

"A pink cake with blue frosting with no verse or imagery": the Colorado Supreme Court at the crossroads between freedom of conscience and non-discrimination

On June 18, the Colorado Supreme Court held an oral hearing of the dispute between Jack Phillips and Autumn Scardina. The subject of the dispute is the evaluation of the legitimacy of the refusal opposed by the pastry chef Phillips to prepare – so reads the question posed to the judges¹ – a pink cake, with a blue frosting, to celebrate *Scardina's* gender transition.

Jack Phillips has already been at the center of a long legal battle, which saw him win before the Federal Supreme Court in 2018², and has become a symbol of the defense of freedom of conscience, enshrined in the First Amendment, against policies aimed at compressing it in the name of protecting minorities.

The story that now concerns him begins on June 26, 2017, when Scardina, an activist for the LGBTQ+ cause³, commissioned a cake to celebrate his gender transition and, after receiving an initial refusal, asked for a cake with the image of Satan smoking. Both demands were in stark contrast to Phillip's professed beliefs.

Scardina first appealed to the Colorado Civil Rights Commission, which rejected the request to impose an administrative fine against the confectioner. Instead of appealing against the authority's denial, the activist turned to the civil courts, which in both instances⁴ recognized Phillips' obligation to bake the cake and censured his behavior as discriminatory against the LGBTQ+ community.

¹ See SUPREME COURT, STATE OF COLORADO, *Oral Argument Schedules and Recordings. Tuesday, June 18, 2024*, p. 8.

² See U.S. SUPREME COURT, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al.*, no. 16-111, June 4, 2018, *U.S. Reports* 584, 2018, pp. 617-639. See L. P. VANONI, "It is (not) a piece of cake": libertà di espressione e politiche antidiscriminatorie in America. Note a margine del caso *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in "Stato, Chiese e pluralismo confessionale", *Rivista telematica* (<https://www.statoechiese.it>), no. 29/2018, pp. 1-26.

³ For a summary of the events, see K. QUIÑONES, *Colorado baker returns to court after activist sues over 'gender transition' cake*, in "Catholic News Agency", June 20, 2024, <https://www.catholicnewsagency.com/news/258053/colorado-cakebaker-returns-to-court-after-activist-sues-over-gender-transition-cake>. For Scardina's position, see <https://scardinalaw.com/masterpiece-cakeshop>; for the position of the confectioner Phillips, see <https://adflegal.org/case/masterpiece-cakeshop-v-scardina>.

⁴ For the judgment of the first instance, see DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO, *Autumn Scardina v. Masterpiece Cakeshop, Inc. et al.*, no. 19CV32214, 4 March 2021, available at <https://adfmedialegalfiles.blob.core.windows.net/files/MasterpieceScardinaDecision.pdf>. The reference to the second instance decision is COLORADO COURT OF APPEALS, *Autumn Scardina v. Masterpiece Cakeshop, Inc., and Jack Phillip*, no. 2023COA8, January 26, 2023, available at <https://law.justia.com/cases/colorado/court-of-appeals/2023/21ca1142.html>.

Particular attention should be paid to the appeal ruling, which is currently being appealed to the Colorado Supreme Court⁵. According to the panel, which issued the decision unanimously on January 26, 2023, Scardina's action would fall under the remedies offered by the Colorado Anti-Discrimination Act of 2021, which allows the person alleging discrimination to file a civil lawsuit after unsuccessfully exhausting administrative means.

At the heart of the Court's reasoning is the characterization of Phillips' conduct, which was not opposed to the preparation of a generic pink cake with blue icing, but was opposed to the symbolic link between the decoration and the principles relied on by Scardina.

In the narrative of the appellate ruling, §56 is the keystone, because it reports a statement by the defendant that he was ready to bake a cake with those specifications, but for other customers; And this is confirmed by the fact that, at first, the pastry chef had agreed to prepare the cake, only to later retract when he knew the destination of his product.

Given the precedent of *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, the Court of Appeals points out that the client's request does not contain any type of message offensive to Phillips' values, indeed, the decoration does not convey any type of message in favor of a certain idea⁶.

To confirm this, in §77 it is reported that a witness presented by the defendant had admitted that when he saw a pink cake with blue icing, without other elements of context, he would not have thought of concepts such as gender, transgenderism, transition, the values of the LGBTQ+ community.

In other words, the First Amendment would not be invoked to protect the position of the confectioner, because he would not be in a situation in which he would spread content contrary to his conscience: neither the cake itself nor its specifications would communicate anything. The customer's request was completely inexpressive (*nonexpressive*).

While awaiting the decision of the Supreme Court of Colorado (and perhaps of the Federal Supreme Court⁷), some data can be identified: firstly, the role of jurisprudence in drawing the limits

⁵The appeal to the Colorado Supreme Court can be read on <https://adfmlegalfiles.blob.core.windows.net/files/MasterpieceScardinaColoradoSupremeCourtPetitionForReview.pdf>.

⁶ See M. RICCA, *Oltre Babele. Codici per una democrazia interculturale*, Dedalo Edizioni, Bari, 2008, and, about US situation, S. TESTA BAPPENHEIM, *I simboli religiosi in Europa e negli Stati Uniti*, in "Ius Ecclesiae", n. 27/2015, pp. 595-618.

⁷ Also in favor of the confectioner is the precedent of the Federal Supreme Court, see the case *303 Creative LLC et al. v. Elenis et al.*, no. 21-746, June 30, 2023, in *U.S. Reports*, 600, forthcoming, pp. 1-26 (provisional pagination).

of the lawful and the unlawful in the light of difficult interpretations of increasingly general legal clauses is increasingly remarkable; secondly, polarization has reached levels that place social peace in an unstoppable crisis; thirdly, the weight attributed to the sign and its meaning assumes capital importance, since the decoration itself is presented as neutral and inexpressive for the judges, while for the pastry chef it is clearly offensive.

Among the *amici curiae* there is a large number of states⁸, but above all, a coalition of Jewish, Christian and Islamic confessional associations has taken a stand, which emphasize how Colorado's attempts to protect equality are leading to serious limitations on the right to religious freedom⁹.

Among the objections to the judgment under appeal, there is one that makes us reflect on the impossibility of separating, in a given context, the symbol from its meaning. To demonstrate this, the *amici curiae* would have "turned" to ChatGPT, whose algorithm "feeds" on a myriad of data, and would have asked the question about the most suitable colors to celebrate a *gender transition*. And the answer would have been the combination of pink and blue¹⁰.

This begs the question: if even a machine recognizes the obvious, why not a judge? Yet, in the progressive centrality of the individual, in the absence of dialogue and in the disintegration of the civil community, even the obvious (real or presumed) is a source of conflict¹¹.

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⁸ See N. C. HUNT, *Brief of Amici Curiae Arkansas & 22 Other States in Support of Defendants*, Dec. 19, 2023, in <https://law.alaska.gov/pdf/amicus/2023/121923-Brief.pdf>.

⁹ See IAN SPEIR, *Brief of Amici Curiae Coalition for Jewish Values, Summit Ministries, The Colson Center for Christian Worldview, and Islam and Religious Freedom Action Team in Support of Petitioners*, April 27, 2023, in <https://religiousfreedominstitute.org/wp-content/uploads/2023/04/Scardina-v.-Masterpiece-Cakeshop.pdf>.

¹⁰ *Ibid.*, p. 13.

¹¹ See M. D'ARIENZO, *Pluralismo religioso e dialogo interculturale. L'inclusione giuridica delle diversità*, Pellegrini Editore, Cosenza, 2018, pp. 139-142.