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| SUPREME COURT, STATE OF COLORADO<br>2 East 14th Avenue<br>Denver, CO 80203 | |
| Petitioners: MASTERPIECE CAKESHOP INC. and JACK PHILLIPS,<br><br>and<br><br>Respondent: AUTUMN SCARDINA. | ▲ COURT USE ONLY ▲ |
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**BRIEF OF *AMICUS CURIAE* CYNDOL HALLER IN SUPPORT OF PETITIONERS**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**



**Rules**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. The undersigned certifies that the Brief of *Amicus Curiae* complies with the applicable word limit set forth in C.A.R. 29(d), as it contains 3,849 words (excluding the caption page, this certificate page, the table of contents, the table of authorities, and the signature block). Furthermore, the *amicus* brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

*/s/ John C. Sullivan*
John C. Sullivan

Pursuant to C.A.R. 53(g), Cyndol Haller submits this brief as *Amicus Curiae* in support of Petitioners Masterpiece Cakeshop Inc. and Jack Phillips.

## Statement of Interest of *Amicus Curiae*

*Amicus Curiae* Cyndol Haller is a creative professional who—like Jack Phillips—designs custom cakes for her clients. She owns her own bakery in Florida. And like Jack Phillips, Ms. Haller was haled into court for exercising her First Amendment freedoms to refuse the creation of a cake with a specific message that went against her beliefs. *See Mannarino v. Cut the Cake Bakery*, Case No. 16-3465, 2017 WL 601408, at *1-3 (Fla. Div. Admin. Hrgs. Feb. 9, 2017). But unlike Jack Phillips, the shoe was on the other foot.

Ms. Haller was approached with an order for a cake with a quote from Leviticus 20:13: "Homosexuality is an abomination unto the Lord"—and she refused to make the cake because of its message. *Id.* at *1–2. Ms. Haller thought that the order was a tasteless prank and quoted the man a price of almost $6000 to make the cake (when a regular cake would be closer to $35). *Id.* at *2. The would-be-customer then exclaimed that he was being discriminated against because of his religious beliefs and attempted to take legal action against Ms. Haller's business, filing a Complaint of Discrimination with the Florida Commission on Human Relations. *Id.* at *1. The evidence, however, showed that Ms. Haller's bakery served customers of all races, religions, and sexual orientations—she only refused the order in question because of the message it conveyed. *Id.* at *4, 10. The Commission thus concluded that Ms. Haller's bakery did not refuse to make the requested cake based on the individual's protected status and the discrimination claim was rejected. *Id.* at *11.

Taking that stand cost Ms. Haller significantly. In addition to facing the lawsuit, she was subjected to a barrage of hostile phone calls and even death threats. Additionally, her business suffered from dealing with fake orders and online reviews. Ms. Haller thus knows firsthand the dangers of compelled speech and the courage it takes for artists such as herself and Jack Phillips to stand up for their beliefs. She therefore has a strong interest in this case as it deals with the mutuality of obligation inherent to tolerance in a pluralistic society that the Supreme Court has repeatedly enforced—most recently in *303 Creative, LLC v. Elenis*, 600 U.S. 570, 594 (2023), in which Ms. Haller filed an *amicus* brief in support of First Amendment protections for artists such as herself.

To be sure, Ms. Haller—a Christian herself—does not share Jack Phillips' religious views regarding sexual orientation. She likely would have made the cake in question here. But Ms. Haller is committed to the freedom of expression *for everyone*—especially for artists who wish to take their true selves into the marketplace to create and speak freely no matter their State of residence. In short, Ms. Haller has an interest here because she knows from experience that the First Amendment must protect Jack Phillips or it cannot protect her.

**Summary of Argument**

The Constitution guards individual rights in furtherance of "a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). But that tolerance in "a pluralistic society . . . presupposes some mutuality of obligation." *Id.* at 590–91. That mutuality of obligation was recently emphasized in *Obergefell v. Hodges*, 576 U.S. 644 (2015). While *Obergefell* held that the Constitution does not allow government to prohibit same-sex marriage, it also explained that the First Amendment rights of individuals who disagree must be "given proper protection." *Id.* at 679.

This case is about applying those principles set forth *Obergefell* to the freedom of artistic expression that should be protected by government rather than threatened by it.

As part of our constellation of individual rights, no government—even one with the best of intentions—may commandeer the artistic talents of its citizens by ordering them to create expression with which the government agrees but the artist does not. Even worse here, the expression at issue deals with a topic that the Supreme Court would recognize divides people of "good faith." *See id.* at 657. The very purpose of the First Amendment's Free Speech Clause—and among its highest uses—is allowing opposing sides of a debate to express themselves as they see fit. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 484 (1957). The Constitution provides freedom of expression "in the hope that use of such freedom will ultimately produce a more capable citizenry and . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971). Artistic work, whether viewed as pure speech itself or as conduct that is inherently expressive, has always received full First Amendment protection.

Designing and creating customized art deserves the strong protection afforded to artistic works, regardless of its medium. Creating custom designs and accompanying works celebrating things such as weddings and births (including gender reveals) is artistry—whether it takes the form of a painting on a canvas, a figure carved into ice, or sculpting on a centerpiece wedding cake. Design and creativity go into all those genuine attempts at artistry; and the result celebrates the significance of the message being conveyed. All these forms of art deserve the same First Amendment protection.

Moreover, the protection given to artistic endeavors has never been subject to the decreased scrutiny applied to mere conduct with some expressive component. *Cf. United States v. O'Brien*, 391 U.S. 367, 376 (1968) (speech involving burning a draft card). That is because art—by its nature—is wholly expressive. Additionally, the state law here is "content-based," so it falls outside of *O'Brien* anyway. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010). Most importantly, though, Respondent wishes the government to go beyond preventing someone from affirmatively engaging in conduct, as did the government in *O'Brien*. Rather, she asks the State to compel artists to create artistic expressions they do not wish to create. No precedent supports forcing a person to speak, let alone create art for someone else. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 578 (1995) (holding unconstitutional an attempt at compelling expression by applying a public-accommodation law "to expressive activity . . . to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own"). Because art is inherently expressive, a compulsory rule from the State would violate the First Amendment.

The art at issue in this case involves a particular type of message—a message Respondent conceded, and the Court of Appeals recognized, was being conveyed through an artistic medium. Like related cases, the facts here arise in the context of expression regarding gender and sexuality. But the controlling principles here transcend, and will long outlast, the Nation's current dialogue about these issues. As with any art, Colorado cannot force Jack Phillips to engage in a particular form of expression—or to refrain from it. The lower court's decision should be reversed.

## Argument

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Edu. v. Barnette*, 319 U.S. 624, 642 (1943); *accord Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Yet Respondent would have Colorado's officials do exactly that—compel citizens to create works of artistic expression that violate their consciences. This Court should reject that move and restore the "mutuality of obligation" necessary for a "pluralistic," "tolerant" society, *Weisman*, 505 U.S. at 590–91, as recognized by *Obergefell*, 576 U.S. at 679–80. Jack Phillips has no invidious animus toward the Respondent or anyone else. The choice not to design artwork was solely a matter of religious conviction and personal expression with respect to the message to be conveyed. Such choices merit full First Amendment protection.

### As Artistic Works, Commissioned Cake Designs Are Protected by the First Amendment's Freedom of Expression and May Not Be Compelled.

The custom-designed cakes at issue here are artistic expression. They are thus protected under the First Amendment, and government cannot compel their creation. *See, e.g.*, *Wooley*, 430 U.S. at 714 (upholding "the right to refrain from speaking").

#### A. Because artistic works are inherently expressive, they receive full First Amendment protection and cannot be compelled.

The Supreme Court long ago recognized art's inherently expressive nature and developed a tradition of protecting artistic works, even works that some might find offensive. *See, e.g.*, *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). Thus, artistic works presumptively fall within the First Amendment's broad protections. *See, e.g.*, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–

67 (1981).[1] Likewise, the creation or sale of art has never been subject to commercial-speech doctrines. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02 (1952).[2]

Supreme Court precedents broadly define what qualifies as art. If the work in question has "artistic . . . value"—*Miller v. California*, 413 U.S. 15, 23 (1973)—or even "bears some of the earmarks of an attempt" at art—*Kois*, 408 U.S. at 231—then the First Amendment's protections apply. Unsurprisingly, then, the First Amendment's protections apply equally to artistic expression that may not be literal speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (upholding a time-place-manner restriction on music, but recognizing that the First Amendment's protections apply to regulations of music). And unlike "symbolic speech," *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning), with artistic expression it is unnecessary to inquire as to the speaker's message or whether it will be understood by viewers. Art in its various forms is "unquestionably shielded" by the First Amendment—even if it is unconventional poetry (Lewis Carroll's Jabberwocky), discordant instrumentals (Arnold Schönberg's atonal musical compositions), or esoteric paintings (Jackson Pollock's modern art). *Hurley*, 515 U.S. at 569.

This Court need not fear in differentiating between what is art and what is not—that line has already been drawn. While not every "expressive" action a person takes qualifies as art, expression is protected when it has "serious" artistic value, *Miller*, 413 U.S. at 23–37, or "bears some of the earmarks of an attempt at serious art," *Kois*, 408 U.S. at 231 (emphasis added); *see*

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[1] Freedom of speech is cabined only by a few "'historic and traditional [exclusions]'—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted).

[2] Even under the commercial-speech doctrine, content-based restrictions on expression are presumptively *invalid*. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

*also 303 Creative*, 600 U.S. at 593–94 (recognizing that "customized creation[s]" that are "expressive in nature, using text [and] graphics" qualify as speech that cannot be compelled under the First Amendment). And to be sure, the medium on which the artist paints—whether it be canvas or icing—is irrelevant to that artistic expression's First Amendment protection.

### B. Commissioned cake designs are artistic works that convey specific messages and *Amicus* only accepts commissions for such work when it is consistent with her artistic vision and values.

Art, by its common definition, is the "expression or application of human creative skill and imagination, typically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power." New Oxford Am. Dictionary 89 (3d ed. 2010). When Jack Phillips accepts a commission to design and create a custom work, the creation is unquestionably an expression of "human creative skill and imagination" made to be appreciated for its beauty and the ideas it represents. It is unsurprising that cakes are regarded as "works of art often created specially by cake design artists" and are "as novel and as beautiful as many paintings and sculptures." Hannah Brown, *Having Your Cake and Eating It Too: Intellectual Property Protection for Cake Design*, 56 IDEA: J. FRANKLIN PIERCE FOR INTELL. PROP 31, 33–34 (2016). More than just an item of food, cakes are often "the embodiment of a plan or design drawn up by an artist." *Id.* at 55.

Ms. Haller's cakes indisputably reflect this artistry, too. As can be seen on her website, she creates custom designs for individuals that require her creativity and skill to convey the appropriate message for the person commissioning the cake. For example, a customer may want to celebrate a friend's birthday by noting that the person is "Aged to Perfection" (rather than just

getting old) and so Ms. Haller can create a cake that looks like an old wooden barrel filled with ice cubes and bottles of liquor. *See* Exhibit 1.


Exhibit 1

Her edible works of art can also include something conveying a person's love for Disney and Mickey Mouse while celebrating an engagement. *See* Exhibit 2.

Exhibit 2

And finally, particularly relevant here, Ms. Haller's cakes often deliver a message about gender as clients commission her to make cakes indicating that their child will be a boy or a girl. *See* Exhibit 3 ("Boy Oh Boy"). Indeed, some designs have the message built into the work itself as one must wait until the cake is cut to reveal the gender of the upcoming baby. *See* Exhibit 4 ("What Will It Bee?").


Exhibit 3


Exhibit 4

Even though cake design has been viewed as art for centuries, cake artists today receive more recognition for their creations than ever before. Cake art has found enormous popularity through reality television shows like Amazing Wedding Cakes, Cake Boss, and Ace of Cakes. There are many art institutes and colleges offering training classes and associates degrees in cake decorating. *See* Wedding Cake Design School: Learn.org (Aug. 24, 2017), https://perma.cc/G8BY-2YMB. This includes the Institute of Culinary Education's 12-week course that trains students in various methods of cake decorating, including advanced sugar work, hand-sculpting, airbrushing, and hand-painting. The Art of Cake Decorating, Institute of Culinary Education (Sept. 5, 2017), https://perma.cc/8WFE-KHED. One college even awards a Bachelor's

of Science in Baking and Pastry Arts. Johnson and Wales University in Rhode Island (Aug. 23, 2017), https://perma.cc/5R5D-U8SG.

As can be seen from both the industry as a whole and specific examples provided here, *Amicus*—like Jack Phillips—creates art, and the expressions created convey ideas just as surely as the more basic symbols found to be protected speech in other cases. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (acknowledging the implicit message in a black armband); *Stromberg v. California*, 283 U.S. 359, 361, 369 (1931) (recognizing the symbolic value in a "red flag"). Commissioned cake art thus enjoys the free-speech protections of any other expressive form of communication. That is also why it is important to Ms. Haller that she does not accept commissions that conflict with her values or the messages she wishes to convey. The State of Florida recognized that her commissions—like the cake art in question here—reflects her creativity and own speech, and must be created in conformity with her values as an artist. *Cut the Cake Bakery*, 2017 WL 601408, at *11. This Court should do the same for Jack Phillips.

### C. Commissioned cake designs would be protected by the First Amendment even if they were considered conduct rather than artistic works.

Unlike mere conduct, art is protected whether or not there is a "succinctly articulable message." *See Hurley*, 515 U.S. at 568–69. And when the medium chosen by the artist to convey the expression is visual—be it a painting, a sculpture, or a cake design—the art constitutes the entirety of the "conduct," and there is no non-expressive element left to be regulated. *See id.* at 567. Thus, free-speech protection for artwork does not depend on assessing the degree of communicativeness of its message—which need not even be "'understood by those who view it"' for protection to attach. *Johnson*, 491 U.S. at 404; *see Hurley*, 515 U.S. at 569 (citing works of art meaningless to most observers); *see also supra* Part A (noting the Supreme Court's categorical

First Amendment protection for even attempts at art); Jed Rubenfield, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 773 (2001) (recognizing that art "defies the *Spence* test").

Regardless, even if commissioned cake designing were treated as mere conduct, as opposed to art, it is still entitled to full First Amendment protection under *O'Brien*'s expressive-conduct test. Designing and creating a cake that conveys a message or theme is of at least the same communicative quality as marching in a parade—and therefore must be equally protected by the First Amendment. *See 303* Creative, 560 U.S. at 593–94; *Hurley*, 515 U.S. at 569-70; *cf. Tinker*, 393 U.S. at 505–06 (treating pure symbolic act as "closely akin to pure speech . . . entitled to comprehensive protection under the First Amendment").

The parade in *Hurley*, like art, was expressive in and of itself. 515 U.S. at 569–70. Because expressive conduct was at issue, the parade was treated as speech: parade organizers could not be compelled to include other speech with which they disagreed. *Id.* at 572–73 (preventing organizers from having "to alter the expressive content" of their private conduct). The overlap between the conduct and speech was complete, leaving no room to apply the state non-discrimination law.

The same is true with designing and creating custom messaging cakes. The commissioned cake itself is expressive in and of itself—*especially when the entire point of the cake is to communicate a specific message about gender*. *See 303 Creative*, 560 U.S. at 594 (protecting "original, customized creation[s]" that are "expressive in nature"). Jack Phillips' decisions with respect to such messaging are therefore fully protected by the First Amendment, regardless of which particular doctrine applies.

### D. Commissioned art sold to others is still the artist's personal speech protected by the First Amendment.

Just because an artist sells commissioned expressions to others does not negate the fact that the First Amendment protects that artist's work. *See Joseph Burstyn*, 343 U.S. at 501–02; *see also 303 Creative*, 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."). The buyer may very well want to endorse, adopt, or join in an artist's expression. But the buyer's wishes do not allow the buyer (or the State) to compel an artist's expression. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 219–20 (2015) (even if it would be joint speech, one speaker cannot compel speech from another).

One can argue that an outside observer would likely think of the cake as something to be eaten rather than speech or that it is not Jack Phillips' speech but rather just an item of a vendor looking to make money. Such reasoning ignores the holdings in *Wooley* and *Barnette*, and the Supreme Court's recent teaching in *303 Creative*, 600 U.S. at 594. After all, one could have simply declared that everyone would understand that the "Live Free or Die" message on a license plate wasn't the driver's message—it was only on the car so that the person could use the vehicle. *Wooley*, 430 U.S. at 715. The Supreme Court's holding would have been equally applicable to a license plate on a work truck that had the name of the company painted on the side. Similarly, one could blithely announce that students are merely complying with the law when they salute the flag rather than "speaking" *per se*. *See Barnette*, 319 U.S. at 642. But that argument fails, too, of course.

The Supreme Court has recognized that compelled speech is infirm *because* it is compelled. When compelled speech is allowed, it will result in governments seeking to enforce a preferred orthodoxy. That is why Colorado's authority "to compel a private party to express a view with which the private party disagrees" must be "stringently limit[ed]." *Walker*, 576 U.S. at 219 (citing *Hurley*, 515 U.S. at 573; *Barnette*, 319 U.S. at 642).

### E. The First Amendment categorically prohibits compelled private artistic expression, and it would be pointless here anyway.

Government cannot compel private artistic expression—ever. So here, "it is both unnecessary and incorrect to ask whether the State can show that the statute is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment) (internal quotation marks omitted). Tellingly, the Court didn't do a balancing test in *303 Creative* either. But even if strict-scrutiny review did apply, government never has a sufficient interest to compel private artistic expression. Private artistic expression inherently espouses ideas that must come from the artist's nuanced work. *See supra* Part A. And "[t]he government may not . . . compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 309 (2012).

It is unsurprising, then, that the Supreme Court has never allowed a government entity to compel art or expressive conduct. A government cannot force a citizen to engage in or endorse expression—whether saluting a flag, *Barnette*, 319 U.S. at 642, or even passively carrying a message on a license plate, *Wooley*, 430 U.S. at 717. And, unlike a cable company hosting someone else's message, for example, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), the

artistic endeavor here is designed and created directly by the person that the government is seeking to coerce. *Id.* at 641.

Also unlike a cable company, there is no concern of creating a bottleneck for people seeking the expression at issue here. *See id.* at 652, 656. Not only would countless other cake artists create the custom work requested, *Amicus* herself would be happy to oblige as well. Respondent's position attacking the First Amendment is thus untenable as there could be no compelling interest even if the government had the ability impose such a rule on artists (which it does not).

* * *

"[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. That concern is only heightened in the context of private artistic expression, which is intimately connected to the artist. Government has no authority to invade that sphere of an artist's personal autonomy and dignity.

**Conclusion**

The Court of Appeals should be reversed.

December 19, 2023

Respectfully submitted.

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