NO. 21-476

IN THE
Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

v.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE

The Corporate Disclosure Statement in the petition remains unchanged.

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SUPPLEMENTAL ARGUMENT SUMMARY

The Oregon Court of Appeals' recent decision in *Klein* v. *Oregon Bureau of Labor & Industries*, __ P.3d. __, 317 Or. App. 138 (2022) (*Klein III*), is further reason to grant review of the Tenth Circuit decision below. *Klein III* triples-down on that court's conclusion that an artist has zero free-speech rights vis-à-vis a state public-accommodation law, placing Oregon on the wrong side of an acknowledged circuit split.

Colorado points to the extensive record in the *Klein III* case as a reason for denying review here. But Colorado ignores its own, extensive stipulated facts which provide a clean vehicle for review. Moreover, the reality that disputes over applying public-accommodation laws to squelch speech often span a decade (or more)—as in *Klein*—is a compelling reason in favor of settling the split, not ignoring it.

That *Klein III* ultimately vacated a large damage award based on religious animus should comfort no one. Colorado has shown an unnerving enthusiasm for prosecuting people of faith with its public-accommodation law. And that enthusiasm is going national, evidenced by the 19 states that now rely on the decision below to argue that officials may use public-accommodation laws to compel citizens to speak in violation of their conscience. Reply.1.

Klein III underscores the need for this Court's intervention to resolve two separate splits of authority. And this case offers an ideal vehicle to answer critical free-speech and free-exercise questions that "will keep coming until the Court … suppl[ies] an answer." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring). Certiorari is warranted.

ARGUMENT

Klein III cements the three-way split over free-speech defenses to public-accommodation laws and confirms that certiorari is warranted.

1. In *Klein III*, the Oregon Court of Appeals "adhere[d] to [its] prior decision in its entirety," affirming that Oregon may apply its public-accommodation law to compel Melissa Klein to create a custom cake celebrating a same-sex wedding. 317 Or. App. at 166. The Oregon Court of Appeals brooked no "state [ ]or federal constitution[al]" defense. *Ibid.* Rather, as Colorado admits in its supplemental brief, *Klein III* affirmed the agency's "determination that the store's refusal to serve a same-sex couple violated Oregon law." Co.Supp.Br.1.

In *Klein I*—the opinion affirmed "in its entirety" by *Klein III*—the Oregon Court of Appeals conceded that free-speech concerns might exist but held that they were irrelevant. *Klein* v. *Or. Bureau of Labor & Indus.*, 410 P.3d 1051, 1065 (Or. Ct. App. 2017) (*Klein I*). The Court ruled that "any burden on … expressive activities is no greater than is essential to further Oregon's substantial interest in promoting the ability of its citizens to participate equally in the marketplace without regard to sexual orientation." *Ibid.* In other words, Oregon's speech compulsion survived heightened scrutiny.

By reaffirming this holding in *Klein III*, the Oregon Court of Appeals placed itself squarely in the same camp as the Tenth Circuit decision here. Both jurisdictions hold that government efforts to compel creative speech and reshape the marketplace of ideas about matters of conscience survive heightened scrutiny.

In stark contrast, the Eighth and Eleventh Circuits, and the Arizona Supreme Court, have held that governments may *not* use public-accommodation laws to compel or restrict speech. Pet.11–17 (citing *Brush & Nib Studio, LC* v. *City of Phoenix*, 448 P.3d 890, 915 (Ariz. 2019) (rejecting argument that "a public accommodations law could justify compelling speech"); *Telescope Media Group* v. *Lucero*, 936 F.3d 740, 758–60 (8th Cir. 2019) (same); *Coral Ridge Ministries Media, Inc.* v. *Amazon.com, Inc.*, 6 F.4th 1247, 1255–56 (11th Cir. 2021) (upholding Amazon's right to exclude a religious group from the company's Amazon-Smile program because to do otherwise would unconstitutionally compel Amazon's speech)).

And yet other state courts of last resort apply a different test. These courts allow governments to force dissenting artists to speak contrary to their faith by characterizing artistic creations as mere conduct entitled to zero First Amendment protection. Pet.17–18 (citing *Elane Photography, LLC* v. *Willock*, 309 P.3d 53, 64–66 (N.M. 2013), and *Craig* v. *Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), overruled on other grounds, *Masterpiece Cakeshop, Ltd.* v. *Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018)). A Colorado trial court recently applied Colorado's test to hold Jack Phillips and Masterpiece Cakeshop liable yet again. Pet.7.

In short, the Oregon Court of Appeals' recent decision left its previous free-speech analysis unchanged. Also unchanged then, is the deep conflict in authority over the interaction of accommodation-laws and speech. This Court's review is urgently needed to resolve that split of authority.

2. Colorado plugs the "fully developed record" in *Klein III* as a basis to deny certiorari. But the reason that record is so developed is because the Kleins have been dragged through state administrative and court proceedings for years of never-ending, expensive, and life-burdening litigation that forced them to close their business five years before *Klein III*. Colorado wants to subject Lorie and others like her to the same litigation burdens—burdens that her pre-enforcement challenge could obviate.

Anyway, this Court does not "need to guess" about how Colorado might apply its public-accommodation law. Cf. Co.Supp.Br.3. Years of filings in Lorie's case and in the *Masterpiece Cakeshop* trilogy show how Colorado enforces its law. Pet.18, 31. In fact, Colorado paints the clearest picture of any state in the nation of how it applies its public-accommodation law to compel the speech of creative professionals in violation of their conscience.

Most important, there is no record deficit here. Colorado stipulates to the content of Lorie's future wedding websites, Pet.App.186a–87a, stipulates what her collaborative process with clients will look like, Pet.App.182a–84a, 186a–87a, stipulates that website viewers will know those websites are Lorie's original artwork, Pet.App.187a, stipulates that its public-accommodation law applies to Lorie's business, Pet.App.189a, and stipulates that Lories does not discriminate based on status and would refuse to create messages celebrating same-sex marriage for anyone, Pet.App.53a, 184a. That is why the Tenth Circuit concluded that Lorie showed an injury in fact on the present record. Pet.App.17a. Indeed, Colorado identifies nary a missing "detail[ ]" that "might make a difference." *Masterpiece*, 138 S. Ct. at 1723.

3. That the Oregon Court of Appeals chose to heed—at the *damages* stage—*Masterpiece Cakeshop*'s neutrality requirement does nothing to undo that court's erroneous *liability* holding. Like the Tenth Circuit, the Oregon Court of Appeals concluded—by affirming its previous decision "in its entirety," 317 Or. App. at 166a—that government officials can compel an artist to speak contrary to her conscience.

It is small comfort to Lorie that the Oregon Court of Appeals recognized and acted on the neutrality principle three states away in a separate case. After all, the Tenth Circuit here recognized that Colorado's public-accommodation law "works as a content-based restriction" that creates a "substantial risk of excising certain ideas or viewpoints from the public dialogue," Pet.App.23a–24a, *i.e.*, the religious viewpoint that marriage can only be between one man and one woman. The Tenth Circuit even held that "[e]liminating such ideas" is the very purpose of Colorado's law. *Ibid.* Yet the court *still* allowed the law to compel Lorie's speech and censor her statement of beliefs.

4. Colorado has aggressively pursued—and declared its compelling need to regulate—artists who wish to create only in ways consistent with their faith. Yet it now suggests that its public-accommodation law is no big deal because it authorizes only a small fine. Co.Supp.Br.3–4. But Colorado law empowers activists to target and harass artists with whom they disagree, forces those artists to incur significant attorney fees if they wish to defend themselves, and imposes a penalty that results in death by a thousand cuts. Jack Philips and Masterpiece Cakeshop are a prime example of this. Pet.31 n.5.

Leaving aside litigation costs, death by a thousand cuts is still death, particularly when those cuts can be accompanied by cease-and-desist orders and contempt findings. And the Colorado Civil Rights Commission can impose onerous re-education and reporting requirements. Officials' use of Colorado's law to compel and squelch speech is a big deal to artists like Lorie, even if it is not to Colorado.

5. Colorado confusingly argues that *Klein III* "does not create a new conflict within the courts." Co.Supp.Br.4. But as shown above, *Klein III* exacerbates an entrenched three-way split regarding free-speech defenses to public-accommodation laws.

What's more, *Klein III* deepens a *second* circuit split under *Fulton* by mirroring a mistake the Tenth Circuit made here. See Pet.23–29. The law in *Klein III* contained an age-discrimination exemption that the court disregarded. 317 Or. App. at 153 n.4. Here, the Tenth Circuit disregarded Colorado's exemptions for secularly motivated objections to religious messages and for bona-fide relationships. Pet.27–28. Yet in *Fulton*, this Court held that a law that burdens religious exercise while allowing comparable exemptions is *not* generally applicable under *Smith*.

In sum, this Court's review is more necessary after *Klein III* than it was before. *Klein III* is just the latest decision to address the thorny issues presented. Until this Court decides those cleanly presented issues, government officials will continue to wield their substantial power against people of faith, creating ever more constitutional violations. Reply.13. Delay will not result in additional lower-court reasoning or a better factual vehicle, only more victims.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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