No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY;

LORIE SMITH,
Petitioners,

v.

AUBREY ELENIS, ET AL.
Respondents.

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

BRIEF FOR *AMICUS CURIAE* FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

Family Research Council (FRC) is a nonprofit research and educational organization that seeks to advance faith, family, and freedom in public policy from a biblical worldview. *See* www.frc.org. Its stated vision is a prevailing culture in which all human life is valued, families flourish, and religious liberty thrives.

To that end, FRC has an interest in ensuring that all American citizens may live and work according to conscience and religious faith. This vision includes the many Americans who feel trapped between their conscience and unconstitutional restrictions on speech and association at issue in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents the Court with the opportunity to uphold, or withdraw, the promise of *Obergefell v. Hodges*. This Court held that "inherent in the concept of individual autonomy," is the right to a same sex union.[2] But sexual autonomy was not to be privileged over religious autonomy.

Justice Kennedy, stressed "that religions, and those who adhere to religious doctrines, may continue to advocate with the upmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[3] And even non-religious people could conclude that opposite-sex marriage should be uniquely privileged, as the Court noted the inherent value of

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[1] No one other than *amicus* and their counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

[2] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

[3] *Id.* at 2607.

civil "disagree[ment]" and continuing an "open and searching debate" on this important social issue. [4]

Notwithstanding this noble sentiment, the lower courts have split on whether *Obergefell*'s more recent discussion of autonomy meant sexual autonomy would displace the older free speech and free exercise rights guaranteed in the Constitution. And activists have aggressively applied (or announced intended enforcement) against those who sought to avoid participation or complicity in same-sex wedding events.

Your *amicus* believes "proper protection" would not require small businesses owners to resort to the courts to secure the basic freedom to work without compelled speech and association. Instead, a wide range of creative professionals[5], like Lorie Smith, find themselves in the crosshairs of a political movement.

Sincere individuals who cannot in good faith lend their creative talents to promote messages or events they cannot condone as a matter of conscience – choosing to turn down such jobs – are facing criminal investigations, sanctions, fines, and imprisonment. Some courts are rushing to put these professional "makers" to a no-win choice: your job or your beliefs.

Smith is not alone, as this brief shows. This Court first addressed *Obergefell's* promise in 2018 in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, involving the forced speech of cake artist

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[4] *Id*.

[5] The term "creative professionals," as used herein, refers to those individuals who make a living through expressive communications and creations. Whereas, many occupations have some expressive component to them, expression of ideas in a distinctive or unique manner is the essence of the work of "creative professionals."

Jack Phillips.[6] But that case was decided based solely on religious animus, not whether sexual autonomy rights override the older, First Amendment rights in a neutral setting.[7]

This Court was presented a question about floral arrangements in *Arlene's Flowers*, but the question about whether floral arrangements were creative artistry, or a mere service seem to have led the Court to let the issues ferment.

In the meantime, the lower courts have taken different paths, and those paths have now hardened into poles. There is no obvious path for consensus.

The Court now has before it a clear case of artistic creation and expression. Your *amicus* urges this Court to guide lower Courts back to the promise of *Obergefell*, that sexual autonomy does not displace or replace religious autonomy or associational autonomy in any way.

Artistic expression, has always been Constitutionally protected. It cannot be coerced or silenced, even in the context of commerce.

Ms. Smith's petition presents this Court with a perfect opportunity to uphold the constitutional rights of creative professionals. We ask this Court to take the opportunity.

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[6] *Arlene's Flowers v. Washington*,138 S. Ct. 1719 (2018).

[7] *Id*. at 1723-24.

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

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

1. 8th Cir. – *Telescope Media Group v. Lucero* (Videographer-Filmmaker)

In *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 747 (8th Cir. 2019), a husband and wife team operated a media company that produced commercials, short films, and life even productions. Judge Stras noted that the Larsens used their editorial judgment about what events to take on, and the presentation of that content. But the Larsens declined any requests that conflicted with their religious beliefs. These subjects include denigrating the Bible, sexual immorality, the destruction of unborn children, racism, or same-sex weddings.

Minnesota claimed that a decision to produce any wedding videos required the Larsens to make them regardless of the wedding celebration's content, regardless of the Larsen's religious and artistic goals in their work of the couple to be wed. *Id*. at 748 (8th Cir. 2019).

The 8th Circuit also noted that "it also does not make any difference that the Larsens are expressing their views through a for-profit enterprise." *Id*. This is

the correct application of this Court's standard in multiple cases, but as seen below, several courts still hold speech in a commercial context to a lower standard of First Amendment protection.[8]

The 8th Circuit said Minnesota's application would interfere with protected speech in at least two ways: it would compel the Larsens to speak favorable about same-sex marriage if they choose to speak favorably about opposite-sex marriage. And it would regulate their speech based on content. *Id.*

"Regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019).

The Larsens represent the best case scenario for religious people in this arena. But still, the Larsens faced the arduous and uncertain task of challenging the law through the courts. And while the 8th Circuit is correctly upholding the law in this area, it would provide welcome relief to small business owners across the country if this Court would use this case to extent the protections nation-wide.

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[8] *Joseph Burstyn v. Williams*, 343 U.S. 495, 501 (1952); see also *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n,* 138 S. Ct. 1719, 1745 (2018) (Thomas, J., concurring) ("[T]his Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech."). *See also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.,* 475 U.S. 1, 8 (1986) (plurality opinion) (collecting cases); *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241, 258 (1974); *Citizens United v. FEC*, 558 U.S. 310, 342 (2010)(collecting cases).

2. **Arizona – *Brush & Nib Studio, LC. V Phoenix* (Wedding Invitation Designer)**

In *Brush & Nib,* the Supreme Court of Arizona found that that a painter and calligrapher who created custom wedding invitations annot be compelled to service same sex weddings. Phoenix "claim[ed] that if we dare to allow Plaintiffs to express their beliefs, we, in essence, run the risk of resurrecting the Jim Crow laws of the Old South." *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 896 (Az. 2019). "But casting [the Designers'] free speech and exercise rights in such a cynical light does grave harm to a society." *Id*.

Brush & Nib's claims were based in the Arizona Constitution and statutory protections for religious free exercise. The Supreme Court of Arizona held that federal precedent required it to rule for the Designers, but that Arizona's Constitution would also protect them. *Id*, 448 P.3d at 903.

Once again, Brush & Nib shows the promise of protecting religious creative professionals. But it also shows the difficulty of obtaining this protection in the current environment.

Of course, state constitutions and religious freedom statutes provide welcome protection to these business owners. But what is so clear to the Arizona Supreme Court about Constitutional law has been elusive in other jurisdictions (*see* pt. II, *infra*). This means business owners face a patchwork of national legal protections.

But it this Court were to resolve this case in favor of petitioner, it would immediately provide uniform relief across the nation to small business owners in situations like the one that faced Brush & Nib.

3. **Kentucky – *Hands On Originals* (screen printer)**

In *Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands On Originals*, 592 S.W.3d 291, 294 (Ky. 2019), a t-shirt screen printer was sued by a county Human Rights Commission. The Commission alleged that the printer, Hands On Originals, violated that county's Human Rights ordinance.

The Commission was acting on a complaint by "GLSO," a charity that advocates for the LGBTQ+ community and which holds the Lexington Pride Festival. GLSO contacted Hands On about shirts for the upcoming Festival. But when presented with the design, Hands On declined the job. Ultimately another local business printed the shirts for free. *Id.*

The Supreme Court of Kentucky dismissed the case, after several years of litigation. But that court failed to reach the merits, instead dismissing on standing grounds, because the complaint had been filed in the name of the organization and not a "single human." The court said the corporate plaintiff made it impossible to conduct the discrimination analysis. *Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands On Originals*, 592 S.W.3d 291, 298 (Ky. 2019). Only one judge would have reached the merits and ruled in favor of the screen printer. *Id.* at 299 (Buckingham, J.)(concurring).

4. **Kentucky – *Chelsey Nelson Photography***

After the Supreme Court of Kentucky failed to reach the merits in *Hands on Originals*, photographer Chelsey Nelson brought a pre-enforcement action in federal court.

Like the Lexington law in Hands on Originals *Hands on Originals*, Louisville's "fairness ordinance" would compel a photographer to service same-sex wedding services, even against the photographer's religious objection. And the ordinance would prohibit Nelson or her business from explaining Nelson's editorial choices in public. *Chelsey Nelson Photography LLC v. Louisville/Jefferson Cnty. Metro Gov't*, No. 3:19-CV-851-JRW, 2020 WL 4745771 (W.D. Ky. Aug. 14, 2020).

In 2020, the District Court dismissed Nelson's claims for nominal or compensatory damages. Judge Walker (before he was elevated to the D.C. Circuit) did grant Nelson a preliminary injunction against enforcement. *Id*.

But as of 2022, the case is still pending, on cross motions for summary judgment, as the County continues to claim that the ordinance is constitutional and narrowly tailored.

And so *Nelson* highlights the reality of the damage that this Court can end. In order to safely operate their business, and obtain the protection of the Constitution that should come easily, a religious person must run a gauntlet. And even with the caselaw is clear, local officials often refuse to give up, because they believe (*contra Obergefell*) that these religious convictions contradict their vision of society. And the religious person must bear not only the uncertainty of entrepreneurships, but the cost of challenging the law.

Ms. Nelson's case, filed in 2019, is just one of the many cases that could be resolved by this Court making a clear statement in favor of 303 Creative.

5. **Michigan – *ThinkRight Strategies v. Ann Arbor* (Political Consulting)**

The case of *ThinkRich Strategies*[9] shows how nondiscrimination ordinances can reach well beyond same-sex weddings.

The City of Ann Arbor's Public Accommodation code provides that public accommodations cannot discriminate on "actual or perceived…political beliefs." [10]

Two local political consultants realized the ordinance left them unable to choose what political platform to promote. Grant Strobl and Jacob Chludzinski had formed their consultancy, *ThinkRight Strategies*, because they believed they had an advantage in developing unique political messages about free enterprise. It would violate their own principles, and perhaps violate the trust of their clients, if ThinkRight could not have a policy that excludes opponents of free enterprise. And both were committed, pro-life Christians who did not want to spend their creative energy advancing the cause of access to abortion.

Obviously, political speech is core to the speech protected in the First Amendment. But courts in other jurisdictions have ruled that speech in a commercial context can be limited severely. ThinkRight challenged the law. Ann Arbor voluntarily decided that it would not enforce this 'political beliefs' rule against businesses that engage in expressive or creative activity for hire. But leaving the decision up to politicians

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[9] *ThinkRight Strategies, LLC v. City of Ann Arbor, a municipal corporation*, No. 2:19-cv-12233 (E.D. Mich.).

[10] *Id*.

means that political winds may change, and other officials may reach different decisions. These freedoms should not be subjected to local political goals.

Unfortunately, Ann Arbor's broad language is typical of theses ordinances. They are written to cover a vast array of conduct not just traditional "public accommodations." There is no 'list of exceptions,' which forces these small businesses to engage in high-risk litigation against local officials. "Proper protection" of these religious Americans would not put the burden on them to challenge these statutes.

6. Ohio—*Covenant Weddings v. Cuyahoga* (Wedding Vow Writers)

A typical wedding involves perhaps hundreds or thousands of choices that can be customized with expressive elements, beyond invitations and photography.

For example, Kristi Stokes is a minister just outside Cleveland, Ohio.[11] She offers to solemnize weddings as an officiant, and to help design the wedding service itself. Stokes will work with couples to develop meaningful, unique vows, homilies, and prayers.

But Cuyahoga County's "public accommodation" clause was broad enough to reach Stokes and her Covenant Weddings LLC and compel Stokes to offer her services to all-comers. Violations of the ordinance brought fines of $1,000 to $5,000 per violation. This would leave Stokes in the position of drafting religiously meaningful vows, or forcing her to solemnize

[11] *Covenant Weddings LLC et al v. Cuyahoga County, Ohio*, 1:20-CV-1622 (N.D. Ohio).

actions with religious significance, in violation of her conscience.

In response, Cuyahoga agreed to entry of judgment[12] that would prevent it from enforcing the law against Stokes or Covenant Weddings.

B. Courts in Washington, New York, Colorado, Wisconsin, New Mexico, Oregon, as well as Virginia, reject free speech as the equal of sexual autonomy

1. Washington – *Arlene's Flowers v. Washington* (Florist)

Perhaps the most well-known of these conscience cases, *Arlene's Flowers* also most clearly shows the danger to citizens trying to live out their conscience in this area.

Baronelle Stutzman had operated Arlene's Flowers for years when a long-time client asked Stutzman to design the arrangements for his same-sex wedding. Stutzman decided she could not do so.

But Washington's attorney general learned about the declination, and sued Stutzman and her business. This took an awkward conversation between Stutzman and her client and turned it into an unfortunately complex and political matter.

After a long battle, the Supreme Court of Washington held that Stutzman's decision was not protected by the Constitution. *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 548 (2017), this Court granted, vacated, and

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[12] *Id.* (entry of judgment filed October 27, 2020; PACER Doc. 23).

remanded to the Washington Supreme Court, to reconsider in light of *Masterpiece. See State v. Arlene's Flowers, Inc.,* 138 S. Ct. 2671 (2018).

But Washington officials and its Supreme Court effectively 'doubled-down,' as its new opinion was effectively the same as the first. It added a section cabining *adjudicators* that have animus against religion, but not necessarily that the *adjudication* process be free from animus. *See State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1209–10 (2019). While *Masterpiece* bars animus at the front door, Washington says animus can sneak back in through the back door.

When this Court elected not to take *Arlene's* last petition for *certiorari, Arlene's Flowers, Inc. v. Washington,* 141 S. Ct. 2884, reh'g dismissed, 142 S. Ct. 521 (2021), it left Stutzman to face potentially crippling attorney fees. And while the matter ultimately settled for a $5,000 payment and dismissal of Sutzman's petition for rehearing, it also represented the end of Sutzman's time as a florist. The 77-year old florist retired.[13]

Arlene's Flowers represents a nightmare scenario for small, faith-based entrepreneurs. At any moment, government officials may decide that the rest of your career will be eaten up with litigation and uncertainty – all because you felt morally compelled to refuse a single event from a customer that you have otherwise served for years.

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[13] S*ee* https://adfmedia.org/case/arlenes-flowers-v-state-washington-arlenes-flowers-v-ingersoll (last accessed May 29, 2022).

2. **New York – *Emilee Carpenter v. James* (Photographer)**

In *Emilee Carpenter, LLC, et al., v. James*, No. 21-CV-6303-FPG, 2021 WL 5879090 (W.D.N.Y. Dec. 13, 2021)(appeal pending 2nd Cir.), a wedding photographer challenged New York's Human Rights Act ("NYHRA"). The Act would compel a photographer to create photographs of same-sex weddings on the same basis as opposite sex weddings. The NYHRA also blocked the photographer from explaining their editorial decisions about same sex-weddings in any way. The restrictions both compelled and limited Carpenter's speech.

The lower court assumed that the law "operates to compel Plaintiff to speak" and "interferes with her right to expressive association." *Emilee Carpenter, LLC v. James*, No. 21-CV-6303-FPG, 2021 WL 5879090, at *12 (W.D.N.Y. Dec. 13, 2021).

But the lower court found that the law was narrowly tailored, and that this Court's precedents in *Dale* and *Hurley* do not apply to transactions where money trades hands. "[A]n economic relationship between proprietor and customer … is not clothed with a significant level of constitutional protection." *Id.* at *14 (W.D.N.Y. Dec. 13, 2021).

The decision against Carpenter shows that the confusion in courts below is not about the nature of expressive conduct. Instead, there is confusion about whether "speech" and "association" of some Americans can be burdened. But no recent case before this Court has subjected visual artists – be they still pictures, cartoonists, or motion pictures – to such restrictions. And this Court has never previously subjected even speech in a commercial context to such burdens.

This is not the "protection" promised by *Obergefell*. No American should have to engage in compelled

speech or create compelled images. Guidance from this Court is necessary to protect professional artists.

3. **Colorado - Masterpiece Cakeshop 1, 2, and 3 (Cake Decorator)**

Jack Phillips, the Christian cake artist, was first sued in 2012 by the Colorado Civil Rights Commission after he respectfully declined a request to create a custom cake celebrating a same-sex wedding. Six years later, June 4, 2018, this Court held that the State had acted with "clear and impermissible hostility" toward his religious beliefs, violating the First Amendment Free Exercise Clause. [14] ("Masterpiece 1")

Mere weeks after his 2018 victory, Jack was charged again by the same state agency, which suddenly found probable cause in a latent complaint by a local attorney. Autumn Scardina had asked Jack in June 2017 (on the same day this Court had granted *cert* in Masterpiece 1) to create a custom gender-transition cake, pink on the inside and blue on the outside, to celebrate a transition from male to female.[15] ("Masterpiece 2") Scardina had also emailed Jack calling him a bigot and a hypocrite. When Jack sued the agency in federal court for religious harassment and targeting, the agency backed down and dismissed its complaint. [16]

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[14] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission*, 138 S.Ct. 1719 (2018).

[15] *Scardina v. Masterpiece Cakeshop Inc.*, Charge No. CP2018011310, at 2 (Colo. Civil Rights Div. June 28, 2018).

[16] *Masterpiece Cakeshop, Ltd. v. Elenis,* U.S. D.C., Colo, Civil Action No. 1:18-cv-02074-WYD-STV, dismissed March 5, 2019.

Next, Scardina filed a new lawsuit against Jack in state court to seek monetary damages of more than $100,000 plus legal fees. [17] ("Masterpiece Cakeshop 3") This same attorney has also asked Jack to make a custom cake to celebrate satanic themes and drug use.

A decade after *Masterpiece* 1, Jack Phillips continues to give up part of his life to defend his family business and his religious freedom as he defends against the lawsuit in *Masterpiece* 3. As always, Jack says he would serve all customers, but he cannot expresses all messages. He cannot create a custom cake that expresses a message or celebrates events in conflict with his deeply held religious beliefs.

Had this Court confronted the free speech issue and ruled for religious freedom, perhaps the bureaucratic harassment would stop, and people like Jack could live out their faith freely in the marketplace.

Masterpiece 1

In *Masterpiece* 1, this Court upheld the free exercise rights of a cake artist Jack Phillips who politely declined the request of two men to create a custom wedding cake for a same-sex union and found himself sued by a hostile State.[18] Phillips claimed free speech and free exercise rights to decline the request.[19] On the

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[17] *Scardina v. Masterpiece Cakeshop, Ltd.,* Denver, Colo. District Court, Case No: 2019CV32214, Filed June 5, 2019.

[18] *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission*, 138 S.Ct. 1719, 1724-6 (2018).

[19] *Id*. at 1726.

other hand, Colorado urged a right for same sex couples to have a wedding cake made for them by a professional baker. [20]

Jack's policy was to decline custom cakes that celebrated things he personally opposed on religious grounds: including messages that demean LGBT people, and celebrate or support Satan. The free speech issue was whether the wedding cake qualified as protected speech, or was it just food? Did the First Amendment right to avoid compelled speech give him legal protection?[21]

The Court came close to recognizing that a baker's artistic expression in a custom cake might give rise to a right not to be compelled by government to express a message contrary to faith. [22]

But the Court stopped short, and set aside these issues for another day, instead holding that Jack's right to a "neutral and respectful consideration of his claims in all the circumstances of the case" was violated. [23]

In a concurrence, Justice Thomas addressed the free speech claim, considering the issue too critical to ignore.[24] He concluded that the free speech claim supplied an independent basis for ruling for Phillips.[25] He reminded that this Court has never held speech can lose its expressive import just because it involves an

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[20] *Id*. at 1725-26.

[21] *Id*. at 1726, 1728.

[22] *Id*. at 1726-29.

[23] *Id*. at 1729.

[24] *Id*. at 1740 (Thomas, J., concurring).

[25] *Id*. at 1748.

accommodations law.[26] He predicted the issue would persist.[27]

Justice Thomas's concerns were warranted. With no definitive ruling in *Masterpiece*, the compelled speech issue has endured. Every filing invoking the issue only serves to deepen the divide.

Masterpiece 2

Days after his Supreme Court victory, Jack was charged again by the same state agency, this time alleging transgender discrimination.

Autumn Scardina asked Jack, on the day this Court granted *cert* in Masterpiece 1, to create a custom gender-transition celebration cake.[28] After Jack's win in Masterpiece 1, Scardina had called the Cakeshop again, asking for a custom cake in the shape of the Satan smoking marijuana.

Scardina's cake requests are harassment and not genuine service requests. Unbelievably, the Colorado Civil Rights Commission treated Scardina's complaints as genuine. When Jack sued the agency in federal court for religious harassment, the agency backed down and dismissed its complaint.[29]

Masterpiece 3

Scardina did not back down however, even when the Commission dismissed the complaint. Scardina

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[26] *Id*. at 1744-45.

[27] *Id*. at 1748.

[28] *Scardina v. Masterpiece Cakeshop Inc.*, Charge No. CP2018011310, at 2 (Colo. Civil Rights Div. June 28, 2018).

[29] *Masterpiece Cakeshop, Ltd. v. Elenis,* U.S. D.C., Colo, Civil Action No. 1:18-cv-02074-WYD-STV, dismissed March 5, 2019.

then filed a lawsuit in state court over the same custom cake requests Masterpiece declined, a decision that was not because of the person who requested it. Phillips would not create cakes expressing the requested message no matter who asked for it.

On June 15, 2021, the court issued a ruling against Jack, but on August 2, 2021, Jack appealed the trial court ruling to the Colorado Court of Appeals. The case is still pending.

According to Jack's lawyer, "[Phillips] once had ten employees and now it's down to four. He has lost a big part of his business, in addition to the severe emotional toll" imposed by litigation.[30]

4. **Wisconsin—*Amy Lynn Photography Studio v. City of Madison***

A sweeping Madison, Wisconsin, ordinance and a state law arguably force commissioned creative professionals to promote messages that violate their beliefs.[31] Under these same laws, Amy Lawson's Amy Lynn Photography Studio, must create photographs and blog posts promoting pro-abortion groups and same-sex weddings if she creates content that promotes pro-life organizations or that celebrates the marriage of one man and one woman.

These laws also forbid creative professionals from explaining to the public that the artist reserves discretion not to use their artistic talents to promote messages that differ from their convictions.

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[30] Jake Warner, attorney for Jack Phillips. https://adfmedia.org/case/scardina-v-masterpiece-cakeshop (Last accessed: May 25, 2022).

[31] *Amy Lynn Photography Studio, LLC et al., v. City of Madison, et al.,* 2017CV000555 (Wis. Cir.)(Dane County)(judgment entered Aug. 23, 2017).

Amy Lawson, a Christian who is a commissioned photographer and copy writer, filed a pre-enforcement complaint in Dane County, WI, Circuit Court, in March 2017, seeking an order that her business activities were not covered by the state and local public accommodations laws.[32] Unwilling to defend the plain scope of these laws, city and state officials agreed that the court should enter declaratory judgment. It found that Amy's commissioned photography business is not a "public accommodation" under the applicable laws, and therefore the provisions that would restrict her First Amendment freedoms do not apply to her. But, again, these resolutions do not cabin future officials in a different political climate from deciding aggressive enforcement against other creative professionals. Amy's case shows the need for creative professionals to go to court just to gain clarity about how public-accommodation laws apply to them.

5. **New Mexico—*Elane Photography, LLC v. Willock***

Elaine Huguenin is a professing Christian who once ran a small photography business in New Mexico.[33] For Huguenin, photography was more than "aim and shoot"; she told stories through her craft.[34] But because of her faith, she could not, in good conscience, take photographs telling the story of same-sex unions.[35] She had no problem photographing LGBTQ+

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[32] *Id*.

[33] *Elane Photography, LLC v. Willock*, 309 P.3d 53, 78 (N.M. 2013).

[34] *Id*. at 63, 70.

[35] *Id*. at 78.

customers.[36] But she could not, as a matter of conscience, photograph a same-sex civil union.[37]

One day, Huguenin was contacted by Vanessa Willock.[38] Huguenin declined, politely informing Willock that she could not photograph a same-sex wedding due to her religious beliefs.[39] Willock filed a discrimination claim against Huguenin.[40]

New Mexico's highest court held the refusal to photograph a same-sex ceremony was unlawful.[41] The court discarded Huguenin's free speech rights, reasoning that because her photography was for-hire, it did not qualify for full First Amendment protection.[42] A concurring opinion added the point that the sacrifice of her conscience was no more than "the price of citizenship."[43]

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. IrishAm. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), did not apply to for-profit entities.[44] The state court determined that protection from compelled inclusion of another's message applies only when the business creates messages independent of

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[36] *Id*. at 61.

[37] *Id*. at 61.

[38] *Id*. at 59.

[39] *Id*. at 60.

[40] *Id*.

[41] *Id*. at 61-2.

[42] *Id*. at 68.

[43] *Id*. at 80 (Bosson, J., concurring).

[44] *Id*. at 65-6.

their speech-for-hire, and so 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(1986) factored in neither.[45]

The court also 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.[46]

Essentially, in New Mexico, creative professionals may be compelled to create art promoting objectionable messages about sexuality or presumably, anything else, because of their offering services to the public when making profit.

6. **Idaho - *Knapp v. Coeur D'Alene* (Wedding Chapel and Officiants)**

In 2014, Coeur d'Alene, Idaho, officials told Donald Knapp that he and his wife Evelyn, both ordained ministers who run Hitching Post Wedding Chapel, had to perform same-sex ceremonies or face months in jail and thousands of dollars in fines. The city claims its "non-discrimination" ordinance requires the Knapps to perform such ceremonies, now that the courts have overridden Idaho's voter-approved constitutional amendment that affirmed marriage as the union of a man and a woman.

The Knapps filed a pre-enforcement action in U.S. District Court for the District of Idaho, captioned *Knapp v. City of Coeur d'Alene*, 2:14-cv-00441-REB (D. Idaho).

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[45] *Id*. at 66-7.

[46] *Id*. at 68-70.

The City acknowledged that it told the Knapps that they business would be subject to the non-discrimination ordinance. But the Knapps had organized as a nonprofit religious corporation, and the City decided not to enforce the law against them because of their ministerial role. The City moved to dismiss and the Court granted in part and denied in part the dismissal. The case was then resolved without enforcement as to the Knapps.[47]

7. Oregon - Sweet Cakes by Melissa (Cake Designer)

Melissa Klein is a Christian, whose artistic talent for designing and decorating cakes led her to open a bakery called "Sweet Cakes by Melissa."[48] Much like Jack Phillips in the Masterpiece Cakeshop case, Klein's cake design and decoration is artistic, intended to create edible art with a message promoting and celebrating the event for which the cake is made.[49] Conducting her business, she gladly served anyone, regardless of sexual or gender status.[50] But her religious faith limited the messages she could commemorate via cake designs. [51] And, on this basis, she refused

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[47] See the ADF landing page on this matter. https://adfmedia.org/case/knapp-v-city-coeur-dalene

[48] 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/wpcontent/uploads/2017/02/SM16-04-25-Klein-Opening-brief-andER-FILE-STAMPED-COPY.pdf.

[49] *Id.* at 374-76, ¶ ¶ 3,6.

[50] *Id.* at 376-77, ¶ 7.

[51] *Id.* at 373-76, ¶¶ 2,4,6.

to create original cakes celebrating divorce, or containing profanity.[52]

In early 2013, a customer for whom Klein had once designed a wedding cake requested Sweet Cakes design a cake, this time, for a same-sex wedding.[53] Her husband (Aaron) declined because it would require them to artistically promote same-sex marriage through a wedding cake, in conflict with their faith.[54]

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.[55] Klein was forced to shut down the Sweet Cakes business.[56]

Klein contested the judgment, but the Oregon Court of Appeals ruled against her in 2017.[57] 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 given the Masterpiece Cakeshop ruling.[58] The parties have since submitted supplemental briefing to the court of appeals addressing the issue of religious hos-

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[52] *Id.* at 376, ¶ 6.

[53] *Id.* at 368-69, ¶¶ 7-8.

[54] *Id.* at 369, ¶ 8.

[55] *Id.* at 46-47.

[56] *Id.* at 377, ¶ 9.

[57] *Klein v. Oregon Bureau of Labor & Indus.*, 410 P.3d 1051, 1068 (Or. Ct. App. 2017).

[58] *Klein v. Oregon Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019).

tility and await ruling. But foreshadowing the outcome, the state court has already rejected Klein's compelled speech arguments.[59]

The Court of Appeals conceived that prior cases apply 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.[60]

Like New Mexico, the Oregon Court of Appeals distinguished *Barnette* and *Wooley* because no *government* message was compelled.[61] But, in recognizing that Klein's cake design was expressive and being compelled, the court considered what standard of scrutiny applied.[62] It concluded that, although regulation of "pure speech" 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).[63]

The court suggested that strict scrutiny might apply if Klein had declined to express a particular message on the cake requested.[64] As it was, the court held the compulsion was justified to prevent the dignitary harms to same-sex couples identified by this Court in *Obergefell*.[65]

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[59] *Klein*, 410 P.3d at 1064- 75.

[60] *Id*. at 1068.

[61] *Id*. at 1067-68.

[62] *Id*. at 1069-70.

[63] *Id*. at 1069-71.

[64] *Id*. at 1072.

[65] *Id*. at 1073-74.

Like New Mexico and Oregon, if creative professionals refuse to create and sell artwork because of an implicit celebratory message that violates conscience, they cannot obtain First Amendment protection.

8. **California - *Tastries Bakery* (Cake Design)**

Tastries Bakery is a case[66] about a California cake artist, Cathy Miller, who declined to use her artistic abilities to celebrate a same-sex ceremony. Cathy serves all who walk through her shop's doors, but when a same-sex couple asked her to create a custom wedding cake to celebrate their same-sex wedding ceremony, Cathy declined, citing her Christian beliefs, and offering to refer them to another bakery who would create their cake.

The couple filed a complaint with California's Department of Fair Employment and Housing (DFEH), the agency that enforces the state anti-discrimination law. The DFEH sought an order to force Cathy and her employees at Tasties Bakery to create cakes that celebrate same-sex ceremonies. In February 2018, state court judge David Lampe ruled in Miller's favor, holding that the First Amendment protects her beliefs.

Despite losing in court, the DFEH sued Miller again in October 2018, demanding a trial. After several years of discovery, the parties filed cross-motions for summary judgment to be heard on November 4, 2021. If the judge decides that judgment cannot be de-

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[66] *Dept. of Fair Emp. & Housing v. Caathy's Creations, Inc. d/b/a/ Tastries*, BCV-18-102633-DRL, Cal. Sup. Ct., Kern County, Cal.

cided summarily through a motion, in either side's favor, then a jury trial is scheduled to begin on February 28, 2022.

True tolerance is a two-way street, not winner take all where the government can destroy a person of faith simply for living and working consistently with their deeply held convictions and beliefs. Everyone's freedom is at risk when the government is able to punish citizens like Cathy just because the government does not like how she exercises her artistic freedom.

Cathy Miller is a cake artist. But most important, Cathy is a devout Christian. And Cathy's relationship with Jesus Christ impacts every area of her life, including her work as owner of Tastries Bakery in Bakersfield, California.

When two women entered Cathy's shop in August 2017 and asked her to design a wedding cake for their same-sex marriage, Cathy declined their request and respectfully recommended another local baker who'd be happy to create their cake.

Cathy's answer was guided by three fundamental principles:

1. All people are created in God's image;
2. God gave Cathy her artistic talents to use for His glory, and she cannot use them to express a message or celebrate an event that violates God's teachings; and
3. God designed marriage as a lifelong union of one man and one woman.

Because of these truths, Cathy knew she could not design a custom cake for a same-sex wedding. But she also knew that God loves all people.

So Cathy told the couple that she would gladly sell them anything else in her store or create a cake for them for another occasion. This decision aligns with her policy of declining to create other cakes, such as those with anti-family and suggestive themes. Cathy's decision not to design other cakes had never caused a problem until that day.

Cathy's decision to honor God's design for marriage has cost her dearly. The two women filed a complaint with California's Department of Fair Employment and Housing (DFEH), accusing Cathy of violating the state's anti-discrimination law, the Unruh Act. Shortly after, the DFEH launched a formal action against Cathy. She now faces the loss of her bakery— and wedding cakes make up about 40% of her business.

If Cathy is forced to create artwork that celebrates activities that conflict with her core convictions, others will be just as compelled to create various forms of expression that violate their conscience. But the First Amendment ensures that we all may live and work by our religious beliefs. Cathy is asking that these cherished freedoms be preserved—not only for her but for all Californians. This case could have lasting repercussions for all Americans.

This case is pending in California Superior Court, Kern County, California, Case No. BCV-18-102633-DRL .Trial is set for July 25, 2022.

9. ***Bibliotechnical Athenaeum v. Nat'l Lawyers Guild, Inc.*, Case No. 653668/16, 2018 WL 1172597 (N.Y. Sup. Ct. Mar. 06, 2018)**

In *Bibliotechnical Athenaeum v. National Lawyers Guild, Inc.*, 2018 WL 1172597 (N.Y.Sup. Mar. 6, 2018), the National Lawyers Guild—a "progressive bar association" -- held an awards banquet and printed a program including 25-plus pages of advertisements, most of which congratulate one or more of the honorees. The Athenaeum, an Israeli organization, tried to submit a 3" x 3" ad, which was to read:

Bibliotechnical Athenaeum
Congratulations to the Honorees
4 Shlomtzion St. Elazar
Gush Etzion 9094200
State of Israel

But the Guild rejected the ad because of the Guild's "resolution barring [Defendants] from accepting funds from Israeli organizations." The Athenaeum sued, claiming this constituted public accommodation discrimination based on national origin in violation of New York state and city law. The Guild moved to dismiss, claiming a First Amendment right to control opinions expressed in its "newspaper," and that the public accommodations law cannot not be used to compel the Guild to publish opinions that violated its strongly held beliefs

The trial court agreed that this violated the public accommodations law, and rejected the Guild's First Amendment compelled speech argument in its motion to dismiss:

> Turning now to the merits of the First Amendment argument, I find that it is not a sufficient basis to dismiss the complaint

at this stage.... In assessing whether an individual is being improperly required to engage in forced speech or expressive conduct, the Supreme Court has held that the threshold inquiry is whether the conduct allegedly compelled was expressive enough to trigger First Amendment protections. Conduct, in turn, is considered inherently expressive when there is " '[a]n intent to convey a particularized message' " as well as a likelihood that the intended " 'message [will] be understood by those who view[] it.' "

Under those standards, I cannot say on the papers before me that the complaint must be dismissed. Without having the benefit of discovery, it is questionable whether the proposed advertisement is forced speech. The advertisement, which simply stated that Plaintiff congratulated the honorees at the dinner and listed an address, is not so different from many of the others appearing in the Dinner Journal. It is therefore questionable whether there is a likelihood the Guild would be perceived as endorsing any Israeli government policies as opposed to merely complying with antidiscrimination laws. In other words, it is not clear from the complaint or documentary evidence that the speech in question triggers First Amendment protections.

Id.

Professor Eugene Volokh disagreed with this decision, saying "legally unfounded speech restrictions and compulsions such as this one should indeed be dismissed early in the process, such as on a motion to dismiss, rather than waiting for future development of legally irrelevant facts."[67]

10. **Virginia - *Updegrove v. Herring* (photographer)**

In *Updegrove v. Herring*, No. 1:20-CV-1141, 2021 WL 1206805, at *1 (E.D. Va. Mar. 30, 2021), a photographer sued to obtain a judgment that he could photograph weddings consistent with his deeply held beliefs. Updegrove also wished to photograph political events, and explain to the public these editorial judgments. Both would apparently violate recently expanded Virginia law.

The district court held that e*ven if* the statute will be enforced as written, Updegrove would not be able to sue without a showing of specific enforcement. *Id*.

The matter is on appeal to the 4th Circuit.

II. REPORTS OF OTHER PROFESSIONAL COERCION

Michigan – Good Cakes and Bakes (Cake Decorator)

On August 13, 2020, the *Detroit Free* News-reported a story about lesbian baker, April Anderson

[67] Volokh, Eugene, Reason.Com, 03.18.2018, https://reason.com/volokh/2018/03/19/court-allows-lawsuit-against-ideological/ (Last accessed: May 25, 2022).

at Good Cakes and Bakes, who received an on-line order for a custom cake with this request for an icing message:

> "I am ordering this cake to celebrate and have PRIDE in true Christian marriage," the customer said in the order. "I'd like you to write on the cake, in icing, 'Homosexual acts are gravely evil. (Catholic Catechism 2357)'"

Anderson baked the cake, but without the requested message. In doing so, she was following the bakery's long-standing policy. Written messages are not permitted on specialty dessert cakes ordered online, as stated on the bakery's website. Anderson and her wife also wrote a letter to Gordon and attached it to the cake, saying they stand against hate.

"We feel the only 'grave evil' is the judgement that good christians, like yourself, impose on folks that don't meet their vision of what God wants them to be," the letter said.

The baker was concerned that the bakery was being "set up" for a claim of discrimination as to services in a public accommodation. Public interest lawyers are quoted in the story saying this is different from the *Masterpiece* case, because Anderson baked the cake but refused to write the message, on grounds that she did not have to write hateful messages.[68]

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[68] Detroit Free News, August 13, 2020, Lesbian owner of Good Cakes and Bakes in Detroit gets homophobic order (freep.com), https://www.freep.com/story/news/local/michigan/detroit/2020/08/13/detroit-baker-april-anderson-homophobic-cake-david-gordon/3343464001/

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO DECISIVELY IMPLEMENT THE PROMISE OF OBERGEFELL

Unlike Masterpiece or Arlene's Flowers, this case presents a matter of expressive, constitutionally protected conduct. Like the filmmakers in *Telescope Media,* the professionals in 303 Creative Artists are engaged in artistic endeavors, involving free expression. These rights have been protected as bedrock freedoms, whether the speech is in a commercial context or not.

Even in the cases where governments have chosen not to enforce their broad laws, these laws chill speech. Other professionals must decide if the local political climate has changed, because local officials could aggressively enforce the same laws in the future.

Unfortunately, since *Obergefell*, professionals across the country have faced disparate, even opposite, legal rules.

They are untenable because they chill speech on all sides of political divides in the United States.

Can a Democrat version of ThinkRight Solutions be forced to write Republican speeches?

Can a pro-abortion version of the pro-life photographer Amy Lawson be forced to support pro-life charities?

Can filmmakers take the opposite position from Telescope Media, or would they be forced to make films that undermine their philosophical convictions?

Can progressive photographers be required to take promotional photographs of candidates they oppose, in a reverse of Bob Updegrove?

The answers should not depend on geography and local politics.

CONCLUSION

Until this Court settles the question, lower courts will continue to erroneously treat sexual autonomy as somehow more protected than religious autonomy or associational autonomy in the public square. *Obergefell* promised that sexual autonomy might be joining the list of protected rights, but it was not a "new and improved autonomy." Yet *Obergefell* has led to uncertainty on how to rule and disagree about what the law requires, so creative professionals are uncertain on how to act. Clarity from this Court is critical to stopping the chill.

For these reasons, and those specified in Petitioners' brief, your *amicus* prays this Court to resolve these issues in favor of free speech and religious liberty.

[signatures on next page]

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