DATE FILED: December 19, 2023 2:58 PM
FILING ID: BFE4FDC73B4F4
CASE NUMBER: 2023SC116

COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
On Writ of Certiorari to the Colorado Court of Appeals Case No. 2021CA1142 District Court, County of Denver, Case No. 19CV32214	
Petitioners: MASTERPIECE CAKESHOP INC., and JACK PHILLIPS, and Respondent: AUTUMN SCARDINA.	**▲COURT USE ONLY▲**
David C. Walker Reg. No. 36551 BROWN DUNNING WALKER FEIN DRUSCH PC 7995 E. Prentice Avenue Suite 101E Greenwood Village, CO 80111 (303) 329-3363 (303) 393-8438 fax dwalker@bdwfd.com Michael P. Farris* DC Bar No. 385969 General Counsel NATIONAL RELIGIOUS BROADCASTERS ASSOCIATION 660 North Capitol St. NW, Suite 210 Washington, DC 20001 (571) 359-6000 (202) 543-2649 fax mfarris@nrb.org **Pending Admission Pro Hac Vice*	Case No. 2023SC00116

BRIEF OF AMICI CURIAE NATIONAL RELIGIOUS BROADCASTERS AND FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 29 and 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

The amici brief complies with the applicable word limit set forth in C.A.R. 29(d). It contains 3,122 words and does not exceed 4,750 words (excluding the caption page, this certification page, the table of contents, the table of authorities, and the signature block).

The amici 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.

/s/ David C. Walker
David C. Walker

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

IDENTITY AND INTEREST OF AMICI

National Religious Broadcasters (NRB) is a nonpartisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's members reach millions of listeners, viewers, and readers on every continent through radio, television, the Internet, and other media.

Since its founding in 1944, NRB has worked to foster excellence, integrity, and accountability in its membership. NRB also works to promote its members' use of all forms of communication, to ensure they may broadcast their messages of hope through fully realized First Amendment guarantees. NRB believes that religious liberty and freedom of speech together form the cornerstone of a free society.

When a case presents issues of great importance to NRB's membership, NRB will step forward as an amicus curiae to share its experience and insights. The First Amendment issues raised by the petitioner here make this matter such a case.

NRB members include both owners and operators of radio and television stations and networks as well as communicators who produce content for inclusion on such media. While all its members advocate the broadest protection for the freedom of speech, this case is especially important to the owners and operators of radio and television stations and networks.

If Colorado can force Jack Phillips to participate in the communication of a message he disbelieves and does not want to associate with, NRB members see a very dangerous precedent that could be employed to force them to use their stations to carry messages they disbelieve as well.

NRB contends that even where another speaker is involved in the creation of a message, coerced participation in the communication of that message by anyone else, is a per se violation of the First Amendment.

Foundation for Moral Law ("the Foundation") is a 501(c)(3) non-profit, national public interest organization based in Montgomery, Alabama, dedicated to defending religious liberty, God's moral foundation upon which this country was founded, and the strict interpretation of the Constitution as intended by its Framers who sought to enshrine both. To those ends, the Foundation directly assists, or files amicus briefs, in cases concerning religious freedom, the sanctity of life, and other issues that implicate the God-given freedoms enshrined in our Bill of Rights. Having supported Jack Phillips as amicus at the United States Supreme Court, the Foundation has an interest working to ensure that Jack's religious freedom is vindicated once and for all.

INTRODUCTION

Your amici address one core issue. While there is little doubt that the gender-reveal cake was intended to deliver a message, the question arises: Whose speech is it? Or to say it more formally, to whom should this speech be attributed? Is this message attributable to Autumn Scardina—who ordered the message-laden cake? Or, for constitutional purposes, is the message attributed to Jack Phillips who, by virtue of the coercive power of state law, is required to create the design for the cake and fashion it into existence?

This argument is often classified as "speech misattribution between formally distinct speakers." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2088 (2020). ("First Amendment misattribution cases are premised on government compulsion to associate with another entity….") *Id.*

The Supreme Court of the United States has made clear that it does not matter that Scardina desires the message to be delivered. The First Amendment does not permit any government to coerce Jack Phillips to associate with or participate in the creation of a message that he disbelieves or does not wish to join in any manner.

ARGUMENT

The internet is replete with posts about gender-reveal cakes. This is a cultural phenomenon that is too common to be misunderstood. All cakes are, of course, capable of being delicious. But a gender-reveal cake serves the unmistakable purpose of delivering a message. In the vast majority of cases, the cake reveals whether a couple's unborn child is a boy or a girl. The very name "gender-reveal cake" leaves no doubt that the central characteristic of the cake is the message to be delivered and not the food to be consumed.

The cake which Scardina attempted to order on June 26, 2017, was designed to deliver the message that Autumn Scardina was celebrating a change from one gender identity to the other. The delivery of that message is the sole reason that it was ordered and the sole reason it was refused.

The circumstances surrounding the timing of this order clearly reveal that Scardina had other, non-gastronomical goals as well. Scardina called Masterpiece Cakeshop on the very day that the Supreme Court of the United States granted certiorari in the case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

Scardina claims to be testing the veracity of Phillips' statements that he would serve anyone regardless of their sexual orientation or

identity. Phillips' public statements routinely assured the public that while he would serve all people, he would not deliver every message. Scardina was not denied a specially-designed cake because of his sexual identity, rather Phillips refused to deliver the message that Scardina desired to communicate. There is no doubt that Phillips would have sold Scardina a cake celebrating a Denver Bronco's victory or a birthday cake with the words "Happy Birthday, Mother."

In fact, the timing of the request makes it plain to all that Scardina wasn't really looking for a cake. Rather, this episode was created to see if Phillips would refuse to deliver the requested message and suffer further legal consequences.

After an unsuccessful effort to pursue this agenda through the Colorado Civil Rights Commission, Scardina brought this instant case seeking to punish Jack Phillips for his principled refusal to create a message via the creation of a cake that was contrary to his beliefs.

While Scardina's motive of seeking to escalate Phillips' legal woes may not be dispositive, the message Scardina was seeking to deliver clearly takes this out of the realm of an ordinary consumer transaction. This episode was designed from the beginning to test the First Amendment's unyielding rule that no person can be forced to deliver a message he does not wish to deliver.

And it is beyond reasonable debate that the cake itself was designed to deliver this particular message: *I was once identified by one gender, I now identify myself by another.*

The trial court addressed this issue as follows:

> Whether making Plaintiff's requested cake is inherently expressive, and thus protected speech, depends on whether Defendants would thereby convey their own particularized message, and whether the likelihood is great that a reasonable observer would both understand the message and attribute that message to Defendants. *See Craig*, 2015 COA 115, ¶ 61 (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The Court cannot conclude, based on the current record, that the act of making a pink cake with blue frosting, at Plaintiff's request, would convey a celebratory message about gender transitions likely to be understood by reasonable observers. Further, to the extent the public infers such a message, that message is far more likely to be attributed to Plaintiff, who requested the cake's simple design. Therefore, if Defendants violated CADA here, they have not shown that their freedom of speech would be violated by holding them liable.

Order on Defs.' Mot. for Summ. J. at 5, *Scardina v. Masterpiece Cakeshop Inc.*, No. 19CV32214 (D. Colo. Mar. 4, 2021).

The *Spence* case, the sole case relied upon by the trial court, is not parallel to the case at bar. *Spence* involved a prosecution for flying an American flag upside down with a peace symbol super-imposed. The Court said: "We are confronted then with a case of prosecution for the expression of an idea through activity." *Spence*, 418 U.S. at 411.

Displaying a flag is considered expressive conduct rather than pure speech. *Id.*

However, cases where the government seeks to punish expressive conduct is not the proper framework for this case. First and foremost, Jack Phillips is not being punished for what he did communicate, but for what he refused to communicate. The far more apt precedent is *Wooley v. Maynard*, 430 U.S. 705 (1977).

In *Wooley*, the State of New Hampshire punished Wooley for taping over the message "Live Free or Die" on his state's license plates. Wooley did not want to use his vehicle to deliver this message. The Court said:

> We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

Id. at 713–14.

Like *Spence*, the decision in *Wooley* was focused on a displayed message. Spence wanted to display an altered flag to deliver a message. Wooley, however, did not want to display the government's mandated message.

Even though *Wooley* can rightly be called an expressive conduct case, the Court's analysis made it clear that in the context of coercion, there is no analytical difference between expressive conduct and pure speech.

A more recent case involving coerced delivery of a government's message is consistent with the conclusion that coerced messages are to be treated as pure speech. In a 2018 case, the State of California tried to force pro-life pregnancy centers to convey a message that the state wanted to be delivered to women coming into these centers. *Nat'l Inst. of Fam. and Life Advocs. (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018). California insisted that the pro-life centers post a sign containing mandatory content announcing the availability of free abortion services.

Once again, the Court ruled that state law cannot be used to force one speaker to deliver a message desired by another speaker—even if the speaker seeking the coerced communication is the state itself.

There is no difference in result whether the act is deemed expressive conduct as in *Wooley* or pure speech as in *NIFLA*. No state may coerce any person to act or speak in order to deliver another person's message.

If the facts of *Spence* are adapted slightly, the correct framework and outcome become immediately apparent. This case involves pure speech.

Let's assume that Washington State, from whence *Spence* originated, had an anti-discrimination law barring refusal of service on the basis of political viewpoint. And, let's further assume that Spence went to a seamstress asking her to sew a peace symbol on an American flag. The seamstress would not be displaying the message; rather she would be using her artistic talents to create the message that Spence desired. If she refused the job because she did not agree with Spence's political viewpoint inherent in the creation she was asked to make, it is beyond debate that the state law banning refusals of service based on political viewpoint had the effect of forcing her to directly participate in the communication of an idea that she disbelieves. The artisan who crafts the message has free speech rights even if another person desires to purchase their services to create a message the purchaser desires to communicate.

Wooley and *NIFLA* make it clear the hypothetical seamstress could not be constitutionally prosecuted for refusing to help deliver any message that violated her own beliefs—even if the state law itself had sought to force her to create such a flag.

But another group of decisions by the Supreme Court are even more apt. This same result attains with even greater force when the undesired message is sought by a third-party employing state law as a weapon of coercion.

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), the respondent, a gay and lesbian club (GLIB) wanted to participate in the St. Patrick's Day Parade in Boston. The South Boston Allied War Veterans Council, which organized and operated the parade, refused to allow the GLIB group to participate. GLIB claimed that the refusal violated Boston's anti-discrimination law. The parade organizers believed that forced inclusion of the GLIB group required them to deliver a message they did not wish to endorse. The GLIB group made the same argument advanced here: the speech should be attributable solely to them and not the Veteran's Council.

While the Supreme Court agreed that both groups had a free speech interest, the Court held that the First Amendment was only implicated by the City's effort to coerce the Veteran's Council to participate in the delivery of GLIB's message. The Court *unanimously* held that Boston's anti-discrimination law could not be used to force an unwilling speaker to devote its platform to the delivery of a pro-LGBT message.

The factual context of *Hurley* is obviously parallel to the case at bar. But a significant difference is that the degree of participation in the delivery of the message weighs even more strongly here than in the Boston case. The GLIB organization did not require the Veteran's Council to actively participate in the creation of the message. All that was required was permission to march in the Veteran Council's parade. Any signs or floats were made by GLIB with no involvement by the Veteran's Council. If GLIB sought to force the Veteran's Council to fashion their signs, the constitutional violation—already condemned by a unanimous Supreme Court—would be all the more flagrant.

In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), Florida law required newspapers that published critiques of political candidates to print responsive articles from the candidate. Tornillo, who had been critiqued by the Herald, sought to force the Herald to deliver his responsive message in their newspaper. The Supreme Court held that it was unconstitutional for the government to require the Herald to deliver Tornillo's message.

Likewise, in *Pacific Gas & Electric Company v. Public Utilities Commission of California*, 475 U.S. 1 (1986) (plurality opinion) (*PG&E*), an activist group opposing rate increases by PG&E sought to force their message to be included in a monthly newsletter delivered by the power

company to their customers. State law was interpreted to require such inclusion. The Supreme Court reiterated its *Miami Herald* ruling. One speaker may not force another speaker to deliver its message. The Court said that government may not "require speakers to affirm in one breath that which they deny in the next." *Id.* at 16.

The application of this time-honored rule to this case is self-evident. The question is not whether the cake and its intended message is attributable to Phillips or Scardina. No case approaches this question in this either/or manner. Like *Wooley*, *NIFLA*, *Hurley*, *Miami Herald*, and *PG&E*, there is one person who desires to force another party to participate in the delivery of a message. The fact that the message was sought by one party provides no justification for forcing anyone else to participate in its delivery. The case at bar cannot be distinguished from this unbroken line of decisions.

Only two Supreme Court cases give even a colorable claim to the premise that a coerced message may be required against the will of another. But both cases are easily distinguished.

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court permitted California to force a shopping center owner to allow students leafletting about their opposition to Zionism to distribute

their message in his center. The Court explained the limited nature of the *PruneYard* holding in the subsequent case of *PG&E*:

> The Court's decision in *PruneYard Shopping Center v. Robins*, *supra*, is not to the contrary. In *PruneYard*, a shopping center owner sought to deny access to a group of students who wished to hand out pamphlets in the shopping center's common area. The California Supreme Court held that the students' access was protected by the State Constitution; the shopping center owner argued that this ruling violated *his* First Amendment rights. This Court held that the shopping center did not have a constitutionally protected right to exclude the pamphleteers from the area open to the public at large. *Id.*, 447 U.S., at 88, 100 S. Ct., at 2044. Notably absent from *PruneYard* was any concern that access to this 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; nor was the access right content based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.

PG&E, 475 U.S. at 12 (plurality).

The second case that presents a colorable claim in favor of coerced speech is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (*FAIR*). In *FAIR*, law schools which received federal funding were required to grant the same form of access to military recruiters as provided to all other employers wishing to recruit students. If meetings with other employers were announced by law

school emails to students, military recruiters were to receive equal treatment.

The laws schools claimed that this amounted to coerced speech since they did not want to promote military careers to their students.

The Court held that this situation was not akin to *Hurley*, *PG&E*, or *Miami Herald*.

> The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate.

FAIR, 547 U.S. at 63.

In *Hurley*, the parade organizers' message was changed by the forced inclusion of a marching unit proclaiming a message it disbelieved. In *Pacific Gas* and *Miami Herald*, precious publication space was required to be turned over to another speaker. All of these involve less participation in the creation and delivery of the message than here. Jack Phillips is being compelled to personally design and create a message-laden cake. There is utterly no doubt that Phillips is being forced to participate in a message he disbelieves. Anytime a government compels the delivery of a message, it changes the compelled person's message.

"[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say … the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 573–74 (cleaned up).

The suggestion that the message is attributable to Scardina is fatal to the Respondent's case. There is no doubt that the cake delivers Scardina's message, but Jack Phillips may not be constitutionally required to participate in its creation.

CONCLUSION

We respectfully request this Court to reverse the decision below and to dismiss this case.

Respectfully submitted this 19th day of December, 2023.

By: */s/ David C. Walker*

David C. Walker
Reg. No. 36551
BROWN DUNNING WALKER FEIN DRUSCH PC
7995 E. Prentice Avenue
Suite 101E
Greenwood Village, CO 80111
(303) 329-3363
(303) 393-8438 fax
dwalker@bdwfd.com

Michael P. Farris*
DC Bar No. 385969
General Counsel
NATIONAL RELIGIOUS BROADCASTERS ASSOCIATION
660 North Capitol St. NW, Suite 210
Washington, DC 20001
(571) 359-6000
(202) 543-2649 fax
mfarris@nrb.org

**Pro Hac Vice Admission Pending*

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I have on this 19th day of December, 2023, served a copy of the foregoing motion for leave and amici brief via the Colorado Courts E-Filing system, and served via the Colorado Courts E-Filing system on the parties and/or their counsel of record as follows:

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

Paula Greisen
Greisen Medlock, LLC
6100 E. Colfax Avenue
Suite 4-216
Denver, CO 80220
pg@greisenmedlock.com

Counsel for Respondent

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

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

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

Counsel for Petitioners

/s/ David C. Walker
David C. Walker