

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 27, 2023 5:36 PM FILING ID: 2F66DE9D9C7E5 CASE NUMBER: 2023SC116
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	
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BRIEF OF <i>AMICI CURIAE</i> MOUNTAIN STATES LEGAL FOUNDATION AND AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS MASTERPIECE CAKESHOP, INC., AND JACK PHILLIPS' PETITION FOR WRIT OF CERTIORARI	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Colorado Appellate Rules (C.A.R.) 28, 29, 32, and 53(g) including all formatting requirements set forth in these rules. Specifically, the undersigned certifies the brief complies with C.A.R. 53(g) because it contains 3,121 words, less than the allotted 3,150 words. I acknowledge that the brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 32.

/s/ William E. Trachman
William E. Trachman

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Mountain States Legal Foundation and Americans for Prosperity Foundation submit this brief in Support of Petitioners Petition for Writ of Certiorari.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation (“MSLF”) is a non-profit public interest law firm based in Colorado. MSLF is dedicated to the defense and preservation of individual liberties: the right to speak freely, the right to equal protection of the laws, and the need for limited and ethical government. For decades, MSLF attorneys have litigated the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (mem.) (*amici curiae* in support of petitioners); *Knipp v. Tri Cty. Health*, No. 22-sc-647, 2022 WL 17586338 (Colo. Dec. 12, 2022) (granting MSLF leave to participate as *amicus* on petition for certiorari stage).

Americans for Prosperity Foundation (“AFPF”) is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Throughout our nation’s history, the fights for civil rights for women, African-Americans, LGBTQ individuals, and all people have

relied on the exercise of civil liberties, which is one reason they must be protected. AFPF is interested in this case because the protection of the freedoms of expression and association, guaranteed by the First Amendment, are necessary for an open and diverse society.

To secure these interests, MSLF and AFPF file this *amici curiae* brief, urging this Court to grant the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Must reasonable and sincere people acting in good faith—who simply adhere to a traditional, Biblical view of the world—be compelled to engage in artistic speech that contravenes their deeply held beliefs? The answer must be no. Higher courts like this one must continue to weigh in on the question of how to balance free speech and anti-discrimination laws. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm’n*, 138 S. Ct. 1719, 1738 (2018) (Thomas, J., concurring) (“If that freedom [of speech] is to maintain its vitality, reasoning like the Colorado Court of Appeals’ must be rejected.”).

Indeed, the Court of Appeals’ decision would have startling applications, like forcing painters and sculptors to create art despite religious or moral objections. This Court has an opportunity to correct the Court of Appeals’ error, announce a broad rule protecting speech right, and avoid the need for the U.S. Supreme Court to once again step in and announce CADA’s proper scope. For these reasons, this Court should grant certiorari.

ARGUMENT

I. Making a Custom Cake Constitutes Protected Speech.

“Cake is an icon of American culture. . . . [C]ake has a special hold on the American palate, imagination, and heart. Why? Because it is celebratory.” Nina

Martyris, *Make America Bake Again: A History of Cake in the U.S.*, NPR (Nov. 7, 2016) (quoting Anne Byrn).¹ For centuries—indeed, millennia—humans across the world have made cakes for a variety of ceremonies and celebrations. “They are a food that carries a certain symbol, meaning, and celebratory value.” *History and Evolution of Cake*, POLKA DOT IT (hereinafter “*History and Evolution*”);² cf. *Masterpiece*, 138 S. Ct. at 1738 (Gorsuch, J., concurring) (“Like an emblem or flag, a cake for a same-sex wedding is a symbol that serves as a short cut from mind to mind, signifying approval of a specific system, idea, or institution.”) (cleaned up).

Birthday cakes, for instance, likely originated in Ancient Egypt. Claire Nowak, *Why Do We Eat Birthday Cake?*, READER’S DIGEST (Dec. 14, 2022).³ And the first modern birthday cakes appeared in the thirteenth century in Germany. *Supra* p. 4, *History and Evolution*. These cakes were decorated with lit candles, one for each year of a child’s life. *Id.* More recently, expectant parents use colored interiors—blue for boys, pink for girls—to symbolize and celebrate the sex of their child. See Kim Severson, *It’s a Girl! It’s a Boy! And for the Gender-Reveal Cake, It May Be the End*, NEW YORK TIMES (June 17, 2019).⁴

¹ <https://www.npr.org/sections/thesalt/2016/11/07/501032393/make-america-bake-again-a-history-of-cake-in-the-u-s>

² <https://polkadotit.com/history-and-evolution-of-cake/> (last visited Apr. 25, 2023)

³ <https://www.rd.com/article/origin-of-birthday-cake/>

⁴ <https://www.nytimes.com/2019/06/17/dining/gender-reveal-cake.html>

From their earliest iterations, cakes have been much more than desserts at a party. *Scardina v. Masterpiece Cakeshop, Inc.*, No. 21-ca-1142, 2023 WL 407620, at *14 (Colo. App. Jan. 26, 2023). (“Phillips testified that part of his creative process in making a custom cake involved visualizing the particular celebration where the cake would be enjoyed and the persons in attendance.”); accord *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 908 (Ariz. 2019) (holding that wedding invitations counted as speech, even if they only conveyed logistical information about the date, time, and location of a wedding, because of the artwork used to make them); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019) (holding that short-film filmmakers engaged in speech partly because they exercised substantial editorial control and judgment regarding the final product). For these reasons, custom cakes and cake artists should be shielded under the First Amendment.

II. Art is Purely Expressive Speech.

Art on all sorts of canvases is protected by the First Amendment. *See, e.g., Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010) (“We hold that tattooing is *purely expressive* activity fully protected by the First Amendment[.]”) (emphasis added). Importantly, “[t]he 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. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (internal quotation and citation omitted).

Forcing artists like Jack Phillips to create custom art that sends a message contrary to his beliefs is compelled speech. The Supreme Court, “like Orwell, has long recognized the risk that compelled speech may ‘turn the writer, and every other kind of artist . . . into a minor official, working on themes handed down from above[.]’” *Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cty. Metro Gov’t*, No. 3:19-cv-851, 2022 WL 3972873, at *16 (W.D. Ky. Aug. 30, 2022) (quoting *The Prevention of Literature*, THE ORWELL FOUNDATION (Jan. 1946)).⁵ “The First Amendment’s safeguard against state action ‘includes both the right to speak freely and the right to refrain from speaking at all.’” *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); *Masterpiece*, 138 F.3d at 1745 (Thomas, J., concurring) (criticizing the Colorado Court of Appeals’ reliance on *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) (FAIR), among other cases, as “badly misguided” and noting that compelled speech cases do “not suggest that the government can force speakers to alter their *own* message.”); Oral Argument 64:09–

⁵ <https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/the-prevention-of-literature/>

24, 303 *Creative v. Elenis*, 142 S. Ct. 1106 (2022) (21-476)⁶ (Roberts, C.J.) (characterizing *FAIR* merely as a case about how “empty rooms don’t speak”).

The Court of Appeals held that “creating a pink cake with blue frosting is not inherently expressive[.]” *Scardina*, 2023 WL 407620, at *14. That reasoning will force future courts to inquire whether a cake becomes expressive if the colors of the frosting are symbolic, if the frosting is sculpted in a particular way, or if the cake displays words. Judicial line-drawing of this nature creates ambiguity and uncertainty. This Court should be exceedingly suspicious of Respondent’s efforts to play puppet-master over private businesses that Colorado has defined as public accommodations. *See Masterpiece*, 138 S. Ct. at 1746 (Thomas, J., concurring) (“States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified.”).

This Court should take this case and resolve the unanswered free speech question from *Masterpiece I*—that the customization of a cake is art worthy of protection under the First Amendment. *Masterpiece*, 138 S. Ct. at 1742 (Thomas, J., concurring) (“The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive.”).

⁶ https://www.supremecourt.gov/oral_arguments/audio/2022/21-476

A. Protected artistic expression takes many forms, not all of them complex.

Shielded under the First Amendment are not just Vermeer's *Girl with a Pearl Earring* and Michelangelo's *David*, but also "the silent symbol of armbands . . . [in] opposition to" the Vietnam war. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969). Our Constitution is not so limited as to confine expression to canvas, marble, or cloth.

The Ninth Circuit has appropriately held that if *elements* of a certain type of expression are already protected, the *expression itself* is shielded by the First Amendment. *See Hermosa Beach*, 621 F.3d at 1055 (protecting tattoos under the First Amendment); *id.* at 1061 ("Tattoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection.").

Just as a tattoo artist considers "color, light, shape, size, . . . literal meaning, symbolic meaning, historical allusion, religious import, and emotional content[,]" so too does a cake artist. *Hermosa Beach*, 621 F.3d at 1057. Jack Phillips views "cake as a canvas" and observers have stated that "walking into Masterpiece Cakeshop was like walking into an art gallery of cakes." *Forget Gay Weddings, Transgender Cakes*

Are The New Battleground, THE BABYLON BEE (June 9, 2021)⁷. Masterpiece Cakeshop’s logo includes not only a whisk, but also a paintbrush—reflecting Jack Phillips’ artistry.



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1. Symbolic speech cannot be compelled.

Autumn Scardina cannot constitutionally force Jack Phillips to use his talents to celebrate a gender transition. “The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.” *Virginia v. Black*, 538 U.S. 343, 358 (2003). “[A]n individual is protected from being compelled to speak, irrespective of whether the speech being compelled is pure speech or symbolic speech[.]” *Cressman*, 798 F.3d at 961.

“While ‘pure speech’ activities are rigorously protected regardless of meaning, symbolic speech or conduct must be ‘sufficiently imbued with elements of communication[.]’” *Cressman*, 798 F.3d at 951–52 (quoting *Spence*, 418 U.S. at 409). “[A] court will only find symbolic speech where a plaintiff can identify a

⁷ <https://www.youtube.com/watch?v=1lxnMkrnugI>

⁸ MASTERPIECE CAKESHOP, <http://masterpiececakes.com/> (last visited Apr. 25, 2023).

message that a *reasonable onlooker* would perceive.” *Id.* at 961 (emphasis added). A reasonable person, “in the symbolic-speech context . . . focuses on ‘context [to] give meaning to [a] symbol’ and is cognizant of the ‘then-current domestic and foreign affairs of his government,’ ‘*issue[s] of intense public concern*,’ the ‘environment’ in which an expressive act occurs, and the reasons for the speaker’s expression.” *Id.* at 958 (quoting *Spence*, 418 U.S. at 410) (emphasis added).

Respondent requested that Jack Phillips create a birthday cake with specific colors, to celebrate a specific occasion. *Scardina*, 2023 WL 407620, at *2.⁹ The cake would have been steeped in symbolism; indeed, the lower court recognized that “the custom birthday cake had personal significance, reflecting Scardina’s birthday as well as celebrating her transition from male to female.” *Id.* Importantly, “the context in which a symbol is used for purposes of expression is important, for *the context may give meaning to the symbol*.” *Spence*, 418 U.S. at 410 (emphasis added).

At trial, a witness conceded that if he were at a transition celebration, “and [he] saw that same cake being served, . . . [i]t would represent from male to female,

⁹ To be clear, it is doubtful that Petitioners would create a “transgender transition” cake for any potential customer, whether the customer were the transgender individual being celebrated themselves, or a non-transgender friend or family member who was hosting a transition party, or to a mixed group of transgender and non-transgender individuals hosting a party generally to celebrate the idea of transgender transitions.

the colors.” *Scardina*, 2023 WL 407620, at *13 (internal quotation and citation omitted). A “reasonable onlooker” apprised of today’s “issue[s] of intense public concern” would understand the symbolism behind the cake. *Cressman*, 798 F.3d at 961; *Spence*, 418 U.S. at 410; *Masterpiece*, 138 S. Ct. at 1738 (Gorsuch, J., concurring) (“To suggest that cakes with words convey a message but cakes without words do not . . . is irrational.”).

The way that certain cakes are constructed speaks for itself, and the colors alone are symbolic. One transgender reveal party organizer “chose . . . *the colors of the cake to be pink, white and blue to represent the colors of the transgender pride flag.*” 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)¹⁰ (emphasis added).



Schoolcraft enjoying his cake that was layered with the colors of the transgender pride flag.

Courtesy Sarah McBride Photography

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¹⁰ <https://www.cnn.com/2020/07/16/us/gender-reveal-party-transgender-son-trnd/index.html>

¹¹ *Id.*

A baking website even educates bakers on baking transgender pride treats, explaining that “the pink and the blues are meant to represent more of your sort of traditional colors in terms of what you’d associate with, you know, boys and girls. And then the white stripe in between is meant to represent those who are either trans or nonbinary or non-gender conforming.” *Bake With Pride*, TESCO REAL FOOD.¹²

One cake-baking website boasts, “[t]he great thing about baking . . . is that it can *carry messages*. . . . This cake is another one of those chances: Trans rights are human rights[.]” *Gluten Free Vanilla Lavender Trans Pride Layer Cake*, SISTERS SAN GLUTEN (Sept. 18, 2020)¹³ (emphasis added).



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Scardina’s counsel has openly echoed these themes, arguing that Petitioners “just object to the idea of Ms. Scardina wanting a birthday cake that *reflects her*

¹² <https://realfood.tesco.com/videos/bake-with-pride.html>, at 2:13 (last visited Apr. 25, 2023)

¹³ <https://sisterssansgluten.com/gluten-free-lavender-cake/>

¹⁴ *Id.*

status as a transgender woman because they object to the existence of transgender people[.]” Colleen Slevin, *Colorado baker loses appeal over transgender birthday cake*, ABC NEWS (Jan. 26, 2023)¹⁵ (emphasis added).

Thus, the lower court’s holding that “creating a pink cake with blue frosting is not inherently expressive” is erroneous. *Scardina*, 2023 WL 407620, at *14.

2. Whether artwork is expressive does not depend on the underlying medium used.

Jack Phillips’ conscience is protected by the First Amendment, irrespective of the intricacies of a customer’s request. “The First Amendment’s fundamental purpose . . . is to protect all forms of peaceful expression in all of its myriad manifestations.” *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996). “[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection[.]” *Kaplan v. California*, 413 U.S. 115, 119–20 (1973).

Degas’ ballerinas can be recreated with edible paint:

¹⁵ <https://abcnews.go.com/Politics/wireStory/colorado-baker-loses-appeal-transgender-birthday-cake-96697751>



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The Mona Lisa can be sculpted out of pound cake:



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Though Phillips’ paintings will be eaten, and his sculptures are cast in flour and eggs, the First Amendment holds no less protection due to the underlying canvas. In fact, “[a]s long as curious and outspoken members of our society find new and creative ways to express themselves, and as long as governments find new and creative ways to regulate those people, courts will confront hard questions.” *Chelsey Nelson Photography*, 2022 WL 3972873, at *14; *Masterpiece*, 138 S. Ct. at 1723

¹⁶ *Prima Ballerina Wedding Inspiration*, BELLE THE MAGAZINE, <https://bellemagazine.com/2016/02/prima-ballerina-wedding-inspiration.html> (last visited Apr. 25, 2023).

¹⁷ *Mona Lisa*, CAKE CENTRAL, <https://www.cakecentral.com/gallery/i/3394347/mona-lisa> (last visited Apr. 25, 2023).

(“This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.”).

Otherwise, the right to free speech and expression would depend entirely on the artistic medium used. *See Hermosa Beach*, 621 F.3d at 1061 (emphasis added) (“a form of speech does not lose First Amendment protection based on the kind of surface it is applied to”). In short, cake is merely a painter’s canvas and a sculptor’s clay.

B. First Amendment protections for speech apply to commissioned messages, which can come in countless forms.

It is well settled that “[s]peech is protected even though it is carried in a form that is sold for profit.” *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003). As such, “a speaker is no less a speaker because he or she is paid to speak.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). The Supreme Court “has repeatedly rejected the notion that a speaker’s profit motive gives the government a freer hand in compelling speech.” *Masterpiece*, 138 S. Ct. at 1745 (Thomas, J., concurring); *id.* at 1741 (“When a public-accommodations law has the effect of declaring speech itself to be the public accommodation, the First Amendment applies with full force.”) (cleaned up).

As noted by the petitioner in the Second Circuit case of *Emilee Carpenter*,

numerous other conflicts may arise:

[Under New York’s theory], if a speechwriter offered her services to the public, creating speech, and writing speeches and that speech writer was a pacifist, she could be required to write a speech celebrating war, celebrating the military, for a military veteran, at a high school ROTC event. Or . . . if an atheist singer, who sang at birthdays or corporate events, was asked to sing at a[n] Easter Service for a Church, under New York’s theory, they would have to sing at that Church service, just the same as they would sing in other services as well.

Oral Argument at 7:58–8:30, *Emilee Carpenter, LLC v. James*, 575 F. Supp. 3d 353 (W.D.N.Y. 2021), *appeal docketed*, No. 22-75 (2d Cir. Jan. 13, 2022);¹⁸ *see also Elane Photography, LLC v. Willock*, 309 P.3d 53, 72 (N.M. 2013) (rejecting the argument that African-Americans would be forced to photograph KKK rallies, but based solely on the fact that New Mexico public accommodations law did not cover political discrimination).

Scardina told Masterpiece that the requested cake would be not just for Scardina’s birthday, but also specifically to “celebrat[e] her transition from male to female.” *Scardina*, 2023 WL 407620, at *2. Phillips’ sincerely held religious beliefs are that “God designed people male and female, [and believes] that a person’s gender is biologically determined.” *Id.* Consequently, Phillips declined to make the

¹⁸ <https://www.ca2.uscourts.gov/decisions>

requested cake, because doing so conflicts with his religious beliefs. *Id.* It doesn't matter whether the event in question is a same-sex wedding, a gay pride festival, or a transition celebration. And it is immaterial that the message in question is in the form of cake sold for profit.

CONCLUSION

The State of Colorado has interpreted its public accommodation laws to require all businesses not just to equally serve transgender individuals generally, but to participate in *celebrating* gender transitioning *specifically*. That is unconstitutional. And this Court can resolve this issue before it need go any further, by granting the Petition and reversing the Court of Appeals.

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted this 27th day of April 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April 2023, I filed the foregoing **BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS MASTERPIECE CAKESHOP, INC., AND JACK PHILLIPS’ PETITION FOR WRIT OF CERTIORARI** with the Clerk of the Court, and that a copy of the foregoing was served upon all counsel of record via Colorado Court E-filing system (CCEF).

/s/ William E. Trachman

William E. Trachman