COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 18, 2021 2:23 PM FILING ID: 578E15E4E83FE CASE NUMBER: 2021CA1142
Appeal from: Findings of Fact and Conclusions of Law DISTRICT COURT, COUNTY OF DENVER District Court Judge: The Hon. A. Bruce Jones DISTRICT COURT CASE NO. 19CV32214	
In the Case of: Plaintiff/Petitioner/Appellee: AUTUMN SCARDINA, and Defendants/Respondents/Appellants: MASTERPIECE CAKESHOP INC. and JACK PHILLIPS.	**▲ Court Use Only ▲**
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BRIEF OF AMICUS CURIAE ARIZONA ATTORNEY GENERAL MARK BRNOVICH WITH THE SUPPORT OF 15 ADDITIONAL STATE ATTORNEYS GENERAL IN SUPPORT OF DEFENDANTS/APPELLANTS

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 3,771 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.

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INTEREST OF AMICUS

Amicus Curiae, Arizona Attorney General Mark Brnovich, with support of 15 additional State Attorneys General,[1] files this brief in support of Appellants Masterpiece Cakeshop Inc. and Jack Phillips.

States have an interest in ensuring consistent interpretations of federal constitutional provisions. Our federal Constitution protects providers of goods and services—like anyone else—from being required to express a particular viewpoint. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). While public-accommodation statutes are important tools to eliminate specific kinds of invidious discrimination, the First Amendment's Free Speech Clause forbids States from using those laws to compel the expression of citizens who create custom speech for a living.

[1] This brief is also supported by the following State Attorneys General: Steve Marshall, Attorney General of Alabama; Treg R. Taylor, Attorney General of Alaska; Leslie Rutledge, Attorney General of Arkansas; Derek Schmidt, Attorney General of Kansas; Daniel Cameron, Attorney General of Kentucky; Lynn Fitch, Attorney General of Mississippi; Eric S. Schmitt, Attorney General of Missouri; Austin Knudsen, Attorney General of Montana; Douglas J. Peterson, Attorney General of Nebraska; Dave Yost, Attorney General of Ohio; John M. O'Connor, Attorney General of Oklahoma; Alan Wilson, Attorney General of South Carolina; Jason R. Ravnsborg, Attorney General of South Dakota; Ken Paxton, Attorney General of Texas; and Patrick Morrisey, Attorney General of West Virginia.

The Arizona Supreme Court recently recognized that individual First Amendment rights do not disappear in the face of public-accommodation laws. *See Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019) (City of Phoenix cannot compel speech from artists who craft custom wedding invitations); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019) ("Even antidiscrimination laws, as critically important as they are, must yield to the Constitution."). Despite recognizing this limited exception, Arizona is still able to robustly enforce its public-accommodation law and effectively punish invidious status-based discrimination.

Amicus Curiae seeks to ensure that the rule of law is upheld consistently and believes that this brief will contribute to the Court's review of this important constitutional question.

INTRODUCTION

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. The decision of the district court below, however, charts a new course.

The district court held that pursuant to the Colorado Anti-Discrimination Act ("CADA"), Colorado can force Jack Phillips and Masterpiece Cakeshop to create a custom-made cake designed to represent an individual's gender transition—regardless of whether Mr. Phillips wants to express that message. Mr. Phillips "has strong religious beliefs that it is not possible for a person to be transgender," and "[h]e and his wife do not believe that a person can transition from the gender assigned at birth." *Scardina v. Masterpiece Cakeshop Inc.*, No. 19CV32214, Findings of Fact and Conclusions of Law, ¶ 22 (Colo. Dist. Ct. June 15, 2021) ("Order"). Thus, creating a custom cake expressing a message of celebration of an individual's gender transition is contrary to Mr. Phillips' religious beliefs.

Yet Colorado says CADA requires Mr. Phillips to create this cake, expressing this message. The decision runs afoul of the Supreme Court's repeated recognition that the First Amendment's guarantee of freedom of expression protects a wide array of artistic works, and in turn, those works cannot be compelled. And recognition of this protection will not nullify a public-accommodation law such as CADA—it is only in narrow circumstances that commercial applications of public-accommodation laws even implicate compelled-speech protection.

Mr. Phillips should not be compelled to use his creative talents to express a message he does not want to convey. Not even public-accommodation laws, as

important as they are, can override the First Amendment. This Court should reverse the decision of the district court.

BACKGROUND

Defendant Jack Phillips, along with his wife, owns and operates Masterpiece Cakeshop. Mr. Phillips "is a devout Christian who seeks to operate the Bakery consistently with his religious beliefs." Order ¶ 5. But this endeavor has not been without legal challenges.

In 2012, Mr. Phillips and Masterpiece Cakeshop were at the center of legal action after Mr. Phillips declined to create a cake for a same-sex wedding because it contradicted his religious beliefs, which prompted an investigation by the Colorado Civil Rights Division. The Colorado Civil Rights Commission ultimately determined that Mr. Phillips' refusal to create the wedding cake violated CADA. Mr. Phillips raised two constitutional claims—First Amendment rights to free speech and free exercise of religion—both of which were rejected. This Court affirmed. *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 112, *rev'd sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

The action gained national attention when the U.S. Supreme Court reversed the Colorado Court of Appeals, holding that "[w]hen the Colorado Civil Rights

Commission considered [Mr. Phillips'] case, it did not do so with the religious neutrality that the Constitution requires." *Masterpiece Cakeshop*, 138 S. Ct. at 1724. Because the Supreme Court was able to decide the case on free exercise grounds, the Court did not reach Mr. Phillips' freedom of expression arguments.

That victory for Mr. Phillips was, however, short-lived. In 2017, while the Supreme Court case was still pending, Masterpiece Cakeshop received a call from the Plaintiff in this action, Ms. Scardina, asking "if the Bakery could make a custom cake for her birthday[.]" Order ¶ 12. Ms. Scardina asked for a cake with a pink interior and a blue exterior and "'explained that the design was a reflection' of her 'transition[] from male-to-female.'" Order ¶ 13. Mr. Phillips declined to make the cake because he "has strong religious beliefs that it is not possible for a person to be transgender," and "[i]t would violate [his] religious beliefs to send a message to anyone that he would celebrate a gender transition." Order ¶ 16, 22. Ms. Scardina filed a complaint with the Colorado Civil Rights Division. After Mr. Phillips brought a suit against the Division in federal court, *see Masterpiece Cakeshop Inc. v. Elenis*, No. 18-cv-02074 (D. Colo.), the Division dismissed that complaint with prejudice. But Ms. Scardina followed by filing the present action, alleging that Mr. Phillips violated CADA by refusing to create a custom cake representing and celebrating her gender transition. The district court ultimately concluded that Mr.

Phillips was in violation of CADA and rejected that the First Amendment protects Mr. Phillips in this case.

ARGUMENT

I. As Artistic Works, Custom Cakes Are Protected Under The First Amendment's Guarantee Of Freedom Of Expression.

The freedom of speech guaranteed by the Constitution protects not only "'the right to speak freely,'" but also "'the right to refrain from speaking at all.'" *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018). Compelling an individual to "mouth support for views they find objectionable violates [a] cardinal constitutional command," rendering efforts to do so "universally condemned." *Id.*; *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) ("[A] speaker has the autonomy to choose the content of his own message[.]"). Not only does compelled speech undermine that which is "essential to our democratic form of government," but it also "coerce[s] [individuals] into betraying their convictions" and promoting "ideas they find objectionable[.]" *Janus*, 138 S. Ct. at 2464.

This protection applies beyond spoken words. It applies equally to other forms of protected expression—in this case, art. *See, e.g.*, *Telescope Media Grp.*, 936 F.3d at 752 ("[T]here is no question that the government cannot compel an artist to paint[.]"). Yet Colorado is compelling Mr. Phillips to create a custom cake that

all parties have admitted expresses a distinct message that Mr. Phillips does not wish to express.

A. The First Amendment Broadly Protects Art.

It has been "long recognized that [the First Amendment's] protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). "[T]he Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569. In line with these principles, the Supreme Court has developed a longstanding tradition of protecting artistic works.[2]

Indeed, this protection appears to run broad. *See, e.g.*, *Hurley*, 515 U.S. at 569 ("painting of Jackson Pollock, music of Arnold Schöenberg, [and] Jabberwocky verse of Lewis Carroll" are "unquestionably shielded" by the First Amendment). The Court has recognized that the protection extends to "pictures, films, paintings, drawings, and engravings," *Kaplan v. California*, 413 U.S. 115, 119 (1973), music without words, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989), nude dancing, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981), movies,

[2] This protection remains subject to the few historically excluded "'well-defined and narrowly limited classes of speech'" that go beyond what the First Amendment protects, i.e., obscenity, incitement, and fighting words. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 791 (2011).

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952), and even video games, *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011).

Likewise, courts around the country have extended the same protection to a wide array of artistic works. For example, both the Ninth and Eleventh Circuits have held that tattoos are protected mediums of speech. *See Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (holding "the act of tattooing is sheltered by the First Amendment, in large part because [the court found] tattooing to be virtually indistinguishable from other protected forms of artistic expression"); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) ("We have little difficulty recognizing that a tattoo is a form of pure expression entitled to full constitutional protection."). The Eighth Circuit recently opined on the First Amendment's protection of wedding videography, holding that the videos "are a form of speech that is entitled to First Amendment protection." *Telescope Media Grp.*, 936 F.3d at 750. And the Supreme Court of Arizona recently recognized protection for the artistic works of wedding invitation calligraphists. *Brush & Nib Studio*, 448 P.3d at 908 ("Plaintiffs' custom wedding invitations, and the process of creating them, are protected by the First Amendment because they are pure speech.").

Justice Souter has noted that this protection "turns not on the political significance" a particular work may express, but rather simply on the "expressive character" of the work itself. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 602–03 (1998) (Souter, J., dissenting); *see also Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) (First Amendment "embrace[s] purely artistic as well as political expression" and protects "art for art's sake."). In that light, some courts have indicated that "context matters," as "all images are not inherently expressive[.]" *See Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (holding that "the reproduction of the Native American image on many thousands of standard license plates [wa]s not an exercise of self-expression to which full First Amendment protection is accorded"); *see also Brush & Nib Studio*, 448 P.3d at 906 (First Amendment protection is warranted when a person uses the medium "as a means of self-expression[.]"). But still, "courts must always remain sensitive to any infringement on genuinely serious … artistic … expression[.]" *Miller v. California*, 413 U.S. 15, 22–23 (1973).

So while "the Supreme Court has never explicitly defined the entire universe of artistic expression safeguarded by the First Amendment," *Buehrle*, 813 F.3d at 976, it is evident that a wide range of artistic mediums warrant the protection of the First Amendment.

B. Custom Cakes Are Widely Recognized As Artistic Works.

Cake design is not a new form of artistry. People have been celebrating occasions with artfully designed cakes for centuries. And cake artists have been broadly recognized for their creations. For example, colleges and advanced learning centers offer classes and specialized programs to train individuals in the art of cake decoration. *See, e.g.*, *The Art of Cake Decorating*, Inst. of Culinary Educ., https://www.ice.edu/newyork/continuing-ed/art-cake-decorating (last visited Nov. 16, 2021) (certificate program in the "Art of Cake Decorating" which includes classes in piping, hand-painting, and airbrushing). Television shows in the past decade have also concentrated on the unique artistry of cake designers. *See* Hannah Brown, *Having Your Cake and Eating It Too: Intellectual Property Protection for Cake Design*, 56 IDEA: J. Franklin Pierce Cent. for Intell. Prop. 31, 40–42 (2016) (discussing the many TV shows highlighting elaborate cake designs). And other areas of law—e.g., copyright law—recognize the creative and artistic value in cake design. *See id.* at 46 ("Cake design is clearly an example of a chef's creative expression and is therefore protectable under copyright law. Cake design fits under the pictorial, graphic, and sculptural works category of copyright law.").

In like manner, cake designers, like Mr. Phillips, often consider themselves to be artists. *See Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring)

("Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palette with a paintbrush and baker's whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas."); *see also* Brief for Cake Artists as *Amici Curiae* in Support of Neither Party at 4–5, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) ("Cake artists must be adept at a multitude of artistic endeavors beyond simply 'baking.' They must have visual-arts skills to design a cake that is pleasing to the eye—painting, drawing, and sculpting."). Mr. Phillips testified below that he took art classes in school, and "many of the same art techniques that he used in his art classes could be applied to creating cakes." Order ¶ 40. According to Mr. Phillips, the artistry carries over to even the simple tasks of cake design:

> Mr. Phillips uses artistic techniques and tools to create intricate custom cakes, which convey the message of the cake not only through written words that may appear on the cake (such as 'Happy Birthday,' 'Congratulations,' etc.) but also by the design of the cake itself. … He uses these skills to create cakes unique to a celebration and to express an intended message. … To reach this goal, Mr. Phillips may use his artistic skills for even simple tasks, such as selecting and applying colors.

Order ¶ 41. And he "seeks to express himself through each of his custom cakes." Order ¶ 45.

Far from being a new artistic medium, the artistic works of custom cake designers are long-recognized and well-accepted.

C. The First Amendment Protects Mr. Phillips In This Case.

The U.S. Supreme Court resolved the original case against Mr. Phillips in his favor without addressing the artistic value of Mr. Phillips' custom cakes. But the Court here can look to the Supreme Court's repeated protection of art, apply the same principles, and recognize that the First Amendment's guarantee of freedom of expression protects Mr. Phillips in this case. *See Brown*, 564 U.S. at 790 ("'[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.").

Within this legal landscape and considering the facts of this case, there should be little doubt that Mr. Phillips is protected by the First Amendment in this instance. He was asked to create a custom cake expressing a distinct message—a message he did not want to express. The record is replete with findings that Ms. Scardina relayed to Mr. Phillips the message the cake should convey:

- "Ms. Scardina told the Bakery that the cake was to celebrate a transition from male to female and that the design reflected that transition." Order ¶ 27.

- "Ms. Scardina testified that the requested cake was to be used at a family celebration of her birthday and gender transition. … In context, her concept of the requested cake, with a pink interior and blue exterior, symbolized a transition from male to female[.]" Order ¶ 48.
- "Ms. Scardina explained that the design was a reflection of her transition from male-to-female and that she had come out as transgender on her birthday." Order ¶ 48(A).
- "The color pink in the custom cake represents female or woman. … The color blue in the custom cake represents male or man." Order ¶ 48(B).
- "Ms. Scardina testified that the requested cake design was 'symbolic of the duplicity of [her] existence, to [her] transness.'" Order ¶ 48(C).
- "Ms. Scardina further testified, 'the blue exterior … represents what society saw [her] as on the time of [her] birth' and the 'pink interior was reflective of who [she is] as a person on the inside.'" Order ¶ 48(D).

The lower court further recognized that the popularity of gender-reveal cakes also made this message apparent. *See* Order ¶ 48(E). There was no mistaking what the message of the cake would be.

The cakeshop's status as a for-profit business does not affect this outcome. *See Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring) (The

Supreme "Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech.") (collecting cases). "[T]he degree of First Amendment protection is not diminished merely because the … speech is sold rather than given away." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988); *see also Brush & Nib Studio*, 448 P.3d at 907 ("A business does not forfeit the protections of the First Amendment because it sells its speech for profit."). Thus, the First Amendment continues to shield an artist who creates and sells expressive works within the context of a for-profit business.

In light of the facts here, applying CADA as the lower court would unconstitutionally compels Mr. Phillips to create a custom cake and express a message that he does not wish to express.[3]

[3] Even if the Court were to analyze the creation of a custom cake here as expressive conduct, the First Amendment would still not permit Colorado to compel Mr. Phillips' speech. "To determine whether conduct is sufficiently expressive, the Court asks whether it was 'intended to be communicative' and, 'in context, would reasonably be understood by the viewer to be communicative.'" *Masterpiece Cakeshop*, 138 S. Ct. at 1742 (Thomas, J., concurring). Ms. Scardina asked for a cake with the intention that it "be communicative." And even the district court noted that the "symbolism of the requested design of the cake is also apparent given the context of gender-reveal cakes, which have become popular in at least the last six years." Order ¶ 48(E).

II. Recognition Of The First Amendment's Protection Here Would Not Constitute A License To Discriminate.

It is only in narrow circumstances, like here, that the commercial application of a public-accommodation law would implicate compelled-speech protection at all. Public-accommodation laws "do not, as a general matter, violate the First or Fourteenth Amendments," *Hurley*, 515 U.S. at 572, which means that "most applications of antidiscrimination laws ... are constitutional." *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, 479 F. Supp. 3d 543, 564 (W.D. Ky. 2020). But protection applies, as here, when a business owner creates custom speech for clients, a prospective client requests custom speech, and the owner declines because he objects to the message that the speech would communicate.

This protection implicates few business transactions because only a small percentage of commercial exchanges revolve around the creation of custom speech. The vast majority of transactions—clothing stores selling attire, landscaping companies mowing lawns, gas stations selling fuel, health clubs offering memberships, and restaurants selling sandwiches, to name a few—will have no basis to claim compelled-speech protection. *See Masterpiece Cakeshop*, 138 S. Ct. at 1728 (recognizing that there are "innumerable goods and services that no one could argue implicate the First Amendment").

Furthermore, the compelled-speech doctrine applies only when the compelled speaker objects to the message communicated through his expression. *See Hurley*, 515 U.S. at 580 (noting the absence of compelled-speech protections when allegedly compelled speakers do not "object[] to the content"); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 12 (1986) (plurality opinion) (same). Thus, if an artist flatly refuses to work for a protected class, regardless of the message that his speech would convey, he finds no refuge in compelled-speech principles. This, of course, does not describe Mr. Phillips at all. While he will not create custom cakes celebrating certain messages, the record below indicates that Mr. Phillips is not unwilling to create other custom cakes for individuals who identify as gay or lesbian or transgender. Order ¶¶ 35–36. His objection here is entirely messaged based. In the same manner, his religious convictions would also prohibit him from creating cakes "promoting Halloween, the 'Day of the Dead,' cakes with Harry Potter and Game of Thrones themes, cakes celebrating same-sex weddings, and cakes demeaning LGBT individuals," regardless of the customer. Order ¶ 37.

In sum, the compelled-speech protection that Mr. Phillips seeks is narrow, and a ruling for him would not be "a license to discriminate." *Chelsey Nelson Photography*, 479 F. Supp. 3d at 564; *see also Brush & Nib Studio*, 448 P.3d at 916 ("Nothing in our holding today allows a business to deny access to goods or services

to customers based on their sexual orientation or other protected status."). While not everything Mr. Phillips does at his business will necessarily warrant protection, the creation of a custom cake in this instance does. *See Brush & Nib Studio*, 448 P.3d at 907 ("[S]imply because a business creates or sells speech does not mean that it is entitled to a blanket exemption for all its business activities. … [N]o business 'is likely ever to be exclusively engaged in expressive activities,' and even the most expressive business will be engaged in non-expressive business activities.").

* * *

"Even antidiscrimination laws, as critically important as they are, must yield to the Constitution." *Telescope Media Grp.*, 936 F.3d at 755. And this is such an instance. The Supreme Court has made clear that artistic expression cannot be compelled, and the same protection that the Court has regularly afforded to artists expressing themselves through various mediums should be afforded to Mr. Phillips here.

CONCLUSION

The Court should reverse the court below and hold that Mr. Phillips and Masterpiece Cakeshop are protected by the First Amendment in this case.

DATED: November 18, 2021

Respectfully submitted,

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