NO. 19-333

IN THE

Supreme Court of the United States

ARLENE'S FLOWERS, INC., D/B/A ARLENE'S FLOWERS AND GIFTS, AND BARRONELLE STUTZMAN,

Petitioners,

v.

STATE OF WASHINGTON; ROBERT INGERSOLL AND CURT FREED,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF OF CENTER FOR RELIGIOUS EXPRESSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae Center for Religious Expression ("CRE") is a non-profit legal organization dedicated to protecting religious expression, a fundamental right that encompasses the freedom not to speak as well as the freedom to speak, in accordance with sincerely-held beliefs.[1] Since forming in 2012, CRE has represented individuals and entities in various courts in different parts of the country to defend these liberties. The *amicus* has a significant interest in this case due its conviction that no creative professional should be forced by the government to create and articulate a message she does not wish to convey.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Obergefell v. Hodges*, this Court held same-sex couples have a fundamental right to marry "inherent in the concept of individual autonomy."[2]. To allay fears about the ruling doing harm to religious liberty, Justice Kennedy, on behalf of the majority, stressed "that religions, and those who adhere to religious doctrines, may continue to

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[1] In compliance with Supreme Court Rule 37.6, counsel for *amicus curiae* represents that he authored this brief in its entirety and neither the parties, nor their counsel, nor anyone other than *amicus* and *amicus* counsel, made a monetary contribution to fund the preparation or submission of this brief. Also, pursuant to Supreme Court Rule 37.2, counsel for *amicus curiae* represents that he received requisite timely consent from counsel of record of all parties to file this brief.

[2] 135 S.Ct. 2584, 2599 (2015).

advocate with the upmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[3] And, in recognizing some could oppose same-sex marriage for other reasons as well, the Court noted the inherent value of civil "disagree[ment]" and continuing an "open and searching debate" on this important social issue.[4]

Notwithstanding this noble sentiment, the *Obergefell* decision unwittingly pit the newly-articulated sexual liberty against free speech and free exercise of religion liberties. Proponents of same-sex marriage presumed the right to marry brings with it an attendant right to have others contribute to the wedding ceremony. Shortly after *Obergefell*, and even in anticipation of it, many states and municipal authorities aggressively applied non-discrimination and public accommodation laws to wedding vendors who sought to avoid participation in same-sex wedding events, effectively cutting short any "open and searching debate" on the propriety of same-sex marriage, demanding full and immediate agreement on the matter.

Consequently, many creative professionals[5], like Barronelle Stutzman, find themselves in the

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[3] *Id.* at 2607.

[4] *Id.*

[5] The term "creative professionals," as used herein, refers to those individuals who make a living through their expressive creations. Whereas many occupations have some expressive component to them, the occupations of "creative professionals" are expressive in nature.

crosshairs of a political cause. Sincere individuals who would rather not lend their creative talents to an event they cannot condone as a matter of conscience – choosing to turn down such jobs – are facing criminal investigations, sanctions, fines, and imprisonment. They are given a Hobson's choice: either forego their beliefs or their livelihood, because they cannot have both.

The compelled expression in this context has led to a substantial amount of litigation in the state and federal court systems, with many cases going to the highest appellate levels. This Court's first opportunity to address the question was last year in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, involving the forced speech of cake artist Jack Phillips.[6] But the religious animus exhibited by the state was so egregious and blatant, this Court could hardly get past it, and did not rule on the core free speech issue.[7]

Without any binding precedent to follow, lower courts have struggled to reconcile the competing interests at stake. They have taken divergent approaches to the issue, drawn opposite conclusions, and have left no discernable path for a consensus.

Amid this jurisprudential disarray, *amicus* urges this Court to supply the requisite guidance. Artistic expression, whether it involves the act of crafting a wedding invitation, taking a photograph,

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[6] 138 S.Ct. 1719 (2018).
[7] *Id.* at 1723-24.

preparing an original cake, or designing a floral arrangement, is constitutionally protected expression and should be treated that way. Such expression should not be coerced just as it should not be silenced. And though the same-sex wedding context is currently the most pressing concern, it is not so limited. All kinds of creative professionals stand to suffer from undue compulsion unless and until this Court weighs in on the matter.

Barronelle Stutzman's petition presents this Court with a perfect opportunity to uphold the constitutional rights of creative professionals. We respectfully ask this Court to take advantage.

ARGUMENT

I. Following *Masterpiece Cakeshop*, Conflict in Authority Persists on Whether the First Amendment Prevents Non-Discrimination and Public Accommodation Laws from Compelling Expressive Works

In *Masterpiece Cakeshop,* this Court considered the plight of a cake artist Jack Phillips who declined to create an original wedding cake for a same-sex union and found himself sued by the State.[8] Phillips claimed a constitutional right to decline the request.[9] On the other hand, the Colorado Civil Rights Commission and ACLU urged the rights of the same-sex couple to have a wedding cake made for them by a baker who regularly bakes

[8] 138 S.Ct. at 1724, 1726.
[9] *Id.* at 1726.

cakes for a living.[10] The free speech issue was whether a custom-designed cake qualified as protected speech that could not be compelled by government's application of a public accommodations law.[11]

At the outset of the Opinion, the Court highlighted the tension between free expression rights and the potential threat of community-wide stigma against LGBTQ+ persons should the constitutional argument stretch too far.[12] The Court also mentioned difficulty in determining the circumstances in which the making of a product becomes speech.[13] But in lieu of tackling these issues, the Court set them aside for another day, ultimately ruling in favor of Phillips on the free exercise question, finding a lack of religious neutrality.[14]

In a concurrence, Justice Thomas, joined by Justice Gorsuch, wrote separately to address the free speech claim, considering the issue too critical to ignore.[15] These two justices opined that the free speech claim supplied an independent basis for ruling in favor of Phillips.[16] They explained the First Amendment considers activity intended and reasonably understood as communicative as

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[10] *Id.* at 1725-26.
[11] *Id.* at 1726, 1728.
[12] *Id.* at 1727.
[13] *Id.* at 1723.
[14] *Id.* at 1723-24.
[15] *Id.* at 1740 (Thomas, J., concurring).
[16] *Id.* at 1748.

protected speech – even if a "particularized message" is not discernable.[17] The justices also reminded that this Court has never held speech can lose its expressive import just because it involves compliance with an accommodations law.[18] And, they warned the issue would persist without final say-so from the Court.[19]

The concurrence's concerns were warranted. In the absence of a definitive ruling in *Masterpiece Cakeshop*, the compelled speech issue has endured, and festered, with a growing, steady stream of conflicting and fractured opinions from state and federal courts regarding whether, and to what degree, the First Amendment can curb the compulsion of creating expressive works under non-discrimination and public accommodation laws. Every filing invoking the issue only serves to deepen the divide.

A. Courts in New Mexico, Oregon, as well as Washington, Reject Free Speech Protections for Business Operations when Non-Discrimination or Public Accommodations Laws are Invoked

New Mexico: Elaine Huguenin

Elaine Huguenin is a professing Christian who once ran a small photography business in New

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[17] *Id.* at 1742.
[18] *Id.* at 1744-45.
[19] *Id.* at 1748.

Mexico.[20] For Huguenin, photography was more than aim and shoot; she liked to tell stories through her craft.[21] But because of her faith, she could not, in good conscience, take photographs telling the story of same-sex unions.[22] She had no problem photographing anyone falling under LGBTQ+ categories, and would gladly serve such customers for other reasons, like a portrait photograph, for instance.[23] She could not photograph events sending a message promoting a same-sex civil union – for anyone, including heterosexuals.[24]

One day, Huguenin was contacted by Vanessa Willock who asked Huguenin to photograph a same-sex ceremony for her.[25] Huguenin declined, politely informing that she could not photograph such events due to her religious beliefs.[26] Dissatisfied with this response, Willock filed a discrimination claim against Huguenin, which worked its way to the New Mexico Supreme Court.[27]

New Mexico's highest court held the refusal to photograph a same-sex ceremony was invalid discrimination against sexual orientation.[28] So holding, the court discarded Huguenin's free speech

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[20] *Elane Photography, LLC v. Willock*, 309 P.3d 53, 78 (N.M. 2013).
[21] *Id.* at 63, 70.
[22] *Id.* at 78.
[23] *Id.* at 61.
[24] *Id.*
[25] *Id.* at 59.
[26] *Id.* at 60.
[27] *Id.*
[28] *Id.* at 61-62.

rights, reasoning that because her photography was for-hire, and part of business activity, it did not classify as speech meriting First Amendment protection.[29] The court reckoned that "[w]hile photography may be expressive, the operation of a photography business is not."[30] A concurrence to the decision added that the sacrifice of her conscience was no more than "the price of citizenship."[31]

The court drew a number of deductions in support of this holding. It concluded that general compelled speech jurisprudence does not apply when the law's intent is to prevent discrimination in business (as opposed to furthering the government's message), distinguishing *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977) on this basis.[32] Turning to whether the law impermissibly compelled Huguenin to speak a third party's message, the court also held the protections outlined in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), did not apply to for-profit entities.[33] The state court determined that protection from compelled inclusion of another's message only applies when the business creates messages independent of their speech-for-hire, and thus, this Court's rulings in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) and *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1

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[29] *Id.* at 68.
[30] *Id.*
[31] *Id.* at 80 (Bosson, J., concurring).
[32] *Id.* at 64-65.
[33] *Id.* at 65-66.

(1986) did not factor in either.[34] Further, the court questioned whether the messaging through photographs could be attributed to the photographer, Huguenin, given that her photography services were available for-hire to the public.[35]

Essentially, in New Mexico, it's all about the money. The doctrine against compelled speech does not apply to a for-profit public accommodation – regardless of the expressive nature of the product or service. The nature of a business as a business categorically exempts otherwise expressive products or services from being considered speech entitled to First Amendment protection. And, as a result, creative professionals may be compelled to create art promoting objectionable messages about sexuality or presumably, anything else, by virtue of their offering services to the public for-profit.

Oregon: Melissa Klein

Melissa Klein is also a Christian, whose artistic talent for designing and decorating cakes led her to open a bakery called "Sweet Cakes by Melissa."[36] Much like Jack Phillips in the *Masterpiece Cakeshop* case, Klein's cake design and decoration is an artistic endeavor, intended to create

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[34] *Id*. at 66-67.
[35] *Id.* at 68-70.
[36] Excerpts of Record to Pet'r's Opening Brief, 373-76, ¶ 2, 3, 5-6. *Klein v. Or. Bureau of Labor and Indus.*, CA A159899 (Or. Ct. App. Apr. 25, 2016), *available at* https://firstliberty.org/wp-content/uploads/2017/02/SM16-04-25-Klein-Opening-brief-and-ER-FILE-STAMPED-COPY.pdf.

edible art with a message promoting and celebrating the event for which the cake is made.[37] Conducting her business, she gladly served anyone, regardless of sexual or gender status.[38] But her religious faith limited the messages she could commemorate via cake designs.[39] And, on this basis, she refused to create original cakes celebrating divorce, or containing profanity.[40]

In early 2013, a customer for whom Klein had previously designed a wedding cake requested Sweet Cakes design a cake, this time, for a same-sex wedding.[41] Her husband (Aaron) declined because it would require them to artistically promote same-sex marriage through a wedding cake, in conflict with their faith.[42] As a result, the bride-to-be filed a complaint with the State of Oregon's Bureau of Labor and Industries (BOLI), alleging sexual orientation discrimination. And, in finding the Kleins guilty, BOLI imposed a fine of $135,000 and prohibited them from mentioning their desire to run their business according to their faith.[43] Klein was forced to shut down the Sweet Cakes business.[44]

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[37] *Id.* at 374-76, ¶¶ 3, 6.
[38] *Id.* at 376-77, ¶ 7.
[39] *Id.* at 373-76, ¶¶ 2, 4, 6.
[40] *Id.* at 376, ¶ 6.
[41] *Id.* at 368-69, ¶¶ 7-8.
[42] *Id.* at 369, ¶ 8.
[43] *Id.* at 46-47.
[44] *Id.* at 377, ¶ 9.

Klein contested the judgment, but the Oregon Court of Appeals ruled against her in 2017.[45] Following the Oregon Supreme Court's denial of review, Klein petitioned to this Court, which vacated and remanded to the Oregon Court of Appeals to reconsider in light of the *Masterpiece Cakeshop* ruling.[46] The parties have since submitted supplemental briefing to the court of appeals addressing the issue of religious hostility and await ruling. However, foreshadowing the outcome, the state court has already rejected Klein's compelled speech arguments.[47]

The Court of Appeals conceived that *Hurley* and the protection it affords against compelled speech are not relevant, applying only to the "peculiar" situation where anti-discrimination law was applied to what it perceived as an abnormal activity (there a parade), not to an undisputed public accommodation like Klein's business.[48]

Like New Mexico, the Oregon Court of Appeals distinguished *Barnette* and *Wooley* because the message compelled was not that of the government's.[49] But, in recognizing that Klein's cake design was expressive and being compelled, the

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[45] *Klein v. Oregon Bureau of Labor & Indus.*, 410 P.3d 1051, 1068 (Or. Ct. App. 2017).
[46] *Klein v. Oregon Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019).
[47] *Klein v. Oregon Bureau of Labor & Indus.*, 410 P.3d at 525-43.
[48] *Id.* at 1068
[49] *Id.* at 1067-68.

court considered what standard of scrutiny applied.[50] It concluded that, although regulation of "pure speech" (which it exemplified as "sculptures," "paintings" and other media "experienced predominantly as expression") requires strict scrutiny, regulation of Klein's cakes did not, believing the activity was part expressive and part conduct, warranting the lesser scrutiny specified in *United States v. O'Brien*, 391 U.S. 367 (1968).[51] The court suggested that strict scrutiny might apply if Klein had declined to author a particular message on the cake requested.[52] As it was, applying the *O'Brien* scrutiny, the court held the compulsion was justified to prevent the dignitary harms to same-sex couples identified by this Court in *Obergefell*.[53]

Akin to New Mexico, in Oregon, if cake artists and other creative professionals refuse to create and sale artwork due to a disagreement with an implicit celebratory message, they are unable to claim First Amendment protection.

Washington: Barronelle Stutzman

Barronelle Stutzman is a floral design artist and owner of Arlene's Flowers, a flower shop in Washington state.[54] Analogous to photography and cake artistry, floral design is an art form in the wedding industry, requiring skill and artistic

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[50] *Id.* at 1069-70.
[51] *Id.* at 1069-71.
[52] *Id.* at 1072.
[53] *Id.* at 1073-74.
[54] Pet'r's App. to Pet. for Cert. at 376a.

judgment, as the florist selects flowers of a particular type and color to generate the mood and message of the event for which they are chosen.[55] Learning this skill from her mother at a young age, Stutzman has honed floral artistry and personal style in plying her trade over the years.[56] And with wedding floral arrangements in particular, she uses a significant degree of artistic talent and judgment, contemplating an original arrangement of flowers that celebrates a specific union in a unique way.[57]

Stutzman is a Christian as well, whose religious beliefs inform her that she must honor God with every decision she makes, including how to best operate her business.[58] Her religiously-based belief that marriage is between one man and one woman prohibits her from participating in same-sex weddings, especially through her artistic floral design talents.[59] Her faith also informs that she is to love and respect her neighbor, and so mindful, she has gladly employed and served anyone regardless of race, religion, sex, or sexual orientation.[60]

One such example of Stutzman's service is Respondent Rob Ingersoll, and her care for him for nine years, with full knowledge that he is gay and in a same-sex relationship with Respondent Curt

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[55] *Id.* at 377a-378a.
[56] *Id.* at 376a-378a.
[57] *Id.* a t 380a-385a.
[58] *Id.* at 376a.
[59] *Id.* at 387a.
[60] *Id.* at 379a-380a, 386a.

Freed.[61] But when Ingersoll asked Stutzman to create arrangements for his wedding, she could participate in the event because of her faith and candidly advised him of her concern (in lieu of making up some other reason).[62] She remained willing to provide custom arrangements to Ingersoll or anyone else for other events, and to provide raw materials, even if they were to be used for same-sex weddings, but she could not – as a matter of conscience – create floral art for the event herself.[63]

Nevertheless, the Washington Supreme Court mandates Stutzman create custom floral arrangements for same-sex weddings or face dire consequences.[64] Refusal to provide custom floral arrangement celebrating a same-sex wedding is deemed discrimination on the basis of sexual orientation status.[65] The court opined that Stutzman's artistic custom floral arrangements did not qualify as speech on the notion that the activity is "not 'speech' in a literal sense [it] is thus properly characterized as conduct"[66] and Stutzman's "conduct" was not sufficiently "inherently expressive" to qualify as expression.[67] Agreeing with the rationale of *Elane Photography*, the court also held *Hurley* protections did not apply because

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[61] *Id.* at 385a-386a.
[62] *Id.* at 386a-389a
[63] *Id.* at 389a-390a.
[64] *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1224, 1237 (2019).
[65] *Id.* at 1221-22.
[66] *Id.* at 1225. One wonders whether non-verbal abstract paintings could qualify as speech under this rubric.
[67] *Id.* at 1226.

Stutzman's business is an ordinary public accommodation.[68] Hence, the court held that Washington's compulsion of Stutzman's custom floral arrangements did not implicate any degree of free speech scrutiny.[69]

Like Oregon, Washington state presumes business activity with expressive services does not amount to speech entitled to protection. And like New Mexico, the focus of the analysis was on the context of a business, belittling the expressive and artistic nature of the products and services.

In New Mexico, Oregon, and Washington State, creative professionals are compelled to produce art even though it promotes disagreeable ideas. These states have all but decided that compelled speech protections do not exist when requiring for-profit businesses to comply with non-discrimination or public accommodation laws.

B. The Eighth Circuit, Arizona, and Kentucky (to Some Degree) Support Free Speech Protections for Business Operations when Non-Discrimination or Public Accommodations Laws are Invoked

Eighth Circuit: Carl Larsen and Angel Larsen

Carl and Angel Larsen are Christians who put their faith and conviction about marriage at the

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[68] *Id.* at 1226-27.
[69] *Id.* at 1228.

center of their lives.[70] Concerned by the current cultural narrative about marriage, they feel religiously compelled to advocate for a biblically-based view of marriage through their video and film production company, Telescope Media Group.[71] Through their films, the Larsens seek to honor Jesus Christ by telling video stories extolling the values of traditional marriage.[72]

But, in applying state law, Minnesota officials have publicly declared that creative professionals like the Larsens who decline to promote same-sex marriage will be punished.[73] To wit, if the Larsens produce a film celebrating a traditional marriage, they must make films celebrating same-sex marriages, or face civil fines, treble damages, punitive damages up to $25,000 per year, and up to 90 days in jail.[74] In fact, in making such films, Minnesota commanded filmmakers to "depict same- and opposite-sex weddings in an equally 'positive' light."[75]

Fearing sanctions, the Larsens filed a lawsuit in federal court to regain their free speech rights. Subjecting the law to intermediate scrutiny, the district court held that the restriction was justified to prevent discrimination and the stigma associated

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[70] Verified Compl., ¶¶ 72-74, *Telescope Media Group v. Lindsey*, No. 16-cv-04094 (D. Minn. filed December 6, 2016), ECF No. 1.
[71] *Id.* at ¶¶ 1, 113-16, 122, 237-240.
[72] *Id.* at ¶¶ 83, 87-88, 93, 122-25.
[73] *Id.* at ¶¶ 60-65.
[74] *Id.* at ¶¶ 12-14, 157, 161-63.
[75] *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 748-49 (8th Cir. 2019).

with it, and therefore dismissed the Larsens free speech claims.[76]

However, by a 2-1 decision, the U.S. Court of Appeals for the Eighth Circuit reversed.[77] The appellate court held that the Larson's creation of wedding films is inherently speech, involving artistic talent and editorial judgment, and that their operation as a for-profit business makes it no less so.[78] The court rejected Minnesota's argument that regulating Larsen's expression was mere conduct, explaining that "what matters" is that the ultimate product, videos, are "medi[a] for the communication of ideas."[79] The court also rejected Minnesota's argument that the *O'Brien* standard scrutiny applied based on the mixture of speech and non-speech elements.[80]

The Eighth Circuit further recognized Minnesota's application of the law as compelled speech under *Hurley* and *Tornillo*, forcing the Larsens to create films as "positive" about same-sex marriage as opposite-sex marriage.[81] The court therefore applied strict scrutiny, finding the law's application unconstitutional, commenting that as important as anti-discrimination laws are, they cannot effectively "'declar[e] [another's] speech itself

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[76] *Telescope Media Grp. v. Lindsey*, 271 F.Supp.3d 1090, 1115-16, 1128 (D. Minn. 2017).
[77] *Telescope Media Grp.*, 936 F.3d at 747.
[78] *Id.* at 750-51.
[79] *Id.* at 752 (citation omitted).
[80] *Id.* at 756-57.
[81] *Id.* at 752-54.

to be [a] public accommodation' or grant 'protected individuals ... the right to participate in [another's] speech,'" as Minnesota was doing.[82]

The Eighth Circuit, as reflected here with the Larsens, centers on the expressive nature of the product or service itself, unconcerned that such speech is conveyed through the services of a for-profit business. Accordingly, creative professionals in this circuit are assured that their artistic endeavors are valued and strongly protected against compelled speech, regardless of whether they expressed in the conduct of commercial enterprise.

Arizona: Joanna Duka & Breanna Koski

Christians Joanna Duka and Breanna Koski create and sell art together as part of a for-profit business they call Brush & Nib Studio.[83] Using their God-given talents in calligraphy and hand-painting, they create custom artwork (in the form of invitations, décor, and more) designed to celebrate the particular wedding or other special event for which they are tasked.[84] The process is collaborative, involving Duka and Koski consulting

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[82] *Id.* at 754-56 (quoting *Hurley*, 515 U.S. at 572-73) (alteration in *Telescope Media Grp.*).

[83] Second Am. Verified Compl., ¶¶ 10-15, *Brush & Nib Studio, LC v. City of Phoenix*, No. CV2016-052251 (Super. Ct. Ariz. Filed September 1, 2016), *available at* https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/brush-nib-studio-v.-city-of-phoenix/brush-nib-studio-v-city-of-phoenix---second-amended-verified-complaint.pdf?sfvrsn=921d31be_4.

[84] *Id.* at ¶¶ 11, 16, 26.

with clients and each other, and exercising artistic judgment to determine the colors, tone, and style that best commemorate the event.[85]

Their commercial efforts in creating these products are informed by scripture in the bible.[86] Specifically, their religious beliefs define the standards of goodness, truth, and beauty they employ in their artwork. [87] And, their biblically-grounded belief that marriage is the union between one man and one woman directs the content and motifs they use in creating wedding-related artwork, like wedding invitations.[88] Though they gladly serve any person, there are messages Duka and Koski are unwilling to produce in their custom art, including that which would promote same-sex weddings.[89]

Duka's and Koski's convictions about marriage placed them at odds with a Phoenix law requiring them to promote a view of marriage contrary to their religious beliefs.[90] Their refusal to literally paint same-sex marriage in the same positive light as opposite-sex marriage subjects them to fines of up to $2,500 and up to six months in jail, for every day they would be out of compliance with the law. [91]

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[85] *Id.* at ¶¶ 19-25, 32-44.
[86] *Id.* at ¶¶ 59-60, 67-69.
[87] *Id.* at ¶¶ 61-63.
[88] *Id.* at ¶¶ 67, 128.
[89] *Id.* at ¶¶ 67, 69-70, 76-78.
[90] *Id.* at ¶¶ 99-100, 111.
[91] *Id.* at ¶ 109.

Left with no other recourse, Duka and Koski filed a lawsuit to enjoin the law, but the Arizona trial court and the court of appeals both ruled against them, holding that, despite the obviously expressive nature of writing and painting words, "their creation of design-to-order merchandise" was mere conduct that could be compelled to prevent stigma to same-sex couples.[92]

In a 4-3 decision, the Arizona Supreme Court reversed.[93] The court confirmed that Duka's and Koski's custom wedding invitations, as well as the process of creating them, constitute pure speech, and are not conduct, though the custom works are sold for-profit.[94] The court rejected the argument that Duka's and Koski's custom artwork was not their speech on account of the public's inability to discern an articulable message, observing that an articulable message is not necessary for pure speech, especially artwork.[95] The court likewise rejected the argument that Duka's and Koski's decision not to create artwork promoting same-sex weddings was discriminatory conduct based on its impact on same-sex couples.[96]

Relying on *Hurley*, the Arizona Supreme Court held that the application of Phoenix's law to

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[92] *Brush & Nib Studio, LC v. City of Phoenix,* 418 P.3d 426, 439 (Ariz. Ct. App. 2018).
[93] *Brush & Nib Studio, LC*, No. CV-18-0176-PR, 2019 WL 4400328, at *33 (Ariz. Sept. 16, 2019).
[94] *Id.* at *13-*19.
[95] *Id.* at *12-*13, *18.
[96] *Id.* at *17.

compel speech necessarily turned on the content of speech, because it "compels them to write celebratory messages with which they disagree, such as 'come celebrate the wedding of Jim and Jim.'"[97] The court held the compulsion of speech could not satisfy this standard, considering that a regulation of speech is not narrowly tailored to an ordinance designed to regulate conduct.[98] The court rejected the argument that *Hurley* did not apply to for-profit public accommodations, noting the core principle was autonomy of speech, not speaker identity, as shown in this Court's decisions in *Tornillo* and *Pac. Gas & Elec. Co.*.[99]

Addressing how other courts have ruled in similar cases, the court explicitly rejected the rationale of *Elane Photography*.[100] The court also distinguished Washington's reasoning in this case as well as that espoused in the *Klein* case on the basis that they "arguably implicated the expressive conduct doctrine" because they involved cakes and floral arrangements rather than words and paintings.[101]

Like the Eighth Circuit, Arizona rejected the notion that the for-profit sale of products and services necessarily renders them "conduct" or anything less than pure speech, subject to full protection against compulsion. This led Arizona to

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[97] *Id.* at 20.
[98] *Id.* at *21-*22.
[99] *Id.* at *21.
[100] *Id.* at 22-23.
[101] *Id.* at *23.

recognize that the use of non-discrimination laws to compel the creation of pure speech compels the content of speech itself. Even so, it is uncertain as to what degree non-verbal artistic endeavors (like Stutzman's) are protected from compulsion in Arizona.

Kentucky: Blaine Adamson

Blaine Adamson is a Christian too, as well as the managing owner of Hands-On Originals, a printing company in Lexington, Kentucky.[102] Adamson's work involves graphic design of words and images printed on shirts and other promotional materials, employing a certain degree of artistic talent to promote particular messages.[103] Adamson's faith drives him to conduct his life – including his business – in a way that honors God, making him accountable to God for the messages he prints.[104] He is willing to serve any customer, but his faith does not permit him to print certain messages.[105]

In March of 2012, Adamson was asked to print shirts promoting the annual pride festival hosted by the Gay and Lesbian Services Organization

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[102] Affidavit of Blaine Adamson, ¶¶ 2-3, 15, *Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals, Inc.*, HRC No. 03-12-3135, (Apr. 9, 2014), *available at* https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/baker-v.-hands-on-originals/affidavit-in-support-of-summary-judgment.pdf?sfvrsn=6.

[103] *Id.* at ¶¶ 6-11.

[104] *Id.* at ¶¶ 15-18, 26-27.

[105] *Id.* at ¶¶ 30, 33, 49-50.

("GLSO").[106] Adamson declined the job because he could not promote the message specified on the shirt and the message of the event generally.[107] Adamson offered to refer GLSO to another printer but they were not interested and soon filed a complaint of sexual orientation discrimination against Adamson with the county Human Rights Commission.[108] Finding Adamson guilty, the Commission ordered him to print the message on shirts for GLSO against his will.[109]

Adamson appealed this decision, and Kentucky courts have so far ruled in Adamson's favor, with the court of appeals being the most recent to rule on the issue.[110]

The court of appeals' decision, however, was badly fractured, with each of the three judges filing a separate opinion, leaving some ambiguity as to where exactly the law lies in Kentucky. Though Chief Judge Kramer occasionally mentioned certain principles that echoed compelled speech

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[106] *Id.* at ¶¶ 34, 38, 43-44.
[107] *Id.* at ¶¶ 43-44.
[108] *Id.* at ¶ 47.
[109] *Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals, Inc.*, HRC No. 03-12-3135, at 16 (Oct. 6, 2014), *available* at https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/baker-v.-hands-on-originals/hands-on-originals-v-lexington-fayette-urban-county-human-rights-commission---hearing-examiner-s-recommended-ruling.pdf?sfvrsn=14.
[110] *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc.*, No. 2015-CA-000745-MR, 2017 WL 2211381, at *6-7 (Ky. Ct. App. May 12, 2017).

jurisprudence, his opinion relied primarily on statutory interpretation, reasoning that Adamson did not violate the law on the premise that discrimination against a particular message is not discrimination against any person, under the ordinance.[111] As such, his opinion did not make clear whether an application would violate free speech.[112] Judge Lambert, by contrast, held that application of the law to Adamson's decision would violate the Free Exercise clause and federal and state religious freedom restoration acts.[113] And Judge Taylor, in dissent, rejected Adamson's free speech and free exercise claims, arguing that refusing to print shirts that promote an LGBTQ+ pride festival is necessarily discrimination against LGBTQ+ persons.[114]

Following the appellate decision, the Kentucky Supreme Court accepted review of the case, and a decision is pending. So, although Kentucky's current rationale, as reflected by the intermediary appellate court, is harmonious with the principles confirmed by the Eighth Circuit and Arizona, it is unclear how Kentucky courts will ultimately rule on the free speech argument, and to what degree speech by creative professionals will be protected.

This case, like all others dealing with this hot topic, demonstrate that the Court's involvement is

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[111] *Id.* at *5-*7.
[112] *Id.*
[113] *Id.* at *8 (Lambert, J., concurring).
[114] *Id.* at *9-*10.

necessary to resolve the continual conflict implicating crucial First Amendment rights.[115]

II. This Case Presents an Ideal Vehicle for this Court to Resolve the Ongoing Conflict

In light of diametrically opposed opinions and resultant uncertainty as to whether and to what degree the First Amendment protects expressive works from compulsion under non-discrimination and public accommodation laws, Barronelle Stutzman's case presents an ideal vehicle for this

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[115] Aside from the conflicts demonstrated in published decisions, the lack of clarity on the issues causes lingering problems for creative professionals. Indeed, not even Jack Phillips – despite the Supreme Court victory he obtained in Masterpiece Cakeshop – can avoid difficulty. His ordeal is far from over. On June 26, 2017, the day this Court granted certiorari in Phillips' prior case, transgender attorney Autumn Scardina called Phillips and Masterpiece Cakeshop and asked them to make a transition celebration cake, specifically required to be blue on the outside and pink on the inside to mark Scardina's male to female gender transition. Compl., ¶¶ 13-19, *Autumn Scardina v. Masterpiece Cakeshop, Inc.*, No. 2019CV32214 (Dist. Ct. Colo. Filed June 5, 2019), *available at* http://www.adfmedia.org/files/MasterpieceScardinaComplaint.pdf. Because Phillips declined to make this particular cake, once again, due to his religious beliefs, Scardina filed charges with the Colorado Civil Rights Commission, which brought new charges against Phillips about 3 weeks after this Court ruled in Phillips' favor. *Id.* at ¶¶ 20, 23-25. The Commission eventually agreed to drop the charges. *Id.* at 28-29. But, Scardina then filed suit against Phillips, alleging that Phillips' refusal to custom-design a cake that is specially designed to send a message celebratory of a gender transition constitutes illegal discrimination based on transgender status. *Id.* at 1-4. This case is still ongoing.

Court to step in and clean up the mess, providing sorely-needed guidance on a multitude of issues.

Specifically, this petition, should the Court accept it, would give opportunity to clarify whether, and under what circumstances, a creative professional's for-profit creation of custom commissioned works constitutes protected speech. In making this determination, the courts have employed differing criteria with various conclusions. Courts have considered whether the business activity constitutes "pure speech" (Eighth Circuit, Arizona, and presumably Kentucky), expressive conduct (Oregon), or pure conduct (New Mexico and Washington). In making this determination, they also have varied opinions on the proper focus, whether it be the operation of the business as a for-profit entity (New Mexico, Oregon, and Washington) or the nature of the product or service (Eighth Circuit, Arizona, and Kentucky).

The courts have additionally considered, and come to sundry conclusions about, whether the activity must convey an articulable message, and whose message is really at issue (the artist's or the customer's), and whether there must be a showing that the public would likely attribute the message to the artist to receive protection. These clashing approaches and analyses have led to conflicting and contrary results on how to determine if artistic expression in the marketplace is protected speech or unprotected conduct.

This brings us to Barronelle Stutzman, whose petition supplies a unique chance to resolve these issues in one fell swoop. Letting the decision of the Washington Supreme Court stand without comment will surely doom courts who will continue to hopelessly flounder over which art is expressive enough to warrant protection in the for-profit context.

Also, as an additional benefit, this case offers the Court a situation free from the possibility of invidious discrimination against same-sex couples as such. Stutzman gladly served Ingersoll for nine years knowing he was in a same-sex relationship, and remains willing to do so, eliminating any suggestion that Stutzman's claims are a smokescreen for animus against status.[116] Stutzman refuses only participation in a specific event (same-sex weddings) regardless of any customer's sexual status.

And, finally, this case is suitable for merits decision because the Washington Supreme Court found no overt animosity against religion on the part of the adjudicatory bodies reviewing the case, presenting a cleaner avenue for answering the free speech question than the *Masterpiece Cakeshop* case.

CONCLUSION

The many cases discussed herein illustrate the jurisprudential chaos taking place in the void of

[116] Pet'r's App. to Pet. for Cert. at 386a-390a.

a decisive and binding ruling on the propriety of free speech defenses with claims made under non-discrimination and public accommodation laws. Courts are uncertain on how to rule and, as a result, creative professionals are uncertain on how to act. Clarity from this Court is required. In *Masterpiece Cakeshop*, this Court reserved these issues for another day and that day has come.

For these reasons, and those specified in Petitioners' brief, this Court should grant certiorari to take up this case and resolve these important and timely issues.

Respectfully Submitted,

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