DATE FILED: April 27, 2023 3:39 PM
FILING ID: B8786C386F4C6
CASE NUMBER: 2023SC116

Colorado Supreme Court 2 East 14th Ave., Denver, CO 80203 On Petition for Writ of Certiorari to the Colorado Court of Appeals, Case No. 2021CA1142 El Paso County District Court Hon. A. Bruce Jones, Case No. 2019CV32214	
Petitioners: MASTERPIECE CAKESHOP INC. and JACK PHILLIPS v. **Respondent**: AUTUMN SCARDINA	
Attorney for Amici Curiae: Ian Speir, #45777 Covenant Law PLLC 13395 Voyager Pkwy. #130-732 Colorado Springs, CO 80921 Telephone: (719) 464-7357 ian@covtlaw.com	Case No. 2023SC00116 Court of Appeals Case No.: 2021CA1142 District Court Case No.: 2019CV32214 County: Denver

Brief of *Amici Curiae* Coalition for Jewish Values, Summit Ministries, The Colson Center for Christian Worldview, and Islam and Religious Freedom Action Team in Support of Petitioners

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28, 29(c), 32, and 53(g), 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. 53(g) in that it contains 3,085 words.
>
> The brief complies with the content and format requirements of C.A.R. 28(a)(2) & (3), 29(c), and 32.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, 29(c), 32, and 53(g).

Respectfully submitted,

Covenant Law PLLC

s/ Ian Speir
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Identity and Interest of *Amici*

Amici are a diverse set of religious organizations representing each of the Abrahamic faith traditions. Coalition for Jewish Values ("CJV") is the largest Rabbinic public policy organization in America, representing over 2,000 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, through education, mobilization, and advocacy, including amicus briefs in defense of equality and freedom for religious institutions and individuals. Summit Ministries and The Colson Center for Christian Worldview are Colorado-based ministries that educate adults and young people, equipping them to live as Christians and champion a biblical worldview. The Islam and Religious Freedom Action Team is part of the Religious Freedom Institute, a Washington, D.C.-based nonprofit organization dedicated to promoting religious freedom as a fundamental human right. The Action Team focuses on advancing religious freedom for Muslims, ensuring they can worship, express, and practice their faith without fear of discrimination or persecution.

Amici are gravely concerned about the direction of Colorado law and jurisprudence. This state's respect for the First Amendment is at a low point, and enforcement of the Colorado Anti-Discrimination Act ("CADA") has gone off the rails. It is time to course-correct. *Amici* urge the Court to grant the petition for

review, reverse the decision below, and realign Colorado with our nation's constitutional traditions. This state, like all states, should be a place where people like Jack Phillips can express their beliefs and exercise their faith without coercion.

Argument

I. Colorado is committing systemic First Amendment violations, and it is past time for this Court to intervene.

Colorado's aggressive enforcement of CADA against people of faith is disturbing, and the U.S. Supreme Court has now taken notice—twice.

In act one of this unfortunate saga, Phillips was hauled before this state's Civil Rights Commission and berated for his Christian beliefs. Commissioners compared him to a slaveowner and a Nazi for holding convictions the Supreme Court has called "decent and honorable." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). Then, another set of state officials—a panel of the Court of Appeals—passed over the incident in silence. Affirming Phillips's punishment, the court extolled the "neutrality" of CADA yet uttered not a word about the overt hostility of officials charged with enforcing it. *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115.

This Court should have granted certiorari then. *See* No. 15SC739 (Apr. 15, 2016) (denying cert). When it didn't, the U.S. Supreme Court took the unusual step of doing so—unusual not just because grants of certiorari are rare, but because the Court's decision in *Masterpiece I*, 138 S. Ct. 1719 (2018), was almost pure error

correction, which is rarer still. STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 5.12(c)(3) (11th ed. 2019). It was bad enough, the Court said, that commissioners had shown "clear and impermissible hostility" toward Phillips. 138 S. Ct. at 1729. Just as troubling was the conspiracy of silence among other state officials: there was "no objection to these comments from other commissioners"; Colorado's appellate judges "did not mention those comments, much less express concern"; and the state attorney general refused to "disavo[w]" the comments "in the briefs filed in this Court." *Id.* at 1729–30.

The Supreme Court's message was clear: Colorado had committed a systemic First Amendment violation. There aren't many cases like *Masterpiece I* in Supreme Court history, but *NAACP v. Alabama* is a close parallel. *See* 357 U.S. 449, 452–54 (1958) (after unusual enforcement action by Alabama Attorney General, unorthodox lower-court rulings, and repeat denials of review by state supreme court, Court "granted certiorari because of the importance of the constitutional questions").

Masterpiece I should have been a wake-up call. Instead, Colorado officials doubled down, insisting they hadn't done "anything wrong" and pledging to "be careful how these issues are framed" in the future. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1169 (10th Cir. 2021) (quoting state officials). They soon took aim at another Christian entrepreneur, Lorie Smith, and her small wedding-website

business. In *303 Creative*, state officials urged the federal court to find that Colorado has a "compelling interest" in forcing a business owner to convey a pro-LGBT message, even when it violates the owner's religious beliefs. The Tenth Circuit agreed and pushed CADA to an extreme, declaring the law's "very purpose" is to "eliminat[e] … ideas" and that the more "creative" and "unique" a person's speech, the more the state can coopt it. *Id.* at 1180. That ruling is bizarre and unprecedented, and the U.S. Supreme Court granted cert—again—to review the troubling First Amendment implications of Colorado law. 142 S. Ct. 1106 (Feb. 22, 2022).

Which brings us to this case, Phillips's second inquisition before the state courts. This time, a Colorado lawyer who called Phillips a "bigot," EX (Trial) 43, intentionally "sequenced" a call with his cakeshop and demanded a custom pink-and-blue cake to "celebrate" a gender transition, *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, ¶¶80,57. This was a setup, with a motive no less invidious than the commissioners' comments in *Masterpiece I*. Yet as before, the Court of Appeals turned a blind eye and upheld Phillips's punishment. And it justified its decision on grounds exactly opposite of *303 Creative*—not because the requested cake is so "creative" and "unique" that it can be compelled, but because it's "a nonexpressive product" with no "particular message" so the First Amendment doesn't apply. *Id.* ¶¶82–83.

What binds *Masterpiece I*, *303 Creative*, and this case together? The common thread is not principle—it is punishment. Each time CADA is interpreted and enforced, the judicial logic shifts but the results are the same: people of faith lose. *Masterpiece I* shined a light on a disturbing trend in Colorado, and between *303 Creative* and this case, the state is careening toward a sequel. It is past time for this Court to intervene and course-correct.

II. First Amendment protection is not limited to speech expressing a "particular message," and the lower court's decision puts Colorado on a jurisprudential island.

The same symbol can convey different messages. A custom cake that is half-black and half-white to celebrate interracial marriage is worlds apart from an identical-looking cake to celebrate segregation. A broken-glass sculpture to celebrate a woman's "breaking the glass ceiling" is not the same thing as a broken-glass sculpture celebrating Kristallnacht. Just because an artist would create the first doesn't mean she should be punished for declining the second. *See Masterpiece I*, 138 S. Ct. at 1728, 1730 (describing CADA's offensiveness rule, which permits "conscience-based objections" to "messages the storekeeper considered offensive").

The cake here expressed a particular message. Scardina told Phillips what the message was, App.005 ¶13, and as the trial court found, the cake "*symbolized* a transition from male to female," App.013, ¶48 (emphasis added). Yet the Court of

Appeals found the cake lacked a "particular message" because its meaning was not "created by Phillips" and "would not be attributed" to him. 2023 COA 8, ¶¶78,83,72. This was error.

The Supreme Court has made clear that "constitutional protection" is not "confined to expressions conveying a 'particularized message.'" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995). That's why, for example, displaying a red flag and wearing a black armband are protected speech. *Stromberg v. California*, 283 U.S. 359 (1931); *Tinker v. Des Moines*, 393 U.S. 503 (1969). "Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 570. If a parade organizer's "selection of contingents to make a parade is entitled to … protection," *id.*, a cake designer's selection of elements to make a cake is, too.

While "a narrow, succinctly articulable message" isn't required, *id.* at 569, lower courts have taken divergent approaches to the issue. In tension with *Hurley*, the Second Circuit still requires a "particularized message" but it need not be "specific." *Church of Am. Knights v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2004). The Third Circuit says *Hurley* "eliminated the 'particularized message'" requirement for speech protection, *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d

Cir. 2002)—a view shared by a prior panel of the Colorado Court of Appeals, *see Curious Theater Co. v. Colo. Dep't of Pub. Health & Env't*, 216 P.3d 71, 79–80 (Colo. App. 2008) ("a narrow, succinctly articulable message is not a condition of constitutional protection" (cleaned up, quoting *Hurley*)), *aff'd*, 220 P.3d 544 (Colo. 2009). Other courts "fall somewhere in the middle." *Cressman v. Thompson*, 798 F.3d 938, 956 (10th Cir. 2015) (en banc). In the Tenth Circuit, a claimant must "articulate some inference drawn from the image that a viewer would perceive." *Id.* at 957. The Eleventh Circuit asks whether "the reasonable person would interpret [a display] as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004).

The Court of Appeals' strict rendition of the "particular message" requirement in this case not only conflicts with *Curious Theater*. It worsens the lower-court divide, putting Colorado at odds with the weight of judicial authority. The Court of Appeals didn't deny that the cake itself is symbolic, but held that Phillips can be compelled to make it because its "message" is not "generated" by him but by an "observer" who has an "understanding of the purpose of the celebration" and the "surrounding circumstances." 2023 COA 8, ¶78. This grafts a new requirement onto compelled-speech jurisprudence—one that no court has imposed, and which the Court of Appeals itself didn't impose in *Curious Theater*. In that sense, the decision

below puts Colorado on an island, presenting yet another opportunity for high-court scrutiny.

That an observer would perceive the message in Scardina's requested cake confirms that the cake *has* meaning, that it *is* speech, because if "*some* viewers understand that *some* message is being conveyed," the First Amendment applies. *Curious Theater*, 216 P.3d at 80 (emphases added); *see also State v. Freedom From Religion Found., Inc.*, 898 P.2d 1013, 1025 (Colo. 1995) ("[C]ontext is also significant … because the context may affect the message a reasonable observer would derive."). And though Phillips need not show that the cake's message would be attributed to him, *see* Pet. for Writ of Cert., p.17 (Apr. 20, 2023), it's reasonable to suppose that it will be since, as the trial court found, Phillips "communicate[s] through his custom cakes" and "often create[s] custom cakes that convey messages." App.011–012, ¶¶42,44. Everyone remembers, for example, that Michelangelo painted the frescoes in the Sistine Chapel; no one remembers that Pope Julius II commissioned them.

Conditioning protection on whether speech or conduct involves a "particular message" is even more problematic in religious contexts. When a kosher baker declines to make a non-kosher cake, he's not trying to send, or avoid, any particular message. His refusal is not a statement about the relative status of Jews and non-

Jews or a value judgment about those who do or don't keep kosher. The baker is simply doing what Jewish law commands, regardless of any perceived "message." Similarly, a Muslim craftsman would decline a request to create a crystal pendant for use in a Wiccan ritual, even if the design came solely from the customer, and regardless of any message conveyed by the pendant and the ritual. To require religious adherents in these contexts to demonstrate that compelled speech carries a "particular message" deprives them of critical protection. "[T]he Free Exercise Clause protects religious exercises, whether communicative or not." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). And where, as here, one seeks to enlist another in conveying a religiously-objectionable message, the Free Exercise and Free Speech Clauses provide "overlapping protection." *Id.*

The Court of Appeals' novel approach, walling off the cake's message from Phillips's creative contribution, was error. "[I]t makes no difference whether or not the customer has the ultimate control over which design she wants" because "both the [designer] and the person receiving the [design] contribute to the creative process" and "are engaged in expressive activity." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010). Phillips is not "merely a conduit for the speech of" his customers; he is "intimately connected with the communication advanced." *Hurley*, 515 U.S. at 575 (cleaned up). Colorado cannot force him to

"disseminat[e] … a view contrary to [his] own" without infringing his "right to autonomy over the message." *Id.*

III. To find the cake "nonexpressive," the Court of Appeals ignored the obvious.

Colors convey meaning. To protest organized government, Yetta Stromberg hoisted a red flag. *Stromberg*, 283 U.S. at 361. To oppose the Vietnam War, Mary Beth Tinker donned a black armband. *Tinker*, 393 U.S. at 504. As symbols, colors are an "effective way of communicating ideas," "a short cut from mind to mind." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943). "Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, *a color* or design." *Id.* (emphasis added). The Justices of this Court, indeed "every federal and state judge in the country," wear black to signify their "common responsibility" "in upholding the Constitution and the rule of law." Sandra Day O'Connor, Why Judges Wear Black Robes, *Smithsonian Mag.*, Nov. 2013.[1]

The Court of Appeals said this pink-and-blue cake lacks "inherent meaning" and "is not inherently expressive." 2023 COA 8, ¶¶65,83. But that is strange logic for the First Amendment. Red flags and black armbands don't have "inherent

[1] https://www.smithsonianmag.com/history/justice-sandra-day-oconnor-on-why-judges-wear-black-robes-4370574/.

meaning" either, but *they do have meaning*. They have meaning because of what the speaker intends and what viewers understand the message to be. Nor must these always be congruent. "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Barnette*, 319 U.S. at 632–33; *Curious Theater*, 216 P.3d at 80 (viewers "need not agree on the interpretation of the message"). In *Barnette*, the Court struck down a compulsory flag salute law because it "compel[led] [a student] to utter what is not in his mind." *Id.* at 634. It didn't matter that the salute was, for him, a "gesture *barren of meaning*." *Id.* at 633 (emphasis added). The First Amendment still protected against the compelled expression.

Deeming the cake non-speech, the Court of Appeals turned a blind eye to the obvious. Since World War II, pink and blue have come to symbolize gender, especially when appearing together. Natalie Wolchover, "Why Is Pink for Girls and Blue for Boys?," *LiveScience*, Aug. 1, 2012.[2] By the 1980s, marketers used these colors widely to signal gender-distinct products. Katy Steinmetz, "What the Toy Aisle Can Teach Us About Gender Parity," *Time*, Aug. 13, 2015;[3] *see also* DR. LISE ELIOT, *PINK BRAIN, BLUE BRAIN* (2009); Andrée Pomerlau at al., *Pink or blue:*

[2] https://www.livescience.com/22037-pink-girls-blue-boys.html.
[3] https://time.com/3995810/what-the-toy-aisle-can-teach-us-about-gender-parity/.

Environmental gender stereotypes in the first two years of life, 22 SEX ROLES 359 (1990).

Hugely popular in recent years, the "gender reveal party" is when expectant parents share the moment they learn their baby's gender. A common reveal method? Cutting into a custom cake to expose a blue or pink interior. Parents typically have the ultrasound technician secretly communicate the baby's gender to a baker, "who whips up a pink or blue cake, covering the telltale color with frosting. The couple discover the gender when they cut the cake." Alex Williams & Kate Murphy, "Boy or Girl? Cut the Cake," *N.Y. Times*, Apr. 7, 2012.[4]

Transgender advocates rely on these color associations. The transgender pride flag was designed in 1999 by Monica Helms, who explained that "[t]he light blue is the traditional color for baby boys, pink is for girls, and the white in the middle is for those who are transitioning." Ariel Sobel & Andrew J. Sullivan, "The Complete Guide to Every Queer Pride Flag," *Pride*, March 1, 2023.[5] In 2014, when the original flag was added to the Smithsonian's archives, the National Center for Transgender Equality observed that "[t]he cuts of blue, pink, and white fabric that Monica first bound together 15 years ago now form a symbol of the trans community." Nat'l Ctr.

[4] https://www.nytimes.com/2012/04/08/fashion/at-parties-revealing-a-babys-gender.html.
[5] https://www.pride.com/pride/queer-flags#rebelltitem27.

for Transgender Equality, "Milestone: Smithsonian Accepts Original Trans Pride Flag," Aug. 19, 2014;[6] *see also* Alex V. Green, "The Pride Flag Has a Representation Problem," *The Atlantic*, June 23, 2021 (explaining that "LGBTQ flags" have evolved by adding colors, including pink, blue, and white to represent transgender people).[7]

We asked ChatGPT, the well-known AI bot, "What is the meaning of a cake with a pink interior and a blue exterior?" After affirming that it "could have different meanings depending on the context," the bot observed that "in some cultures, pink may be associated with femininity and blue with masculinity, so the cake could be meant to represent a celebration of gender or gender identity." When we asked, "Can you suggest how to design a cake to celebrate a gender transition?", the bot suggested "[a] half-and-half cake" to "represent the person's transition from one gender to another," with "one half of the cake decorated in pink, and the other half decorated in blue." If even a machine can recognize the symbolism here, surely the Court of Appeals should have grasped it.

The Court of Appeals also ignored relevant legal context and background. Scardina admits to demanding the cake *because* of the message it expressed: the "pink interior and blue exterior" were "intended for the celebration of my transition

[6] https://transequality.org/blog/milestone-smithsonian-accepts-original-trans-pride-flag.
[7] https://www.theatlantic.com/culture/archive/2021/06/pride-flag-has-representation-problem/619273/.

from male to female," Scardina said. Ex (Trial) 46. The demand was made *on the day* the U.S. Supreme Court granted cert in *Masterpiece I*. Scardina had already emailed Phillips to call him a "bigot" and volunteered to become a complainant to the Civil Rights Commission, and then later demanded another custom cake depicting Satan in order to "correct" the "errors of [Phillips's] thinking." Pet. for Writ, p.9. Scardina was trolling for a legal case, targeting Phillips for his religious beliefs and his role in an ongoing national controversy.

To deny that this case was a setup, 2023 COA 8, ¶80, and to divorce the pink-and-blue cake from its broader social, cultural, legal, and factual context is to play the ostrich. That's what the Court of Appeals did last time, in *Masterpiece I*. This Court should not overlook the error again.

Conclusion

The Court should grant Phillips's petition for review.

Respectfully submitted April 27, 2023,

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