SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 15, 2023 12:41 PM FILING ID: 621223DDA8D18 CASE NUMBER: 2023SC116
On Petition for 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 ▲**
***Attorneys in Support of Petitioners*:** James Kerwin, Atty Reg. No. 57545 William E. Trachman, Atty. Reg. No. 45684 MOUNTAIN STATES LEGAL FOUNDATION 2596 S. Lewis Way Lakewood, CO 80227 Phone: (303) 292-2021 Fax: (877) 349-7074 Email: wtrachman@mslegal.org Email: jkerwin@mslegal.org	Case Number No. 2023SC00116 Court of Appeals Case Number: 2021CA1142 District Court Case Number: 2019CV32214

BRIEF OF *AMICI CURIAE* MOUNTAIN STATES LEGAL FOUNDATION, AMERICANS FOR PROSPERITY FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, AND MANHATTAN INSTITUTE IN SUPPORT OF PETITIONERS MASTERPIECE CAKESHOP, INC., AND JACK PHILLIPS AND FOR REVERSAL

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Colorado Rules of Appellate Procedure (C.A.R.) 28(g), 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with Colo. R. App. P. 29(d), because it contains 4,744 words, less than the allotted 4,750 words, or half the length of the parties' principal briefs. *See* Colo. R. App. P. 28 (setting maximum length at 9,500 words). The brief complies with the content and form requirements set forth in C.A.R. 29(c). I acknowledge that the brief may be stricken if it fails to comply with any of the requirements of the Colorado Rules of Appellate Procedure.

/s/ James Kerwin
James Kerwin

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Mountain States Legal Foundation ("MSLF"), Americans for Prosperity Foundation ("AFP"), Southeastern Legal Foundation ("SLF"), and Manhattan Institute ("MI") submit this brief in Support of Petitioners.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

MSLF is a non-profit public interest law firm based in Colorado dedicated to the preservation of individual liberties including the right to speak freely and the right to equal protection. For decades, MSLF attorneys have litigated the proper application of statutory and constitutional provisions. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *303 Creative LLC v. Elenis*, 142 S.Ct. 1106 (2022) (mem.) (*amici curiae* in support of petitioners); *Masterpiece Cakeshop, Inc. v. Scardina*, 2023SC00116 (Apr. 27, 2023) (brief of *amici curiae* in support of petition for writ of certiorari).

AFPF is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Throughout our nation's history, the fights for civil rights for women, African-Americans, LGBTQ individuals, and all people have relied on the exercise of civil liberties, which is one reason they must be protected. AFPF is interested in this case because the protection of the freedoms of expression and association, guaranteed

by the First Amendment, are necessary for an open and diverse society.

Founded in 1976, SLF is a national nonprofit legal organization that advocates to protect individual rights and the framework set forth to protect such rights in the Constitution. For 46 years, SLF has advocated, both in and out of the courtroom, for the protection of our First Amendment rights. This aspect of its advocacy is reflected in regular support of those challenging overreaching governmental actions in violation of their freedom of speech and religion. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) (*Masterpiece I*); *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

MI is a nonprofit policy research foundation that works to keep America and its great cities prosperous, safe, and free. MI develops and disseminates ideas that foster individual freedom and economic choice. To that end, it produces scholarship and files briefs opposing regulations that violate constitutionally protected liberties, including in the marketplace of ideas. MI's counsel Ilya Shapiro is one of only three lawyers in the entire country to have filed briefs in the U.S. Supreme Court supporting both Jim Obergefell and Jack Phillips.

To secure these interests, MSLF, AFPF, SLF, and MI file this *amici curiae* brief, urging this Court to reverse the Colorado Court of Appeals.

SUMMARY OF THE ARGUMENT

Is designing and making a custom-made cake so different from designing and making a custom-made website?

In *303 Creative v. Elenis*, 600 U.S. 570 (2023), the U.S. Supreme Court rejected the proposition that Colorado's public accommodations laws may be used to force ideological conformity on creative artists, even in the marketplace for goods and services. The Court reviewed the same law at issue here and determined that its "very purpose" was "eliminating . . . dissenting ideas" about hot-button social issues like same-sex marriage. *Id.* at 588 (cleaned up).

The Court rejected the position that creative artists who were also market participants were carved out of the protections of the First Amendment, noting that "Colorado's logic . . . [t]aken seriously, . . . would allow the government to force all manner of [creators] whose services involve speech to speak what they do not believe on pain of penalty. The government could require an unwilling Muslim movie director to make a film with a Zionist message, . . . [or] could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage." *Id.* at 589-90 (cleaned up). The First Amendment, the Court held, "tolerates none of that." *Id.* at 590.

Here, Respondent must convince this Court that the act of knowingly designing, making, and providing a cake to celebrate a transgender transition

involves no speech at all, even where the creator behind the work vehemently disagrees with the underlying premise and purpose for which he knows that the cake is being made. But Respondent cannot dispute that the machinery of government is being used to compel *something*. The question for this Court is whether that something is speech.

The best reading of *303 Creative*—and the best way to avoid another trip to the Supreme Court for CADA—is to hold that the compulsion here involves speech. The Court of Appeals erred by concluding that no "speech" is being compelled when a cake-maker is forced merely to engage in the "the creation of a pink cake with blue frosting." *Scardina v. Masterpiece Cakeshop, Inc.*, 528 P.3d 926, 939 (2023). That framing is just acrobatic wordplay. "Speech is not conduct just because the government says it is." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). The Eighth Circuit saw through similar sophistry in *Telescope Media* because any form of speech can be broken down into pieces and called action. It cannot be seriously argued that a painting is not speech "because it involves the physical movements of a brush" any more than it can be argued that a parade is only conduct "because it involves walking." *Id*. Underselling what Jack Phillips does, in terms of the edible sculptures and messages he creates with fondant, icing, and buttercream serves only to confuse what is at stake. *Id*. ("[W]hat matters … is that these activities come together to produce … the

communication of ideas.").[1]

Contrary to Respondent's view, the details and context of a creative work matter; and under the circumstances of this case, the idea that CADA is not being used to enforce ideological conformity on hot-button social issues is unpersuasive. More to the point, to say that Respondent is merely forcing Jack Phillips to "create a pink cake with blue frosting" is disingenuous, or at least willfully blind to what is obvious: Respondent is not just ordering a colorful cake, but rather trying to force *this* cake designer to create a *specific* cake with *specific* visual details that convey a *specific* message, one that the allegedly injured party dictated in precise terms, such that, by "creat[ing *this specific*] pink cake with blue frosting," Jack Phillips could not help but communicate something precise and (for him) profoundly objectionable—that human beings can change their sex, and that a decision by a human to "identify as" the opposite sex (or perhaps as both sexes, or neither sex) is something to be celebrated. And, of course, Respondent understands this well,

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[1] Even the dissenters in *303 Creative* understood that the ruling would have cross-cutting effects throughout the market for goods and services. *See, e.g.*, *303 Creative*, 600 U.S. at 604 (Sotomayor, J., dissenting) (noting that the majority opinion protects a business's free speech rights even when it denies "the full and equal enjoyment of its services based on the owner's religious belief that same-sex marriages are 'false.'"); *see id.* at 638 (referring to the majority opinion as protecting a First Amendment right to engage in "discrimination on the basis of sexual orientation or gender identity" for creative artists); *id.* at 623 (acknowledging that the First Amendment rights protected by *303 Creative* "grant[] the business a *broad* exemption from state law. . .") (emphasis added).

which is why, out of the many bakers and cake designers in the metropolitan Denver area, *this* cake designer was approached for this custom, expressive order. As *303 Creative* establishes, the First Amendment tolerates none of that.

ARGUMENT

Forcing Jack Phillips to Create the Specific Cake at Issue in this Litigation Would Compel Speech and Enforce Ideological Conformity

The Court of Appeals acknowledged that the effect of applying Colorado's public accommodations law to Mr. Phillips would be to put him to a choice to either create a custom cake or to suffer legal penalties. Notwithstanding that under the circumstances of this case, everyone involved knew that the entire purpose of Autumn Scardina's specification of the cake's design features was to imbue the cake with a message "reflect[ing and] celebrating" the idea that a person could switch from male to female, *Scardina*, 528 P.3d at 931, the court below determined that compelling Phillips to make the cake did not compel him "to speak," *id.* at 941. This was reversible error.

The First Amendment's free speech clause protects more than "printed or spoken words," but also includes other "activity [that is] sufficiently imbued with elements of communication." *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974). Such activity includes the display of "flags [and other] symbols," "the wearing of black armbands in a school environment," *id*. at 410, and engaging in a "sit-in by blacks in a 'whites only' area to protest segregation," *Texas v. Johnson*, 491 U.S.

397, 404 (1989) (quoting *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966)); *see also Masterpiece I*, 138 S.Ct. 1719, 1741-42 (Gorsuch, J., concurring) (citing the "wide array of conduct that can qualify as expressive"). Stated as a rule, activity that functions as a "short cut from mind to mind" for "communicating [an] idea[]" is sufficiently communicative to invoke the First Amendment. *Spence*, 418 U.S. at 410 (*citing W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943) (internal quotation marks omitted).

Of course, not all activity is imbued with communication. On the outer perimeter lies conduct that the actor, and no one else, considers to be speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *see also Spence*, 418 U.S. at 409; *Masterpiece I*, 138 S.Ct. at 1742 (Gorsuch, J., concurring) (citing *O'Brien*). This limit makes good sense. If the only requirement to bring conduct into the realm of protected speech is the subjective intent of the actor, no law would ever be safe from a First Amendment challenge by a party alleging that his breach of legal duties was intended to convey a message. Any bank robber could claim that robbing a bank was, to him, a way of expressing that "property is theft," or that laws against bank robbery are unjust. Or someone urinating on a building could say that he was just expressing disapproval for the organization

inside, such that laws against public urination can't be applied to him.

Considering the obvious problems with defining speech solely in terms of the communicative intent of the alleged speaker, the Supreme Court has required that some attention also be paid to the other end of the transaction. The free speech clause requires at least two minds, and some symbol or activity that provides "a short cut" between the two and "communicat[es] ideas." *Spence*, 418 U.S. at 410; *see also, e.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984) ("[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.").

In certain contexts, such as when a person hangs a symbol from a street-facing apartment window, there are potentially many minds on the other side of the communication. In those instances, it makes sense to question whether a general audience of passersby would be likely (or not likely) to understand the intended message. In *Spence*, for example, a student displayed an upside-down American flag bearing a peace symbol from his apartment window. 418 U.S. at 406. There was no question that the student intended to communicate an idea, and the Supreme Court further found that the audience (persons passing by on the street) would likely catch the "drift of appellant's point." *Spence*, 418 U.S. at 410. So too, where a protestor "burned an American flag as . . . the culmination of a [multi-

hour] political demonstration [at the Republican National convention, t]he expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent." *Johnson*, 491 U.S. at 406.

In contrast, there are cases where the activity being claimed as communicative has no apparent audience at all. In *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006) ("FAIR"), for example, the Court rejected a suit by a consortium of law schools that objected to military recruiters soliciting law students. In so doing, the Court considered whether a school could require military recruiters to conduct their business in rooms located outside the law school as protected communicative conduct on the part of the schools. *Id.* at 66. But the activity in that case—the denial of room space in law school buildings to military recruiters—could hardly have been said to be for an "audience" of any reasonable description. Indeed, any "observer" of the would-be communication would enter the picture only far removed from the law school's conduct. *Id*. What an "observer" would "see[]" would be "military recruiters interviewing away from the law school," *id.*, not the conduct of the law school itself (which would have been something like an office worker in the administration building entering data into a room-reservation system denying a military recruiter's request to use an on-premises recruitment room). In such a case, where there would be effectively no audience to the actual conduct at issue,

the alleged "expressive component of [the] law school's actions," *id.*, would be non-existent.

Not only must there be at least two minds involved for communication to happen, but there needs to be some reasonable possibility of agreement, at least in rough form, as to the content of the "ideas" being transmitted. In *Cressman v. Thompson*, 798 F.3d 938 (2015), for instance, the Tenth Circuit addressed a case involving multiple interpretations of a particular expression. On the one hand, the plaintiff was compelled by the government to display a symbol on his automobile license plate, specifically an image of a Native American aiming an arrow to the sky. *Id.* at 942. Just as surely as the plaintiff was the compelled "speaker" of the symbolic message, there was a ready "audience" consisting of other persons who might see the symbol as the plaintiff drove his car in public. There was therefore at least the possibility of communication—that is, a "short cut from mind to mind," *Spence*, 418 U.S. at 410 (quotation marks, citation omitted), transmitting an idea. For that reason, the Tenth Circuit held that by requiring the plaintiff to display the image, the State was compelling "symbolic speech." *Cressman*, 798 F.3d at 957.

The *Cressman* plaintiff developed a highly idiosyncratic interpretation of the *content* of the communication, however, which defeated his compelled-speech claim. According to the plaintiff, that image of a Native American aiming an arrow to the sky conveyed a message supporting "pantheism [and] ritualistic

prayer," *id.* at 960, to which he objected. The Tenth Circuit rejected this interpretation, finding that the "reasonable observer" of the image would perceive a different message: that the State's "history and culture has been strongly influenced by Native Americans." *Id*. Because the plaintiff did not object to the message that a reasonable observer would have understood, he had no claim that the government compelled him to speak a message with which he disagreed. *Id.* at 961 ("[T]o state a proper compelled-speech claim, a plaintiff must object to a message conveyed by the speech he is required to utter . . . if the plaintiff does not object . . . his compelled speech claim fails.").

Crucially, in all cases, there is no requirement that communicative activity or symbolism convey a sophisticated or precise meaning to qualify for First Amendment protection. Instead, even the communication of "primitive . . . ideas," or "drift[s]" are sufficient. *Spence*, 418 U.S. at 410; *accord Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection.").

Applying these principles here, forcing Jack Phillips to create the cake specified by Scardina would amount to compelling him to engage in symbolic speech in violation of the First Amendment. *Masterpiece I*, 138 S.Ct. at 1742 ("Once a court concludes that conduct is expressive, the Constitution limits the

government's authority to restrict or compel it.").[2]

First, there is no question that Jack Phillips understood the cake to express a message—indeed, Scardina *told him what the visual elements represented* and how the design would be used to "reflect and celebrate" an idea anathema to Phillips' beliefs. Second, there is also no doubt that there was at least one other mind

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[2] Notably, although the record is not completely clear, it is possible that Phillips did not actually decline to make the cake at issue "because of" Scardina's gender identity. Jack Phillips would likely not create a custom "transgender transition" cake for any potential customer, including a non-transgender individual who wanted to celebrate the idea of transgender transitions generally, or to celebrate a person who identified as gender-fluid celebrating their re-identification as their own biological sex for a short time. Accordingly, the holding below that Scardina's "transgender status" was the "but for" cause of Jack Phillips' decision not to create the cake was potentially in error. The District Court reasoned that "even in Defendants' hypothetical, the non-transgender person is purchasing the cake for the celebration of a transgender person [so Phillips' decision not to make the cake amounts to] *indirectly* withholding goods and services because of protected status." Dist. Ct. Findings of Fact & Conclusions of Law ¶ 14 (cleaned up). But this holding presents an analytical error. Under the "but for" test for causation, a court must consider whether holding all other facts constant, the outcome would have been different if the gender identity of the alleged victim of discrimination were different. In the District Court's formulation, the alleged "indirect" victim of discrimination was an imaginary transgender person for whose ultimate benefit the cake was being purchased. But to query "but for" causation, the court should have considered a scenario where a non-transgender person seeks a "transgender celebration" cake for the ultimate benefit of someone who is *not* transgender (or even for no person at all). It is, of course, possible that a non-transgender person could order a "transgender celebration" cake for use at a celebration of the *idea* of transition, where there are no actual transgender individuals present. In this scenario, Jack Phillips would still likely have declined to create the custom cake. Accordingly, where neither the party at the point of purchase, nor any ultimate beneficiary of the transaction has a "transgender status," it seems erroneous to have found "but for" causation.

(indeed there were several) on the other side of the communicative transaction. Scardina had a clear understanding of what the particular pink-and-blue cake expressed, and asked Jack Phillips to deliver that specific message.

There is no requirement that to qualify as speech, compelled utterances, symbolic displays or creative endeavors need to spring from the mind of the speaker. To the contrary, the whole point of the compelled speech doctrine is that the *government* is putting words in the mouth of the complaining party and making him say something he does not believe. Ultimate authorship of the ideas in a compelled speech case *always* belongs to someone other than the complaining party. Here ultimate authorship belongs to Scardina. While Scardina is not the government, Scardina is attempting to use the mechanisms of government to force Phillips to say what Scardina wants him to say. That is enough to make out a compelled speech case. *See Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S.Ct. 2141, 2176 (2023) ("What cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. . .") (cleaned up).

Even aside from Scardina, there were other audience members who would reasonably understand the message conveyed by the cake at a specific level, let alone at the level of "[catching] the drift," which is what is required for First Amendment protection. *Spence*, 418 U.S. at 410. It's no accident that Scardina

selected a cake with a pink interior that was concealed by a blue exterior, representing the idea that a person can, on the basis of anatomy and other physical facts, be identified at birth as one sex, but nevertheless actually have a gender that does not match the identified sex, "on the inside." The blue frosting represented a message: male. The pink cake represented another: female. The juxtaposition between the two colors in the same cake communicated a third message, that a person can be "assigned" one sex at birth even as his or her true identity is as a different sex. The topic of whether an individual can claim a gender identity other than their birth sex is the subject of intense debate among millions of Americans, and the Court need not address that issue here. But it is undisputed that Scardina and Phillips have clear—and contradictory—positions on it.

The cake obviously represents to anyone familiar with these conceptions that while Scardina appeared to be male at birth (represented by the blue exterior of the cake), that on the *inside*, Scardina was actually female, a fact only revealed later by cutting through the blue exterior to reach the pink interior. The messaging was neither concealed nor intended to be. Indeed, if the cake didn't communicate a message to anyone other than Phillips, it would have been a surprise to Scardina.

The symbolism in this case is well-established. At trial, a witness conceded that if he were at a transition celebration, "and [he] saw that same cake being served, . . . [i]t would represent from male to female, the colors." *Scardina*, 528

P.3d at 941 (internal quotation and citation omitted). Scardina testified as much at trial. *See* Dist. Ct. Findings of Fact & Conclusions of Law ¶ 48 (finding, based on Scardina's testimony, that for Scardina "the cake design was symbolic of the duplicity of . . . existence [aka] transness"), ¶ 49 (for Scardina, "the blue exterior . . . represents what society saw" at "the time of . . . birth" and the "pink interior was reflective of who [Scardina is] as a person on the inside").[3] And there are many examples from everyday life of others using similar symbols to convey similar messages.[4]

Precisely because Scardina planned to use the cake to personally celebrate a transgender transition, it is undeniable that the cake Scardina specified was *intended to convey and indeed did convey* these ideas. Indeed, it is apparent that the communicative aspect was the reason Scardina sought the cake in the first

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[3] And, lest there be any doubt: the mere fact that the medium chosen to express Scardina's message was a cake, rather than (for instance) a canvass, makes no difference to the outcome. Cake, just like oil painting, modern dance and semaphore, can be used to express messages. History and Evolution of Cake, POLKA DOT IT ("[Cakes] are a food that carries a certain symbol, meaning, and celebratory value."); *cf. Masterpiece I*, 138 S.Ct. at 1738 (Gorsuch, J., concurring) ("Like an emblem or flag, a cake for a same-sex wedding is a symbol that serves as a short cut from mind to mind, signifying approval of a specific system, idea, or institution.") (cleaned up).

[4] *See, e.g.*, 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) (reporting on the use of a cake colored "pink, white and blue to represent the colors of the transgender pride flag"), available at https://www.cnn.com/2020/07/16/us/gender-reveal-party-transgender-son-trnd/index.html (last visited Dec. 11, 2023).

place. If there were no *meaning* in the specific custom cake design features, Scardina could have selected a cheaper pre-made cake, which the undisputed evidence shows Phillips would have happily provided. 528 P.3d at 931; Dist. Ct. Findings of Fact & Conclusions of Law ¶¶ 35, 45.

Recall that the Supreme Court in *303 Creative* offered examples where, without First Amendment protections, creative artists would be compelled to make art in derogation of their personal beliefs. *See*, *e.g.*, 600 U.S. at 589 (unless properly cabined, Colorado's law could be used to "require an unwilling Muslim movie director to make a film with a Zionist message . . . ")(cleaned up). Here, too, Respondent's position confronts a similar *reductio ad absurdum*. Take one simple thought experiment: an Israeli custom t-shirt-maker is asked by a customer to create a green shirt with a small blue rectangle in the center, sprinkled with red dots. Based on the description alone, the shirt-maker would be unlikely to comprehend a particular communicative content or symbolism behind the design at first blush. (Just like Jack Phillips, when initially presented with a pink and blue cake request).

Now suppose that the customer then revealed that he was holding a party to celebrate the attack on Israel on October 7, 2023, and that the t-shirt design was intended to "reflect" the attack. The State of Israel is represented by the blue rectangle, the forces of Hamas are represented by green, with the bloodshed

represented by scattered red dots. At that point, there would absolutely be communicative content to the shirt design, and to the shirt designer's act of creating that bespoke t-shirt.[5]

And, surely, a law forcing the Israeli shirt-maker to ignore his horror at what he now understood to be the message behind the shirt, and make it anyway, would be just as unconstitutional as the "Muslim movie director [forced] to make a film with a Zionist message," and other hypotheticals contemplated by the Supreme Court in *303 Creative*.

But this hypothetical is no different than what happened here. Even if Scardina's original request for a pink and blue cake, without more, did not trigger associations with objectionable messages, Scardina's later clarification of the *precise symbolic meaning* certainly did. Accordingly, requiring Jack Phillips to go through with creating the now-richly-symbolic product cannot be understood in any other way than as forcing Mr. Phillips to mouth assent to the preferred

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[5] The message being conveyed in this scenario would include not just a message in favor of the elimination of Israel from the Middle East but would also include a message that Colorado approves of the demanded message, and disapproves of the shirt-maker's objection. To capitulate to such a demand, therefore, carries not only the compelled geopolitical message, but also a message that the shirt-maker accepts that his views are disfavored, and that he occupies a lesser position in society for having those views.

Indeed, the customer's objective in this scenario is more likely to humiliate the shirt-maker than anything else. Similarly, under the circumstances of this case, it is hard to conclude that Scardina did not have Jack Phillips' humiliation as a primary objective.

narrative that people can change sex—and celebrating Scardina's having done so—regardless of Jack Phillips' conscience.

Finally, there is no risk in this case of a radical disconnect between speaker and audience, as there was in *Cressman*. In *Cressman*, the plaintiff interpreted the image of a Native American aiming an arrow at the sky to convey a message in support of "pantheism." 798 F.3d at 960. Although the Tenth Circuit held that he was compelled to engage in symbolic speech, his objection stemmed from the fact that he layered an unusual and idiosyncratic interpretation onto the symbol. *Id.* at 956-59. As the court found, however, audience members would not take away a message in favor of "pantheism" at all, but rather would take away the unobjectionable message that the State's history was influenced by Native Americans. *Id.* at 960. In stark contrast here, Jack Phillips is not engaged in flights of interpretive fancy. Everyone agrees that the cake specified by Scardina has the same message: a message "celebrating" transgender transitions. There is no *Cressman*-like possibility for communication failure here. Under well-established authority, the thing Scardina is trying to force Jack Phillips to do qualifies as "speech" for First Amendment purposes.

CONCLUSION

Scardina seeks to wield Colorado's public accommodations laws to require Masterpiece not just to serve transgender individuals generally, but to use their

creative talents to *celebrate* gender transitioning *specifically*. That is unconstitutional. This Court should reverse the Court of Appeals.

Respectfully submitted this 15th day of December 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 2023, I caused to be filed the foregoing **BRIEF OF AMICI CURIAE MOUNTAIN STATES LEGAL FOUNDATION, AMERICANS FOR PROSPERITY FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, AND MANHATTAN INSTITUTE IN SUPPORT OF PETITIONERS MASTERPIECE CAKESHOP, INC., AND JACK PHILLIPS AND FOR REVERSAL** with the Clerk of the Court, and that a copy of the foregoing was served upon all counsel of record via Colorado Court E-filing system (CCEF).

/s/ *James Kerwin*

James Kerwin