

<p>SUPREME COURT, STATE OF COLORADO  2 East 14th Avenue  Denver, Colorado 80203</p>	<p>DATE FILED: December 19, 2023 8:17 AM  FILING ID: AC422BE3421D2  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><b>▲ COURT USE ONLY ▲</b></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>  Michael A. Cantrell (Arkansas Bar # 2012287)  <i>Assistant Solicitor General</i>  OFFICE OF THE ARKANSAS ATTORNEY GENERAL  323 Center Street, Suite 200  Little Rock, AR 72201  Phone: (501) 682-2401  Email: Nicholas.Bronni@ArkansasAG.gov  Dylan.Jacobs@ArkansasAG.gov  Michael.Cantrell@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 align="center"><b>BRIEF OF <i>AMICI CURIAE</i> ARKANSAS &amp; 22 OTHER  STATES IN SUPPORT OF DEFENDANTS</b></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 3,915 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

## TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI CURIAE .....	1
INTRODUCTION .....	2
BACKGROUND .....	2
ARGUMENT.....	6
I.    A Gender-Transition Cake is at Least Symbolic Speech. ....	6
II.   The Lower Courts Misapplied First Amendment Doctrine.....	8
III.  Ruling for Phillips Won't License Discrimination.....	16
CONCLUSION.....	18

## TABLE OF AUTHORITIES

### Cases

<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023).....	4, 14, 16-17
<i>Clark v. Cmty. for Creative Non-Violence</i> , 468 U.S. 288 (1984).....	6, 11, 14
<i>Craig v. Masterpiece Cakeshop, Inc.</i> , 370 P.3d 272 (Colo. App. 2015).....	3-4
<i>Fulton v. City of Phila.</i> , 141 S. Ct. 1868 (2021).....	4
<i>Hurley v. Irish-Am. Gay, Lesbian &amp; Bisexual Gp. of Boston</i> , 515 U.S. 557 (1995).....	12, 14-15
<i>Janus v. AFSCME</i> , 138 S. Ct. 2448 (2018) .....	1
<i>Masterpiece Cakeshop Inc. v. Elenis</i> , 445 F. Supp. 3d 1226 (D. Colo. 2019).....	3, 7
<i>Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n</i> , 138 S. Ct. 1719 (2018).....	<i>passim</i>
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015).....	18
<i>Pacific Gas &amp; Elec. v. Pub. Utilities Comm’n of Calif.</i> , 475 U.S. 1 (1986).....	15
<i>PruneYard Shopping Ctr. v. Robins</i> , 447 U.S. 74 (1980).....	14
<i>Rumsfeld v. Forum for Academic &amp; Institutional Rights</i> , 547 U.S. 47 (2006).....	12-13
<i>Stromberg v. California</i> , 283 U.S. 359 (1931) .....	10
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989) .....	12, 18
<i>Tinker v. Des Moines Ind. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969).....	10
<i>W.V. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943) .....	2

### Statutes

17 U.S.C. 101 .....	14
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## Other Authorities

- Abby Saldana, *Just How did Red & Pink Become the Colors of Valentine's Day?* MediaFeed.org (Feb. 13, 2023), <https://perma.cc/Z279-Y5YD> .....9
- 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> .....7
- G.D. Schott, *Sex Symbols Ancient and Modern: Their Origins and Iconography on the Pedigree*, 331 *British Medical Journal* 1509 (2005), <https://perma.cc/EAT3-CTEE>.....9
- Gender Reveal Celebrations, *Gender Reveal Cake Ideas* (Dec. 13, 2019), <https://perma.cc/865H-UEJX>.....7
- Jo B. Paoletti, *Pink and Blue: Telling the Boys from the Girls in America* (2012).....9
- Shirley Cherkasky, *Birthday Cakes and Candles, in Food and Celebration* 221 (Patricia Lysaght ed. 2002).....6
- Sybaris Collection, *A Brief History of Artwork Commission*, <https://perma.cc/NQJ5-4BDF> .....14
- Why are Red and Green the Colors of Christmas*, *Farmer's Almanac*, <https://perma.cc/6A2Y-WHDH> .....9

## 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, Virginia, and West Virginia.<sup>1</sup> 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.

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<sup>1</sup> 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; Jason S. Miyares, Virginia Attorney General; and Patrick Morrissey, West Virginia Attorney General.

## INTRODUCTION

The First Amendment prevents governments from “coerc[ing]” individuals “into betraying their convictions.” *Janus v. AFSCME*, 138 S. Ct. 2448, 2464 (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 create the cake anyway. But compelling Phillips to speak contrary to his religious beliefs violates the First Amendment. This Court should reverse.

## BACKGROUND

Jack Phillips has spent the past decade in court defending his right to speak consistently 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 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” celebrating 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 once again 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, the lower 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 Coloradan whose right to refrain from speaking conflicts with Colorado’s antidiscrimination laws. The Supreme Court held in June that 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*, 600 U.S. 570 (2023). That decision effectively overruled the decisions of

the lower courts here by holding that the First Amendment protects “a speaker’s right to control his own message” and distinguishing that expressive control from “status-based discrimination unrelated to expression.” *Id.* at 596 n.3. This “distinction between status and message” is “a fundamental feature of the Free Speech Clause.” *Id.* (noting that “Colorado *itself* has, in other contexts, distinguished status-based discrimination (forbidden) from the right of a speaker to control his own message (protected).”).

This Court should likewise conclude that Phillips cannot be compelled to create custom cakes expressing a message contrary to his beliefs.

## ARGUMENT

### I. A Gender-Transition Cake is at Least 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 partygoers of a baby’s sex.

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

And some, 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. *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 recognize the cake Scardina requested symbolized Scardina's gender transition. App. 13-14, 67-68. Even so, they held that forcing Phillips to create 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).

True, a color is not expressive, in and of itself. Pink, for example, doesn't have any intrinsic meaning. In this way colors are like other symbols: In the course of social interaction, things that aren't meaningful in themselves come to signify, represent, or suggest other things. So although the marks ♂ and ♀ are without intrinsic meaning, they've come to signify male and female. *See, e.g., G.D. Schott, Sex Symbols Ancient and Modern: Their Origins and Iconography on the Pedigree* 331 *British Medical Journal* 1509 (2005), <https://perma.cc/EAT3-CTEE>. Colors also have come to be gender specific. Thus, since the 1940s, pink has been associated with girls and femininity and blue with boys and masculinity. Jo B. Paoletti, *Pink and Blue: Telling the Boys from the Girls in America* (2012).

Color combinations have significance, too. Green with red suggests Christmas, while pink with red suggests Valentine's Day. *See Why are Red and Green the Colors of Christmas*, *Farmer's Almanac* (Dec. 5, 2022), <https://perma.cc/6A2Y-WHDH>; Abby Saldana, *Just How Did Red & Pink Become the Colors of Valentine's Day?*, *MediaFeed.org* (Feb. 13, 2023), <https://perma.cc/Z279-Y5YD>. And pink with blue together suggests the male/female binary, *see Paoletti, supra*, as Scardina himself recognized. *See App. 13* ("The color pink in the custom cake represents female or woman," and "[t]he color blue in the custom cake represents male or man.").

The manner in which colors are combined can be even more suggestive, as this case well illustrates. Here, Scardina asked Phillips specifically for a “cake with a pink interior and a blue exterior.” App. 5. It *mattered* that the cake was to be pink inside and blue outside—not otherwise. That’s because the cake would express the message that, despite the male characteristics “society saw” at birth, Scardina was female “on the inside.” App. 13 (quoting Tr. 150:2-5). Given its design, a reasonable observer could understand—more, could learn from—the cake’s message: An attendee who didn’t know whether Scardina’s internal sense of gender was male or female could pick up that information from the cake itself.

“To 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 recognized, “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. Cmty. 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 relatively simple. *See* App. 13-14. No, “the design of the cake itself” sufficiently “convey[s] the message of the cake.” App. 11.

To support a novel complexity requirement, the lower courts misread *Masterpiece II*. See App. 66-67 (quoting *Masterpiece II*); App. 22 (same). In dicta, that opinion recognized the First Amendment analysis might depend on “details” like whether “a baker refused to design a special cake with words or images” or instead “refus[ed] to sell any cake at all.” *Masterpiece II*, 138 S. Ct. at 1723. But that doesn’t imply that wordless designs are unprotected. Rather, it acknowledges the obvious—that a baker who refuses to sell premade cakes hasn’t been compelled to speak.

Far from needing a “more intricate” or “artistically involved” design, Scardina’s gender-transition cake plainly would express a message. App. 22. And compelling Phillips to create that expression would violate the First Amendment.

*2. Symbolic speech is understood in context.* The lower courts disregarded the fact that the message of the gender-transition cake would need no explanation in the context of twenty-first century American culture. Indeed, 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 *necessarily* informs the message of symbolic speech. As the district court found, “[t]he symbolism of the requested design of the cake” is “apparent given the context of gender-reveal” parties, “which have become quite popular.” App. 14. At those celebrations, “gender is only revealed” when someone “cuts into the cake” to disclose “[t]he interior” color, which is “either pink” for a girl “or blue” for a boy. App. 14.

The same is true of parades and other symbolic expression. 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 (quotation 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.” *FAIR*, 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 readily 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 create 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. “An individual does not forfeit constitutional protection simply by combining multifarious voices.” 303 *Creative*, 600 U.S. at 589 (quotation and citation omitted); *Masterpiece II*, 138 S. Ct. at 1743 n.3 (Thomas, J., concurring) (“More than one person can be engaged in protected speech at the same time.”). 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>. 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). That “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 expression (creating the cake) has ended. So by definition, selling the premade cake is not compelled speech.

Nor is it an answer to claim that Phillips could somehow 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 can't 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 Ctr. 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 create a cake intentionally symbolizing gender transition, Phillips must speak.

The lower courts' reasoning would justify any compulsion. *Accord id.* at 1744. By their logic, "creative professionals" could "be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so." *303 Creative*, 600 U.S. at 590. Thus, a Colorado website designer could have been compelled to create websites for same-sex weddings. *See id.* Or three Colorado bakeries could have been compelled to create cakes disparaging same-sex marriage. App. 60-61. But "the First Amendment tolerates none of that." *303 Creative*, 600 U.S. at 590.

### **III. Ruling for Phillips Won't License Discrimination.**

Scardina and the lower courts treat Phillips's refusal to create 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.

Refusing service to a person on the basis of transgender status is not the same as refusing to create a custom cake expressing support for a gender transition. In

collapsing this important “distinction between status and message,” *303 Creative*, 600 U.S. at 595 n.3, the district court applied the wrong legal standard. *See* App. 16-20. “While [the Free Speech Clause] does *not* protect status-based discrimination unrelated to expression, generally it *does* protect a speaker’s right to control her own message.” *303 Creative*, 600 U.S. at 595 n.3.

Phillips’ situation is like that of the website designer in *303 Creative*: He “will gladly create custom [cakes] for [LGBT] clients” “so long as the custom [design] do[es] not violate h[is] beliefs.” *303 Creative*, 600 U.S. at 594-95 (cleaned up); *see* App. 2-3, 9-10. This applies to “all customers.” *303 Creative*, 600 U.S. at 595 (quotation and citation omitted); App. 9-10. Indeed, far from engaging in status-based discrimination, Phillips “regularly serve[s] customers who identify as gay or lesbian” and those “who identify as transgender.” App. 9. His “willingness to serve those who identify as LGBT includes the creation of custom cakes for them.” *Id.* He merely won’t “creat[e] custom cakes that express messages that would violate his religious convictions.” *Id.* at 9-10.

Of course, for Scardina, that’s not good enough. Scardina considers Phillips’s views wrong, Tr. Ex. 42-44, and Scardina treats Phillips’s 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 accepted 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 19th day of December 2023,

*Amici Curiae* supporting Petitioners,

TIM GRIFFIN  
Arkansas Attorney General

NICHOLAS J. BRONNI  
Arkansas Solicitor General

DYLAN L. JACOBS  
Deputy Solicitor General

MICHAEL A. CANTRELL  
Assistant Solicitor General  
Office of the Arkansas Attorney General  
323 Center Street, Suite 200  
Little Rock, AR 72201  
Phone: (501) 682-2401  
*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 19th day of December 2023, served a copy of the foregoing document via the Colorado Courts e-filing system, which serves the parties and their counsel of record.

*/s/ Nicole C. Hunt* \_\_\_\_\_  
Nicole C. Hunt, #47052