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Certiorari to the Colorado Court of Appeals Case No. 2021CA1142 Judges: Schutz, Dunn, Grove DISTRICT COURT, COUNTY OF DENVER District Court Judge: The Hon. A. Bruce Jones District Court Case No.19CV32214	
Petitioners: MASTERPIECE CAKESHOP INC. and JACK PHILLIPS, v. Respondent: AUTUMN SCARDINA.	▲ COURT USE ONLY ▲ Case No. 2023SC00116 Court of Appeals Case Number: 2021CA1142 District Court Case Number: 19CV32214 County: Denver
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AMICUS BRIEF OF CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONERS	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 4,707 words.

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to serving the Nation by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and focus on the dignity of the person, CVEF is deeply concerned about the threat that *Scardina v. Masterpiece Cakeshop Inc.*, 528 P.3d 926 (Colo. App. 2023) poses to freedom of speech. When public accommodations laws, like the Colorado Anti-Discrimination Act ("CADA"), are applied to commandeer the expression of businesses—forcing them to either convey, foster, or respond to a government-favored message—religious liberty and freedom of speech are endangered. CVEF, therefore, comes forward to support the right of all citizens to (1) practice their art (and earn their living) in a manner that is consistent with their religious faith and (2) participate fully in ongoing discussions regarding important local and national issues, such as same-sex marriage and gender identity.

ARGUMENT

This case requires the Court to consider the intersection of public accommodations laws and the broad protection afforded speech activity under the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). As the scope of public accommodations laws has grown—in terms of both the types of entities classified as public accommodations and the number of groups protected from discrimination—the possibility for conflict with First Amendment speech rights has increased. While acknowledging that public accommodations laws generally are constitutional when applied to a business's conduct, *Hurley* recognized that such laws must yield to the First Amendment when "the sponsors' speech itself [is taken] to be the public

accommodation." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

Under the Supreme Court's free speech precedents, this can happen in at least one of three ways: (1) by compelling a public accommodation to create or promulgate speech that conveys a government-preferred message, *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023) ("Generally, too, the government may not compel a person to speak its own preferred messages."); (2) by requiring individuals and businesses to foster or promote a government-mandated message, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (finding unconstitutional "a state measure which forces an individual … to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable"); or (3) by putting such individuals and businesses in a position where they must respond to the message of one whom the government permits to speak on or through their property or goods, *Pacific Gas and Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion) (explaining that "the State is not free … to force appellant to respond to views that others may hold"). When public accommodations laws are applied against businesses in any of these ways, such laws "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," which includes the right "to shape [one's] expression by speaking on one subject while remaining silent on another." *Hurley*, 515 U.S. at 573-74; *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (confirming that a speaker has the right to determine "both what to say and what *not* to say").

To protect "individual freedom of mind," the First Amendment "withdraw[s] certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *W. Va. State Bd. of Educ. v. Barnette*, 319

U.S. 624, 637-38 (1943). In so doing, "[t]he First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Serv. Empls. Intern. Union, Local 1000*, 567 U.S. 298, 309 (2012) (quoting *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)); *303 Creative*, 600 U.S. at 584-85 (citations omitted) ("By allowing all views to flourish, the framers understood, we may test and improve our own thinking both as individuals and as a Nation. For all these reasons, '[i]f there is any fixed star in our constitutional constellation,' it is the principle that the government may not interfere with 'an uninhibited marketplace of ideas.' "). CADA violates these First Amendment principles by forcing Phillips to convey, promote, or respond to Autumn Scardina's views on gender identity.

A. The lower courts' interpretation of CADA violates the First Amendment because it impermissibly requires Jack Phillips to create and express a message about gender transitioning with which he disagrees.

Given that "*all* speech inherently involves choices of what to say and what to leave unsaid," *PG&E*, 475 U.S. at 11, "the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. Parades and "[a]ll manner of speech—from 'pictures, films, paintings, drawings, and engravings,' to 'oral utterance and the printed word'—qualify for the First Amendment's protections." *303 Creative*, 600 U.S. at 587 (citation omitted); *Hurley*, 515 U.S. at 569 (explaining that "the Constitution looks beyond written or spoken words as mediums of expression" to include "symbolism"); *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952) (confirming that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the method of communication used). As the Court explained in *Citizens United v. Fed. Elec. Comm'n*:

> "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it."

558 U.S. 310, 372 (2010) (quoting *McConnell v. Fed. Elec. Comm'n*, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring)).

Baking may not be inherently expressive. Doughnuts, cakes, cookies, and breads usually are made for people to eat, just as people may march for no other reason than "to reach a destination." *Hurley*, 515 U.S. at 568. But when someone asks a cake artist to design a custom cake for a specific occasion (such as a wedding or a gender transition party), the cake is meant to do more than give attendees something to eat; it expresses and celebrates the importance of the event. As the lower courts recognized, the particular symbol in this case was communicative; it "reflect[ed Scardina's] identity as [an] LGBT individual[]." *Scardina v. Masterpiece Cakeshop Inc.*, Case No. 2019-cv-32214 at 19 (Colo. Dist. Ct. 2021). If "the refusal to provide the bakery item is inextricably intertwined with the refusal to recognize Ms. Scardina as a woman," *id*., then the creation of that symbol must be interconnected with support for and acceptance of Scardina's gender transition—which is why Phillips declined to make the cake. Like the parade organizers in *Hurley*, Phillips "decided to exclude a message [he] did not like from the communication [he] chose to make, … shap[ing his] expression by speaking on one subject while remaining silent on another." 515 U.S. at 574. Moreover, "[t]he message [he] disfavored is not difficult to identify." *Id*. Phillips did not believe "that such a transition is possible and should be celebrated." *Scardina*, 2019-cv-32214 at 10; *Hurley*, 515 U.S. at 574 (recognizing that "[t]he parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and

lesbians, or have some other reason"). Under the district court's analysis, then, the special-ordered cake *is* expressive. It conveys a message about Scardina's gender identity—that Scardina is a woman. And "whatever the reason" Phillips does not want to convey that message, under the First Amendment "it boils down to the choice of [Phillips] not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id*. at 575.

The district court intimates that the "analysis would be different if the cake design had been more intricate, artistically involved, or overtly stated a message attributable to Defendants." *Scardina*, 2019-cv-32214 at 22; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719, 1723 (2018) ("If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference."). Yet if an elaborate custom cake made for a particular celebration is expressive, there is no basis for holding that a simpler cake (created to convey the same message and celebrate the same event) is not. Simple does not mean non-expressive, as evidenced by, among other things, minimalist art like Ellsworth Kelly's "Yellow Piece," Brent Hallard's "Knot (Pink)," or Tony Smith's "Die." Phillips stated that he would sell any pre-made item to and make a wide variety of custom cakes for Scardina, refusing to make only those special order cakes that convey messages inconsistent with his religious beliefs. *Scardina*, 2019-cv-32214 at 10 (providing examples of such cakes).

As the Tenth Circuit confirmed in *Cressman v. Thompson*, "[t]he concept of pure speech is fairly capacious" and includes works with an "expressive character." 798 F.3d 938, 952 (10th Cir. 2015). Moreover, " 'the basic principles of freedom of speech … do not vary' when a new and different medium of communication

appears." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc.*, 343 U.S. at 503). Custom-made cakes—even "simple" ones—can be "a primitive but effective way of communicating ideas." *Barnette*, 319 U.S. at 632. Symbols, like a blue cake with a pink interior, are chosen "to symbolize some system, idea, institution, or personality" and are meant to serve as "a short cut from mind to mind." *Id*. That some people may not discern the intended message—or even realize that the work is expressive—does not remove the speech from the protection of the First Amendment, which is why the First Amendment guards even abstract works like the "paintings of Jackson Pollock," the atonal "music of Arnold Schöenberg," and the nonsensical "verse of Lewis Carroll." *Hurley*, 515 U.S. at 569; *Barnette*, 319 U.S. at 632-33 ("A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."). The cake at issue here was intended to "celebrat[e Scardina's] transition from male to female." *Scardina*, 528 P.3d at 931. And because the cake expressed a message, the First Amendment safeguards Phillips's "choice … not to propound a particular point of view," *Hurley*, 515 U.S. at 575, including viewpoints that conflict with his vision of "what merits celebration." *Id*. at 574. Accordingly, because some baking *is* expressive (just like some marching is), the government cannot apply CADA to force Phillips to create such expressive works for government-preferred customers.

B. Assuming for the sake of argument that custom-made cakes are not inherently expressive, CADA still violates Phillips's right not to foster or promote views that he finds morally objectionable.

Contrary to the lower courts' suggestion, the First Amendment protects Phillips's decision not to make a gender transition cake even if Phillips is not viewed as speaking directly through that custom-made creation. *Scardina*, 2019-cv-32214 at 24 ("Although Ms. Scardina could be considered a speaker in this context,

Defendants—as explained above—would not have joined in that speech by making the requested cake."). As the Supreme Court explained in *Wooley*, the First Amendment shields a person's expressive activity and ensures that he or she cannot be conscripted to serve as a courier for the message of another: "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster … an idea they find morally objectionable." 430 U.S. at 715. In *Wooley*, the Maynards were not engaged in expressive activity; rather, they objected to New Hampshire's requiring them to display on their vehicle a state-owned license plate containing the state motto ("Live Free or Die"). While many (perhaps most) vehicle owners did not object to the State's message, the Maynards did because it conflicted with "their moral, religious, and political beliefs." *Id*. at 707. Even though the Maynards were not speaking, the Supreme Court held that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Id*. at 714. Forcing the Maynards—or anyone else—to promote "an ideological point of view he finds unacceptable … invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id*. at 715. As a result, *Wooley* found that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id*. at 717.

As applied to Phillips's custom creations, CADA violates *Wooley*'s admonition that the government cannot force individuals or businesses to serve as couriers for the ideological, political, or religious messages of the government (or third parties). According to the Court of Appeals, CADA requires Phillips to use his creative talents to make a custom cake celebrating Scardina's gender transition, thereby

making him "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id*. at 715. To "foster" is "to promote the growth or development of: encourage." Merriam-Webster Dictionary, "foster" (available at https://www.merriam-webster.com/dictionary/foster). CADA does exactly that. As the Supreme Court acknowledged last term, CADA "seeks to compel [certain] speech in order to 'excis[e] certain ideas or viewpoints from the public dialogue.' Indeed, the Tenth Circuit recognized that the coercive 'eliminati[on]' of dissenting 'ideas' about marriage constitutes Colorado's 'very purpose' in seeking to apply its law to Ms. Smith." *303 Creative*, 600 U.S. at 588 (citations omitted). By preventing public accommodations from declining to promote gender transitioning, CADA encourages only positive and supportive views on that topic. Phillips is made to serve as a conduit for these government-approved views regarding gender transitioning even though that message is directly opposed to his sincerely held religious beliefs. Yet "the law … is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579; *Barnette*, 319 U.S. at 642 ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). As applied to Phillips, therefore, CADA violates the First Amendment because it "identifies a favored speaker 'based on the identity of the interests that [the speaker] may represent,' and forces the speaker's opponent … to assist in disseminating the speaker's message." *PG&E*, 475 U.S. at 15.

The District Court made much of the fact that there is "no evidence in this case that a reasonable observer would understand the cake to convey any message attributed to Defendants." *Scardina*, 2019-cv-32214 at 23. Justice Rehnquist made

the same point in his dissent in *Wooley*. 430 U.S. at 721 (Rehnquist, J., dissenting) (denying that "appellees, in displaying … state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views"). The problem is that the majority in *Wooley* rejected this position, holding for the Maynards even though a reasonable observer would not attribute the State's message directly to them. *Id*. at 715 ("Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree."); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 (1980) (Powell, J., concurring) ("[T]he right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed … are those of the owner."). Regardless of who was speaking, the First Amendment safeguarded the Maynards from "fostering" views with which they disagreed and "becoming the courier for [the State's ideological] message." 430 U.S. at 717; *id*. at 721 (Rehnquist, J., dissenting) (describing how the majority's "fostering" requirement is much broader than conditioning First Amendment protection on an "affirmation of belief"). The First Amendment provides the same protections for Phillips and other public accommodations. *PruneYard*, 447 U.S. at 97-98 (Powell, J., concurring) ("A person who has merely invited the public onto his property for commercial purposes cannot fairly be said to have relinquished his right to decline 'to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable' ") (quoting *Wooley*, 430 U.S. at 715).

CADA, however, violates even the narrower reading of the First Amendment that Justice Rehnquist championed in his *Wooley* dissent. Justice Rehnquist would have upheld the New Hampshire statute because, among other things, "there is nothing in

state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plate." 430 U.S. at 722 (Rehnquist, J., dissenting). Given that "any implication that [the Maynards] affirm the motto can be so easily displaced," there was no basis for "invalidat[ing the statute] under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto." *Id*. In the present case, though, CADA's Communication Clause prohibits Phillips from "publish[ing] … any written, electronic, or printed communication … that indicates that the full and equal enjoyment of the goods, services, [or] facilities … of [Masterpiece Cakeshop] will be refused, withheld from, or denied an individual or that an individual's patronage or presence … is unwelcome, objectionable, unacceptable, or undesirable because of … gender identity." Colo. Rev. Stat. § 24–34–601(2)(a) (2022). Under CADA, Phillips cannot express his disagreement with the view "that a person can change genders and that a gender-transition should be celebrated" or explain why his religious beliefs preclude his "send[ing] a message to anyone that he would celebrate a gender transition." *Scardina*, 2019-cv-32214 at 5-6. Why? Because some potential customers might take such statements to mean that their "patronage or presence" is "objectionable … or undesirable." As a result, the Communication Clause imposes a viewpoint-based restriction on Phillips's speech and, along with the Accommodation Clause, provides Phillips with a choice: (1) foster a celebratory message about Scardina's gender transition and forego expressing his views on gender transitioning, or (2) be punished under CADA for conveying his sincerely held religious beliefs about this important issue and/or not making the custom cake. The first option violates *Wooley* and compels silence, while the second disciplines Phillips for exercising his First Amendment rights. Both are unconstitutional. *Ashcroft v. Am. Civil Liberties Union,* 535 U.S. 564, 573 (2002) (internal quotation marks omitted) ("[A]s a general matter, ... government has no power to restrict

expression because of its message, its ideas, its subject matter, or its content."); *Boy Scouts of America v. Dale*, 530 U.S. 640, 660-61 (2000) (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)) (explaining that the First Amendment protects the " 'freedom to think as you will and to speak as you think' " and " 'eschew[s] silence coerced by law—the argument of force in worst form.' ").

C. Given the national publicity regarding Phillips's beliefs, applying CADA to his custom creations puts him in the impermissible position of having to respond to Scardina and others who seek custom cakes conveying messages to which Phillips objects.

Even if this Court determines that Phillips is not directly engaged in expression (which he is) and that CADA does not force him to foster or promote a morally objectionable message (which it does), CADA still violates the First Amendment values articulated in *PG&E* and *PruneYard*. Under these cases, the government cannot require individuals or businesses to accommodate the speech of others when that mandated access might compel them to respond to a third party's expression: "[T]he State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold." *PG&E*, 475 U.S. at 11-12. The First Amendment precludes the government's requiring one "to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response" to the government regulation. *Id*. at 11 n.7. And this is true even when a reasonable observer knows that the message does not belong to the speaker because that awareness does "nothing to reduce the risk that [a business] will be forced to respond when there is strong disagreement with the substance of [the third party's] message." *Id*. at 15 n.11; *id*. at 18 (describing how "[s]uch forced association with potentially hostile views burdens the expression of views different

from [the third party's] and risks forcing appellant to speak where it would prefer to remain silent").

In *PG&E*, a plurality upheld the utility company's right not to carry the message of a third party (TURN) in its newsletter—even when the message was expressly identified as that of TURN and not of the company. According to *PG&E*, such "[c]ompelled access … both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set." *Id*. at 9 (plurality opinion). Pacific Gas's newsletter, *Progress*, included a range of topics "from energy-saving tips to stories about wildlife conservation, and from billing information to recipes." *Id*. at 8. But having spoken on specific topics, Pacific Gas was required to disseminate TURN's desired message, thereby fostering a message that it did not control and with which it might disagree. Pacific Gas, therefore, was in the same position as the newspaper in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974)—the government "interfered with [the utility's] 'editorial control and judgment' by forcing [it] to tailor its speech to an opponent's agenda, and to respond to [TURN's] arguments where the [utility] might prefer to be silent." *PG&E*, 475 U.S. at 10. Because "the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold," the Commission's order violated the First Amendment. *Id*. at 11; *PruneYard*, 447 U.S. at 100 (Powell, J., concurring) ("Thus, the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner.").

As interpreted by the lower courts in this case, CADA violates these First Amendment doctrines. The lower courts' opinions require Phillips "to carry speech with which [he] disagree[d]," *PG&E*, 475 U.S. at 11 n.7, or at a minimum respond to views that conflict with his own. *Id*. at 15 n.11 ("The presence of a disclaimer on

TURN's message … does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message."). And as *PG&E* and *PruneYard* both recognized, "[t]his pressure to respond 'is particularly apparent when,' " as in this case, " 'the owner has taken a position opposed to the view being expressed.' " *Id*. at 15-16 (quoting *PruneYard*, 447 U.S. at 100 (Powell, J., concurring)). Phillips's religious views on same-sex marriage and LGBT issues "were covered extensively in the media and became part of a public debate about religious freedom and antidiscrimination laws" as Phillips "was quoted in the media, gave TV interviews, and wrote op-eds seeking to explain his religious convictions." *Scardina*, 2019-cv-32214 at 3. The present case received additional national coverage as Scardina contacted Masterpiece Cakeshop to "call [Phillips's] bluff" and show that he was not "willing to serve people who identify as LGBT." *Id*. at 8.

Against this backdrop, Phillips "might well feel compelled to reply"—to defend his faith and to further explain his views on same-sex marriage and gender identity. *Id*. at 11 n.7; *Rumsfeld v. Forum for Academic and Inst. Rts., Inc.*, 547 U.S. 47, 49 (2006) (explaining that the First Amendment is violated when "the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate"). CADA, therefore, foists upon Phillips another impermissible choice: "he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he had been forced to speak when he would prefer to remain silent. In short, he has lost control over freedom to speak or not to speak on certain issues." *PruneYard*, 447 U.S. at 99 (Powell, J., concurring).

Furthermore, if the lower court's interpretation of CADA is upheld, Masterpiece Cakeshop will be forced to "contend with the fact that whenever it speaks out on a given issue, it may be forced … to help disseminate hostile views." *PG&E*, 475 U.S. at 14. After all, Phillips's defense of his Christian beliefs was the reason Scardina sought him out in the first place. Confronted with this possibility, Phillips " 'might well conclude' that, under these circumstances, 'the safe course is to avoid controversy,' thereby reducing the free flow of information and ideas that the First Amendment seeks to promote." *Id*. (quoting *Tornillo*, 418 U.S. at 257). The First Amendment, however, prevents the government from chilling speech through the application of public accommodations laws to individuals who disagree with the government's desired message. *See United States v. Alvarez*, 567 U.S. 709, 723 (2012) (noting that the Court cannot permit the government to "chill" speech "if free speech, thought, and discourse are to remain a foundation of our freedom").

In addition, *PruneYard* is wholly consistent with this analysis. In *Pruneyard*, third parties were permitted to distribute petitions only because the Court concluded that "[t]he principle of speaker's autonomy was simply not threatened." *Hurley*, 515 U.S. at 580. Unlike here, where Phillips expressly voiced his opposition to creating a custom cake celebrating Scardina's gender transition, in *PruneYard* there was no "concern that access to this [public] area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets." *PG&E*, 475 U.S. at 12 (plurality opinion). The mall owner never "alleged that [he] object[ed] to the ideas contained in the appellees' petitions" or that he disagreed with the views of any other group that might speak at the mall. *PruneYard*, 447 U.S. at 100-01. Accordingly, as *PG&E* acknowledged, "*PruneYard* … does not undercut the proposition that forced associations that burden protected speech are impermissible." 475 U.S. at 12.

CONCLUSION

As the Supreme Court recently explained in rejecting CADA's application to a creator of custom wedding websites, "[t]he First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands." *303 Creative*, 600 U.S. at 603. This is true with respect to all attempts by the government to compel or foster government-preferred speech. Where, as here, a public accommodations law is applied "in a peculiar way" to force a business to convey, foster, or respond to a government-preferred message, that law violates the First Amendment. *Hurley*, 515 U.S. at 572; *id*. at 574 (describing how the First Amendment protects "unsophisticated expression" and "shield[s] just those choices of content that in someone's eyes are misguided, or even hurtful."). This Court, therefore, should reverse the Colorado Court of Appeals and find that, as applied to Phillips, CADA violates the First Amendment.

Respectfully submitted this 19th day of December 2023 by:

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