARDINA’S MOTION  
TO INTERVENE REGARDING PLAINTIFFS’ REQUEST FOR PRELIMINARY  
INJUNCTION**

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## INTRODUCTION

This case is about whether *the government* has shown hostility toward Plaintiffs Jack Phillips and Masterpiece Cakeshop (collectively, Phillips) and whether *the government* can enforce its Anti-Discrimination Act (CADA) against Phillips by requiring him to create custom cakes that express messages in conflict with his religious beliefs. Whatever legally cognizable interests proposed intervenor Autumn Scardina may have in this case, Defendants (collectively, Colorado) adequately represent them, and Scardina's intervention request is untimely and prejudicial at this stage. Scardina's objectives, motives, and actions do not affect the constitutionality of Colorado's decision to prosecute Phillips based on the information available to it. Scardina's proposed intervention will only complicate matters by duplicating Colorado's efforts and by distracting from the central issue.

After the U.S. Supreme Court condemned Colorado for unjustly enforcing CADA against Phillips the first time, Colorado targeted Phillips again—necessitating this action. In light of these unique circumstances, no one can question Colorado's zeal to prosecute Phillips. Nor can anyone doubt the competency or resources of Colorado's lawyers. Yet Scardina still seeks to intervene to oppose Phillips's preliminary injunction motion and to participate in an evidentiary hearing that is less than a month away. This Court should deny Scardina's late request for three reasons.

First, Scardina's interests do not warrant intervention. Colorado courts have repeatedly explained that CADA is designed to eliminate discriminatory practices and that any benefit to an individual complainant—like Scardina—is merely incidental. The timing and nature of Scardina's requests also undermine Scardina's interest since Scardina requested a custom cake on the day the U.S. Supreme Court accepted Phillips's first case, Scardina volunteered that its design would

express messages contrary to Phillips's faith, and Scardina subsequently requested another custom cake to celebrate Satan's "birthday." Scardina seems more interested in getting Phillips to decline cakes than in receiving them.

Second, Colorado adequately represents Scardina's interests. To the extent Scardina has valid interests in this case, those interests are in CADA's enforcement. And Colorado has the legal obligation, incentive, and skill to represent those interests adequately. Indeed, it just defended CADA's enforcement all the way to the Supreme Court.

Third, Scardina's intervention request is untimely and intervention would prejudice Phillips. Scardina has been aware of this case for at least five of the six months it has been active. While Scardina fears a preliminary injunction, Phillips's original preliminary injunction motion was fully briefed and a hearing held on that motion two months ago. If Scardina considers it necessary to intervene to resist a preliminary injunction, the time to do so was months ago. Not now.

Now is too late, and intervention at this stage would prejudice Phillips. The parties have already made multiple discovery agreements, litigated discovery disputes, exchanged written discovery, and provided lists of potential witnesses for the upcoming evidentiary hearing. Phillips's counsel are now preparing to take and defend depositions, present arguments, and examine witnesses at the upcoming hearing, and also to reply to Colorado's opposition to the preliminary injunction motion. To face the unexpected introduction of a new party—with undisclosed witnesses and potential discovery requests—so close to a hearing date is prejudicial.

This Court should therefore deny Scardina’s motion to intervene and allow Phillips to move forward with his request for a preliminary injunction while Colorado advocates for its interests in enforcing CADA—interests it shares with Scardina.

### **BACKGROUND**

Scardina is a Colorado lawyer whose website indicates that Scardina “take[s] great pride” in suing businesses that allegedly “discriminate against lesbian, gay, bisexual, and transgender people and serving them their just desserts.” Doc. 104-8 at 2. On the very day the U.S. Supreme Court announced it would hear Phillips’s case, Scardina called Masterpiece Cakeshop. Doc. 51, ¶¶ 1, 184. During that call, Scardina requested a custom cake, volunteering that it was to reflect and celebrate a gender transition. Doc. 104-3 at 3-4; Doc. 104-5 at 7; Doc 104-4 at 14. Masterpiece Cakeshop politely declined to create that cake because it would express and celebrate a message contrary to Phillips’s religious beliefs. Doc. 51, ¶¶ 7, 191. Scardina asked the shop’s representative to repeat herself so that someone listening over the speaker phone could hear it. *Id.* at ¶ 195. Scardina then filed a discrimination complaint with Colorado. Doc. 104-3 at 3-4. Over the course of the next year, Phillips received requests for cakes celebrating Satan, featuring satanic symbols, depicting sexually explicit materials, and promoting marijuana use. Doc. 51, ¶¶ 6, 307-324. Phillips has confirmed that Scardina submitted at least one of those requests. *Id.* ¶¶ 6, 199, 305-322.

Only 24 days after the U.S. Supreme Court ruled in Phillips’s favor and condemned Colorado’s hostility toward his religious beliefs, Colorado concluded that Phillips violated Colorado law by declining to create Scardina’s requested custom cake celebrating a gender transition. *Id.* ¶ 7. Given Colorado’s unabated hostility toward Phillips’s religious beliefs and his

decisions about how to exercise his constitutional freedoms, Phillips brought this action against Colorado on August 14, 2018. Scardina was aware of the lawsuit on or before September 17, 2018, and wrote about the case online. Warner Decl. ¶¶ 3-6. At that time, neither Phillips nor Colorado had taken any substantive action in the case. But much has occurred since then.

On October 9, 2018, the Colorado Civil Rights Commission issued a formal complaint against Phillips, indicating that it was going to proceed with prosecuting him. Doc. 117-4. Phillips then filed an amended complaint on October 23, 2018. Doc. 51. Two days later, Phillips filed a preliminary injunction motion. Doc. 57. Colorado moved to dismiss Phillips's amended complaint. Doc. 64. The parties engaged in simultaneous briefing on the motions to dismiss and for preliminary injunction, and the Court set a hearing on these motions for December 18, 2018. Doc. 82.

At that hearing, the Court denied Phillips's motion for preliminary injunction and ordered the parties to propose a briefing schedule for an amended preliminary injunction motion. Doc. 90. Then, on January 4, 2019, the Court partially denied and partially granted Colorado's motion to dismiss. Doc. 94. The parties filed a joint status report on January 11, 2019 with proposed dates for briefing and for an evidentiary hearing on the preliminary injunction motion. Doc. 96. On January 15, 2019, the Court issued a Scheduling Order specifying parameters and deadlines for expedited discovery to prepare for the evidentiary hearing, Doc. 99, and the parties subsequently entered into multiple agreements about discovery, *see* Doc. 120-1, including a joint proposed protective order, Doc. 111. On January 16, 2019, the Court set a briefing schedule for the preliminary injunction motion and set the hearing for March 14 and 15, 2019. Doc. 102.

On February 8, 2019, three weeks after Phillips filed his amended preliminary injunction motion, and months after Phillips filed his original motion, Scardina moved to intervene to oppose Phillips’s request for a preliminary injunction and to participate in the March 14 and 15 hearing. Doc. 117. Aside from an email a few days before that filing, Scardina had not previously informed Phillips of an intent to intervene, and the parties’ discovery agreements and proposed schedules were determined without contemplating Scardina’s participation.

### **ARGUMENT**

Scardina wishes to intervene to oppose Phillips’s “request for preliminary injunction” and to participate in “the scheduled evidentiary hearing regarding the same.” Doc. 117 at 1 (Mot. to Intervene). Scardina seeks to intervene as of right under Federal Rule of Civil Procedure 24(a) or permissively under Rule 24(b). But Scardina cannot justify doing either.

#### **I. Scardina cannot justify intervention as of right under Rule 24(a).**

Scardina can only intervene as of right under Rule 24(a) if all of the following elements are satisfied: (1) Scardina must have “an interest relating to the property or transaction which is the subject of the action” and which may be impaired or impeded, (2) Scardina’s interest must not be adequately represented by Colorado, and (3) Scardina’s request for intervention must be “timely.” *Utah Ass’n of Ctys. v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001) (quoting *Coal. of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 840 (10th Cir. 1996)). Scardina cannot satisfy any of these elements.

##### **A. Scardina does not have a valid interest justifying intervention as of right.**

To intervene as of right, Scardina must show “an interest relating to the property or transaction which is the subject of [this] action” that may be impaired or impeded. *Utah Ass’n*, 255

F.3d at 1249 (quoting *Coal. of Ariz./N.M.*, 100 F.3d at 840). Given that Scardina asked Phillips for a custom cake with a design that reflects and celebrates a gender transition *on the very day* the Supreme Court agreed to hear Phillips’s first case, that Scardina volunteered that the cake’s design would express and celebrate messages contrary to Phillips’s faith, and that Scardina later asked Phillips to create a “birthday” cake for Satan depicting Satan smoking marijuana, it is doubtful whether Scardina has any good-faith interest in Phillips’s services separate and apart from a desire to harass him. Doc. 51, ¶¶ 184-186, 311-315. But even setting that question aside, Scardina still lacks a sufficient interest in the Commission proceeding to justify intervention.

The Tenth Circuit has indicated that “the requisite interest to intervene as of right ... must be ‘direct, substantial, and legally protectable.’” *Utah Ass’n*, 255 F.3d at 1251 (quoting *Coal. of Ariz./N.M.*, 100 F.3d at 840). A more “recent Tenth Circuit decision cast[] doubt upon the usefulness of the ‘direct, substantial, and legally protectable’ test without explicitly overruling it.” *United States v. N. Colo. Water Conservancy Dist.*, 251 F.R.D. 590, 597 n.3 (D. Colo. 2008). That decision indicated that “practical judgment must be applied in determining whether the *strength of the interest* and the potential risk of injury to that interest justify intervention.” *San Juan Cty. v. United States*, 503 F.3d 1163, 1199 (10th Cir. 2007) (en banc) (emphasis added).

Whether looking for a “direct” and “substantial” interest, *Utah Ass’n*, 255 F.3d at 1251, or applying “practical judgment” to determine whether the “strength of the interest” justifies intervention, *San Juan*, 503 F.3d at 1199, Scardina’s interest falls short. As Colorado cases make clear, any interest Scardina may have in the Commission proceeding that Phillips seeks to enjoin are “*merely incidental.*” *Brooke v. Rest. Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995) (emphasis added) (explaining that CADA “is not designed primarily to compensate individual claimants, but

to eliminate unfair or discriminatory practices as defined by [CADA],” and that “[a]ny benefits to the individual obtained by the [Commission] are merely incidental”); *see also Agnello v. Adolph Coors Co.*, 689 P.2d 1162, 1165 (Colo. Ct. App. 1984) (stating that CADA’s “primary purpose is not ... to provide relief for the individual claimants” and that the claimant is “only an *incidental beneficiary* of any determination ultimately rendered by the Division and Commission” (emphasis added)); *Red Seal Potato Chip Co. v. Colo. Civil Rights Comm’n*, 618 P.2d 697, 700 (Colo. Ct. App. 1980) (noting that CADA “was not intended to provide relief to individual claimants”). The incidental nature of Scardina’s interest is further confirmed because state law restricts an intervenor in the Commission proceeding, as Scardina’s own motion to intervene in that matter concedes, to the limited role of “present[ing] evidence” and “examin[ing] and cross examin[ing] witnesses.” Doc. 117-8 at 1 (Unopposed Mot. for Leave to Intervene) (quoting 3 CCR § 708-1:10.8(A)(5)).

If Scardina wished to have a direct or strong interest in an action against Phillips, Scardina needed to ask the Commission for a right-to-sue letter. But Scardina did not do so—accepting a far reduced role as only a potentially incidental beneficiary of the Commission’s action—even *after* becoming aware that this lawsuit sought to enjoin the Commission. *See* Doc. 1, Prayer for Relief, ¶ 1. Specifically, Scardina was aware of the present action by at least September 17, 2018, Warner Decl. ¶¶ 3-6, and could have requested a right-to-sue letter “at any time prior to service of a notice and complaint” by the Commission, Colo. Rev. Stat. § 24-34-306(15), which occurred on October 9, 2018, *see* Doc. 117-4 at 5 (Notice of Hr’g & Formal Compl.).

Because Scardina chose to rely on the Commission’s efforts rather than seeking a direct interest in an action against Phillips, Scardina lacks a basis to intervene. The mere possibility of

receiving an *incidental* benefit as a result of Commission proceeding is neither a direct and substantial interest nor a strong interest justifying mandatory intervention.

**B. Colorado adequately represents any of Scardina’s valid interests.**

When a current party adequately represents a proposed intervenor’s interests, attempts to intervene as of right cannot succeed. *Kane Cty. v. United States*, 597 F.3d 1129, 1133-34 (10th Cir. 2010) (“Even if an applicant satisfies the other requirements of Rule 24(a)(2), it is not entitled to intervene if its ‘interest is adequately represented by existing parties.’” (quoting *San Juan*, 503 F.3d at 1203 (en banc))). Here, Scardina bears the burden of showing inadequate representation, but has failed to satisfy it. *Utah Ass’n*, 255 F.3d at 1254.

To be sure, Scardina doubts Colorado’s ability to “represent Ms. Scardina’s personal interests,” Mot. to Intervene 2, Doc. 117, saying Colorado cannot simultaneously represent the public interest and Scardina’s private interest, and that Colorado’s “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.” *Id.* at 7. But according to Colorado, it must prosecute Phillips based on Scardina’s complaint as part of its duty to enforce CADA. And Colorado’s defense against claims of anti-religious hostility and bad faith is necessary for it to pursue Scardina’s claim. So here, Colorado’s and Scardina’s interests align perfectly.

While Scardina may have knowledge about communications between Scardina and Masterpiece Cakeshop, those details don’t matter here. Whether those details may be relevant in a Commission proceeding is a separate question, making the propriety of Scardina’s limited

intervention there irrelevant to the question of intervention here.<sup>1</sup> Indeed, given the issues here, this Court has already said that it is “not interested” in hearing evidence from Colorado—or presumably Scardina—that “might otherwise [be] present[ed] to the administrative law judge.” Doc. 96-1 at 75 (Tr. of Dec. 18, 2018 Hearing). What matters are the facts *as understood by Colorado* when it decided to prosecute Phillips yet again—not the facts as Scardina understands them. On that question, Colorado is fully equipped to make the best possible arguments using its best evidence. And it has a strong incentive to do so because it is facing allegations of bad faith and anti-religious hostility.

The clear, singular goal shared by Colorado and Scardina—to proceed with the Commission proceeding against Phillips—distinguishes this case from those cited by Scardina. *Id.* (citing cases in which courts questioned the ability of the government to adequately represent the interests of proposed intervenors). Those cases involved complicated and multifaceted scenarios, such as environmental concerns and regulations of agricultural cooperatives engaging in transportation for hire in interstate commerce. In such cases, diverging interests and litigation positions should be expected. Here, however, the ultimate preliminary injunction question is whether Colorado can continue its Commission proceeding against Phillips. On that specific question, Colorado and Scardina stand united.

For that reason, Colorado can adequately represent any interest Scardina may have in this litigation. *See San Juan*, 503 F.3d at 1203-04, 1206 (Hartz, J., lead opinion) (explaining that precedents expressing concern about inadequate representation when the government “has

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<sup>1</sup> As already indicated, Scardina’s motion to intervene in the Commission proceeding was limited to the ability “to present evidence and to examine and cross examine witnesses.” Doc. 117-8 at 1 (Unopposed Mot. for Leave to Intervene) (quoting 3 CCR § 708-1:10.8(A)(5)).

multiple interests to pursue” simply “do[] not apply . . . when interests are aligned” and *presuming* that the government adequately represents the interests of proposed intervenors). Even if Colorado’s “ultimate motivation . . . may differ” from Scardina’s, its “objective is identical.” *City of Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1042 (10th Cir. 1996). And “representation is *adequate* ‘when the objective of the application for intervention is identical to that of one of the parties.’” *Id.* (quoting *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986)). This presumption of adequacy of representation is bolstered by Colorado’s history of doggedly pursuing Phillips for supposedly violating CADA.

Thus, any interests Scardina may have in the questions addressed in this case are more than adequately represented by Colorado. In fact, Scardina’s proposed response to Phillips’s preliminary injunction motion largely repeats the arguments made by Colorado.

**C. Scardina’s intervention request is untimely and will prejudice Phillips.**

When evaluating the timeliness prong, courts consider all the circumstances, placing particular emphasis on “(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. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017). These factors show that Scardina’s motion is untimely.

First, Phillips filed this case six months ago, and Scardina has known about it for at least five months—as Scardina’s online post about the case indicates. Warner Decl. ¶¶ 3-6. Since the litigation began, it has proceeded rapidly. While Scardina tries to excuse the delay in seeking intervention by claiming to have “reasonably waited for resolution of [Colorado’s] motion to dismiss . . . to ascertain whether intervention would be necessary,” that justification fails. Doc. 117 at 5 (Mot. to Intervene). In cases that stay dormant while a motion to dismiss is the first matter

briefed and decided, courts sometimes allow potential intervenors to wait and see whether the case will continue. But this is not such a case.

Colorado's motion to dismiss and Phillips's preliminary injunction motion were briefed simultaneously. The hearing on those two motions occurred on the same day two months ago. And, as far as Scardina and the parties knew, this Court could have decided both motions that day. So, while Scardina emphasizes the need to stop this Court from issuing a preliminary injunction, Scardina watched from the sidelines when the question was first presented. If Scardina wanted to participate in preliminary injunction proceedings, at the very least Scardina should have tried to intervene when the matter was first before this Court. The fact that this Court happened to ask Phillips to file an amended preliminary injunction motion does not remedy Scardina's untimeliness.

Second, Scardina's efforts to intervene now are prejudicial to Phillips. After the December 18, 2018 hearing where this Court asked the parties to prepare for an evidentiary hearing, the parties have conducted intense litigation efforts. They have exchanged potential witness lists, engaged in discovery disputes, reached discovery agreements, exchanged expedited discovery, and submitted a stipulated protective order. The parties are crafting arguments, reviewing documents, and preparing to take and defend depositions within a short timeframe. With the evidentiary hearing and arguments less than a month away, it would prejudice Phillips to require his counsel to suddenly need to account for a new party—that party's involvement in the evidentiary hearing with undisclosed witnesses, that party's potential efforts to obtain expedited discovery, and the potential need to obtain expedited discovery from that party and that party's witnesses to avoid surprises at the hearing.

Finally, denying intervention will not prejudice Scardina. Scardina’s claim of prejudice—that a preliminary injunction would require waiting on the Commission proceeding “until final resolution of this case”—is minimal. Mot. to Intervene 5, Doc. 117. Scardina does not explain what, if any, harm Scardina will suffer if the Commission proceeding is delayed. In fact, Scardina could have avoided the potential of a delay in the Commission proceeding by requesting and receiving a right-to-sue letter. But Scardina chose not to do so despite knowing of this lawsuit and did not seek to intervene when the preliminary injunction was first before this Court. All this undercuts any argument of prejudice if Scardina cannot intervene now. In any event, Colorado adequately represents Scardina’s interests, so Scardina will not suffer any prejudice if unable to intervene.

For these reasons—Scardina’s insufficient interest in the Commission proceeding, the adequacy of representation, and the untimely and prejudicial nature of intervention—this Court should deny Scardina’s motion to intervene as of right.

## **II. Scardina is not entitled to permissive intervention under Rule 24(b).**

The Court “may” permit intervention when a proposed intervenor files a “timely motion” and “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b); *see also Kane Cty.*, 597 F.3d at 1135 (noting that whether to allow or forbid “permissive intervention lies within the discretion of the district court”). As discussed above, Scardina’s motion is not “timely,” as the rule for permissive intervention requires. *See* Fed. R. Civ. P. 24(b)(1). Therefore, Scardina does not qualify for permissive intervention.

Even when a proposed intervenor files a timely request to permissively intervene, the Court “must consider whether the intervention will unduly delay or prejudice the adjudication of the

original parties' rights." Fed. R. Civ. P. 24(b)(3). Again, as the discussion above proves, Scardina's intervention will prejudice Phillips.

And beyond that prejudice to Phillips, Scardina's presence will not add value to this case. That is because Colorado's aim in this case aligns perfectly with Scardina's. *Cf. Tri-State Generation & Transmission Ass'n v. N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1075 (10th Cir. 2015) (explaining that the district court did not err in rejecting permissive intervention due to existing adequate representation). What's more, any information that Scardina seeks to add about Scardina's interactions with Masterpiece Cakeshop will distract from the core question—whether Colorado acted unconstitutionally based on the information available to it when it launched the Commission proceeding against Phillips. In the end, Scardina's participation at best duplicates Colorado's efforts and at worst diverts attention from the actual controversy. *See N. Colo. Water*, 251 F.R.D. at 599 (“[T]he Tenth Circuit has explained that if an applicant’s intervention ‘clutter[s] the action’ without aiding the current parties or issues, the applicant’s motion to intervene may be denied.” (quoting *Arney v. Finney*, 967 F.2d 418, 421-22 (10th Cir. 1992)) (alteration in original)).

Allowing Scardina's intervention will inflict harm on Phillips with no corresponding benefit to the parties, the Court, or Scardina. This Court should deny the request for permissive intervention.<sup>2</sup>

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<sup>2</sup> If Colorado has not presented arguments that Scardina wishes to, Scardina can always submit an *amicus curiae* brief.

**CONCLUSION**

This Court should deny the motion to intervene because Scardina's interests do not justify intervention, Colorado adequately represents those interests, the motion is untimely, and intervention would prejudice Phillips.

Respectfully submitted this 19th day of February, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 19, 2019, the foregoing document and all its attachments were filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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PHIL WEISER, Colorado Attorney General, in his official capacity,

*Defendants.*

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**DECLARATION OF JACOB P. WARNER IN SUPPORT OF PLAINTIFFS’  
RESPONSE IN OPPOSITION TO AUTUMN SCARDINA’S MOTION TO INTERVENE**

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I, JACOB P. WARNER, hereby declare:

1. I am over the age of eighteen and competent to testify, and I make this declaration based on my personal knowledge.

2. I am one of the attorneys representing Plaintiffs Masterpiece Cakeshop Incorporated and Jack Phillips in this litigation.

3. I am aware that Autumn Scardina is listed as an attorney and founder of Scardina Law. See <https://www.scardinalaw.com/About/>

4. On September 17, 2018, I discovered that the website for Scardina Law included a statement regarding Jack Phillips and Masterpiece Cakeshop.

5. On September 17, 2018, that statement said that “[i]n response” to the Colorado Civil Rights Division’s finding of probable cause regarding Autumn Scardina’s complaint, “Masterpiece Cakeshop recently filed a lawsuit in federal court.”

6. While I know that this statement existed on September 17, 2018, I do not know when it was first added to Scardina Law’s website.

7. The only lawsuit that Masterpiece Cakeshop filed in federal court following the Colorado Civil Rights Division’s probable cause finding is the lawsuit captioned above.

8. On September 17, 2018, I captured an electronic screenshot of the statement on Scardina Law’s website about Masterpiece Cakeshop.

9. A true and correct copy of that image is attached to this declaration as Exhibit A.

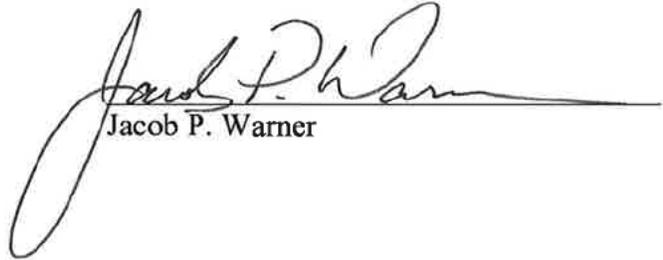
10. As of the date of this Declaration, the statement about Masterpiece Cakeshop remains on Scardina Law’s website and is available at

<https://www.scardinalaw.com/Masterpiece-Cakeshop-Information.shtml>.

**DECLARATION UNDER PENALTY OF PERJURY**

I, Jacob P. Warner, a citizen of the United States and a resident of the State of Arizona, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge.

Executed this 19th day of February, 2019, at Scottsdale, Arizona.



Jacob P. Warner

## Masterpiece Cakeshop Information

For years, Jack Phillips has claimed that he has no objection to providing cakes, including birthday cakes, for LGBTQ individuals. Taking him at his word, Ms. Scardina ordered a birthday cake. The design for this birthday cake, chosen by Ms. Scardina, was personally significant as it reflected her identity as a transgender woman. Nothing about the design of the cake (a pink cake with blue frosting) or the event (a birthday) violates any religious belief held by Mr. Phillips. In fact, Masterpiece Cakeshop agreed to make this cake for her. It was only after she identified herself as transgender that Masterpiece Cakeshop decided it had a religious objection to making a birthday cake for her. And it was at that point that Mr. Phillips' wife hung up without offering any other goods or services. Ms. Scardina's existence as a transgender woman was all Masterpiece Cakeshop needed to know to deny service to her.

As the United States Supreme Court recently explained in the previous Masterpiece case, religious objections 'do not allow business owners ... to deny protected persons equal access to goods and services' and that it is 'unexceptional that Colorado law can protect gay 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.' Under these well-settled legal principles, the Colorado Civil Rights Division appropriately found probable cause that Masterpiece Cakeshop's refusal to sell a birthday cake to Ms. Scardina. violated Colorado law.

In response, Masterpiece Cakeshop recently filed a lawsuit in federal court. This lawsuit confirms that Mr. Phillips' prior claims to being open to LGBTQ individuals was always false. Masterpiece Cakeshop asks the court for nothing less than a complete exemption from Colorado's "unexceptional" civil rights law. In the 1989 case of *Employment Division v. Smith*, Justice Antonin Scalia warned about this precise outcome if individuals like Mr. Phillips are allowed to use the veil of religion to object to laws of this type, noting that to 'make an individual's obligation to obey such a law contingent upon the laws coincidence with his religious beliefs' would allow that person 'to become a law unto himself' which 'contradicts both constitutional tradition and common sense.'

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