

COLORADO SUPREME COURT 101 West Colfax Avenue, Suite 800 Denver, CO 80202	DATE FILED: April 26, 2023 9:46 AM FILING ID: DB2A1EB22097E CASE NUMBER: 2023SC116
On Petition for a Writ of Certiorari to the Colorado Court of Appeals, Division IV Case No. 21CA1142 Opinion by Judge Schutz	
Defendants / Petitioners: <i>Masterpiece Cakeshop, Inc., and Jack Phillips</i> v. Plaintiff / Respondent: <i>Autumn Scardina</i>	<p style="text-align: center;">▲ Court Use Only ▲</p>
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<p style="text-align: center;">BRIEF OF AMICUS CURIAE U.S. REPRESENTATIVE DOUG LAMBORN IN SUPPORT OF PETITIONERS</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 29, 32, and 53, 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. 53(g) and is 2,958 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 curiae*, and an argument.

3. *Amicus* has sought leave to file in compliance with C.A.R. 53(h).

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 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.

But the court of appeals disregarded these bedrock principles by compelling the Petitioners to create a cake customized to celebrate a person’s gender transition from male to female. To vindicate the First Amendment, *Amicus* urges this Court to grant the petition and 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 customized cakes that capture 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 specially design each cake, using techniques similar to those of other artists, to convey a message.

Second, because Phillips’ cakes are expressive in nature, 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 precious right, based on justifications that contradict well-established First Amendment jurisprudence.

Importantly, 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. His petition instead focuses on customized cakes that would compel his artistic expression of 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 grant the petition.

ARGUMENT

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

Cake-making is an act of self-expression to most bakers. Cake bakers are referred to as “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). Individual bakers liken baking 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>.

Tellingly, bakers of diverse ideological positions have affirmed the expressive vocation of cake artists like Phillips. In Petitioners’ previous case at the United States Supreme Court, 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* emphasized 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 a wide array of other contexts too. “Cake artists assist their clients in innumerable circumstances to add significance and convey thoughts, emotions, exhortations, or celebrations.” *Id.* at 19. While wedding cakes might be the most recognizable cake art today, “[c]akes for every conceivable occasion ... can convey articulable messages.” *Id.* at 4. There thus is “no doubt that petitioner Jack Phillips is a genuine cake artist who uses these skills.” *Id.* at 30.

Like these other artists, Phillips “creates a masterpiece” with each custom cake. Jack Phillips, *Welcome!*, Masterpiece Cakeshop, <https://bit.ly/3ok59bf>. The

logo on his website is an artist's paint palette and interlocking paintbrush and baker's whisk, symbolizing the artistic nature of his process. *See id.* "Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S.Ct. 1719, 1742 (2018) (Thomas, J., concurring) (describing the "expressive" nature of Phillips wedding cakes); Pet.App.66. Unlike pre-made cakes, Mr. Phillips creates each custom cake one at a time from scratch—he seeks to express himself through each of his custom cakes. *Id.* at 12.

One recurring theme in custom cakes is the use of color to symbolize gender—blue for male, pink for female. Consider "gender-reveal" cakes. In 2008, Jenn Karvunidis, the purported "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>; *see also* Carly Gieseler, *Gender-Reveal Parties as Mediated Events: Celebrating*

Identity in Pink and Blue 2 (2020) (gender-reveal parties “reasser[t] the significance of checking the female or male box of identity”).

Long before the first gender-reveal cake, the colors pink and blue symbolized 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 same association has persisted ever since in both the United States and the United Kingdom—“pink for girls and blue for boys.” *Id.* Marketing techniques demonstrate the same pattern. In the early 1980s, major toy companies placed particular importance on 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 “celebrat[e]” Scardina’s “transition from male-to-female.” Pet.App.35. True, such a cake need not communicate this exact message in every possible instance. (That is why Petitioners could have produced such a cake before learning of its intended message. *See id.* at 67.) But as the trial court recognized, Scardina’s requested 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”).

Phillips’ business, design, and creation process—like those of other cake artists—show that his custom cakes are intended to be communicative. 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’ professional 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 other than words. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

The Supreme Court has recognized that the First Amendment protects numerous forms of expression. This includes, among others, drawings,¹ engravings,² abstract art,³ radio and television broadcasts,⁴ movies,⁵ pornography,⁶ theatrical productions,⁷ dancing,⁸ nude dancing,⁹ live musical entertainment,¹⁰ music without words,¹¹ atonal music,¹² unintelligible verse,¹³ “the passive act of carrying the state motto on a license plate,”¹⁴ and even sleeping.¹⁵ Other courts, too, have recognized similar forms of artistic expression worthy of First Amendment protection. This includes, among others, wedding videography,¹⁶ wedding invitations,¹⁷ smoking in

¹ *Kaplan v. California*, 413 U.S. 115, 119 (1973).

² *Id.*

³ *Hurley*, 515 U.S. at 569.

⁴ *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981).

⁵ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

⁶ *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

⁷ *Schacht v. United States*, 398 U.S. 58, 62-63 (1970).

⁸ *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

⁹ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991).

¹⁰ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58 (1975).

¹¹ *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

¹² *Hurley*, 515 U.S. at 569.

¹³ *Id.*

¹⁴ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

¹⁵ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 304 (1984).

¹⁶ *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019).

¹⁷ *Brush & Nib Studio*, 448 P.3d at 906.

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

If such artistic expression warrants First Amendment protection, then there is no question that the custom cakes that Phillips creates are equally protected. *See Masterpiece Cakeshop, Ltd.*, 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’ products “communicate emotions and messages at least as clearly as other forms of art.” *Cake Artists Brief*, at 3.

Phillips’ custom cake making is analogous to other forms of recognized pure speech. As a practical matter, his techniques and designs are like those used by sculptors and painters. *Cf. Kaplan*, 413 U.S. at 119 (First Amendment protects “paintings, drawings, and engravings”). The fact that Phillips’ medium is cake, not

¹⁸ *Curious Theater Co. v. Colorado Dep’t of Pub. Health & Env’t*, 216 P.3d 71, 79-80 (Colo. App. 2008).

¹⁹ *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).

²⁰ *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).

²¹ *Mastrovincenzo v. City of New York*, 435 F.3d 78, 92-97 (2d Cir. 2006).

²² *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924-25 (6th Cir. 2003).

²³ *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 628-29 (7th Cir. 1985).

stone or canvas, has no bearing on the First Amendment analysis. Here, Phillips was asked to create a custom-made cake with the two colors, pink and blue, that have symbolized gender for over a century. A reasonable third-party observer would have no trouble understanding that the custom cake represents and celebrates transgender identity. Executing the envisioned cake would thus enlist Phillips in expressing a view about gender, one in conflict with his own beliefs. And by ordering him to do so or face judicial sanction, 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 court of appeals' justification for declining to apply First Amendment scrutiny cannot pass muster. The court concluded that any "information" "convey[ed]" by the cake was derived from its "specific context." Pet.App.68. That is, 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.*; *see id.* at 66 (framing "issue presented" as "whether making a pink cake with blue frosting rises to the level of protected conduct"). But this reductive framing of Phillips' speech contradicts established First Amendment principles.

Courts have always looked to the context of alleged 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 on expressive conduct are incomprehensible if the disputed conduct is considered only in the abstract. In *Texas v. Johnson*, 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.” 491 U.S. 397, 405 (1989). There, the defendant’s “expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent.” *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 worn to voice “objections to the hostilities in Vietnam.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). In these and other cases, 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* itself examined the context of the disputed conduct to hold that it did not rise to the level of 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 Court did not silently overrule a slew of First Amendment precedents with the phrase “inherently expressive.” Rather, this phrase requires expression to be “apparent,” *id.*, only under the circumstances in which it actually 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 “[p]erhaps 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 court of appeals’ 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. A cake’s relative simplicity of design by no means negates its expressive content.

CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted this 26th day of April, 2023,

s/ J. Michael Connolly

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