COLORADO SUPREME COURT 2 EAST 14TH AVENUE DENVER, COLORADO 80203 Colorado Court of Appeals Case No. 2021CA1142 Judges Schutz, Dunn, and Grove presiding District Court, County of Denver Case No. 19CV32214 Honorable A. Bruce Jones presiding	DATE FILED: February 23, 2024 5:39 PM FILING ID: 40C65E3BA55EB CASE NUMBER: 2023SC116
MASTERPIECE CAKESHOP, INC. and JACK PHILLIPS, Petitioners v. **AUTUMN SCARDINA,** Respondent	COURT USE ONLY
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AMICI CURIAE BRIEF OF ACLU AND ACLU OF COLORADO IN SUPPORT OF RESPONDENT SCARDINA

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Amici Curiae brief complies with all requirements of C.A.R. 28, 29, and 32. The undersigned specifically certifies that:

This brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 4611 words. I acknowledge this brief may be stricken if it fails to comply with any requirement of the foregoing rules.

/s/ *Laura Moraff*

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STATEMENT OF INTEREST OF AMICI

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Colorado is one of the ACLU's statewide affiliates. As organizations that advocate for First Amendment liberties as well as equal rights for lesbian, gay, bisexual, and transgender people, the ACLU, the ACLU of Colorado, and their members have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws. The ACLU and ACLU of Colorado have appeared as counsel-of-record and as amicus curiae in many cases nationwide in which businesses challenge laws barring discrimination in public accommodations on First Amendment grounds, including as counsel-of-record in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018).

INTRODUCTION

This appeal arises from the refusal of bakery Masterpiece Cakeshop to sell a birthday cake to Autumn Scardina, a transgender woman who requested a pink cake with blue frosting from the bakery in 2017. The bakery had no objection to making such a cake—*until* Ms. Scardina said that she intended to use it to celebrate her birthday and her gender transition. At that point Masterpiece Cakeshop refused to

fill the order, although the bakery would have happily made this exact same cake were it not being used to celebrate a transgender person's gender identity. In short, the bakery did not object to anything inherent to the cake's design or message, but to the fact that Ms. Scardina sought to use it to celebrate her transgender status.

Ms. Scardina filed a complaint under the Colorado Anti-Discrimination Act ("CADA"), alleging discrimination based on gender identity. Following a bench trial, the district court ruled in favor of Ms. Scardina, Findings of Fact and Conclusions of Law, No. 19CV32214 (Denver Dist. Ct., Jun. 15, 2021), and the Colorado Court of Appeals affirmed, 2023 COA 8. Masterpiece Cakeshop appealed, and this Court granted review of three reframed questions:

> [REFRAMED] Whether Scardina's CADA claim is barred because Scardina did not appeal the Commission's dismissal of the administrative complaint before suing Masterpiece Cakeshop, Inc. and Phillips.
>
> [REFRAMED] Whether the decision by Masterpiece Cakeshop, Inc. and Phillips not to create a pink cake with blue frosting that was to be used to celebrate a gender transition violated CADA's prohibition on transgender-status discrimination.
>
> [REFRAMED] Whether the decision by Masterpiece Cakeshop, Inc. and Phillips not to create a pink cake with blue frosting that was to be used to celebrate a gender transition was protected by the First Amendment.

Order of Court, No. 2023SC116 (Oct. 3, 2023).

Amici ACLU and the ACLU of Colorado focus their brief on one part of this Court's third question: whether the First Amendment's free speech protections permit a business open to the public to violate CADA and discriminate based on a protected characteristic because the business owner objects to the purpose for which the customer intends to use that product.[1] Specifically, this brief addresses the impact of the U.S. Supreme Court's recent decision in *303 Creative LLC. v. Elenis*, 600 U.S 570 (2023), on the claims at issue in this case.

Colorado law prohibits a business from discriminating against customers based on their intended use of a product the business would sell to others where the "use" is a proxy for the customer's protected characteristic. The First Amendment does not provide a defense for such discrimination. Just as a bakery could not refuse to make a cake saying "Happy Birthday" to a customer on the ground that it was to be used to celebrate a Black child's birthday, so it does not permit Masterpiece Cakeshop to refuse to sell to Ms. Scardina a pink and blue cake that it would sell to anyone else merely because she intends to use it to celebrate her transgender identity.

When a storefront business refuses to sell a transgender person the identical

[1] Amici take no position on the first question. Amici agree with Ms. Scardina and the lower courts that the bakery's refusal to sell her the blue and pink cake she requested was based at least in part on her transgender status, and therefore unlawful under CADA. *See, e.g.*, *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 253 (Colo. App. 2006).

product it would sell to others because of objections to *why* the customer wants the product—and those objections are based on the customer's transgender status—that is discrimination, not protected expression. Nothing in *303 Creative* or any other decision of the U.S. Supreme Court supports Petitioner's contention to the contrary.

303 Creative expressly rejected the charge that its decision permitted identity-based discrimination, and instead upheld a business owner's right to refuse to express a particular message *for anyone*. Here, CADA is not being applied to compel a business to use its own words to express a message it objects to expressing for anyone. Instead, this case involves the very identity-based discrimination that the *303 Creative* majority insisted the First Amendment did not authorize. This dispute involves a plain, colored frosted cake that the parties agreed has no "particular inherent meaning"—not pure speech. The bakery admits it would have sold the *identical product* to other customers; it refused to sell it to Ms. Scardina not because of the content of the cake, but because it was to be used to celebrate a transgender person. The bakery admitted that it would not have sold *any* custom-made product (presumably even a plain vanilla sheet cake) to this customer—again, not because of any message the product inherently expressed, but because the owner objected to her use of the product to celebrate being transgender. That is identity-based discrimination under CADA and is not protected by the First Amendment.

ARGUMENT

Petitioners argue that the U.S. Supreme Court's decision in *303 Creative LLC v. Elenis,* protects their refusal to sell a cake to Ms. Scardina, because, they claim, they are being forced to express a message about gender to which they object. Pet'r's Br. 38-39. Because *303 Creative* is easily distinguishable and CADA is a law of general applicability, it should be subject to, at the most, intermediate scrutiny to the extent application of the law in this situation even burdens the bakery's expressive rights at all.

303 Creative held that the government may not compel a web designer to produce "pure speech"—an original, customized message using the owner's own words and artwork—expressing a view that the owner objected to expressing *for anyone*. The Court further found that in such circumstances, requiring the business to provide the service was motivated by a state desire to suppress disfavored ideas. At the same time, the Court expressly rejected the dissent's charge that it was authorizing businesses to refuse service to customers based on their identity. Because it found that 303 Creative did not object to the customer's identity, but to the content of the message it would be required to express, the law's application under these unusual circumstances violated the First Amendment.

This case is fundamentally different. It does not involve a request for a business to provide a "pure speech" service in the proprietor's own words expressing a message to which she objects. Instead, it involves the refusal to sell a cake bearing no message to a particular customer because she seeks to use it to celebrate being transgender. The cake itself, the parties agree, expresses no message. Thus, its mere sale to a particular person for a particular purpose cannot plausibly be characterized as the bakery's speech. The bakery would sell this exact same product to others; the only reason the owner refused to sell it to Ms. Scardina is that she seeks to *use* it to celebrate her transgender identity. *303 Creative* holds that businesses can refuse to express a particular message *for anyone*, and that application of nondiscrimination laws to compel them to express such a message violates the First Amendment. It does not remotely support a claim that a bakery can refuse to sell a cake to a transgender person that it would gladly sell to anyone else.

Petitioners contend that the Tenth Circuit's assertion that CADA's application to 303 Creative under the circumstances of that case was intended to suppress disfavored ideas—an assertion relied upon by the Supreme Court—establishes an impermissible government purpose for *all* applications of CADA. But that is wrong. CADA is a generally applicable nondiscrimination provision, designed to halt discrimination in sales by businesses open to the public. The Tenth Circuit's and

Supreme Court's reference to suppressing dangerous ideas was limited to peculiar applications, like that in *303 Creative* itself, where the law was used to compel a business to provide a "pure speech" service whose content it objected to providing to anyone. But neither the Supreme Court nor the Tenth Circuit suggested that an application of CADA to garden-variety identity discrimination, as here, was somehow designed to suppress disfavored or dangerous ideas. Petitioners' argument to the contrary would require application of strict scrutiny to all public accommodation laws in every context. Colorado's interest in prohibiting discrimination by public accommodations applies equally to all businesses that serve the public, and, as a general matter, is unrelated to the suppression of expression. Accordingly, at most intermediate scrutiny applies, and the decision below should be affirmed.

I. *303 Creative v. Elenis* Is Not Applicable in this Case Because Making Ordinary Baked Goods Is Not Compelled Speech.

In *303 Creative*, the Supreme Court majority framed the question before it as whether "a State [can] force someone who provides her own expressive services to abandon her conscience and speak *its* preferred message instead?" *303 Creative LLC v. Elenis*, 600 U.S. 570, 597 (2023). While the Court recognized that public accommodations laws may generally be applied to protect LGBTQ people from

discrimination, *id.* at 591-92, it observed that "public accommodations statutes can sweep too broadly when deployed to compel speech," *id.* at 592. *303 Creative*'s conclusion that Colorado's public accommodations law could not constitutionally be applied to the plaintiff business's expression depended on the Court's finding that the law was being applied to compel its owner to engage in pure speech, and that the owner objected to providing the message requested *for anyone*—not to serving a gay couple. Because the case arose in a pre-enforcement posture, the Court had no actual denial of service to examine. So the Court rested its decision on the following stipulated facts:

- "Ms. Smith is 'willing to work with all people regardless of classifications such as race, creed, sexual orientation, and gender,' and she 'will gladly create custom graphics and websites' for clients of any sexual orientation." *Id.* at 582 (quoting App. to Pet. Cert. 184a).
- "She will not produce content that 'contradicts biblical truth' regardless of who orders it." *Id.* (quoting App. 184a).
- "Ms. Smith's websites promise to contain 'images, words, symbols, and other modes of expression.'" *Id.* at 587 (quoting App. 181a).
- "[E]very website will be her 'original, customized' creation." *Id.* (quoting App. 181a).
- She intended to "consult with clients to discuss 'their unique stories as source material'" and "produce a final story for each couple using her own words and her own 'original artwork.'" *Id.* at 588 (quoting App. 182a–183a).
- "And they have stipulated that Ms. Smith will create these websites to communicate ideas—namely, to 'celebrate and promote the couple's wedding and unique love story' and to 'celebrat[e] and promot[e]' what Ms. Smith understands to be a true marriage." *Id.* at 587 (quoting App. 186a-187a).

Under these circumstances—where the owner refused a pure speech service because of its content, and not because of the identity of the customer—the Court found that application of CADA would result in compelled speech in violation of the First Amendment. While the Court recognized that "determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions," it concluded that "this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity. And the Tenth Circuit has recognized her services involve 'pure speech.'" *Id.* at 599 (emphasis in original).

"Pure speech" is bare communication "for the purpose of expressing certain views," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969), as distinct from situations where "'speech' and 'nonspeech' elements are combined in the same course of conduct," *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The stipulations in *303 Creative* rendered the wedding website "pure speech," akin to a parade's message, *cf. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), a political speech, or a film or mural. *See 303 Creative*, 623 U.S. at 589. The same cannot be said of a pink and blue cake.[2]

[2] Before *303 Creative*, the Supreme Court had previously found public accommodations laws were misapplied to compel expression in *Hurley* and *Boy*

Ms. Scardina requested a plain cake with colored frosting, with no message whatsoever—certainly not "pure speech." The cake requested was "custom" in the sense that it was an individual order, but even Phillips "agreed that a pink cake with blue frosting has no 'particular inherent meaning' and does not express any message." *Scardina*, 2023 COA 8, ¶ 8. It did not involve the bakery's "own words" or "original artwork." *Cf. 303 Creative*, 624 U.S. at 588.

Masterpiece Cakeshop objected to making this product not because of any content intrinsic to the cake. Indeed, Phillips indicated he "would make the same custom pink and blue cake for other customers. He stated he would make the cake if he did not know why the cake was being used." *Scardina*, ¶ 56.

Whatever meaning the product's *use* by Ms. Scardina might express was not the *bakery's* speech, just as the fact that a customer ordered pink paint from a paint store because they intended to paint pink triangles would not mean the paint store

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Scouts of America v. Dale, 530 U.S. 640 (2000), but those decisions, involving, as in *303 Creative*, peculiar applications, did not call into question the enforcement of public accommodations laws in general, or even of those states in other applications. Rather, those cases invalidated the "peculiar application" of the laws to compel purely expressive content, *Hurley*, 515 U.S. at 572; or that would "significantly affect [an expressive association's] expression," *Dale*, 530 U.S. at 658. So too, *303 Creative* invalidated a particular application of CADA to "pure speech" where the business's objection was to the content of the message, not the identity of the customer. It did not otherwise hold that nondiscrimination laws cannot be enforced, even if they might incidentally affect expression.

was expressing anything about LGBTQ status. The bakery's objection here is to baking and frosting the identical cake it would sell to other customers because the owner knows the cake will be used by a transgender person to celebrate her identity. The sale of a plain frosted cake with no intrinsic message does not *become* "compelled speech" about gender because the customer intends to use the product *after purchase* to express a message. As the Court of Appeals observed below, "a proprietor may not refuse to sell a nonexpressive product" based on a protected characteristic just because the buyer intends to use the product to celebrate the protected characteristic that the proprietor finds offensive. *Id.* ¶ 82.[3]

While Phillips would have sold the exact same cake to a non-transgender customer, he refused to sell to Ms. Scardina because of her transgender status and her desire to use the cake to celebrate that status. The trial court's findings show that Phillips would not make *any* product for Ms. Scardina that she sought to use to celebrate her transgender identity. Findings of Fact and Conclusions of Law at 18,

[3] CADA does not regulate business activity beyond discrimination based on the enumerated protected characteristics. Accordingly, businesses remain free to decline sales for nearly any reason, or no reason, so long as the decision is not based in any part on a protected characteristic. For example, a bakery could refuse to sell a child's first birthday cake based on the knowledge that it would be used to smash, not eat, because it objects to wasting food. Or it could refuse to sell a pie to be used in a slapstick routine because it doesn't find people getting pie in the face funny.

Scardina v. Masterpiece Cakeshop, Inc., No. 19CV32214 (Denver Dist. Ct., Jun. 15, 2021) ("[W]hen asked why the Bakery will not make any cake reflecting transgender status, Mr. Phillips testified that he believes that no one can change the gender assigned to them at birth and he will not 'celebrate somebody who thinks that they can.'").

Requiring a bakery to sell to a transgender customer the same product it would make for others does not compel pure speech; it requires only equal treatment. *303 Creative* expressly rejected any suggestion that it authorized status-based discrimination by expressive businesses, and this Court should reject Petitioners' efforts to expand that decision. *See 303 Creative*, 600 U.S. at 598 ("[W]e do no such thing."); *see generally* David D. Cole, *"We Do No Such Thing": 303 Creative v. Elenis and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 Yale L.J. Forum 499 (2024).

This is not to say that government regulation of baked goods could never implicate the First Amendment. If the government passed a law explicitly targeting the expressive elements of cakes, such regulation would be content-based and thus trigger strict First Amendment scrutiny. A requirement, for example, that bakeries make and sell cakes bearing American flag décor—or vice versa, prohibiting cakes with American flag décor—would not be "unrelated to the suppression of

expression," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), and therefore would trigger, and fail, strict scrutiny. Such a law would violate the First Amendment's bar on a state requiring its citizens to "use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) ("Here it is the State that . . . requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks."). But the application of CADA, a law of general applicability prohibiting identity-based discrimination, to a refusal to sell because of a customer's identity, is unrelated to the suppression of expression, and triggers at most intermediate scrutiny—which it easily survives. *See* Part II, *infra.*

Based on the parties' stipulations in *303 Creative*, the Court viewed the website designer as a content creator who "speaks for pay." *303 Creative*, 600 U.S. at 589. It was concerned that applying CADA in those circumstances "would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty." *Id.* Because this case does not implicate the application of CADA to pure speech where the business objects to the content of a particular message requested, but a mere requirement of equal treatment, it does not implicate the First Amendment

prohibition announced in *303 Creative*. The lower courts' analysis—applying traditional First Amendment principles to the facts of this case—holds just as firm after *303 Creative*.

II. The Lower Courts Correctly Held That the First Amendment's Free Speech Principles Do Not Protect the Refusal to Sell Baked Goods to a Customer Because She Is Transgender.

CADA is a law of general applicability that targets discriminatory conduct, rather than expression. It forbids the refusal to engage in commerce with people because of protected characteristics, regardless of whether a business sells books (protected by the First Amendment) or groceries (not so protected). Even if there were something expressive about a plain frosted cake (and petitioners here conceded there was not), *O'Brien*, 391 U.S. 367, would govern. Under *O'Brien*, "content-neutral restrictions that impose an incidental burden on speech . . . will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *O'Brien*, 391 U.S. at 377).

CADA's application here easily satisfies that test. The law is content-neutral because it bans all discriminatory sales by businesses open to the public, regardless

of whether they sell expressive goods at all. Colorado's interest in preventing discrimination in access to public accommodations is unrelated to the suppression of expression. As the U.S. Supreme Court has recognized, antidiscrimination laws "do[] not aim at the suppression of speech" and instead "reflect[] [a state's] strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-24 (1984). The mere fact that such laws apply to "expressive" as well as nonexpressive commodities does not evince an intent to suppress dissenting views. *See O'Brien*, 391 U.S. at 382 (holding that a law generally prohibiting the destruction of draft cards does not violate the First Amendment as applied to the expressive destruction of draft cards as a form of political protest).

CADA furthers an important interest unrelated to the suppression of expression, namely, ensuring that the public marketplace is equally open to all. And its prohibition on identity-based discrimination is narrowly tailored to the concern in fighting discrimination, and therefore restricts speech no more than is essential to further the state's end.

Attempting to shoehorn the very different facts in this case into the stipulations in *303 Creative*, Petitioners argue that CADA's application is "content- and viewpoint-based" because it "mandates speech about gender that Phillips would

not otherwise make, and does so only because of Phillips' prior speech on the subject." Pet'r's Br. 38 (citations and quotations omitted). But as discussed above, requiring the bakery to sell to Ms. Scardina a pink cake with blue frosting that it would happily sell to others is not compelling speech, as it is *not* expression he would "not otherwise make." Just as the bakery could not refuse to sell the same cake to a Black or Jewish customer because it objected to the customer's use of the cake to celebrate their race or religion, it cannot refuse to sell it to a transgender person because she seeks to use it to celebrate her gender. What the customer does with the product is her own business, not the bakery's compelled speech.

In *303 Creative*, the Tenth Circuit and the U.S. Supreme Court concluded that when CADA was applied to compel pure speech on a particular viewpoint that the business objected to expressing for anyone, the application functioned as a "content-based restriction" and risked "excising certain ideas of viewpoints from the public dialogue." 6 F.4th 1160, 1178 (10th Cir. 2021); 600 U.S. at 588. In that peculiar application, the court noted, "[e]liminating such ideas is CADA's very purpose." 6 F.4th at 1178. The Supreme Court cited this language in support of its conclusion that as applied to compel speech on a topic a business owner had chosen not to speak upon (marriages of same-sex couples), CADA had an impermissible purpose. 600 U.S. at 588. But nothing in either decision suggests that *in general* CADA's purpose

is to suppress ideas. It prohibits discriminatory conduct—namely, with respect to the public accommodations provisions, the refusal to engage in commerce with people because of certain protected characteristics. CADA's purpose is to ensure that no one is excluded from the marketplace because of their race, disability, religion, sex, sexual orientation, or gender identity.[4] C.R.S. § 24-34-301 *et seq.* That is a content-neutral purpose, and plainly legitimate. *Hurley*, 515 U.S. at 572.

Petitioners take the Tenth Circuit's language out of context and urge this Court to apply strict scrutiny. Pet'r's Br. 38-39. But because the law is not being applied here to compel speech at all, much less speech that the business objects to expressing for anyone, applying CADA here has nothing to do with eliminating "dissenting ideas," nor is it content-based. If the Tenth Circuit or Supreme Court had meant that *all* public accommodations laws are improperly motivated, CADA (and all other public accommodations laws) would be unconstitutional not just in the peculiar "pure speech" situation stipulated to in *303 Creative,* but in all circumstances. Nothing in the decisions even remotely suggests such a radical conclusion, which would have required overruling the Court's many decisions upholding

[4] *See, e.g.*, *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249 (Colo. Ct. App. 2006 (disability discrimination claim by high school athlete).

nondiscrimination laws against First Amendment objections.[5] It was only because the Supreme Court found that Colorado sought to apply its law to require a business owner to produce pure speech bearing a specific message that she objected to producing for anyone that the Court held the state's interest in applying CADA in that case was related to the suppression of expression. *See* Cole, "We Do No Such Thing," *supra* at 17. Where, as here, the law is applied to prohibit identity-based discrimination in the sale of a product that the business would willingly sell to others, the government's interest is in prohibiting discrimination in sales by public businesses, an interest unrelated to the suppression of expression.

The *303 Creative* Court confirmed that most commercial transactions one might seek or encounter in daily life remain fully covered by applicable anti-discrimination law. *See, e.g.*, 600 U.S. at 591-92 ("Colorado and other States are generally free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses."). At a minimum, goods and services that do not involve creating original pure speech must be provided to all comers on equal terms. *See id.* at 598 n.5 ("[O]ur case is nothing like a typical application of a public accommodations law requiring an ordinary, nonexpressive

[5] *See, e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976); *Hishon v. King & Spalding*, 467 U.S. 69, 78-79 (1984); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-29 (1984); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11-12 (1988).

business to serve all customers or consider all applicants."). Petitioners' argument would void these propositions by imputing to every enforcement of an anti-discrimination law a constitutionally impermissible motive of eliminating dissenting ideas.

CONCLUSION

If accepted, the arguments advanced by Masterpiece would significantly erode civil rights protections and open the door to widespread discrimination based on presumptions about a customer's intended use of a product. An antisemitic business owner could refuse to sell blue products to Jewish customers celebrating Hannukah. A business owner that objected to LGBTQ families could refuse to sell a "onesie" to a same-sex couple celebrating the birth of their child. An anti-Catholic hair salon could refuse to style a client's hair because she was preparing to celebrate her confirmation.

A storefront business cannot avail itself of the First Amendment to refuse to sell the identical product to a transgender person that it would sell to others. And when discrimination based on a protected characteristic occurs, the purpose for which the customer is buying the product does not convert the sale into the business owner's expression. Because this case does not involve compelled speech, *303*

Creative does not cast doubt on the correctness of the lower courts' decisions here, and this Court should affirm.

Respectfully submitted this 23rd day of February, 2024.

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