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On Writ of Certiorari to the Colorado Court of Appeals, Division IV Case No. 21CA1142 Opinion by Judge Schutz	
Defendants / Petitioners: *Masterpiece Cakeshop, Inc., and Jack Phillips* v. **Plaintiff / Respondent:** *Autumn Scardina*	▲ **Court Use Only** ▲
J. Michael Connolly* ANTONIN SCALIA LAW SCHOOL FREE SPEECH CLINIC CONSOVOY MCCARTHY PLLC 1600 Wilson Blvd., Ste. 700 Arlington, VA 22209 (703) 243-9423 mike@consovoymccarthy.com ** - pro hac vice* Joseph B. Brown, # 54986 Theresa Sidebotham, # 36713 Telios Law PLLC P.O. Box 3488 Monument, CO 80132 Tel: 855-748-4201 Fax: 775-248-8147 tls@telioslaw.com	Case No.: 2023SC00116 Court of Appeals Case No.: 2021CA1142 District Court Case No.: 2019CV32214 County: Denver

BRIEF OF AMICUS CURIAE U.S. REPRESENTATIVE DOUG LAMBORN IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in these rules. Specifically, I certify that:

1. This brief complies with the applicable word limits of C.A.R. 29(d) and is less than 4,750 words, excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block.

2. The brief complies with the requirements of C.A.R. 28(a)(2) and (3), contains a concise statement of the identity and interest of Amicus, and an argument.

3. Amicus has sought leave to file in compliance with C.A.R. 29(a).

I acknowledge that this brief may be stricken if it fails to comply with any of the applicable requirements.

s/ J. Michael Connolly

s/ Joseph B. Brown.

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STATEMENT OF IDENTITY AND INTEREST IN THE CASE

Amicus Doug Lamborn represents Colorado's Fifth Congressional District in the United States House of Representatives. He is committed to protecting the free-speech rights guaranteed by the First Amendment. Free speech is critical to our democracy: It creates an open "marketplace of ideas" in which individuals can freely and respectfully debate the political, economic, and social issues of the day, and it furthers the search for truth by allowing all ideas to compete free of government censorship or compulsion.

The court of appeals disregarded these bedrock principles by compelling Jack Phillips to create a cake customized to express a view with which they disagree. To vindicate the First Amendment, Amicus urges this Court to reverse.

No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from Amicus and his counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The First Amendment protects the artistic expression at issue in this case. Petitioner Jack Phillips creates custom cakes that express the spirit of particular celebrations. Pet.App.66. As surely as the First Amendment protects music, dance, theater, paintings, drawings, engravings, video games, and countless other forms of artistic expression, it likewise protects Phillips' art. And just as the government may

not compel a parade organizer to accept participants, it cannot compel the artistic expression at issue here.

The decision below was wrong for at least two reasons. First, Phillips' custom cakes are expressive creations. Phillips is not simply baking and selling food products—his custom cakes are true works of art. Cake artists like Phillips specially design each cake, using techniques similar to those of other artists, to convey a message.

Second, because Phillips' cakes are expressive, the First Amendment protects him from compulsory creation. The state must leave "each person" free to "decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). "Our political system and cultural life rest upon this ideal." *Id.* The court of appeals' decision strips Phillips of this right and contradicts well-established First Amendment jurisprudence.

Phillips does not challenge the State's interest in protecting its citizens from discrimination. As the trial court found, he regularly designs cakes for customers who identify as gay, lesbian, or transgender. Pet.App.09. He objects only to being compelled to create customized cakes conveying messages and beliefs with which he disagrees. This Court thus can rule for Phillips without calling into question anti-discrimination laws.

Moreover, "'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)). To the contrary, even things like video games may "communicate ideas—and even social messages—through many familiar literary devices ... and through features distinctive to the medium." *Id.* That communication, however novel, "suffices to confer First Amendment protection." *Id.* Because the court of appeals disregarded these principles, the Court should reverse.

ARGUMENT

I. Petitioners' Custom Cakes Are Expressive, Artistic Creations.

Cake-making is an artistic, expressive act. Cake bakers are "creators," expanding the limits of "cake design and creation" through modes of expression like "[s]tructural designs and intricate frostings." Rachel Overby, *A Cakewalk Through History: The Evolution of Cake and its Identity in America* 33-34 (2018). They liken their craft to other creative outlets, like "painting" or "knitting," as a "form of ... self expression." Sally McKenney, *What Baking Means to You*, Sally's Baking Recipes (Sept. 17, 2020), http://bitly.ws/CR8G.

Like other artists, Phillips "creates a masterpiece" with each custom cake. Jack Phillips, *Welcome!*, Masterpiece Cakeshop, https://bit.ly/3ok59bf. His logo is

an artist's paint palette and interlocking paintbrush and baker's whisk, symbolizing the artistic nature of his creative work. *See id.* In his store, Phillips displays "a picture that depicts him as an artist painting" *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1742 (2018) (Thomas, J., concurring) (describing the "expressive" nature of Phillips' cakes); Pet.App.66. Unlike pre-made cakes, Phillips creates each custom cake from scratch so that each one expresses a unique message. Pet.App.12. Phillips' cakes are his "customized and tailored" expression. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 593 (2023).

Cakes are often used to convey messages about gender. Consider "gender-reveal cakes," which use the colors blue and pink as a recurring theme to symbolize gender—blue for male, pink for female. In 2008, Jenn Karvunidis, the claimed "inventor" of such cakes, "cut into her custom-made cake," and "[t]he pink frosting announced to the room that she was due to have a baby girl." Zahra Manji, *Wildfires, Alligators and Jelly*: *The Brief, Chaotic History of the Gender Reveal Party*, Prospect Magazine (May 20, 2021), https://bit.ly/40dju6k. In other words, the use of the pink cake *communicated* a symbolic message that a baby girl, not a boy, was entering the family. The trend soon exploded, as "TV stars and everyday couples alike began cutting open cakes dyed pink or blue." Kim Severson, *It's a Girl! It's a Boy! And for the Gender-Reveal Cake, It May Be the End*, N.Y. Times (Jun. 17, 2019), https://nyti.ms/2x5ynN0; Megan Orlanski, *The Phenomena of Gender Reveal*

Parties: Moving Beyond the Bounds of Pink and Blue, Wash. Univ. Pol. Rev. (Apr. 7, 2020), bit.ly/46U0RZs (identifying "cutting into cakes" "to see what color emerges, blue or pink" as the "typical" gender-reveal activity).

The colors of the cake convey a symbolic message. The colors pink and blue have long represented the female and male sexes. References to sex and "pink and blue beg[an] to appear around 1890 and intensif[ied] after World War II." Marco Del Giudice, *The Twentieth Century Reversal or Pink-Blue Gender Coding: A Scientific Urban Legend?* 41 Archives of Sexual Behavior 1321, 1322 (2012). The association has persisted ever since. *Id.* Marketing practices demonstrate the same pattern. In the early 1980s, major toy companies began emphasizing gender-targeted marketing, and "[t]hus the era of 'blue for boys, pink for girls' exploded." Taylor W. Brownell, *Pink and Blue Advertising: Legal Remedies for Gendered Toy Aisles*, 38 Women's Rts. L. Rep. 136, 138-39 (2016) (citation omitted).

Drawing on these historical and contemporary associations, Scardina ordered a cake with a blue exterior and pink interior to express a message "celebrating" Scardina's "transition from male-to-female." Pet.App.35. To be sure, a cake with a blue exterior and a pink interior need not communicate this exact message in every instance. (That is why Phillips would have produced such a cake before learning of its intended message. *See id.* at 67.) But as the trial court recognized, Scardina's requested symbolic design did communicate a message. *Id.* at 13 (finding, based on

Scardina's testimony, that the "concept of the requested cake ... symbolized a transition from male to female," and further that "the requested cake design was 'symbolic of the duplicity of [Scardina's] existence, to [Scardina's] transness'"); *id.* at 14 (recognizing that "[t]he symbolism of the requested design of the cake is ... apparent"). After Phillips learned the message the cake would convey, he declined to express it.

Tellingly, bakers of diverse viewpoints have affirmed the expressive aspect of Phillips' work. In Phillips' case at the Supreme Court of the United States, a group of bakers—writing in support of neither party—explained that "the preparation of custom cakes is an artistic, expressive activity." Brief for Cake Artists as Amici Curiae in Support of Neither Party at 5, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S.Ct. 1719 (2017) (No. 16-111), https://bit.ly/3KFKZ2I. These amici noted that many of them "would gladly have prepared the cake that respondents requested" in that case, but that in doing so, they would have been "accepting a commission to create a work of edible *art*." *Id.* at 2. Custom cakes, they argued, "communicate emotions and messages at least as clearly as other forms of art." *Id.* at 3.

While that case concerned a custom wedding cake, the bakers emphasized that cakes are forms of expression in many other contexts, too. "Cakes for every conceivable occasion ... can convey articulable messages," *id.* at 4, and "[c]ake

artists" design them to "convey thoughts, emotions, exhortations, or celebrations." *Id.* at 19. There is thus "no doubt that petitioner Jack Phillips is a genuine cake artist who uses these skills" to convey articulable messages. *Id.* at 30.

Phillips' business, design, and artistic process—like those of other artists—show that his custom cakes are communicative and expressive. His cakes are not "fungible products, like a hamburger or a pair of shoes." *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 910 (Ariz. 2019). They are custom-created, artistic expressions of chosen themes and messages, just as a painter or sculptor might provide. As Phillips' artistic colleagues have recognized, "cake design and preparation *is an art*," and "Jack Phillips is a genuine cake artist." Cake Artists' Brief at 2, 30.

II. Petitioners' Custom Cakes Are Speech Protected by the First Amendment.

"Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). For this reason, the First Amendment protects expression through media, not only "oral utterance and the printed word" but also any "images, words, symbols, and other modes of expression" which "communicate ideas." *303 Creative*, 600 U.S. at 587; *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). Indeed, any "'original,' 'customized,' and 'tailored' creatio[n]" is

protected free expression. *303 Creative*, 600 U.S. at 579. In short, the First Amendment protects "[a]ll manner of speech." *Id.* at 587.

The Supreme Court has accordingly applied the First Amendment's protections to many forms of expression. This includes, among others, website design,[1] drawings,[2] engravings,[3] abstract art,[4] radio and television broadcasts,[5] movies,[6] pornography,[7] theatrical productions,[8] dancing,[9] nude dancing,[10] live musical entertainment,[11] music without words,[12] atonal music,[13] unintelligible verse,[14] "the passive act of carrying the state motto on a license plate,"[15] and even sleeping.[16] Other courts, too, have recognized the First Amendment protects similar forms of artistic expression. This includes, among others, wedding videography,[17]

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[1] *303 Creative*, 600 U.S. at 587.
[2] *Kaplan v. California*, 413 U.S. 115, 119 (1973).
[3] *Id.*
[4] *Hurley*, 515 U.S. at 569.
[5] *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981).
[6] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).
[7] *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).
[8] *Schacht v. United States*, 398 U.S. 58, 62-63 (1970).
[9] *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).
[10] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991).
[11] *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975).
[12] *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).
[13] *Hurley*, 515 U.S. at 569.
[14] *Id.*
[15] *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).
[16] *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 304 (1984).
[17] *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019).

wedding invitations,[18] smoking in a stage performance,[19] tattoos and tattooing,[20] the sale of original artwork,[21] custom-painted clothing,[22] a person's image and likeness,[23] and stained-glass windows.[24]

If the First Amendment protects such diverse forms of artistic expression, then Phillips' custom cakes are likewise protected. *See Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring) ("The use of [a person's] artistic talents to create a well-recognized symbol ... clearly communicates a message—certainly more so than nude dancing or flying a plain red flag." (citations omitted)). Whatever their specific theme, Phillips' production of custom cakes "communicate[s] emotions and messages at least as clearly as other forms of art." Cake Artists Brief, at 3; *cf. Kaplan*, 413 U.S. at 119 (First Amendment protects "paintings, drawings, and engravings"). The fact that Phillips' chosen medium is cake, not stone or canvas, has no bearing on the First Amendment analysis.

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[18] *Brush & Nib Studio*, 448 P.3d at 906.
[19] *Curious Theater Co. v. Colorado Dep't of Pub. Health & Env't*, 216 P.3d 71, 79-80 (Colo. App. 2008).
[20] *Buehrle v. City of Key West*, 813 F.3d 973, 975 (11th Cir. 2015); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010); *Coleman v. City of Mesa*, 284 P.3d 863, 869 (Ariz. 2012).
[21] *White v. City of Sparks*, 500 F.3d 953, 955 (9th Cir. 2007); *Bery v. City of New York*, 97 F.3d 689, 694-96 (2d Cir. 1996).
[22] *Mastrovincenzo v. City of New York*, 435 F.3d 78, 92-97 (2d Cir. 2006).
[23] *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924-25 (6th Cir. 2003).
[24] *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628-29 (7th Cir. 1985).

Here, Phillips was asked to create a custom-made cake celebrating a person's gender transition. The cake would commemorate this transition symbolically, using the two colors, blue and pink, that have represented maleness and femaleness for over a century. A reasonable third-party observer would have no trouble understanding that the custom cake represents and celebrates transgender identity. Creating the envisioned cake would enlist Phillips in expressing a view about gender, one in conflict with his own beliefs. And by ordering him to do so "on pain of penalty," *303 Creative*, 600 U.S. at 589, the lower courts' rulings force him to "bear witness to ... fact[s]" he contests and "compel affirmance of a belief with which [he] disagrees," *Hurley*, 515 U.S. at 573-74. The state seeks to compel Phillips' speech by placing him in an untenable position: forcing him to "speak as the State demands or face sanctions for expressing [his] own beliefs." *303 Creative*, 600 U.S. at 589. The First Amendment forbids imposing such a choice.

Other arguments against protecting Phillips' speech also fail in light of *303 Creative*. First, while Phillips' cakes may be a combination of his own and his client's speech, "for purposes of the First Amendment that changes nothing." *Id.* at 588 (stating a website designer did "not forfeit constitutional protection" merely because her clients also had a speech interest in the website) (citing *Hurley*, 515 U.S. at 569). Second, Phillips by no means forfeited First Amendment protection by exchanging his speech for money. If that were true, then "the government [could]

compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message." *Id.* at 589. Such a rule would even permit requiring "'an atheist muralist to accept a commission celebrating Evangelical zeal,'" or "a male website designer married to another man to design websites for an organization that advocates against same-sex marriage." *Id.* at 589-90.

The court of appeals' justification for declining to apply First Amendment protection for Phillips' expressive art cannot pass muster. The court concluded that the cake "expressed no message," Pet.App.62, because any "information" was only "convey[ed]" by its "context," and the "message" depended on an observer's "understanding of the purpose of the celebration, knowing the celebrant's transgender status, and seeing the conduct of the persons gathered for the occasion," *id.* at 68; *see also id.* at 66 (framing "issue presented" as "whether making a pink cake with blue frosting rises to the level of protected conduct").

The court's reductive framing of Phillips' speech contradicts established First Amendment principles. Far from ignoring it, courts must look to the context of speech to determine its expressive nature. The First Amendment protects expressive conduct which "*in context*, would reasonably be understood by the viewer to be communicative." *Clark*, 468 U.S. at 294 (emphasis added); *see also Cressman v.*

Thompson, 798 F.3d 938, 952 (10th Cir. 2015) ("[A]ll images are not inherently expressive for purposes of pure speech. Context matters.").

Many landmark First Amendment decisions are incomprehensible if the disputed expressive conduct is considered without context. When analyzing a criminal conviction for flag-burning, for example, the Supreme Court did not "automatically conclud[e] ... that any action taken with respect to our flag is expressive," but instead "considered the context in which it occurred." *Texas v. Johnson*, 491 U.S. 397, 405 (1989). There, the defendant's conduct was "expressive" and "overtly political." *Id.* at 406. But in other contexts—say, the burning of a worn-out flag before a color guard with a ceremonial salute—burning a flag might instead convey the opposite message of respect for the flag. *Cf.* 4 U.S.C. §8(k) ("The flag, when it is in such condition that it is no longer a fitting emblem for display, should be destroyed in a dignified way, preferably by burning."). For another example, a black armband might be an unremarkable, non-expressive piece of cloth, unless in context it is worn to voice "objections to the hostilities in Vietnam." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). When determining whether a particular act or image is speech, "[c]ontext is all." *Anderson*, 621 F.3d at 1068 (Noonan, J., concurring).

The court of appeals rejected a context-sensitive analysis by insisting that purportedly expressive conduct be "inherently expressive." Pet.App.65. But the case

from which the court drew this phrase, *Rumsfeld v. Forum for Acad. & Inst'l Rts, Inc.*, 547 U.S. 47 (2006), only reaffirmed the importance of context. First, for the proposition that "First Amendment protection" extends "only to conduct that is inherently expressive," *Rumsfeld* cited *Texas v. Johnson*, with its contextual inquiry. *Id.* at 66. Second, *Rumsfeld* then itself examined the context of the disputed conduct and held that it was not speech. *See id.* (considering whether an "observer who sees military recruiters interviewing away from the law school" would perceive the law school's expression). The Supreme Court did not silently overrule landmark First Amendment precedents with the phrase "inherently expressive." Rather, this phrase requires expression to be "apparent," *id.*, in the context in which it arises.

The court of appeals also repeatedly emphasized the simplicity of Scardina's requested design: a "pink cake with blue frosting," Pet.App.35-36, 38, 57, 62-63, 66-67, 70, without any "verse or imagery," *id.* at 62; *see also id.* at 22 (trial court, suggesting "the analysis would be different if the cake design had been more intricate, artistically involved, or overtly stated a message attributable to Defendants."). But this too has no bearing on the First Amendment's application. Speech need not be complex to be protected. If that were so, then the First Amendment would not protect a "plain red flag" or a simple "black armband." *See Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Tinker*, 393 U.S. at 504. The lower courts'

suggestion would also mean that while the chaotic "painting of Jackson Pollock" is "unquestionably shielded," *Hurley*, 515 U.S. at 569, the monochrome works of Yves Klein or Ad Reinhardt are not. But such "esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree." *Brown*, 564 U.S. at 790 (internal quotations and citations omitted). The relative simplicity of a cake's design by no means negates its expressive content.

CONCLUSION

The Court should reverse.

Respectfully submitted this 19th day of December, 2023.

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