No. 21-476

In the
Supreme Court of the United States

303 CREATIVE LLC, *et al.*,
Petitioners,

v.

AUBREY ELENIS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* AARON AND MELISSA KLEIN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the First Amendment.

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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 the plaintiff in *303 Creative*, the Kleins' business involved creating original art consistent with their faith.

In 2013, Aaron and Melissa were asked to create a custom cake for a same-sex wedding. Due to their religious beliefs, they could not, in good conscience, use their art to celebrate the 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 and imposed a financially devastating penalty of $135,000 against the Kleins. Aaron and Melissa were forced to shut down their family bakery, which they had worked for years to build, and were punished with a "gag order" whereby the Oregon government restricted their freedom to discuss their case in public. The incident giving rise to the case took place almost a decade ago, yet the litigation is still ongoing.

Appellate courts have incrementally issued rulings in favor of Aaron and Melissa since that time. In 2017, the Oregon Court of Appeals struck the "gag order" but

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[1] Counsel for amicus 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 amicus curiae made any monetary contribution intended to fund the preparation or submission of this brief. Petitioner has granted blanket consent to amicus curiae briefs, and counsel for Respondent consented in writing to the filing of this brief. Therefore, all parties have consented to the filing of this brief.

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, this 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). The Kleins announced their intention to seek relief before this Court by the end of summer.

The Court's decision in *303 Creative* will determine whether the government can force artists like Lorie Smith and the Kleins to speak messages through their art that violate their consciences. The Kleins know far too well the tremendously high human cost of government coercion. As amici, the Kleins have a strong interest in ensuring the First Amendment protects all artists' right to speak freely or refrain from speaking at all, in accordance with the artists' convictions.

SUMMARY OF ARGUMENT

The Tenth Circuit correctly concluded that Lorie Smith's creation of wedding websites is "pure speech." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1176 (10th Cir. 2021). As the court found, Ms. Smith's websites are pure speech because each website is her own expressive, original work of art, combining "custom text, graphics, and other media" to "celebrate and promote the couple's wedding and unique love story." *Id*. Ms. Smith's websites are "inherently expressive," and their expressiveness is not lessened when they are "requested by a third-party" or made for a "profit motive." *Id*. at 1177. Websites celebrating a wedding are especially expressive because weddings are themselves "particularly expressive event[s]." *Id.* at 1076.

However, the Tenth Circuit's opinion took a glaringly unconstitutional turn, with devastating on-the-ground consequences. The court held that Colorado's interest in ensuring "equal access to publicly available goods and services" gives the government license to force artists to create art that violates the artist's deepest convictions. *Id*. at 1779. This stunning conclusion "subverts our core understandings of the First Amendment" and gives the government unfettered power to coerce artistic speech. *Id*. at 1204 (Tymkovich, C.J., dissenting). Coercing speech from small business owners will not lead to the utopian marketplace the Tenth Circuit envisions. Instead, it will force creative artists to close their business doors, destroying their livelihoods and creating inferior

markets for all. Such an outcome will harm many and benefit none.

Oregon bakers Aaron and Melissa Klein experienced the cost of government-coerced speech firsthand. The state of Oregon imposed a financially devastating $135,000 fine—plus a gag order—on the Kleins for declining to create a custom wedding cake for a same-sex wedding. As a result, the Kleins were forced to shut down their family-owned business, have undergone almost a decade of litigation defending their religious decision, and have suffered personal attacks, property vandalism, and death threats against themselves and their five children. No one should be subjected to such consequences for simply wishing to stay silent.

This brief addresses the unacceptably high human cost that results when the government arrogates to itself the power to compel artists to speak government-approved messages. To prevent such a cost from being levied against creative professionals, this Court should affirm that custom art is uniquely deserving of broad First Amendment protection. Custom art is pure speech because of the expressiveness and originality inherent in the artist's work, regardless of the medium used to create it, the meaning observers ascribe to it, or whether it is a commissioned or non-commissioned piece. This Court should also affirm that wedding-related custom artwork is expressive speech because it invariably conveys expressive messages about the wedding, which is itself a uniquely expressive event.

Finally, it is imperative that this Court reverse the Tenth Circuit's erroneous finding that governments

may coerce artistic speech in violation of the artists' convictions. Without such a reversal, free speech will be chilled, markets will falter, and an unacceptably high human cost will be paid by artists forced to choose between violating their conscience or losing their business.

ARGUMENT

I. The Tenth Circuit Correctly Held Custom Art Is Pure Speech Because the Originality and Expressiveness Inherent in Custom Art Make It Uniquely Deserving of Broad First Amendment Protection.

The First Amendment protects the expressive speech of all Americans. Custom artwork is pure speech due to its originality and expressiveness. This Court has held that expressive, original 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 v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

Art is expressive when it conveys 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 and film—and 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).

The "animating principle" behind the First Amendment's pure speech protection is "safeguarding self-expression." *Cressman v. Thompson*, 798 F.3d 938, 952–53 (10th Cir. 2015). If a work of art is the "artist's self-expression," it receives First Amendment protection. *White v. City of Sparks*, 500 F.3d 953, 955–56 (9th Cir. 2007).

Original artistic work deserves protection as pure speech because it is inherently self-expressive. Artists give of themselves—their emotional energy, creative talents, and aesthetic judgments—to express their artistic vision in original art. *See* John Hospers, *Philosophy of Art*, ENCYCLOPEDIA BRITANNICA ONLINE, https://bit.ly/3yQaFpa (last accessed May 8, 2022) (noting artists "manifest" their "inner state" to create art). This self-expression results in an intimate connection between the artist, the art she creates, and the message her art expresses. The personal identification each artist feels with her creation makes art a form of deeply personal, artistic self-expression worthy of First Amendment protection. *E.g., Hurley*, 515 U.S. at 576 (stating that self-expression exists where the speaker is "intimately connected with the communication advanced"). Original artwork requires broad First Amendment protection to ensure artists are not forced to use their expressive gifts to communicate messages antithetical to their beliefs.

As the Tenth Circuit found, Ms. Smith's original websites are "pure speech" because of their originality (they require her to combine "custom text, graphics,

and other media") and expressiveness (they are "inherently expressive" and draw upon Ms. Smith's "unique creative talents"). *303 Creative,* 6 F.4th at 1176–77. This Court should hold that original, custom art is pure speech and its First Amendment protection does not depend on a) the medium used to create the art, b) the meaning observers ascribe to the art, or c) the art's status as a commissioned piece.

A. Original, Expressive Art Is Pure Speech, Regardless of the Medium Used to Create It.

In determining if art is pure speech, the originality and expressiveness of the work 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 pure 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.

This 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, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–03 (1952), and 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), instrumental music, *Ward v. Rock Against Racism*, 491

U.S. 781, 790 (1989), and theater, *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975).[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 (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.[3]

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

[3] The Oregon Court of Appeals held that the Kleins' cakes were not fully protected speech in part because "even when [the cakes are] custom-designed for a ceremonial occasion," they are "still cakes made to be eaten." *Klein*, 410 P.3d at 1071–72. It makes little sense to protect custom, sculptural, artistic centerpieces at weddings only when they are not edible. The artistic, communicative nature of wedding 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 $5,000 per cake—for the intricacy, personalization, and beauty of custom cakes. *See, e.g.*, Imogen Blake, *Bakery Whips Up Decadent Wedding Cakes so*

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)). As the Tenth Circuit correctly noted, Ms. Smith's websites are art because they are "inherently expressive," even though they exist in cyberspace rather than in physical form. *303 Creative,* 6 F.4th at 1177. This Court should hold that, when determining if art is pure speech, the originality and expressiveness of the work matter far more than the medium used to create it.

B. Original, Expressive Art Is Pure Speech, Regardless of What Observers Understand the Art to Mean.

The First Amendment protects art as pure expression regardless of what the public understands

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Elaborate They Take a MONTH to Make, DAILYMAIL.COM (Apr. 7, 2017), https://www.dailymail.co.uk/femail/food/article-4389566/Are-elaborate-wedding-cakes-time.html. And couples assuredly aren't paying the markup for the cake's flavor. As renowned wedding cake baker Ron Ben-Israel admits, custom cakes are generally not purchased for their taste. Julia Moskin, *Here Comes the Cake (And It Actually Tastes Good)*, NEW YORK 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." *Id.* If couples are not buying wedding cakes for their price or taste, there is only one reason left for them to make the purchase: for the cakes' artistic value.

the art to mean.[4] *See Hurley*, 515 U.S. at 569. The Tenth Circuit correctly held that Ms. Smith's websites are pure speech without judging audience perceptions. *303 Creative*, 6 F.4th at 1176. Some courts, including the Oregon Court of Appeals, have used an "audience response" test to determine whether art is expressive, finding that the expressiveness of a created work turns on how the work is "perceived and experienced by others." *Klein,* 410 P.3d at 1071. But this Court has never looked to audience perceptions to gauge whether a work of art is a protected expression.

This 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*. 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).

Courts should not judge the expressiveness of art by how audiences respond to it. The "audience response test" is a subjective standard, easily manipulable to afford some messages more protection than others. In

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[4] This principle aligns with the "heckler's veto" doctrine, which prohibits the government from banning speech based on listeners' reactions. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 126–27 (1992); *Terminiello v. City of Chi.*, 337 U.S. 1, 5 (1949).

Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1730 (2018), the Court elaborated on Colorado's different treatment of custom wedding cakes based on the message, writing that the Colorado agency "ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism." This Court should clarify that the First Amendment protects art as pure expression regardless of what courts think the public understands the art to mean.

C. Original, Expressive Art Is Pure Speech, Regardless of Whether the Art is Commissioned or Non-Commissioned.

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).

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" (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974))); *see also 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."). As the Ninth Circuit recognized, when a client commissions art from an artist, both client and artists are "engaged in expressive activity." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010). 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.*

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. Art—such as the websites produced by Ms. Smith and the custom cakes created by the Kleins—does not receive a diminished degree of 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[5] to the Human Rights Campaign's blue

[5] Alicja Zelazko, *Last Supper*, ENCYCLOPEDIA BRITANNICA ONLINE, https://bit.ly/3zaHk8O (last accessed May 27, 2022). 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.").

and yellow "equal" logo commissioned from artist Robert Stone.[6]

Artists must engage in self-expression to create both commissioned and non-commissioned original artwork. As the Tenth Circuit correctly held, the "speech" of artists like Ms. Smith is "implicated even where [their] services are requested by a third-party." *303 Creative,* 6 F.4th at 1177. A "profit motive" does not transform an artist's speech into "commercial conduct." *Id*. However, other courts—including the Oregon Court of Appeals—disagree, finding that commissioned art deserves less protection. *See, e.g.*, *Klein,* 410 P.3d at 1072 ("[T]o the extent that the cakes are expressive, they do not reflect only the Kleins' expression. Rather, they are products of a collaborative process in which Melissa's artistic execution is subservient to a customer's wishes and preferences."); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 287 (Colo. Ct. App. 2015) ("The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product."); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 (N.M. 2013) ("It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so."); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1227 (Wash. 2019) ("[w]hile photography may be expressive, the operation of a photography business is not" (quoting *Elane Photography*, 309 P.3d at 68)). This Court should clarify and declare that the

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[6] HUMAN RIGHTS CAMPAIGN, *Our Logo*, https://www.hrc.org/about/logo (last accessed May 8, 2022).

First Amendment fully protects both commissioned and non-commissioned art.

D. Custom Wedding-Related Art Always Conveys an Expressive, Protected Message About the Wedding Because Weddings Are Expressive Events.

Custom, wedding-related art is doubly protected speech. The First Amendment protects original art as pure speech, and it also protects speakers from being compelled to promote, support, or otherwise contribute to a wedding because weddings are themselves expressive events. The First Amendment forbids compelled contributions to an expressive event. *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 wedding is an intrinsically expressive event, conveying "important messages about the [marrying] couple, their beliefs, and their relationship to each other and to their community." *Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012). A wedding "offer[s] symbolic recognition" of a couple's union, where "a couple vows to support each other," while "society pledge[s] to support the couple." *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015). Every component of a wedding—from the venue to the officiant, to the music, to the garments, to the cake—contributes to the wedding's overall message. Just as the government cannot compel a parade to accept an unwanted parade float, the government cannot compel a parade float to

participate in a parade. *See Hurley*, 515 U.S. at 581. In the same way, the government cannot compel a wedding party to accept a particular artist's work or compel the artist to participate in the wedding.

Many courts have found that artists engage in speech when they contribute their art to a wedding, from designing the event invitation to capturing the ceremony through photos. *See Brush & Nib,* 448 P.3d at 908 (the plaintiffs' "custom wedding invitations" are "protected by the First Amendment" as "pure speech"); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750–51 (8th Cir. 2019) (wedding videography serves as a "medium for the communication of ideas about marriage" and is thus "a form of speech that is entitled to First Amendment protection") (internal quotation marks omitted); *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cty. Metro Gov't*, 479 F. Supp. 3d 543, 558 (W.D. Ky. 2020) (wedding photography "is speech").

An artist's work is her own protected, expressive speech, particularly when her art is created to support the expressive event of a wedding. This is true whether the artist's creative work is expressed in the form of a wedding website, video, portrait, invitation, flower arrangement, or custom cake. The Free Speech Clause protects the right of such artists to only support expressive events with which they agree. This Court should hold, as the Tenth Circuit held, that wedding-related art is "pure speech" because it conveys a message of support for the marriage being formed, as well as "celebrat[ing] and promot[ing] the couple's wedding and unique love story," *303 Creative*, 6 F.4th

at 1176. The government may not compel artists to support any expressive event in violation of their beliefs or convictions.

II. Compelling Artistic Speech Will Devastate the Lives of Artists Who Refuse to Abandon their Convictions, Reducing Citizens' Access to Goods and Services and Creating Inferior Markets for Everyone.

Coercing speech from small business owners will not lead to the utopian marketplace that Colorado envisions. Instead, it will destroy the lives of creative artists and reduce the quality of markets for everyone. Aaron and Melissa Klein know this all too well, for they have experienced the personal and professional devastation that results when the government forces family business owners to choose between their faith and their livelihood.

A. Government Coercion of Speech Devastated Aaron and Melissa Klein's Lives and Destroyed Their Business.

The Kleins' story illustrates the consequences of government compelled speech on small, family-owned businesses.

In 2007, Aaron and Melissa Klein opened a bakery in Gresham, Oregon, called "Sweet Cakes by Melissa," specializing in custom-designed, artistically crafted cakes. Pet'r's Br., ER.373, *Klein v. Or. Bureau of Lab. & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017) (Case No. A159899). Aaron and Melissa operated Sweet Cakes as an expression of their Christian faith, in accord with their religious convictions. *Id.* at ER.365–66, 373–74.

The Kleins chose to create wedding cakes, in part, to celebrate marriages, which their faith taught them to view as the blessed and sacred union of one man and one woman. *Id*. at ER.365–67, 373–76.

Aaron and Melissa joyfully served all customers who came to their bakery, including those of all protected classes. *Id*. at ER.368, 376; ER.275. The Kleins' long-standing commitment to serving all customers was an expression of their faith—namely, the belief that all people are made in the image of God, deserving of dignity and respect. *Id*. at ER.365, 373.

Like Ms. Smith, the Kleins would only create original art consistent with their faith. *Id*. at ER.368, 376.[7] Aaron and Melissa were asked to design and create a custom wedding cake to celebrate a same-sex wedding, but their religious beliefs would not allow them to do so. *Id*. at ER.369. They believed that contributing to the wedding would express their support for the marriage, a statement contrary to their religious beliefs that marriage is the sacred union of one man and one woman. *Id*. at ER.365–67, 373–76.

When Aaron and Melissa declined to contribute their art to the wedding, an Oregon administrative agency found that the Kleins violated Oregon's public accommodation law, OR. REV. STAT. § 659A.403. *In the Matter of Melissa Elaine Klein, dba Sweetcakes by Melissa*, Nos. 44-14 & 45-14 at 22 (Or. Bureau of Lab.

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[7] The Kleins declined to craft any cakes that would force them to express messages inconsistent with their faith, such as cakes celebrating divorce, cakes with profanity, or cakes advocating harm to others. *Id*. at ER.368, 376.

& Indus., July 2, 2015) (order). For declining to support a single same-sex wedding, Oregon imposed a financially devastating penalty of $135,000 against the Kleins.[8] *Id.* at 42. Oregon also punished Aaron and Melissa for discussing their religious faith in media interviews by imposing a "gag order" on them, ordering them not to publicly discuss their views regarding marriage in the future. *Id.* at 42–43.

The penalty—along with an internet-orchestrated boycott campaign against the bakery—forced Aaron and Melissa to close their Gresham, Oregon bakery, which they had worked for years to build. Pet'r's Br., ER.370, *Klein v. Or. Bureau of Lab. & Indus.* (Or. Ct. App. 2017). "Having to shut down the shop was devastating," Melissa said.[9] "Watching something our family had worked so hard [to build] just disappear in such a short time—it crushed me. I felt like I'd lost a part of myself."[10] The closure was especially painful for the Kleins because it represented not only the loss of their "second home" but their legacy because the Kleins had planned to pass the bakery down to their

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[8] This $135,000 financial exaction was styled as monetary damages for declining to bake a wedding cake and the "mental" and "emotional distress" that the declination allegedly had upon the same-sex couple in question. *In the Matter of Melissa Elaine Klein, dba Sweetcakes by Melissa*, Nos. 44-14 & 45-14 at 33–34 (Or. Bureau of Lab. & Indus., July 2, 2015).

[9] FIRST LIBERTY INSTITUTE, *In Sweet Cakes by Melissa Case, The Search for Sweet Justice Continues*, (Feb. 4, 2022), https://bit.ly/3yO7ka0.

[10] *Id.*

children.[11] Years after the Kleins closed the bakery doors, Melissa said she still misses the bakery "every day."[12]

The trauma of the Kleins' years-long litigation battle was worsened by hostile media outlets hounding them for interviews and anonymous attackers vandalizing their property, breaking into their home, and making expletive-laced death threats against the Kleins and their five children.[13]

Rivaling the loss of the Kleins' business was the loss of their due process rights. The state commissioner who made the final ruling on the Kleins' case, issuing the improper gag order and unconstitutional damage award, made statements online and in media interviews clearly indicating he had prejudged the Kleins as guilty before their case came before him.[14] The commissioner also engaged in religious discrimination by stating that the Kleins used religion as "an excuse" for their actions and penalizing the Kleins for using religious speech in an interaction

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[11] Kelsey Bolar, *Bakers Accused of Hate Get Emotional Day in Court*, DAILY SIGNAL (Mar. 2, 2017), https://dailysign.al/3LtWE2V.

[12] *Id.*

[13] Pet'r's Br., ER.370, *Klein v. Or. Bureau of Lab. & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017) (Case No. A159899); Aaron and Melissa Klein, *Oregon Forced Us to Close Our Cake Shop. Here's What the Masterpiece Decision Means for Us.*, DAILY SIGNAL (June 19, 2018), https://dailysign.al/3wwQTgD.

[14] Pet'r's Supp, Reply Br. 4–6, ASER.11, *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108 (Or. Ct. App. 2022) (Case No. A159899).

entirely separate from the declination of service.[15] The bias and discrimination of the commissioner resulted in an egregious violation of the Kleins' rights under *Masterpiece Cakeshop,* 138 S. Ct. 1719. *See Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1114, 1124–27 (Or. Ct. App. 2022) (holding BOLI's handling of the damages portion of the case violated the Kleins' constitutional rights under the Free Exercise clause).

The incident giving rise to the case took place almost a decade ago, yet the litigation is still ongoing.[16] The Kleins challenged the constitutionality of the Oregon government's draconian actions against them in Oregon state court in April 2016. Pet'r's' Opening Br. 2-3, *Klein*, 410 P.3d 1051. Over the years, appellate courts have incrementally issued rulings in favor of Aaron and Melissa. In 2017, the Oregon Court of Appeals struck the "gag order" but upheld the remainder of the state agency's decision. *Id.* at 1086–87. In 2019, this Court granted a writ of certiorari in the Kleins' case, then remanded it for reconsideration in light of *Masterpiece Cakeshop*, 138 S. Ct. 1719. *Klein v. Or. Bureau of Lab. & Indus.*, 139 S. Ct. 2713 (Mem) (2019).

On remand, 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 under *Masterpiece Cakeshop*, 138 S. Ct. 1719, and

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[15] *Id.* at 6–8, ASER.2, 8–11, ASER.9, 35.

[16] The incident in question occurred on January 17, 2013. *Klein*, 410 P.3d at 1057.

therefore violated the Kleins' Free Exercise rights. *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1114, 1124–27 (Or. Ct. App. 2022) ("[W]hen viewed in the light of *Masterpiece Cakeshop*, BOLI's handling of the damages portion of the case does not reflect the neutrality toward religion required by the Free Exercise Clause."). The court also struck the damages award issued by the state agency but upheld the remainder of the state agency's liability finding against the Kleins. *Id.* at 1128. The court remanded the case to the same non-neutral agency to engage in further proceedings on damages. *Id.* 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). The Kleins announced their intention to seek relief before this Court by the end of summer.

Aaron and Melissa's story is a tragic example of the extraordinary damage caused by government coercion. As the Kleins' case illustrates, the Tenth Circuit's reasoning does not lead to utopian markets and harmonious communities but to the destruction of lives, businesses, and communities. Such outcomes harm many and benefit no one.

B. Government Coercion of Speech Is Devastating Lives and Destroying Businesses Across the Country.

The risk to artistic business owners from compelled-expression laws is not hypothetical. Artists throughout the nation—particularly creative professionals specializing in wedding-related art—have experienced trauma, public disgrace, loss of access to markets, and

years of litigation for refusing to speak the government's preferred message. One noteworthy victim of government coercion is Colorado cake artist Jack Phillips.[17] Phillips has undergone years of stressful and expensive litigation over his desire to only create art that aligns with his beliefs.[18] Another victim is Barronelle Stutzman, the Washington state floral artist-in-residence of Arlene's Flowers who nearly lost her business *and* her home over her commitment to remain true to her faith.[19] Additionally, the owners of Elane Photography were not only fined for refusing to speak the government's message but lost their business.[20]

The dangers of government-compelled speech extend beyond the wedding context. A Kentucky printer was embroiled in years of lawsuits for declining

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[17] *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018).

[18] *E.g., Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015); *Scardina v. Masterpiece Cakeshop Inc.*, No. 19CV32214 (Colo. Dist. Ct. June 15, 2021).

[19] *See, e.g.*, Pet. for Reh'g at 11, *Arlene's Flowers, Inc. v. Washington*, No. 19-333 (U.S. July 27, 2021).

[20] *See, e.g.*, *Willock v. Elane Photography, LLC*, HRD No. 06-12-20-0685, at 20 (H.R. Comm'n of N.M. Apr. 9, 2008), https://bit.ly/3AEt6e3; Richard Wolf, *Same-Sex Marriage Foes Stick Together Despite Long Odds*, USA Today (Nov. 15, 2017), https://bit.ly/3m2czwk.

to print shirts promoting a gay pride parade.[21] A family farm was banned from a farmers market for its views on marriage and is in the middle of an ongoing legal battle over its First Amendment rights.[22] And a pro-life photographer was forced to engage in litigation over her right to decline to take promotional photos for Planned Parenthood.[23] This Court should not ignore the human cost that results when governments stigmatize religious beliefs and force artists to choose between their faith and their livelihoods.

C. Without Broad First Amendment Protections for Artistic Speech, The Lives and Businesses of All Artists Are at Stake.

If this Court follows the Tenth Circuit's reasoning, it will rubberstamp the government compelling artists of all beliefs and backgrounds to express messages with which they disagree, as long as the conduct to which the speaker objects is ostensibly related to a statutorily protected class. Under this logic, a fiercely atheist videographer can be compelled to film a Catholic communion ritual because there is a "close relationship" between Catholic rituals (the conduct)

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[21] *Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands On Originals*, 592 S.W.3d 291, 294–95 (Ky. 2019).

[22] *Country Mill Farms, LLC v. City of E. Lansing*, 280 F. Supp. 3d 1029, 1041–42 (W.D. Mich. 2017).

[23] Compl., *Amy Lynn Photography Studio, LLC v. City of Madison*, No. 17-cv-000555 (Dane Cnty. Cir. Ct. Mar. 7, 2017), https://bit.ly/3yNS229 (the incident in question occurred in Madison, WI).

and practitioners of the Catholic religion (a protected class). A feminist t-shirt printer can be forced to design shirts for a fraternity initiation because there is a close relationship between fraternity initiations and the male sex. A Democrat speechwriter can be required to write a speech for a Republican candidate[24] and an unwilling Muslim movie director can be coerced to make a film with a "Zionist message." *303 Creative,* 6 F.4th at 1199 (Tymkovich, C.J., dissenting).

A world where the state can require artists, entertainers, writers, and producers to use their expressive gifts to communicate messages that violate their convictions is a world where the First Amendment has been rendered meaningless. This Court should correct the Tenth Circuit's flawed reasoning, which paves the way to such a future.

D. Enforcing the First Amendment Will Ensure That Both Free Speech and Free Markets Can Flourish.

Colorado and other states claim their interest in ensuring "equal access to publicly available goods and services" justifies their compulsion of artistic speech from small business owners. However, if a state truly wants to ensure access to robust markets, the last thing it should do is compel or silence speech from artistic business owners. Such coercion will not increase access to goods and services but will instead

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[24] Some jurisdictions consider "political affiliation" or "political ideology" a protected class, *e.g.*, D.C. Code § 2-1411.02 (2001); V.I. Code tit. 10, § 64(3) (2006); Seattle, Wash. Mun. Code §§ 14.06.030(B)(5).

devastate the commercial marketplace, driving small, family-run art shops out of business and leading to inferior markets for all. This is because an artist who is ordered to speak a message with which she disagrees, or to refrain from speaking about her beliefs, will often close her business rather than violate her deepest convictions.

Instead of coercing speech from artistic professionals, states like Colorado and Oregon must adopt reasonable accommodations to public accommodation laws to protect artists' free speech. *Hurley*, 515 U.S. at 573 (state public accommodation laws may not violate "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."). Equitable accommodations will allow states to facilitate access to markets without requiring artists to betray their faith. Such accommodations may include allowing artists to select the messages they wish to create, exempting artists who create expressive speech from the public accommodation laws, or modifying the definition of a "place of public accommodation" to exempt expressive businesses. *303 Creative,* 6 F.4th at 1203-04 (Tymkovich, C.J., dissenting). Such reasonable steps will allow governments to achieve their interests without unnecessarily abridging free speech.

This Court should affirm that governments may not compel artistic speech in violation of the artists' convictions. By upholding broad First Amendment protections for artistic speech, this Court can ensure a tolerant, equitable society where both free markets and

free speech can flourish. The First Amendment requires no less.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be reversed.

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