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On Petition for Writ of 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	**▲COURT USE ONLY▲**
Petitioners: MASTERPIECE CAKESHOP INC., and JACK PHILLIPS, and Respondent: AUTUMN SCARDINA.	
Attorneys for Defendants/Appellants: Jonathan A. Scruggs (Arizona Bar No. 030505)* Jacob P. Warner (Arizona Bar No. 033894)* ALLIANCE DEFENDING FREEDOM 15100 N. 90th Street Scottsdale, Arizona 85260 T. (480) 444-0020 F. (480) 444-0028 jscruggs@ADFlegal.org jwarner@ADFlegal.org John J. Bursch (Michigan Bar No. P57679)* ALLIANCE DEFENDING FREEDOM 440 First Street NW, Suite 600 Washington, DC 20001 T. (202) 393-8690 F. (202) 202-347-3622 jbursch@adflegal.org **Admission Pro Hac Vice* Samuel M. Ventola, Atty. Reg. #18030 1775 Sherman Street, Suite 1650 Denver, CO 80203 T. (303) 864-9797 F. (303) 496-6161 sam@sam-ventola.com	Case No. 2023SC00116 Court of Appeals Case Number: 2021CA1142 District Court Case Number: 2019CV32214 County: Denver
REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	

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CERTIFICATE OF COMPLIANCE	

I hereby certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 32 and 53. Including:

It contains 3,112 words, which is not more than the 3,150-word limit.

The brief complies with the standard-of-service requirements set forth in C.A.R. 25 and C.A.R. 53(h).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.

/s/ Jacob P. Warner
Jacob P. Warner

TABLE OF CONTENTS

Table of Authorities ii

Introduction 1

Record Clarification 2

Argument 5

I. The ruling below conflicts with other appeals court decisions interpreting CADA's jurisdictional requirement 5

II. The ruling below incorporated and misinterpreted federal law to interpret CADA's causation requirement. 9

III. Scardina does not contest that this Court should review the constitutional rulings below 11

A. *303 Creative* will likely control. 11

B. Colorado has interpreted CADA to include an "offensiveness" rule that protects artists 12

C. This Court should protect all artists' speech. 13

Conclusion 14

TABLE OF AUTHORITIES

Cases

303 Creative v. Elenis,
No. 21-476 (U.S. Dec. 5, 2022) 11

Agnello v. Adolph Coors Company (*Agnello I*),
689 P.2d 1162 (Colo. App. 1984) 5, 6, 7

Agnello v. Adolph Coors Company (*Agnello II*),
695 P.2d 311 (Colo. App. 1984) 5, 6, 7

Bostock v. Clayton County,
140 S. Ct. 1731 (2020) 9

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993) 10

Brock v. Weidner,
93 P.3d 576 (Colo. App. 2004) 7

Brush & Nib Studio, LC v. City of Phoenix,
448 P.3d 890 (Ariz. 2019) 10

Chittenden v. Colorado Board of Social Work Examiners,
292 P.3d 1138 (Colo. App. 2012) 7

Colorado Department of Public Health & Environment v. Bethell,
60 P.3d 779 (Colo. App. 2002) 8

Continental Title Company v. Denver District Court,
645 P.2d 1310 (Colo. 1982) 8

Craig v. Masterpiece Cakeshop, Inc.,
370 P.3d 272 (Colo App. 2015) 12, 13

Demetry v. Colorado Civil Rights Commission,
752 P.2d 1070 (Colo. App. 1988) 5

Foothills Meadow v. Myers,
832 P.2d 1097 (Colo. App. 1992) 7

Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale,
901 F.3d 1235 (11th Cir. 2018) 12

Harrison v. Edison Brothers Apparel Stores, Inc.,
924 F.2d 530 (4th Cir.1991) 7

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995) 4, 5, 10, 11, 12

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,
138 S. Ct. 1719 (2018) 12, 13

Miami Herald Publishing Company v. Tornillo,
418 U.S. 241 (1974) 5

Scardina v. Masterpiece Cakeshop, Inc., (Colo. App. Jan. 21, 2022),
Filing ID: 7C139A8525DA9 6

Spence v. State of Washington,
418 U.S. 405 (1974) 3

State, Department of Fish & Game, Sport Fish Division v. Meyer,
906 P.2d 1365 (Alaska 1995)..... 8

Telescope Media Group v. Lucero,
936 F.3d 740 (8th Cir. 2019) 10

Timus v. District of Columbia Department of Human Rights,
633 A.2d 751 (D.C. 1993) 8

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 12

World Peace Movement of America v. Newspaper Agency Corp.,
879 P.2d 253 (Utah 1994)..... 10

Statutes

C.R.S. § 24-4-105(2)(a) 8

C.R.S. § 24-34-306(2)(b)(II) 6, 7

C.R.S. § 24-34-306(4)-(10) 6, 8

Other Authorities

Transcript of Oral Argument at 23-24, 30-33, *Hurley*, 515 U.S. 557 (1995) (No. 94-749) 11

INTRODUCTION

Using the Colorado Anti-Discrimination Act (CADA), Colorado tried to punish Petitioners Jack Phillips and Masterpiece Cakeshop (collectively, "Phillips") for living out their faith. Colorado lost at the U.S. Supreme Court. Undeterred, Plaintiff Autumn Scardina targeted Phillips, brought a similar CADA charge against him, participated as a party in that proceeding, and also lost. Scardina could have but didn't appeal. Now, Scardina is trying to re-litigate those prior cases, rewrite CADA, and punish Phillips for his religious beliefs—something Scardina has promised to do with serial litigation if necessary.

The decision below ruled against Phillips and conflicts with other Colorado appeals court decisions interpreting CADA's procedures. Worse, it treats Phillips' lawful, message-based decision as illegal, status-based discrimination. And it contradicts U.S. Supreme Court precedent by holding religious artists to a higher standard to prove compelled speech than secular artists.

As the outpouring of amici demonstrate, this case presents critical issues. Even Scardina does not contest that constitutional review is warranted. This Court should grant review both to clarify CADA and to ensure that all artists are free to express what they believe without fear of government punishment.

RECORD CLARIFICATION

This case boils down to a few, settled facts. Scardina asked Phillips to create a custom cake, with a blue exterior and pink interior, that "celebrate[d]" and "symbolized a transition from male to female." App.13; TR (03/22/21) 188:16-189:4; *see id.* at 187:7-12; EX (Trial) 46, 133. Scardina conveyed the cake's symbolism to Phillips during the request. App.08; Resp. to Pet. For Writ of Certiorari (Resp.) 2. And as the trial court found, this custom cake indisputably conveyed a message in context:

- Scardina "explained that the design was a reflection of [the] transition from male-to-female…." App.13.
- "The color pink in the custom cake represents female or woman. The color blue in the custom cake represents male or man." *Id.* (internal citations omitted).
- Scardina "testified that the requested cake design was 'symbolic of [Scardina's] transness.'" *Id.*
- Scardina "further testified, 'the blue exterior … represents what society saw [Scardina] as on the time of [Scardina's] birth' and the 'pink interior was reflective of who [Scardina is] as a person on the inside.'" *Id.*
- "The symbolism of the [cake design] is also apparent given the context of gender-reveal cakes…." App.14.

Phillips declined because he cannot create a custom cake conveying this message "for anyone." App.10. Scardina mistakes this equal treatment for discrimination because Scardina insists that Phillips would create "the same cake … for other customers." Resp. 6. But as the trial court

found, Phillips cannot "create a custom cake to celebrate a gender transition *for anyone (including someone who does not identify as transgender)*," though he will create "a *similar-looking* cake" for any customer—including those "*who identif[y] as transgender*"—if its message does "not violate his … beliefs." App.10 (emphasis added). A cake expressing a different message—even if similar looking—is a different cake.

That's the crux of this case. And while Phillips "often create[s] custom cakes that convey messages through symbolism," App.12, he has never said all his custom "cakes are expressive." Resp. 3. They're not. Like black armbands, custom cakes with a blue exterior and pink interior, for example, are expressive only in certain contexts. *Spence v. State of Wash.*, 418 U.S. 405, 410 (1974) (Wearing "black armbands" once "conveyed an unmistakable message about … the Vietnam [War]."). While such cakes may have no "inherent" meaning, App.23, in this "context," the requested cake "*symbolized* a transition from male to female." App.13 (emphasis added). If Scardina requested a "similar-looking cake" that expressed nothing or something different, Phillips would create it. App.10. A custom cake's context "often determines" its "message." App.13; 22 States Amicus Br. Supp. Pet'rs 9-10.

Scardina repeatedly rejects this fact. Scardina says Phillips will not create "a rainbow cake for LGBT+ people," Resp. 4, yet the trial court found the opposite—Phillips *would* create such a cake depending on its "message." App.13. While Phillips cannot create a rainbow cake that

celebrates "gay pride," he can create one symbolizing God's promise to Noah—*no matter who requests it*. App.13. Phillips can serve all people while not expressing all messages. *See Hurley v. Irish-Am Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572-73 (1995) (distinguishing discrimination from "disagreement" with a message).

Scardina even says Phillips objects to the "existence of LGBT+ people." Resp. 3. Not true. As the trial court found, Phillips welcomes all people, including "those who identify as LGBT." App.09. Just ask Mike Jones, a longtime "gay activist," who testified for Phillips at trial. TR (03/23/21) 442:13. Jones visited Phillips after seeing him in the "news," *id.* at 445:22-23, told Phillips he was "gay," *id.* at 442:16-19, and Phillips gladly served him. Jones was so warmly received, he's returned "about 25 times" for custom cakes and other items. *Id.* at 447:10-449:13. Phillips has likewise served other LGBT friends. App.09. He always decides whether to create a custom cake based on *what* the cake will express, not *who* requests it. TR (03/23/21) 350:3-352:5, 366:8-367:10.

Finally, Scardina suggests that Phillips' expressive cakes are not "self-expression." Resp. 3. Not so. The trial court found that Phillips creates those cakes "to express an intended message," and that Phillips often "seeks to communicate through his custom cakes." App.11. Indeed, when Phillips creates expressive cakes, he believes "he is 'agreeing with [their] message.'" App.11. In this way, Phillips acts like newspapers and parade organizers—speakers who often express themselves through content

requested by third parties. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974); *Hurley*, 515 U.S. at 572-81. Only Phillips is asked to create the expression himself. 22 States Amici Br. 10-12.

ARGUMENT

I. The ruling below conflicts with other appeals court decisions interpreting CADA's jurisdictional requirement.

The decision below held that CADA does not allow appeals from final orders dismissing administrative complaints with prejudice after an administrative settlement. App.40-48. That ruling conflicts with *Agnello v. Adolph Coors Co.* (*Agnello I*), 689 P.2d 1162 (Colo. App. 1984), and *Agnello v. Adolph Coors Co.* (*Agnello II*), 695 P.2d 311 (Colo. App. 1984), which both held the opposite. Scardina responds that *Demetry v. Colorado Civil Rights Commission*, 752 P.2d 1070 (Colo. App. 1988), controls and that *Agnello I* reviewed a "merits-based determination" rather than a final order approving an administrative settlement. Resp. 8. That is incorrect. And it underscores why this Court's review is necessary.

Take the latter point first. *Demetry* held that no-probable-cause determinations are not appealable orders. 752 P.2d at 1072. No one disputes that was correct. But *Demetry* also said, "the Commission cannot issue a final order [without] an evidentiary hearing or default." *Id.* That contradicts *Agnello I*, where the appeals court reviewed a "ruling adopting and approving a settlement agreement." 689 P.2d at 1163. Even Scardina agrees that appeal was possible "without" the complainant having

received "an evidentiary hearing." Answer Br. 15 n.3, *Scardina v. Masterpiece Cakeshop, Inc.* (Colo. App. Jan. 21, 2022), Filing ID: 7C139A8525DA9. *Demetry*'s dictum does not control here.

Second, Scardina tries to reconcile *Demetry* and *Agnello I* by saying the Colorado Civil Rights Division settled with the administrative respondent only "as to the process" of resolving the administrative charge, and that later, the Division somehow adjudicated the charge (without an evidentiary hearing) by making "a merits-based determination" against the administrative complainant. Resp. 8. That's not correct.

The Division did not issue a "determination" in *Agnello I*. Resp. 8. CADA forbids that. After finding probable cause, the Division may "endeavor to eliminate the [alleged discrimination] by conference, conciliation, and persuasion and by means of the compulsory mediation." C.R.S. § 24-34-306(2)(b)(II). That's all. Only the Commission may determine discrimination claims. C.R.S. § 24-34-306(4)-(10). This shows that the *Agnello I* complainant necessarily appealed an order "approving a *settlement agreement*." 689 P.2d at 1163 (emphasis added). To be sure, the Division explained why it settled, but that does not mean the Division exceeded its authority or that the settlement was a determination in disguise. It was still an order "approving a *settlement*." *Id.*; *see Agnello II*, 695 P.2d at 313 ("conciliation efforts were successful").

That ruling was a final order because it ended the Commission's administrative process and imposed legal consequences. The

discrimination dispute was resolved, the respondent would not face punishment, and the complainant could not sue in district court. *See Chittenden v. Colo. Bd. of Social Work Examiners*, 292 P.3d 1138, 1143 (Colo. App. 2012); *Agnello II*, 695 P.2d at 313 (forbidding district-court suit).

Likewise, the Commission's dismissal of Scardina's complaint with prejudice—arising from the settlement with Phillips, TR (03/23/21) 317:11-16; CF 231-32—is a final order. Indeed, that dismissal bears even more indicia of a final order than the *Agnello I* settlement order. Unlike in *Agnello I*, the Commission prosecuted Phillips. It filed a formal complaint and held a hearing. EX (Trial) 138. The Commission's dismissal resolved that dispute. *Cf. Chittenden*, 292 P.3d at 1143 (escaping "discipline" is a "legal consequence[]"). "A dismissal with prejudice is a final judgment; it ends the case and leaves nothing further to be resolved." *Foothills Meadow v. Myers*, 832 P.2d 1097, 1098 (Colo. App. 1992). Such a dismissal also constitutes an "adjudication on the merits." *Brock v. Weidner*, 93 P.3d 576, 579 (Colo. App. 2004) (citing *Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534 (4th Cir.1991)).

Alternatively, the *Agnello I* settlement meant the Commission refused to enter a final order. On this logic, once the Division finds probable cause, it must "endeavor to eliminate the discriminatory or unfair practice," C.R.S. § 24-34-306(2)(b)(II), and thus cannot dismiss charges "arbitrarily or with improper motive," 689 P.2d at 1165—which would unlawfully keep complainants from receiving final orders.

If so, Scardina had even greater justification to appeal. After the Commission issued a formal complaint against Phillips, CADA required it to hold a hearing and issue findings of fact and conclusions of law. C.R.S. § 24-34-306(4)-(10); C.R.S. § 24-4-105(2)(a). A failure to perform these duties is appealable. *Cf. Timus v. D.C. Dep't of Hum. Rts.*, 633 A.2d 751, 757 (D.C. 1993); *State, Dep't of Fish & Game, Sport Fish Div. v. Meyer*, 906 P.2d 1365, 1370 (Alaska 1995). So regardless of whether the Commission issued a final order against Scardina or refused to enter that order, Scardina could have but chose not to appeal. And contrary to Scardina's fear, this does not mean Commission orders must be appealed "in every instance," Resp. 10—appeal is necessary only when proceedings resolve (or fail to resolve) a dispute after the agency incurs a statutory duty to act.

This framework best promotes CADA and protects all administrative parties. On the theory below, administrative respondents could settle with the Commission, pay $1 million to resolve the dispute, and face an identical suit in district court—subjecting them to "duplicative and possibly conflicting" resolutions. *Cont'l Title Co. v. Denver Dist. Ct.*, 645 P.2d 1310, 1316 (Colo. 1982). This result would also allow complainants to second-guess agency decisions on "matters within [their] expertise" and waste "judicial resources." *Colo. Dep't of Pub. Health & Env't v. Bethell*, 60 P.3d 779, 784 (Colo. App. 2002). That's not the law.

II. The ruling below incorporated and misinterpreted federal law to interpret CADA's causation requirement.

Turning to the merits, Scardina argues that Phillips' decision not to create the custom cake celebrating a gender transition was based on Scardina's "transgender status" because Phillips would gladly create "an identical cake for other customers." Resp. 11. But as the trial court found, Phillips cannot "create a custom cake to celebrate a gender transition *for anyone (including someone who does not identify as transgender)*," though he will create "a *similar-looking* cake" for any customer—including those "*who identif[y] as transgender*"—if its message does "not violate his … beliefs." App.10 (emphasis added). A similar-looking cake that expresses a different message is a *different cake*.

Scardina then argues Phillips "cannot avoid liability just by citing some *other* factor that contributed" to his decision. Resp. 12. But while Scardina suggests that the "because of" standard requires merely that a protected trait motivate the defendant's decision, Resp. 11-12, the trial court correctly held that the protected trait must "actually motivate[ ]" the defendant's decision *and* have a "determinative influence" on the outcome. App.15. In other words, the protected trait must be the *most significant* factor in the defendant's decision. So while defendants may not "avoid liability just by citing some *other* factor" for their decision, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020), they can when that other factor—rather than the protected trait—is determinative.

Scardina then defends the error below, equating Phillips' message-based decision with status-based discrimination. Resp. 12-13. While Scardina says Phillips' cases do not recognize "a distinction between objecting to [a] message" and someone's status, *Hurley* distinguishes between objecting to "homosexuals as such" and "disagreement" with a message, 515 U.S. at 572. *Brush & Nib Studio, LC v. City of Phoenix* said artists who serve all people but cannot promote same-sex marriage through their custom art distinguish "based on *message*, not *status*." 448 P.3d 890, 910 (Ariz. 2019); *accord Telescope Media Grp. v. Lucero*, 936 F.3d 740, 760 (8th Cir. 2019). And *World Peace Movement of America v. Newspaper Agency Corp., Inc.* held that publishers do not discriminate "on the basis of religion" when they decline religious "content even when [that] content overlaps with a [person's] religion," 879 P.2d 253, 258 (Utah 1994).

It's no answer to say these are "First Amendment" cases. Resp. 13 n.6. As the court below recognized, First Amendment claims address causation—considering whether the artist "objects" to "speech" or something else. App.63. But because these cases involve speech, they differ from cases like *Bray v. Alexandria Women's Health Clinic*, which distinguish between *another's status* and *her conduct*—not between *an artist's speech* and *another's status*. 506 U.S. 263, 270 (1993); Resp. 13.

Nor does the analysis change when a "transgender person" requests a custom cake "reflecting" a gender transition. Resp. 12 n.5. In *Hurley*,

an LGB group argued that forcing parade organizers to let them carry a self-identifying sign when "[e]verybody else self-identified" is distinct from an order allowing the group to carry signs expressing things like "Gay is Good." Tr. of Oral Argument at 23-24, 30-33, *Hurley*, 515 U.S. 557 (1995) (No. 94-749). But the U.S. Supreme Court rejected that notion of equal treatment because mandating speech reflecting a person's identity "compel[led] the speaker to alter the message." 515 U.S. at 581.

This distinction is crucial. CADA, properly understood, does not punish artists who serve all people but cannot express every message.

III. Scardina does not contest that this Court should review the constitutional rulings below.

The court below punished Phillips' religiously-motivated decision not to express a message. That violates Phillips' First Amendment rights. Scardina does not contest that this issue warrants review. Resp. 14-17. But three points are worth clarifying: (1) *303 Creative LLC v. Elenis* will likely control here, No. 21-476 (U.S. Dec. 5, 2022), (2) CADA includes an "offensiveness" rule; and (3) this Court should protect all artists.

A. *303 Creative* will likely control.

Scardina tries to distinguish *303 Creative* by saying that case concerns government-compelled "pure speech." Resp. 14. But the compelled-speech doctrine does not turn on what type of speech the government is coercing. Though marches and salutes do not always express a message, the government cannot coerce them when they do. *See Hurley*, 515 U.S.

at 568; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *cf. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1241 (11th Cir. 2018) (describing "parade" as "expressive conduct"). Scardina cites no caselaw suggesting otherwise.

If *303 Creative* holds that government may not use CADA to compel an artist to express a message, that decision should control here. At minimum, this Court should vacate and remand in that scenario.

B. Colorado has interpreted CADA to include an "offensiveness" rule that protects artists.

Scardina also says this Court should reject CADA's offensiveness rule, arguing it does not exist. Resp. 16. But when the appeals court in *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo App. 2015), distinguished Phillips' first case from Colorado's decision to punish three secular bakers for refusing to create religious-themed cakes for a religious man, it recognized that those bakers "refuse[d] the patron's request … because of the offensive nature of the requested message." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). While Scardina suggests it is unclear how this rule applies to "the judicial branch," Resp. 17, *Masterpiece* holds that courts may not apply a rule that treats religious artists worse than secular ones, 138 S. Ct. at 1730-31. The court in *Craig* erred by not applying the "offensiveness" rule to protect Phillips. *Id.* at 1731; *see id.* at 1730-31.

If *Craig* simply meant "there was no evidence that the bakeries based their decisions on the [customer's] religion," Resp. 16, that distinction also violates free exercise. The "evidence" showed that both Phillips and the other artists serve all people, but while Phillips could not create cakes promoting "same-sex marriage," *Craig*, 370 P.3d at 282 n.8; *see id.* at 282, the others could not create cakes with religious text criticizing "same-sex marriage," *Masterpiece*, 138 S. Ct. at 1730. The result differed because *Craig* treated Phillips' message-based "opposition to same-sex marriage" as "tantamount to [sexual orientation] discrimination" but did not treat the other artists' opposition to religious text as "evidence" of religious discrimination. 370 P.3d at 282 n.8. That "disparate consideration" violates free exercise. *Masterpiece*, 138 S. Ct. at 1732.

And no matter whether this Court retains CADA's offensiveness rule for future cases, the rule applied when Phillips declined to create the requested cake because of its message. Phillips relied on that rule; retroactively denying him its protection would also violate free exercise.

C. This Court should protect all artists' speech.

The First Amendment and CADA's "offensiveness" rule protect all speakers. Scardina seeks to erase that protection. Resp. 14-17. On the logic below, CADA would punish Ukrainian cake artists who decline to create custom cakes promoting the Russian invasion and atheists who decline to create cakes celebrating Easter—provided the customers

request symbolism the artists would use to express other messages they support. Scardina contests none of this. And it leaves countless artists with a cruel choice: censor their conscience, close their shop, or choose punishment. But free speech is for everyone, especially those targeted for their beliefs. Nat'l Religious Broad. Amicus Br. Supp. Pet'rs 4-5. No artist should be forced to choose between their livelihood and beliefs.

CONCLUSION

This Court should grant the petition for review.

Respectfully submitted this 1st day of June, 2023.

By: */s/ Jacob P. Warner*

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CERTIFICATE OF SERVICE

I certify that I have on this 1st day of June, 2023, served a copy of the foregoing reply in support of petition for writ of certiorari via the Colorado Courts E-Filing system on all parties and/or their counsel of record.

/s/ Jacob P. Warner
Jacob P. Warner