SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	~~DATE FILED: December 19, 2023 2:38 PM~~ FILING ID: 61BA0F84ECB35 CASE NUMBER: 2023SC116
On Writ of Certiorari to the Colorado Court of Appeals, Case No. 2021CA1142, Judges Schutz, Dunn, Grove DISTRICT COURT, COUNTY OF DENVER District Court Judge: The Hon. A. Bruce Jones District Court Case No. 19CV32214	
Petitioners: MASTERPIECE CAKESHOP INC., and JACK PHILLIPS, and Respondent: AUTUMN SCARDINA.	▲ COURT USE ONLY ▲
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BRIEF OF *AMICI CURIAE* AARON AND MELISSA KLEIN IN SUPPORT OF PETITIONERS	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Colorado Appellate Rules (C.A.R.) 28, 29, 32, and 53, including all formatting requirements set forth in these rules:

1. This brief complies with the applicable word limit set forth in C.A.R. 29(d) and is 4,736 words, excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block.

2. This brief complies with the requirements of C.A.R. 28(a)(2) and (3), containing both a concise statement of the identity and interest of the *Amicus curiae*, and an argument.

3. This brief complies with the requirements of C.A.R. 32. This brief has been prepared in proportionally spaced typeface with 14-point Times New Roman font.

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

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.

Dated: December 19, 2023.

/s/ Eric Kniffin
Eric Kniffin
Counsel for Amici Curiae

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INTEREST OF AMICUS CURIAE[1]

In 2007, Aaron and Melissa Klein opened a bakery in Gresham, Oregon, called "Sweet Cakes by Melissa." Like Jack Phillips (the petitioner in this case), the Kleins are expert cake artists. They use their artistic skills to sketch, sculpt, and paint custom cakes that convey messages consistent with their faith. The Kleins—like Phillips—fulfill their religious calling to love their neighbors by creating cakes for all people. And like Phillips, the Kleins serve all people, but cannot express all messages they are asked to express through their custom cakes.

In 2013, a couple asked Aaron and Melissa to create a custom cake for a same-sex wedding. Their religious convictions would not allow them to create art celebrating a same-sex marriage, so they declined to create the cake. For this single declination, an Oregon state agency ruled that the Kleins violated the state's public accommodation law. The agency imposed a financially devastating penalty of $135,000 on the Kleins. Oregon effectively forced the Kleins to shut down their family bakery, which they had worked for years to build, and punished them with a "gag order" whereby the Oregon government restricted them from discussing their

[1] Counsel for amici curiae authored this brief in its entirety. No attorney for any party authored any part of this brief, and no one apart from counsel for amici curiae made any monetary contribution intended to fund the preparation or submission of this brief. A Motion for Leave to File Brief of Amici Curiae was filed concurrently with this brief.

case in public. That single declination occurred over a decade ago, yet the litigation remains ongoing.

Appellate courts have incrementally issued rulings in favor of the Kleins since then. In 2017, the Oregon Court of Appeals struck the "gag order" but upheld the remainder of the state agency's decision. *Klein v. Or. Bureau of Lab. & Indus.*, 410 P.3d 1051, 1086–87 (Or. Ct. App. 2017). In 2019, the U.S. Supreme Court granted a writ of certiorari in the Kleins' case, then remanded the case for reconsideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018). On remand in January 2022, the Oregon Court of Appeals concluded that the state agency's handling of the damages portion of the case was not neutral toward the Kleins' religion and therefore violated the Kleins' Free Exercise rights. *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1124–27 (Or. Ct. App. 2022). Nevertheless, the Oregon Court of Appeals upheld the agency's liability finding against the Kleins. *Id*. at 1128. In May 2022, the Oregon Supreme Court declined to review the Oregon Court of Appeals' decision. *Klein v. Or. Bureau of Lab. & Indus.*, No. S069313 (Or., May 5, 2022) (order denying review). In 2023, the U.S. Supreme Court granted a writ of certiorari in the Kleins' case, then remanded the case for reconsideration in light of *303 Creative v. Elenis*, 600 U.S. 570 (2023). Their case is currently pending before the Oregon Court of Appeals.

This Court's ruling will establish an important precedent on whether governments can force cake artists to speak messages that violate their faith. As amici, the Kleins have a strong interest in ensuring that all artists have a right to speak freely—or refrain from speaking—as their faith requires. The Kleins urge this Court to rule in favor of Phillips and protect free speech and religious liberty.

SUMMARY OF ARGUMENT

The Colorado Court of Appeals correctly found that whether the trial court's ruling violated Phillips' First Amendment rights "rests upon whether the creation of a pink cake with blue frosting constitutes protected speech." *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, ¶ 68. However, the lower court incorrectly concluded the cake was not speech. *Id*. ¶ 83.

This brief focuses on a single issue: why the requested cake constitutes pure, expressive speech. Due to briefing constraints, Petitioners' analysis on whether the requested cake is speech was limited to two-and-a-half pages. To assist the Court and support the Petitioner, this brief draws on the expertise the Kleins have gained through litigating over the past decade whether a custom, artistic cake is speech. It explains why original, expressive cakes—particularly those requested as the centerpiece of an expressive event—are pure speech worthy of broad constitutional protection.

Also, in June of this year, the U.S. Supreme Court issued an opinion in *303 Creative v. Elenis*, 600 U.S. 570 (2023). In that case, the Court found that the *303 Creative* petitioner engaged in "nearly identical conduct" to Phillips' conduct. *Id*. at 583. Due to the similarities of fact between *303 Creative* and this case, *303 Creative*'s analysis is highly relevant to the disposition of this case and will be referenced throughout this brief.

The First Amendment to the U.S. Constitution offers substantial protections for free speech. These protections safeguard both the right to speak and the right to refrain from speaking at all. This brief explains why the requested custom cake is pure speech and, as such, is worthy of full speech protection. The protection to which Phillips is entitled is in no way lessened by the fact that the cake was to be made from an edible medium, was commissioned by a customer, was offered as a commercial product, and may have different meanings assigned to it by different observers. Since Phillips' act of creating a custom, expressive cake is pure speech, it is worthy of broad constitutional protection. This Court should rule in favor of Phillips and protect his right to speak only those messages that align with his faith. The First Amendment demands no less.

ARGUMENT

I. The First Amendment Protects Pure Speech.

The First Amendment to the U.S. Constitution protects "the 'freedom to think as you will and to speak as you think.'" *303 Creative*, 600 U.S. at 584, citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660–61 (2000). As the lower court in this case acknowledged, the government may not "force a person to communicate a particular message." 2023 COA 8, ¶69 (citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.* (*FAIR*), 547 U.S. 47, 61 (2006)). *See also, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018).

Indeed, just last term, the U.S. Supreme Court reaffirmed that "the First Amendment protects acts of expressive association" and forbids the government from compelling a person "to speak its own preferred messages." *303 Creative*, 600 U.S. at 585–87 (citing *W.Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (upholding the right of schoolchildren to refuse to pledge allegiance to the American flag for religious reasons); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557 (1995) (upholding the right of a veterans parade group to

refuse to include an LGBT group in a parade); and *Boy Scouts*, 530 U.S. 640 (upholding the right of the Boy Scouts to exclude gay scoutmasters)).

In both *303 Creative* and in this case, Colorado attempted to apply its Anti-Discrimination Act (CADA) to "compel" an artist "to create speech [he or she] does not believe." *303 Creative*, 600 U.S. at 579. Such government compulsion "offends the First Amendment" and denies the First Amendment's "promise" to "all persons" to be "free to think and speak as they wish, not as the government demands." *Id*. at 587, 603. This Court should rule in favor of Phillips, guaranteeing that promise remains for all Colorado artists.

II. Original, Expressive Art Is Pure Speech.

In *303 Creative*, the United States Supreme Court utilized an originality/expressiveness test to determine what constitutes speech. *Id*. at 587. The Court concluded the petitioner's art was "pure speech" because of its *originality* (it was her "original, customized creation" "tailored" for each customer) and *expressiveness* (it utilized "images, words, symbols, and other modes of expression" to "communicate ideas" and "celebrat[e] and promot[e]" expressive events). *Id*. at 587, 593.

This was not a novel ruling. The Supreme Court has long held that original, expressive works of art—including the "painting of Jackson Pollock, music of

Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll"—are "unquestionably shielded" by the First Amendment. *Hurley*, 515 U.S. at 569. Similarly, in *303 Creative,* the Court found that "all manner of speech"—from "'pictures, films, paintings, drawings, and engravings,' to 'oral utterance and the printed word'"—qualify for "First Amendment protections." 600 U.S. at 587 (citing *Kaplan v. California*, 413 U.S. 115 (1973)). *See also Shurtleff v. Boston*, 142 S.Ct. 1583, 1590–91 (2022) (flags); *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 790 (2011) (video games); *Hurley*, 515 U.S. at 568–70 (parades); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02, (1952) (movies). The First Amendment encompasses all "original, customized creation[s]" and extends to "all persons engaged in expressive conduct." *303 Creative,* 600 U.S. at 587, 600.

Protected expressive conduct encompasses the creation of art made to convey a message or idea. "[P]aintings, photographs, prints and sculptures" are speech because they "always communicate some idea or concept". *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996). Music, film, *even tattoos* are pure speech because they "predominantly serve to express thoughts, emotions, or ideas." *Coleman v. City of Mesa*, 284 P.3d 863, 869–70, 872 (Ariz. 2012). Even art that merely conveys the

artist's "sense of form, topic, and perspective" is expression worthy of speech protection. *White v. City of Sparks*, 500 F.3d 953, 955–56 (9th Cir. 2007).

303 Creative drew a bright line between (1) government-compelled creation of original, expressive content and (2) government-compelled non-expressive conduct involving "ordinary commercial good[s]." 600 U.S. at 593, 598. The United States Supreme Court took great pains to explain that the former is inherently a violation of the First Amendment's guarantee of free speech, while the latter will rarely implicate free speech concerns. *See id*. at 587, 592, 593-594.

Under the *303 Creative* originality/expressiveness test, Phillips' cakes are not non-expressive, ordinary commercial goods. Rather, they are expressive, customized works of art worthy of full free speech protection.

III. Phillips' Custom Cakes Are Original, Expressive Art Constituting Pure Speech.

The Colorado Court of Appeals found that the requested cake in this case was "not inherently expressive" and, as such, was not speech. 2023 COA 8, ¶83. This Court must reverse because the intermediate court's ruling is squarely at odds with *303 Creative* and its application of the originality/expressiveness framework.

Like the petitioner in *303 Creative*, Phillips demonstrates the originality of his art by making original, customized creations that he tailors for each customer. For his custom cakes, he will first gather detailed "information from the customer" and

"visualiz[e] the particular celebration where the cake would be enjoyed and the persons in attendance." *Scardina*, 2023 COA 8, ¶¶73,82. Then, he will deploy the breadth of his creative skill to develop a concept that will communicate the cake's message. He will sketch the design out on paper, choose the color scheme, create the specific shades of frosting required to fulfill his creative vision, bake and sculpt the cake, decorate it meticulously, and deliver it to an event. The lower court acknowledged the original artistry of Phillips' creations by noting that he creates "custom cakes," using "artistic tools, such as a palette, paintbrushes, knives, and sponges." *Id.* ¶¶73. Phillips' artistic skill is unquestionably required in crafting these original creations because mixing just the right shade of frosting requires the same artistry as mixing just the right shade of paint, while sculpting fondant requires the same creativity as sculpting clay, and painting brushwork on cake requires the same skill as brushwork on canvas.

Again, mirroring the petitioner in *303 Creative*, Phillips demonstrates the expressiveness of his art by using images, words, symbols, and other modes of expression (including color) to communicate ideas and celebrate/promote expressive events. The cakes Phillips crafts are not only intended to express the message of the customer but also Phillips' artistic vision of how best to celebrate and memorialize

the event. The expressiveness of Phillips' art is evident in photos of his cake creations. EX (Trial) 135, 163–14–15.

In general, the artistic, expressive nature of custom cakes is evidenced by the high value customers place on them. Although sheet cakes can be procured from grocery stores at low prices, brides and grooms routinely pay top dollar—sometimes over $1,000 per cake—for the intricacy, personalization, and beauty of wedding cakes. Kristin Tice Studeman, *How Much Do Wedding Cakes Cost?*, Brides (July 18, 2021), https://bit.ly/3yKltVM. And couples assuredly aren't paying the markup for the cake's flavor. As renowned wedding cake baker Ron Ben-Israel admits, cakes are generally not purchased for their taste. Julia Moskin, *Here Comes the Cake (And*

It Actually Tastes Good), N.Y. Times (June 11, 2003), https://nyti.ms/3LAKUvH. As Ben-Israel confesses, most wedding guests forgo wedding cake at the reception based on their assumption that "the cake [will be] dry, the frosting tasteless and the decorations inedible." If customers are not buying cakes for their price or taste, there is only one reason left for them to make the purchase: for the cakes' artistic and expressive value.

The lower court acknowledged the expressiveness of Phillips' cakes by noting that, the "Masterpiece logo," with its "paint palette with a brush and a whisk," is "[r]eflective of [Phillips'] artistic *expression*". 2023 COA 8, ¶73 (emphasis added). And as the lower court acknowledged, "expressive conduct need not contain verbal speech or the written word to be entitled to First Amendment protection." *Id*. ¶70. Under the *303 Creative* originality/expressiveness test, Phillips' custom cakes are pure speech worthy of broad free speech protection.

IV. The Requested Cake Is Original, Expressive Art Constituting Pure Speech.

Although the lower court said the requested cake was "not inherently expressive," *id*. ¶83, the expressiveness of the cake in question is self-evident due to the historical and cultural significance of the requested design. The trial court agreed, saying the "symbolism of the requested design of the cake" was "apparent,"

Scardina v. Masterpiece Cakeshop, Inc., No. 19CV32214, ¶ 48 (Colo. Dist. Ct. June 15, 2021). The respondent, Autumn Scardina, openly admitted the sole purpose of the cake was to express a message. *Id*. As Scardina testified, "the requested cake design was symbolic of [Scardina's] transness" and "was a reflection of her transition from male-to-female". *Id*. The trial court agreed, finding that "[i]n context…the requested cake, with a pink interior and blue exterior, symbolized a transition from male to female". *Id*.

Additionally, the colors pink and blue have long been used to represent the male and female sex. Jeanne Maglaty, *When Did Girls Start Wearing Pink?*, Smithsonian Magazine (Apr. 7, 2011), https://bit.ly/3ghsmth5 (noting that the colors of pink for girls and blue for boys were popularized in the 1940s); Burton F. Peebles, *Blurred Lines: Sexual Orientation and Gender Nonconformity in Title VII*, 64 Emory L.J. 911, 952 (2015) (explaining how newborns are photographed in pink or blue to indicate their sex). Custom cakes with pink or blue interiors are often used at "gender-reveal" parties to announce their baby's sex. *What Is a Gender Reveal Party? (And How Do You Throw One?)*, Gender Reveal Guide, https://bit.ly/4aflMYO (last accessed Dec. 11, 2023). The "classic" way to reveal a baby's gender at a gender-reveal party is to cut into the cake and see the color inside.

Id. The cakes often serve as the "centerpiece" of gender-reveal parties. Jessica Winter, *Are You a Boy or a Girl?*, Slate (May 11, 2016), https://bit.ly/48fe934.

The concept of the gender-transition party was derived from the concept of the gender-reveal party. *Scardina*, No. 19CV32214 at ¶48 ("The symbolism of the requested design of the cake is also apparent given the context of gender reveal cakes"). Like the cakes at gender-reveal parties, a person commissions a custom cake for a gender-transition party to symbolically communicate the person's intended gender transition. *See* Nicole Pelletiere, *Friends Throw 'It's a Boy' Party to Celebrate Buddy's Transition from Female to Male*, Good Morning America (May 30, 2018), https://bit.ly/3NnvhM2; *see also* 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://bit.ly/47TLxMZ.

The record shows that the blue and pink cake requested here was meant to symbolize Scardina's gender transition. Scardina desired the "color pink in the custom cake" to represent "female or woman" and the "color blue in the custom cake" to represent "male or man." *Scardina*, No. 19CV32214 at ¶ 48. Scardina said the cake was designed to be "a reflection of her transition from male-to-female." *Id*. As such, the sole purpose of the cake was to express a message about Scardina's gender, making the cake protected speech.

The cake's role as the centerpiece of Scardina's gender-transition party makes it doubly protected speech. The First Amendment not only protects speech but also protects speakers from being compelled to promote, support, or otherwise contribute to expressive events against the speakers' wishes. *See United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (even in the commercial speech context, "mandated support" where businesses are required to "simply to support speech by others, not to utter the speech itself" violates the First Amendment). A gender transition party is an intrinsically expressive occasion, used by a transitioner to convey an important message about his or her beliefs about his or her gender. As the trial court noted here, Scardina "testified that the requested cake was to be used at a family celebration of her . . . gender transition." *Scardina*, No. 19CV32214 at ¶ 48.

The record shows that the requested cake was much more than a decorative dessert: it was the crucial medium used to communicate a message about Scardina's gender transition. The cake and its message are inseparable. As such, the cake—particularly as the centerpiece of Scardina's gender-transition party—is entitled to full First Amendment protection. Furthermore, the appropriate level of free speech protection does not depend on either a) the medium used to create the cake, b) the cake's status as a commissioned commercial piece, or c) the meaning observers ascribe to the cake.

A. The Requested Cake Is Pure Speech Regardless of the Medium Used to Create It.

In determining if the cake is pure speech, the originality and expressiveness of the cake matter far more than the medium used to create it. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 906 (Ariz. 2019) (protection for speech is not solely "based on the medium" used to create it). The Constitution "looks beyond written or spoken words as mediums of expression" when determining whether art deserves First Amendment protection. *Hurley*, 515 U.S. at 569.

The U.S. Supreme Court has granted First Amendment protection to art forms such as paintings and poetry, which are recorded on the traditional media of canvas or paper, *id*., as well as to movies, which are recorded on the less traditional media of celluloid film, *Burstyn*, 343 U.S. at 502–03, and to websites, which are recorded in a digital cloud, *303 Creative*, 600 U.S. at 587. First Amendment protections even extend to art not recorded on any medium at all, such as dance, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) and instrumental music, *Ward v. Rock Against Racism*, 491 U.S. at 790.[2]

Speech does not lose First Amendment protection "based on the kind of surface it is applied to." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061

[2] The Court's definition of protective speech is expansive. *See, e.g.*, *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803 (2000).

(9th Cir. 2010). The "principal difference" between a "tattoo" and "a pen-and-ink drawing" is that a tattoo is "engrafted onto a person's skin rather than drawn on paper," but this distinction has "no significance in terms of the constitutional protection afforded the tattoo." *Id*. The words, symbols, or pictures of a tattoo are no less meaningful because they are "rendered on a person's body, rather than a canvas or paper." *Jucha v. City of N. Chi.*, 63 F. Supp. 3d 820, 828 (N.D. Ill. 2014). Similarly, the message of "Yes We Can!" is no less powerful because it is displayed on a website rather than on a poster. And the symbolism of a peace sign is no less symbolic because it is carved from cake rather than stone.

The First Amendment's fundamental purpose is "to protect all forms of peaceful expression" in "all of its myriad manifestations." *Bery*, 97 F.3d at 694 (citing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 231 (1977)). This Court should hold that the originality and expressiveness of the cake in question matter far more than the medium used to create it.

B. The Requested Cake Is Pure Speech Even Though It Was a Commissioned Commercial Product.

The First Amendment fully protects both commissioned and non-commissioned art. This is true even when art is conceptualized in collaboration with

a customer or created with a profit motive. *Hurley*, 515 U.S. at 569; *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 801 (1988).

In this case, the lower court found that "any message or symbolism" provided by a custom pink and blue cake "would not be attributed to" Phillips, removing First Amendment protection from Phillips' speech. 2023 COA 8, ¶83. This is plainly wrong under *303 Creative*, which affirmed the obvious truth that an artist's voice does not disappear simply because he is communicating a message on behalf of a client. *See Masterpiece Cakeshop*, 138 S. Ct. at 1744 n.3 (Thomas, J., concurring in part and concurring in the judgment) ("Nor does it matter that the couple also communicates through the cake. More than one person can be engaged in protected speech at the same time."). The U.S. Supreme Court has often found that speakers do not forfeit First Amendment protection by collaborating with other speakers. *See Hurley*, 515 U.S. at 569 ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices").

As the Ninth Circuit recognized, when a client commissions art from an artist, both client and artist are "engaged in expressive activity." *Anderson*, 621 F.3d at 1062. While both parties "contribute to the creative process," in which "the customer has ultimate control over which design she wants," and the artist "provide[s] a service," the result is no less an expression by the creator "because there is no dispute

that the [commissioned artist] applies [her] creative talents as well." *Id.* An artist's work is his own protected, expressive speech, particularly when his art is created to support an expressive event, such as a gender-transition party. *See 303 Creative*, 600 U.S. at 588 (finding the petitioner's wedding-focused websites were "her speech").

The First Amendment also protects art created for a commercial purpose. A speaker is "no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801. In *303 Creative*, the U.S. Supreme Court said that the level of free speech protection artists deserve is in no way decreased just because the artist offers their speech in exchange for payment. 600 U.S. at 594.

> Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return? Or that a visual artist who accepts commissions from the public does the same? Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech. This fact underlies our cases involving everything from movie producers to book publishers to newspapers. See, e.g., *Burstyn*, 343 U.S., at 497–503; *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Grosjean v. American Press Co.*, 297 U.S. 233, 240–241, 249 (1936).

303 Creative, 600 U.S. at 594.

Art—such as the custom cakes created by Phillips—does not receive less First Amendment protection "merely because" it is "sold rather than given away." *City of*

Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 756 n.5 (1988). If it were not so, vast swaths of expressive art would be excluded from the protection of the First Amendment, from Leonardo da Vinci's *Last Supper* painting commissioned by the Duke of Milan[3] to the Human Rights Campaign's blue and yellow "equal" logo commissioned from artist Robert Stone.[4]

This Court should find that Phillips and his customer, Scardina, were both engaged in expressive activity by collaborating on the creation of the pink and blue cake and that Phillips does not forfeit First Amendment protection by collaborating with other speakers.

C. The Requested Cake Is Pure Speech Regardless of What Observers Understand the Cake to Mean

The lower court used an "audience response" test to determine whether Phillips' cakes are expressive, finding that the expressiveness of the cake turned (at least in part) on how an "observer" would "perceive" the cake. 2023 COA 8, ¶78, 79, 83. The court said the information "convey[ed]" by the cake "is not derived from

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[3] Alicja Zelazko, *Last Supper*, Encyclopedia Britannica Online, https://bit.ly/3zaHk8O (last accessed December 18, 2023). The First Amendment's protection of free speech assuredly protects religious speech. *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[A] free-speech clause without religion would be Hamlet without the prince.").

[4] Human Rights Campaign, *Our Logo*, https://www.hrc.org/about/logo (last accessed May 8, 2022).

any artistic details or message created by the baker" but that "the message" would be "generated by the observer based on their 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*. ¶78. But the U.S. Supreme Court has never looked to audience perceptions to gauge whether a work of art is protected expression, in part because the audience response test is a subjective standard, easily manipulable to afford some messages more protection than others. *See, e.g., Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (finding that listeners' reactions to speech is not a content-neutral basis to regulate speech, and content-based regulations violate the First Amendment).

The United States Supreme Court, for example, did not ask what audiences understand paint-splatter paintings or twelve-tone music to mean before declaring both "unquestionably shielded" by the First Amendment. See *Hurley*, 515 U.S. at 569. To the contrary, this Court has emphatically stated that a "narrow, succinctly articulable message is not a condition of constitutional protection." *Id*. If a message does not even need to be articulable to be protected, an audience's perception of the message should have no bearing on its expressiveness.

Only when evaluating "expressive conduct" does this Court consider how "the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S.

397, 404–05 (1989) (internal citations and quotation marks omitted). For the reasons listed above, Phillips' cakes are much more than expressive conduct; they are pure speech worthy of full speech protections. And even if the creation of the cake is expressive conduct, the message of the cake was understood by both Phillips and Scardina. *Scardina*, 2023 COA 8, ¶¶13,16,48. And due to the cultural context of the cake at a gender transition party, the message would be understood by third parties, too.

D. *303 Creative* Prescribes the Outcome of This Case.

The outcome of this case is dictated by the U.S. Supreme Court's ruling in *303 Creative* (where the justices found the conduct of the petitioner "nearly identical" to Phillips' conduct). 600 U.S. at 583. Under the *303 Creative* originality/expressiveness test, the requested cake—as an expressive, custom work of art serving as the centerpiece of an expressive event—is pure speech. This is true even though the cake is an edible, commissioned, commercial product, and even though different audiences might attribute different meanings to the cake. Since Phillips' cake is pure speech, it is worthy of broad constitutional protection. The First Amendment demands no less.

CONCLUSION

For the foregoing reasons, the judgment of the Colorado Court of Appeals should be reversed.

Respectfully submitted,

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