DISTRICT COURT COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED: March 9, 2021 1:57 PM FILING ID: A8CF93F6E2801 CASE NUMBER: 2019CV32214
Plaintiff: AUTUMN SCARDINA, **v.** **Defendants:** MASTERPIECE CAKESHOP INC. and JACK PHILLIPS	**▲ COURT USE ONLY ▲** Case No.: 2019CV32214 Division/Courtroom: 275
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DEFENDANTS' REQUEST TO CLARIFY HOW THE PARTIES MAY ADDRESS OR REFERENCE PERSONS AT TRIAL	

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Introduction

Defendants and their counsel seek the Court's guidance regarding how they may respectfully address Plaintiff Autumn Scardina and others at trial while still honoring their sincere religious beliefs and public advocacy on sex and gender. At the September 2020 case management conference, Scardina's counsel acknowledged that there "hasn't been a problem" in the case thus far, and asked only that, "to the extent personal pronouns or genders are used," Plaintiff, who identifies as transgender, "be referred to as a female." The Court indicated that "whatever the preference is of the person is to be respected."

To date, Defendants and their counsel (who, along with Jack Phillips's wife, Debra, we refer to as "Defendants") have avoided using gender-specific pronouns and titles. Instead, they have respectfully addressed Scardina by first name, last name, full name, or simply as "Plaintiff." For their part, Scardina and Scardina's counsel use gender-specific pronouns and titles.

Defendants file this request to ensure that they can continue this mutually respectful practice through trial. Defendants would address Plaintiff by first name, last name, full name, party designation, or some combination of these. Thus, Defendants would address Plaintiff as "Autumn," or as "Scardina" (as they have done in briefing), or as "Autumn Scardina" (as they did in depositions), or "Plaintiff" (as they did at oral argument on the first motion to dismiss). This tracks the approach the U.S. Supreme Court once took when it faced this issue and avoided using pronouns and titles. *See Farmer v. Brennan*, 511 U.S. 825 (1994). Plaintiff and Plaintiff's counsel, of course, would be free to use whatever pronouns and titles they prefer.

As we explain below, requiring Defendants to use the preferred pronouns and titles of the Plaintiff would raise significant constitutional problems that can easily be avoided.

Discussion

Defendants believe that a person's gender reflects his or her biological sex, which is scientifically established based on a person's "X" and (in the case of males) "Y" chromosomes, and that a person's sex cannot change no matter how they identify.[1] Defendants also believe that sex-specific pronouns and titles reflect a person's God-given, biological sex. And they have promoted these ideas publicly. To use such language differently, Defendants and their counsel would violate their understanding of science and their religious beliefs.

Requiring the use of gender-specific pronouns and titles also would infringe on Defendants' rights to free speech, expressive association, due process, and the free exercise of religion. We address each in turn.

I. The federal and state constitutions ensure that Defendants can speak at trial consistently with their beliefs on sex and gender.

The Colorado Constitution, Article II, Section 10, and the First Amendment to the U.S. Constitution protect "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This means the government cannot compel unwanted expression. Indeed, speakers have "the autonomy to choose the content of [their] own message." *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). It would violate these principles to compel Defendants to express a message that they disagree with—namely, that a person's gender is controlled by something other than their biological sex.

A. Defendants engage in protected speech while they are presenting testimony and argument in court.

The federal and state constitutions protect speech on "matters of public concern." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). Such speech is "constitutionally protected" (*id.*) even, and indeed especially, when it concerns "controversial subjects"

[1] *See* National Human Genome Research Institute, Sex Chromosome, available at https://www.genome.gov/genetics-glossary/Sex-Chromosome.

like religion and "gender identity." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2476 (2018). Among other things, this means that "litigants and their attorneys" may freely express (or decline to express) "ideas" in court without fear of government punishment. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001). Here, Defendants' decision not to use gender-specific labels when addressing Plaintiff at trial—either in testimony or in argument—easily fits that category.

B. Defendants should not be required to express a message that directly contradicts their religious beliefs.

As noted, Defendants believe that gender-specific pronouns and titles reflect a person's God-given biological sex. They cannot use such pronouns differently; otherwise, they believe that they would be lying about objective truth and so dishonor God. This is a serious moral issue, as many Christian theologians have taught.

Take Dr. John Piper, a well-known Christian pastor and theologian, who has emphasized the theological significance of how we address people who identify as transgender. *See* John Piper, *He or She? How Should I Refer to Transgender Friends*, Desiring God (July 16, 2015), https://bit.ly/2ZO1XVG. Dr. Piper cites Genesis 1:27, which states that "God created us male and female"—implying that "God wills for our sexual identity to be of one piece with our biological, genetic identity." *Id.* Dr. Piper applies that principle to contend that Christians should not use gender-specific pronouns that do not reflect a person's God-given, genetically known sex. *Id.* That would be "lying" and "contrary to" a biblical "understanding" of sex and gender. *Id.*

Dr. Piper is far from alone in this view. Dr. Andrew T. Walker, a Christian ethics and apologetics professor at the Southern Baptist Theological Seminary, has emphasized that "[p]ronouns are not an insignificant" because they communicate big truths about "reality." Andrew T. Walker, *He, She, Ze, Zir? Navigating pronouns while loving your transgender neighbor*, ERLC (Dec. 4, 2017), https://bit.ly/3kn02Ra. Christians must therefore carefully consider whether "the reality" their pronoun-use

"affirm[s] … corresponds to biblical truth." *Id*. As Dr. Walker explains, Christians must speak the "truth" but do so in "love"—i.e., they must "obey" their "conscience" while trying to "live peaceably with" everyone "so far as it depends on [them]." *Id*. (quoting Romans 12:18). In practice, this means Christians should try to "avoid using pronouns," or simply use preferred names, when addressing those who identify as transgender "in public." *Id*. Countless other Christian theologians agree, as do adherents of other faiths and many feminists.[2]

Scardina and others share a different view. But the "freedom to differ is not limited to things that do not matter much." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). It extends to society's most "sensitive" topics (*Janus*, 138 S. Ct. at 2476)—even those, like gender, "that touch the heart of the existing order" (*Barnette*, 319 U.S. at 642; *Janus*, 138 S. Ct. at 2476). Ideas come and go. Popular views change. But if "there is any fixed star in our constitutional constellation," it is that no government may "prescribe what shall be orthodox" on life's biggest issues or "force citizens" to affirm "by word or act" popular views. *Barnette*, 319 U.S. at 642; *Wooley*, 430 U.S. at 714 (compelled-speech doctrine protects "individual freedom of mind").

As one federal appellate court has said, "no authority supports the proposition that [courts] may require litigants, judges, court personnel, or anyone else to refer

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[2] *See, e.g.*, Albert Mohler, *The Briefing* (Feb. 20, 2020), https://bit.ly/3pVJrVY; Shane Morris, *Should Christians Use LGBT Preferred Pronouns?* BreakPoint (Aug. 7, 2020) (same), https://bit.ly/3dOkqJJ; Sam Parkison, *Should I Use My Trans Neighbor's Preferred Pronoun?* For The Church (Feb. 4, 2020) (same), https://bit.ly/3bCjllS. Although Defendants do not espouse everything in these articles, the articles underscore the seriousness of this issue to Defendants, and to millions of other Americans. *See also* Br. of *Amici Curiae* Religious Freedom Institute's Islam & Religious Freedom Action Team and Islamic Scholars, at 12, *Bostock v. Clayton County*, Nos. 17-1618, 17-1623, 18-107 (S. Ct. Aug. 23, 2019) ("Islamic jurisprudence teaches that a person's sex cannot change. God's creation of male and female is determined by biology, by genitalia and by genetics[.]"); Women's Liberation Front, *2021 Media Guide* 20 (2021), https://bit.ly/3uWtL8t ("The use of inaccurate pronouns misleads the public by providing false information about the subject or source's sex.").

to" litigants with "pronouns matching their … gender identity." *United States v. Varner*, 948 F.3d 250, 254-55 (5th Cir. 2020). Indeed, the U.S. Supreme Court itself avoided this very issue in *Farmer v. Brennan*, 511 U.S. 825 (1994), by declining to use gendered pronouns when addressing someone who identified as transgender *Id.* at 829. This Court should allow Defendants to follow that example.

Taking a different approach "could raise delicate questions about judicial impartiality." *Varner*, 948 F.3d at 256. Courts "should always seek to promote confidence that they will dispense evenhanded justice." *Id.* At the very least, this means courts should not show "bias for or against either party" to a proceeding. *Id.* (citing *Repub. Party of Minn. v. White*, 536 U.S. 765, 775-76 (1992)). That is especially true today, given the increase in "cases that turn on hotly-debated issues of sex and gender identity." *Id.* While "a court may have the most benign motives in honoring a party's request" concerning gender-specific labels, it may "unintentionally convey its tacit approval of the litigant's underlying legal position" if it obliges that request. *Id.* This Court should take care to avoid this "appearance of bias." *Id.*

C. Defendants should not be compelled to express a message based on its content and viewpoint.

Requiring Defendants to use Plaintiff's preferred terms would also compel and restrict speech in a content- and viewpoint-based manner, taking a side in the ongoing public debate. But government may not "target speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is "content-based."); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992) (viewpoint discrimination when law restricts speech only on "one side of a debate"). For this reason, too, the Court should allow Defendants to continue using the neutral approach taken thus far during this litigation.

II. Requiring Defendants to use Plaintiff's preferred titles would violate Defendants' right to freely engage in expressive association.

The Colorado Constitution, Article II, Section 10, and the First Amendment to the U.S. Constitution also protect Phillips's and his counsel's "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). And this right "plainly presupposes a freedom not to associate." *Id.* at 623. Government may not force those "engaged in some form of expression" to associate with a third party or a message that "affects in a significant way [their] ability to advocate public or private viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 564-66 (2005) (likely violation if group forced to promote speech it disagrees with, if speech could be "attributed to" the group). Requiring Defendants and their counsel to use Plaintiff's preferred terms would disrupt their freedom of association.

To begin, it would force Defendants to associate with a message that deeply violates their religious beliefs and so undermines their advocacy on a widely-debated "political, social," and "religious" issue. *Roberts*, 468 U.S. at 622. Defendants have publicly acknowledged that they believe sex is given by God, is biologically determined, and cannot be chosen or changed. If Defendants were to start using pronouns or titles that do not match the person's biological sex, the public would write them off as hypocrites and discredit their advocacy on the topics of sex and gender.

Next, it would limit Jack Phillips's ability to associate with legal counsel who can effectively advocate Phillips's positions. If defense counsel were to change the approach it has taken thus far in this case, that could undermine Phillips's legal and public advocacy on the topics of sex and gender—including in this very case. *See Hurley*, 515 U.S. at 576 (government may not "require speakers to affirm in one

breath that which they deny in the next"). If Phillips's counsel is forced to use Plaintiff's terms, Phillips will be forever tied to speech that violates Philips's beliefs—speech that could be used to impeach the sincerity of those beliefs. *Id*.

Finally, requiring Defendants to use Plaintiff's terms would curb Alliance Defending Freedom's (ADF) ability to associate with clients, donors, and team members who support the organization in part thanks to its beliefs about sex and gender. ADF publicly advocates that God created people male or female, that these traits are scientifically known and fixed, and that laws should reflect that biological reality. *See, e.g.*, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (U.S.); *Meriwether v. The Trustees of Shawnee State Univ.*, No. 20-3289 (6th Cir.); *Soule v. Conn. Ass'n of Schools, Inc.*, No. 3:20-cv-00201-RNC (D. Conn.). This mission attracts donors, team members, and clients. If ADF backtracks, these people would be less likely to associate with ADF. The Constitution forbids forcing ADF to alienate them.

III. Requiring the use of Plaintiff's preferred pronouns and gendered titles would violate due process.

The Colorado Constitution, Article II, Section 25, and the Fifth and Fourteenth Amendments to the U.S. Constitution protect litigants' right to "due process." That ensures that litigants receive "fearless, vigorous, and effective advocacy," no matter what polls may say. *Offutt v. United States*, 348 U.S. 11, 13 (1954). Our legal system rests on the premise that truth "is best discovered by powerful statements on both sides," delivered through "partisan advocacy" that passes "the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 655-56 (1984) (cleaned up). Requiring Defendants to use Plaintiff's terms would hamstring Defendants' advocacy—by forcing them to change course (damaging their credibility) and to use terminology inconsistent with the substance of their arguments (weakening their position). That would destroy Phillips's right to a fair trial.

IV. Requiring Defendants to use Plaintiff's terms would discriminate based on religious exercise.

The Colorado Constitution, Article II, Section 4, and the First Amendment to the U.S. Constitution protect the "free exercise" of religion. To comply with these mandates, government may not "target[] religious conduct for distinctive treatment," (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)), including by imposing a rule that is hostile to religious people and their beliefs (*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729-31 (2018)). When officials target religion, that per se violates free exercise. *Id*.

Here, requiring the use of gender-specific pronouns and titles would violate Defendants' sincere religious beliefs. And it would signal "official disapproval of" those religious beliefs, as this Court would be elevating Scardina's "view of what is offensive over" Defendants' view. *Id*. at 1731 (citing *Matal v. Tam*, 137 S. Ct. 1744, 1762-64 (2017)). That would *both* target religion *and* "disfavor the religious basis" of one side's position and so violate free exercise. *Masterpiece*, 138 S. Ct. at 1731.

V. The practice of not using gender-specific pronouns and titles when addressing Plaintiff best respects the beliefs of all parties.

There is no practical reason to cross any of these constitutional lines. Defendants seek to respect Plaintiff while honoring their religious beliefs. Plaintiff and Plaintiff's counsel may use whatever language they see fit. This approach respects everyone's dignity interests. By contrast, forcing Defendants to convey messages against their faith would violate the "individual dignity and choice" promised in the Constitution. *Cohen v. California*, 403 U.S. 15, 24 (1971). "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning[.]" *Janus*, 138 S. Ct. at 2464. Government has no interest in coercing litigants to affirm another party's dignity at the expense of their own, especially when a neutral third option exists—and has been used successfully in this suit.

Conclusion

For all of these reasons, Defendants respectfully request that this Court clarify that they and their counsel may continue to use gender-neutral language while addressing Plaintiff at trial.

Respectfully submitted this 9th day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing via the Colorado Courts E-Filing system and email (as designated below) on:

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This 9th day of March 2021,

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