

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: April 27, 2023 11:21 AM FILING ID: EC8C33C6A402B CASE NUMBER: 2023SC116</p>
<p>On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2021CA1142 Judges Dunn, Grove, and Schutz</p>	
<p>Plaintiff-Appellee: AUTUMN SCARDINA, v. Defendants-Appellants: MASTERPIECE CAKESHOP INC. and JACK PHILLIPS.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>TIM GRIFFIN, ARKANSAS ATTORNEY GENERAL Nicholas J. Bronni (Arkansas Bar # 2016097) <i>Solicitor General</i> Dylan L. Jacobs (Arkansas Bar # 2016167) <i>Deputy Solicitor General</i> Hannah L. Templin (Arkansas Bar # 2021277) <i>Assistant Solicitor General</i> OFFICE OF THE ARKANSAS ATTORNEY GENERAL 323 Center Street, Suite 200 Little Rock, AR 72201 Phone: (501) 682-3661 Fax: (501) 682-2591 Email: Nicholas.Bronni@ArkansasAG.gov Dylan.Jacobs@ArkansasAG.gov Hannah.Templin@ArkansasAG.gov <i>*admitted pro hac vice</i> Nicole C. Hunt (Colorado Atty Reg. # 47052) 1032 South Union Blvd., Suite 100 Lakewood, CO 80228 Phone: (720) 425-4856 Email: Nicole.C.Hunt@gmail.com</p>	<p>Case No.: 2023SC116</p>
<p>BRIEF OF AMICI CURIAE ARKANSAS & 21 OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with all requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with the applicable word limits set forth in C.A.R. 29 and C.A.R. 28(g). This amicus brief contains 3,128 words. In addition, I certify that this brief complies with the content and form requirements of C.A.R.29 and C.A.R. 32.

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.

/s/ Nicole C. Hunt _____
Nicole C. Hunt, #47052

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INTEREST OF AMICI CURIAE

Amici are the States of Arkansas, Alabama, Alaska, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia.¹ The Amici States have an important interest in ensuring that people are not denied equal access to publicly available goods and services. But they are also interested in ensuring that persons providing such goods and services are not compelled to speak. Indeed, our federal Constitution protects the providers of goods and services—like anyone else—from being required to express a particular viewpoint. The Amici States seek to ensure that antidiscrimination policy does not trump that constitutionally protected right.

INTRODUCTION

The First Amendment prevents governments from “coerc[ing]” individuals “into betraying their convictions.” *Janus v. AFSCME*, 138 S. Ct. 2448, 2464

¹ On behalf of the States, this brief is supported by the following State Attorneys General: Steve Marshall, Alabama Attorney General; Treg Taylor, Alaska Attorney General; Chris Carr, Georgia Attorney General; Raúl R. Labrador, Idaho Attorney General; Theodore E. Rokita, Indiana Attorney General; Brenna Bird, Iowa Attorney General; Kris W. Kobach, Kansas Attorney General; Daniel Cameron, Kentucky Attorney General; Jeff Landry, Louisiana Attorney General; Lynn Fitch, Mississippi Attorney General; Andrew Bailey, Missouri Attorney General; Austin Knudsen, Montana Attorney General; Michael T. Hilgers, Nebraska Attorney General; Drew H. Wrigley, North Dakota Attorney General; Dave Yost, Ohio Attorney General; Alan Wilson, South Carolina Attorney General; Marty Jackley, South Dakota Attorney General; Jonathan Skrmetti, Tennessee Attorney General and Reporter; Ken Paxton, Texas Attorney General; Sean D. Reyes, Utah Attorney General; and Patrick Morrissey, West Virginia Attorney General.

(2018). That’s true even if—perhaps especially when—those convictions offend. The government cannot prescribe an “orthodox[y]” its citizens must profess. *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Yet, as applied by the lower courts, that’s precisely what Colorado law requires of Jack Phillips. Phillips’s religion teaches him that biological sex is immutable, so he refused to create a cake symbolizing gender transition. The lower courts held that Phillips must bake the cake anyway. But compelling Phillips to speak contrary to his religious beliefs violates the First Amendment. This Court should take Phillips’s case and reverse.

BACKGROUND

Jack Phillips has spent the past decade in court defending his right to speak consistent with his beliefs. Phillips is a baker who “uses artistic techniques and tools to create intricate custom cakes,” which convey a message “not only through written words ... but also by the[ir] design.” App. 11. He is also a devout Christian who runs his bakery, Masterpiece Cakeshop, consistent with his religious beliefs. App. 2.

Phillips believes that marriage is the union of opposite-sex individuals and that gender is biologically determined. App. 7, 10. Phillips will happily serve customers who identify as gay or transgender. App. 2, 9. But he will not create custom cakes celebrating same-sex weddings or gender transitions. App. 9-10.

Thus, in 2012, Phillips declined to create a custom wedding cake for a same-sex couple. App. 3. When the couple complained, the Civil Rights Commission censured Phillips for discrimination. *Id.* And the court of appeals agreed, concluding that Phillips’s custom cakes weren’t expressive. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 281, 288 (Colo. App. 2015) (hereinafter “*Masterpiece I*”). Eventually, the United States Supreme Court reversed. Though it did not decide whether applying Colorado antidiscrimination law to Phillips restricted his free expression, it concluded that the Commission had acted with “hostility” to his “religious viewpoint.” *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (hereinafter “*Masterpiece II*”).

But that victory didn’t end the assault on Phillips’s beliefs. The very day the Supreme Court agreed to hear Phillips’s case, Autumn Scardina, a transgender attorney, called Phillips and asked him to create “a birthday cake with a pink interior and a blue exterior” reflecting Scardina’s “transition[] from male-to-female.” App. 5. Scardina’s goal was simple: Scardina sought to “correct” the “errors of ... Phillips’s thinking.” Tr. 141:5-8. When Phillips refused, Scardina complained to the Commission. But before the Commission could again censure Phillips, he sued in federal court. *See Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226 (D. Colo. 2019) (hereinafter “*Masterpiece III*”). After that court

concluded that Phillips had plausibly pled that the Commission was targeting him in bad faith, *id.* at 1239-42, the Commission closed its investigation. App. 9.

Undeterred, Scardina hauled Phillips into state court. And once again, Colorado courts concluded that his cakes were not expression and found him liable for discrimination. App. 27-28, 70-71. Echoing *Masterpiece I*, both characterized Phillips's refusal to accept Scardina's view of gender as intolerable. App. 19, 58-59. In fact, the district court inferred discrimination from Phillips's refusal to acknowledge Scardina as a woman at trial. TR 556:9-22. Phillips's "[eleven]-year odyssey thus barrels on." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1930 (2021) (Gorsuch, J., concurring in judgment).

Phillips isn't the only Coloradoan whose right to refrain from speaking conflicts with Colorado's antidiscrimination laws; the Supreme Court is currently considering whether the First Amendment prevents Colorado from using those laws to compel a website designer to create websites for same-sex weddings. *See 303 Creative LLC v. Elenis*, No. 21-476 (U.S.). This Court should take up Phillips's similar challenge and conclude that he cannot be compelled to create custom cakes expressing a message contrary to his beliefs.

ARGUMENT

I. A Gender-Transition Cake Is Symbolic Speech.

The First Amendment covers more than just words. Conduct that is “intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative” is protected. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984). Indeed, the Supreme Court “has recognized a wide array of conduct that can qualify as expressive,” including parades, nude dancing, and flag-burning. *Masterpiece II*, 138 S. Ct. at 1741-42 & n.1 (Thomas, J., concurring in part) (compiling cases).

Custom cakes are also expressive. When Phillips creates a custom cake, he “express[es] an intended message.” App. 11. Phillips learns about the customer and his celebration, “envisions himself ... taking part in the occasion,” and creates a cake representing the “unique” celebration. *Id.* (cleaned up).

And Phillips’s cakes do “convey messages.” App. 12. “[C]akes are symbolic of life’s dramatic moments....” Shirley Cherkasky, *Birthday Cakes and Candles*, in *Food and Celebration* 221 (Patricia Lysaght ed. 2002). A cake with candles celebrates a birthday. *Id.* at 220-21. A “white, multi-tiered cake” represents a marriage. *Masterpiece II*, 138 S. Ct. at 1743 (Thomas, J., concurring). At a gender-reveal party, a cake with pink or blue filling informs parents of their

baby's sex. Gender Reveal Celebrations, *Gender Reveal Cake Ideas* (Dec. 13, 2019), <https://perma.cc/865H-UEJX>.

And some transgender individuals, like Scardina, use the symbolism of gender-reveal cakes to announce their transgender identity. *See, e.g.,* Alicia Lee, *A Mom Threw a Belated Gender Reveal Party for Her Transgender Son 17 Years After She 'Got It Wrong,'* CNN (July 16, 2020), <https://perma.cc/DA46-8V5B>. Scardina asked Phillips to create a cake with a blue exterior, representing Scardina's biological sex, and a pink interior, representing Scardina's gender identity. App. 13-14. The cake's gender-transition symbolism would be "apparent" to people at Scardina's birthday party because Scardina "had come out as transgender" on a previous birthday. *Id.* Indeed, that symbolism is precisely why Scardina asked for the pink-and-blue design. *Id.*

Creating that cake would have required Phillips to use his "time," "talents," and "energies" to express a message about Scardina's gender with which he disagrees. App. 12 (cleaned up) (quoting Phillips). "[E]ven simple tasks, such as selecting and applying colors" require Phillips to use his "artistic skills." App. 11. Forcing him to use those skills to renounce supposed "errors of thinking," as Scardina desired, is the very definition of compelled speech. Tr. 141:5-8.

II. The Lower Courts Misapplied First Amendment Doctrine.

The lower courts here don't dispute that Phillips intends to express a message when he creates custom cakes or that those cakes are expressive. App. 11-12, 65-66, 68. And they acknowledge the cake Scardina requested symbolized Scardina's gender transition. App. 13-14, 67-68. Even so, they held that forcing Phillips to bake Scardina's cake wouldn't be compelled speech, for three unpersuasive reasons.

1. The First Amendment protects expression, not complexity. First, the lower courts erroneously added a complexity requirement to their analysis of the cake's expressiveness. Though the cake indisputably symbolized gender transition, they recast it as simply "a pink cake with blue frosting." App. 66. *But see Masterpiece III*, 445 F. Supp. 3d at 1242 ("Scardina did not request just a blue and pink cake" but rather "a blue and pink birthday cake that was intended to celebrate ... gender transition...."). And that design, they suggested, could not be expressive because it was insufficiently complex. App. 22. ("Perhaps the analysis would be different if the cake design had been more intricate, artistically involved, or overtly stated a message...."); App. 59-62 (distinguishing Phillips's refusal from other bakeries' refusals to make cakes condemning same-sex marriage because those other cakes contained text).

But “[t]o suggest that cakes with words convey a message but cakes without words do not ... is irrational.” *Masterpiece II*, 138 S. Ct. at 1738 (Gorsuch, J., concurring). As the court of appeals itself acknowledged, “expressive conduct need not contain ... the written word to be entitled to First Amendment protection.” App. 64. Indeed, even simplistic conduct, like wearing black armbands or flying red flags, can be protected expression. *See Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503, 509-10 (1969); *Stromberg v. California*, 283 U.S. 359, 363 (1931). If monochromatic cloth can be expressive, a symbolic cake can’t be labeled non-expressive just because it’s simple. *See App.* 13-14.

To support their complexity requirement, the lower courts misread *Masterpiece II*. *See App.* 66-67 (quoting *Masterpiece II*); App. 22 (same). In dicta, that opinion recognized that First Amendment analysis might depend on “details,” such as whether “a baker refused to design a special cake with words or images” or simply “refus[ed] to sell any cake at all.” 138 S. Ct. at 1723. But *Masterpiece II* didn’t resolve the free-speech issue, let alone hold that simple, wordless designs are unprotected. Rather, its dicta is best read to acknowledge the obvious—a baker who refuses to sell premade cakes hasn’t been compelled to speak—not to redefine symbolic speech.

2. *Symbolic speech is understood in context.* If the lower courts added complexity to symbolic speech analysis, they subtracted context. *Clark*, 468 U.S. at 294. Both held that Scardina’s gender-transition cake isn’t expressive because its pink-and-blue design isn’t “inherently associated with a pro-transgender message” but rather must be understood in context. App. 67; *accord* App. 23-24.

But context often informs the message of symbolic speech. Without context, a parade would simply be “a group of people [marching] from here to there.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Gp. of Boston*, 515 U.S. 557, 568 (1995). And depending on the context, flag burning may express respect for the country, symbolize frustration with American policy, or not say anything at all. *Texas v. Johnson*, 491 U.S. 397, 405, 416-17 (1989). Courts and viewers use context to discern meaning. *Id.* at 405. So because the gender-transition cake’s symbolism was “apparent” in context, it was symbolic speech. App. 13-14.

Resisting that conclusion, the district court pointed to *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*, which held that a law school boycott of military recruiters in protest of “Don’t Ask, Don’t Tell” wasn’t expressive because “additional speech would be required for an outside observer to understand the claimed message.” App. 23 (internal quotation marks omitted) (citing *FAIR*). But that case is “far afield” from this one. *Masterpiece II*, 138 S. Ct. at 1744 (Thomas, J., concurring). There, no one could see the law schools’ decision not to host the

recruiters; at most, observers might have noticed the “recruiters interviewing away from the law school.” 547 U.S. 47, 66 (2006). Even then, they could not know “whether the law school is expressing its disapproval of the military, all the law school’s interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.” *Id.* That unobservable and indecipherable conduct contrasts sharply with a cake that no partygoer could miss and that most would immediately understand. App. 13-14.

3. *Creating the cake creates the message.* Finally, the lower courts divorced Phillips from the cake’s message. They noted that Scardina, not Phillips, proposed the design and that Phillips would willingly make an identical cake expressing a different message or sell a premade cake for a gender-transition celebration. App. 4, 7, 9-10, 12, 23-25, 67. And they suggested that Phillips could ignore Scardina’s intended message and disassociate from the cake’s message after-the-fact. App. 14, 24. Thus, they concluded that forcing Phillips to bake the cake wouldn’t require him to speak at all.

The logic of that position is baffling. If the baker created the cake knowing it expresses a message, *of course* the baker created the message. It doesn’t matter that “Scardina could be considered a speaker” too. App. 24. “More than one person can be engaged in protected speech at the same time.” *Masterpiece II*, 138 S. Ct. at 1743 n.3 (Thomas, J., concurring). For instance, art is often

commissioned by purchasers who seek to enlist the artist in expressing a particular message. *See, e.g.,* Sybaris Collection, *A Brief History of Artwork Commission*, <https://perma.cc/NQJ5-4BDF> (last visited Mar. 19, 2023). Yet we attribute the message of artwork as much to the artist as to the purchaser. *Cf.* 17 U.S.C. 101 (providing that an artist retains the copyright even after selling the art). Similarly, creating the cake would require Phillips to be “intimately connected” with Scardina’s message, if not express his own. *Masterpiece II*, 138 S. Ct. at 1743 n.3 (Thomas, J., concurring) (citing *Hurley*, 515 U.S. at 569-70, 576). “[T]hat is enough to implicate his First Amendment rights.” *Id.*

The lower courts misunderstand Phillips’s compelled-speech claim when they point to premade cakes or custom cakes expressing other messages. When Phillips creates a pink-and-blue cake for a birthday party, he’s not expressing a belief with which he disagrees. And when he bakes premade cakes, he doesn’t “intend[.]” to communicate a message at all. *Clark*, 468 U.S. at 294. A customer may buy one of his premade cakes for a gender-transition celebration or any other celebration. But Phillips plays no role in that choice; his speech (creating the cake) has ended. So by definition, selling the premade cake is not compelled speech.

It’s no answer to tell Phillips to hide his participation and hope partygoers don’t connect the dots. App. 14. That’s like forcing a painter to accept a commission because he need not sign the finished work or requiring a

photographer to shoot a wedding because no one will know that the photos are hers when they're hanging on the client's wall. The government cannot compel someone to express a message simply because he can disclaim that message later. *Pacific Gas & Elec. v. Pub. Utilities Comm'n of Calif.*, 475 U.S. 1, 16 (1986).

Indeed, Phillips's active participation in creating the message makes his situation vastly different from cases where any message wouldn't be attributed to the person asserting free-speech rights. Take *PruneYard Shopping Center v. Robins*, which rejected a private shopping mall's free-speech claim to exclude solicitation on its premises because "[t]he views expressed by" solicitors would "not likely be identified with those of the owner." 447 U.S. 74, 87 (1980). Permitting solicitation did not require the mall to participate in speech at all. *Hurley*, 515 U.S. at 580 (discussing *PruneYard*). But that's not true of a baker who must use his own skills to express the message. *Masterpiece II*, 138 S. Ct. at 1744-45 (Thomas, J., concurring). To bake a cake intentionally symbolizing gender transition, Phillips must speak.

The lower courts' reasoning would justify any compulsion. *Accord id.* at 1744. By their logic, a photographer could be forced to shoot a Santa scene reminiscent of the 1950s, with "a sign next to the Santa that says 'only white children,'" as long as the idea originated elsewhere and the photographer could denounce her involvement. *303 Creative, Inc. v. Elenis*, No. 21-476 (U.S.), Tr.

27:3-7. Or three Colorado bakeries could have been compelled to create cakes denigrating same-sex marriage. App. 60-61. Of course, the analysis here is apparently good-for-Phillips's-case-only; the court of appeals acknowledged that requiring bakers to accept a design denigrating same-sex marriage would violate the First Amendment. *Id.* Phillips is entitled to that same protection.

III. Ruling for Phillips Wouldn't License Discrimination.

Scardina and the lower courts treat Phillips's refusal to bake a gender-transition cake as a blow to LGBT equality. App. 6, 27-28, 58-59. But ruling for Phillips wouldn't upend the long-settled rule that "business owners" may not "deny protected persons equal access to goods and services." *Masterpiece II*, 138 S. Ct. at 1727-28. It would simply confirm that Colorado's antidiscrimination law cannot be applied in the rare case where it would compel speech.

And in Phillips's case, that would affect a tiny number of his sales. Phillips does not want to lend his talents to express messages with which he has a religious objection. App. 9-10. But he happily serves LGBT customers: he'll sell them premade cakes for any purpose and create custom cakes that do not express a message contrary to his religious beliefs. App. 2-3, 9-10. "It's hard to see how this ... stigmatizes" LGBT individuals. *Masterpiece II*, 138 S. Ct. at 1747 (Thomas, J., concurring).

Of course, for Scardina, that's not good enough. Scardina considers Phillips's views wrong, Tr. Ex. 42-44, and treated his refusal to affirm Scardina's gender transition as "a strike at [Scardina's] dignity and at the LGBT community," App. 6. Essentially, Scardina wishes to "stamp out" Phillips's "dissent" on LGBT issues. *Obergefell v. Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting). And the lower courts accept Scardina's premise that anything short of "celebration" of "Scardina's transgender status" is discrimination. App. 57; *accord* App. 19.

But "[i]f there is a bedrock principle underlying the First Amendment," it is that individuals may not wield the power of the state to stamp out insulting opinions or compel affirmance of a comforting orthodoxy. *Johnson*, 491 U.S. at 414. However offensive Scardina finds Phillips's views on gender and sexuality, Colorado cannot compel him to profess a contrary belief. *Obergefell*, 576 U.S. at 679-80 (majority opinion).

CONCLUSION

When Phillips creates a custom cake, he engages in expressive conduct protected by the First Amendment. The gender-transition cake Scardina requested was no exception; creating it would require Phillips to express a readily understood message about sex with which he disagrees. This Court should vindicate his right to not speak.

Respectfully submitted on this 27th day of April, 2023,

Amici Curiae supporting Petitioners,

TIM GRIFFIN
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

DYLAN L. JACOBS
Deputy Solicitor General

HANNAH L. TEMPLIN
Assistant Solicitor General
Office of the Arkansas Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201
Phone: (501) 682-2007
**admitted pro hac vice*

and

Nicole C. Hunt
Colorado Atty Reg. # 47052
1032 South Blvd., Suite 100
Lakewood, CO 80228
Phone: (720) 425-4856

By: /s/ Nicole C. Hunt
Nicole C. Hunt

CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of April, 2023, served a copy of the foregoing document via the Colorado Courts e-filing system, which serves the parties and their counsel of record as follows:

Counsel for Plaintiffs/Appellees:

John M. McHugh
Fennemore Craig PC
1700 Lincoln Street, Suite 2400
Denver, CO 80203
jmchugh@fennemorelaw.com

Paula Greisen
Greisen Medlock, LLC
6110 E. Colfax Ave., Suite 4-216
Denver, CO 80220
pg@greisenmedlock.com

Counsel for Defendants/Appellants:

John J. Bursch
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001
jbursch@adflegal.org

Jonathan A. Scruggs
Jacob P. Warner
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
jscruggs@adflegal.org
jwarner@adflegal.org

Samuel M. Ventola
1775 Sherman Street, Suite 1650
Denver, CO 80203
sam@samventola.com

/s/ Nicole C. Hunt

Nicole C. Hunt