

In the  
**Supreme Court of the United States**

— ◆ —  
MELISSA ELAINE KLEIN AND AARON WAYNE KLEIN,

*Petitioners,*

v.

OREGON BUREAU OF LABOR AND INDUSTRIES,

*Respondent.*

— ◆ —  
*On Petition for a Writ of Certiorari to the  
Oregon Court of Appeals*

— ◆ —  
**BRIEF OF *AMICUS CURIAE*  
MOUNTAIN STATES LEGAL FOUNDATION IN  
SUPPORT OF PETITIONERS**

— ◆ —  
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## QUESTIONS PRESENTED

1. Whether, under *Masterpiece*, the Oregon Court of Appeals should have entered judgment for Petitioners after finding that Respondent had demonstrated anti-religious hostility.
2. Whether, under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), strict scrutiny applies to a free exercise claim that implicates other fundamental rights; and if not, whether this Court should return to its pre-*Smith* jurisprudence.
3. Whether compelling an artist to create custom art for a wedding ceremony violates the Free Speech Clause of the First Amendment.

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**IDENTITIES AND INTERESTS OF  
*AMICUS CURIAE*<sup>1</sup>**

Mountain States Legal Foundation (“MSLF”) is a nonprofit public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues that are vital to the defense and preservation of individual liberties: the right to speak freely, the right to own and use property, and the need for limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (mem.) (*amici curiae* in support of petitioners); *Emilee Carpenter, LLC v. James*, 575 F. Supp. 3d 353 (W.D.N.Y. 2021), *appeal docketed*, No. 22-75 (2d Cir. Jan. 13, 2022) (*amicus curiae* in support of appellants).

To secure these interests, MSLF files this *amicus curiae* brief, urging this Court to grant the Petition.



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<sup>1</sup> Pursuant to Rule 37.2, all parties have received timely notice and have consented to the filing of this brief. Pursuant to Rule 37.6, no party or parties’ counsel authored this brief in whole or in part or contributed money that was intended to fund its preparation or submission, and no other person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

## STATEMENT OF THE CASE

### I. Factual Background

Petitioners Melissa and Aaron Klein once owned a bakery called Sweetcakes by Melissa in Gresham, Oregon. The bakery sold custom cakes for important events; in other words, every cake was bespoke, for a specific client and a specific event.

During the life of their business, Petitioners designed and created cakes only for events that were not inconsistent with their Christian faith, which includes the belief that marriage is the union between one man and one woman, as instituted by God. Petitioners would serve any customer regardless of his or her sexual orientation, but would not facilitate the celebration of events that contravened their faith. Accordingly, they did not design or create cakes celebrating non-traditional marriages or divorces.<sup>2</sup>

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<sup>2</sup> If cake makers like Petitioners can be compelled to celebrate same-sex weddings in order to comply with non-discrimination laws, it will not end there—the slippery slope is slipping. Customers who are polyamorous will also be able to demand that cake makers celebrate polyamorous weddings, and the demand for participation in nontraditional weddings will not end there. *See West 49th Street, LLC v. O'Neill*, No. 30-1352, 2022 WL 4392993, at \*7 (N.Y. Civ. Ct. Sept. 23, 2022) (“In sum, the problem with *Braschi* and *Obergefell* is that they recognize only two-person relationships. . . . Those decisions, however, open the door for consideration of other relational constructs; and, perhaps the time has arrived.”); *see also* Berit Brogaard, “*I am in Love with Trains*,” *PSYCHOLOGY TODAY* (Sept. 1, 2020) <https://www.psychologytoday.com/us/blog/the-mysteries->

Petitioners’ objections to making cakes celebrating same-sex weddings were based on their religious beliefs, and Petitioners have credibly alleged that the State of Oregon displayed hostility toward their religious beliefs.

But this case is about more than just religion. Individuals of all religious stripes, regardless of the official tenets of their faith, can object to the celebration of same-sex weddings. And people of no faith at all may feel similarly. *See Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (“Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”).

Indeed, the *Obergefell* majority recognized the historical and long-standing beauty of traditional marriage, which is recognized by individuals regardless of their faith. *Id.* at 657 (“There are untold references to the beauty of marriage in religious *and philosophical* texts spanning time, cultures, and faiths, *as well as in art and literature in all their forms*. It is fair and necessary to say these references were based on the understanding that marriage is a

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love/202009/i-am-in-love-trains (“Objectophilia, or Object-Sexuality, is a sexual orientation involving an enduring emotional, romantic or sexual attraction toward specific objects. . . . [A] self-identified objectophile[] describes it as ‘an orientation just as hetero- and homo-sexuality are orientations of one’s innate sexuality.’”).

union between two persons of the opposite sex.”) (emphasis added).

Thus, this *amicus* brief presses forward arguments exclusively based on free speech principles under the First Amendment.

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## SUMMARY OF THE ARGUMENT

This issue won’t die. From bakers, to florists, to photographers, to website designers, and to many others. Shall “reasonable and sincere” people acting “in good faith”—who simply adhere to a commitment to traditional marriage—nevertheless be compelled to engage in artistic speech that fundamentally contravenes their deeply held beliefs? The answer must be no.

And this Court should not resist offering that clear answer any longer. Over four years after *Masterpiece Cakeshop* was decided on narrow grounds, it is more obvious than ever that states, localities, and the American public need guidance on the question of how to balance free speech and antidiscrimination laws. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1748 (Thomas, J., concurring in part) (“[T]he freedom of speech could be essential to preventing *Obergefell* from being used to ‘stamp out every vestige of dissent’ and ‘vilify Americans who are unwilling to assent to the new orthodoxy.’”) (quoting *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting)); *id.* at 1738 (Gorsuch, J.,

concurring) (“To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack’s case while penalizing Mr. Phillips—is irrational.”).<sup>3</sup>

Many members of this Court have known that this case, and numerous other cases like it, would need to some day come before this Court. *Obergefell*, 576 U.S. at 741 (Alito, J., dissenting) (“Today’s decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.”); *id.* (“[T]he majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. . . . We will soon see whether this proves to be true.”) (internal citations omitted).

The Court has already opted to hear *303 Creative v. Elenis*, 142 S. Ct. 1106 (2022) (mem.). That case is of critical importance. But that case presents a slightly different question than this one, because the underlying appellate decision in that case concluded that website design *is indeed* protected speech. See *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (10th Cir. 2021) (“[C]reating a website . . . is [] inherently

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<sup>3</sup> In *Obergefell*, one dissent recognized the lingering consequences that that decision would have. See *Obergefell v. Hodges*, 576 U.S. 644, 687 (2015) (Roberts, C.J., dissenting) (“Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.”).



expressive.”). Here, there is no such conclusion regarding cakemaking.

However, thus far, this Court has acknowledged that the First Amendment encompasses myriad art forms. The conclusions it has already reached in those cases largely determine this case. Not only is the history of wedding cake designing steeped in symbolism, but it subsumes many already-protected art forms, such as sculpting and painting.

It would be stunning for a state to force a painter to accept patrons whose requests offend his virtues. Or for the state to compel a sculptor to use his skill to carve stone to celebrate an event in conflict with his conscience. Similarly, the state lacks the power to have forced Petitioners to custom-design a cake for an occasion which contravened their deeply held beliefs. Indeed, it is difficult to see how Petitioners could ever comply with such a mandate, given that it is hardly evident that compulsory labor will be of equal quality to freely-given labor.

This case thus presents the Court with an opportunity to finally resolve what was left unanswered in *Masterpiece*—that creating a custom wedding cake is speech that should be protected by the First Amendment. But it offers more: the opportunity to go much further, and to end the ceaseless line-drawing between cakes, flowers, photos, hairdressing, calligraphy, and more.

Indeed, the issue of “line drawing” has the potential to consume the Court’s resources

indefinitely and unnecessarily, as evidenced by the colloquy many years ago in the *Masterpiece* oral argument:

JUSTICE KAGAN: -- [A] makeup artist, I think, might feel exactly as your client does, that they're doing something that's of - - great aesthetic importance to the - - wedding and - - that there's a lot of skill and artistic vision that goes into making a - - somebody look beautiful. And why - - wouldn't that person or the hairstylist - - why wouldn't that also count?

MS. WAGGONER: Because it's not speech. And that's the first trigger point of this case - -

JUSTICE KAGAN: I mean, some people might say that about cakes, you know?

Transcript of Oral Argument at 13, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).<sup>4</sup> Rather than forcing litigants to return to the Court every time a question arises about artistic speech, this Court should instead grant certiorari in this case, and craft a broad ruling addressing the dispute in this matter.

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[https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-111\\_f29g.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f29g.pdf)

Indeed, in the time since the Court declined to reach this question, commercial activity in numerous forms has been embraced as a form of political speech. *See infra* p. 26–27. The Court should thus take the opportunity to reach a broad conclusion in this case: that custom wedding cake designing is protected, and further, that furnishing nearly any good or service—particularly bespoke services—can likely be construed as protected speech under the First Amendment.

In sum, Petitioners’ First Amendment rights are not limited to the words that come out of their mouths. Petitioners must not be compelled to speak through their art in a manner that defies their conscience.

## ARGUMENT

### **I. Wedding Cakes Have Historically Conveyed a Message, are Imbued with Symbolism, and Therefore Constitute Speech.**

Throughout history, wedding cakes have always been intended to convey a message. That message is: “a wedding has occurred, a marriage has begun, and the couple should be celebrated.” *Masterpiece*, 138 S. Ct. at 1743 (Thomas, J., concurring in part) (internal quotations and citations omitted).

“The origins of the modern wedding cake can be traced back to the one made for Queen Victoria and Prince Albert in 1840[.]” Olivia B. Waxman, *Masterpiece Cakeshop Isn’t the First to Bake Larger Meaning Into Wedding Cakes*, *TIME*, Dec. 5, 2017 (citing CLAIRE STEWART, *AS LONG AS WE BOTH MAY*

EAT: A HISTORY OF WEDDING FOOD AND FEASTS (2017)).<sup>5</sup> Their cake was an elaborate work of art filled with meaning. As described by author Claire Stewart:

The massive cake was festooned with a sugar sculpture of Britannia (the female figure who stands in as the physical embodiment of Britain). A dog at Britannia's feet represented faithfulness, with sculptures of the bride and groom, amid fluttering turtledoves, draped safely in classical Roman garb.

In addition to the symbolic sculptures on the cake, the cake's white icing was a symbol of virginity. *Id.* (quoting STEWART, *supra* page 8–9, at 130).

A generation later, when Queen Victoria's daughter married in 1858, “[o]nly the bottom tier consisted of cake; the others were made of sugar icing and were purely decorative[.]” Carol Wilson, *Wedding Cake: A Slice of History*, GASTRONOMICA, (May 5, 2005).<sup>6</sup> In that sense, early modern wedding cakes were more art than food—in fact, it was not until the marriage of Queen Victoria's youngest son, Prince Leopold, in 1882, that “[f]or the first time guests could enjoy a wedding cake made entirely of cake.” *Id.*

The modern wedding cake came to America from Victorian England in the latter half of the nineteenth century, especially as American lifestyle magazines

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<sup>5</sup> <https://time.com/5047981/wedding-cake-lgbt-history/>

began writing about them. Waxman, *supra* page 7. By the 1960s, cake toppers and customization were common. *Id.*

Today, custom wedding cakes are a common—and an expensive—part of many American weddings. Couples can commission intricate and elaborately-designed cakes just like they can commission a sculpture or a painting. And for many couples, the art of the cake is what is being purchased.<sup>7</sup> In fact, some wedding websites recommend purchasing a fake “display cake” as a symbol of the marriage for photos, and then serving a simple sheet cake to guests, in order to cut costs. See Kristen Tice Studeman, *How Much Do Wedding Cakes Cost?*, BRIDES (July 18, 2021).<sup>8</sup>

While the style of wedding cakes and the traditions surrounding them have changed over time, the ubiquity of wedding cakes is undeniable. “Almost no wedding, no matter how spartan, is missing the cake.” *Masterpiece*, 138 S. Ct. at 1743 (Thomas, J., concurring in part). Even the most basic wedding cakes are immediately recognizable as a symbol of marriage: “If an average person walked into a room and saw a white, multi-tiered cake, he would

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<sup>7</sup> That wedding cakes today are pieces of art, just like paintings and sculptures, is perhaps best evidenced by the abundance of cake decorating competitions. In these competitions, like Food Network’s Wedding Cake Championship, cake artists are judged on their skill, technique, and creativity. See *Wedding Cake Championship*, FOOD NETWORK, <https://www.foodnetwork.com/shows/wedding-cake-championship> (last visited Oct. 6, 2022).

<sup>8</sup> <https://www.brides.com/wedding-cake-cost-guide-5071392>

immediately know that he had stumbled upon a wedding.” *Id.*

The history of wedding cakes from their earliest iterations through today shows that they are much more than desserts at a party. Rather, wedding cakes are “a well-recognized symbol that celebrates the beginning of a marriage [and] clearly communicates a message[.]” *Id.* Indeed, “[t]his Court has long held that . . . [s]ymbolism is a primitive but effective way of communicating ideas[.]” *Id.* at 1741 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)). The art form of wedding cakes pre-dates its purpose of consumption.

## **II. Designing a Custom Wedding Cake Is Protected Under the First Amendment Because a Wedding Cake is Simply Speech in an Edible Medium.**

Gustav Klimt’s paintings are replete with gold leaf. Claude Monet’s lilies are best depicted through watercolors. Banksy’s art is memorialized in spray paint. No matter the medium, art should be protected as purely expressive speech under the First Amendment.<sup>9</sup> Art on all sorts of canvases (even skin) has been deemed protected by the First Amendment, and cake is simply one form of canvas. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010) (“We hold that tattooing is *purely expressive* activity fully protected by the First Amendment[.]”)

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<sup>9</sup> “[T]he Constitution looks beyond written or spoken words as mediums of expression.” *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

(emphasis added). Importantly, “[t]he basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary’ when a new and different medium for communication appears.” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

Petitioners’ custom wedding cakes are speech in an edible medium that should be protected by the First Amendment.<sup>10</sup> Many aspects of custom wedding cake creation, such as painting and sculpting, are already protected under the First Amendment in different mediums.

Forcing artists like Petitioner Melissa Klein to create custom art that endorses a message in friction with her beliefs is compelled speech. This Court, “like Orwell, has long recognized the risk that compelled speech may ‘turn the writer, and every other kind of artist . . . into a minor official, working on themes handed down from above[.]’ . . . The First Amendment exists to resist that pressure and keep the artist’s expression truly free.” *Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cty. Metro Gov’t*, No. 3:19-cv-851, 2022 WL 3972873, at \*16 (W.D. Ky. Aug. 30, 2022) (quoting *The Prevention of Literature*, THE ORWELL FOUNDATION,

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<sup>10</sup> If wedding videos, “[b]y design, . . . serve as a ‘medium for the communication of ideas’ about marriage[.]” so does a custom wedding cake. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)); see *supra* Part I discussing the history of wedding cakes.

<https://www.orwellfoundation.com/the-orwell-foundation/orwell/essays-and-other-works/the-prevention-of-literature/> (last visited Oct. 6, 2022)).

Line-drawing among different forms of art is particularly difficult because vendors sometimes provide multiple related services.<sup>11</sup> For instance, in a case recently argued before the Second Circuit, *Emilee Carpenter v. James*, the State of New York took the position that the Appellant in that case must not only photograph same-sex weddings, but must blog about them as well, because the services are connected:

Q. Well, but I think the question is if she does provide a service that blogs about the weddings that she photographs, does New York require her to comparably blog about same-sex weddings that she photographs?

A. Yes. . . . Not, not to create a message that she disagrees with. But you can see the text in the record; you know, she has a brief description of the couple, and if that's part of the service, you how they met and so on; and if that's part of the service she provides, she has to provide that service on equal terms.

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<sup>11</sup> See *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 908 (Ariz. 2019) (noting that not all of an art studio's services were protected, but that custom wedding invitations were protected pure speech).



Oral Argument at 26:55–27:23, *Emilee Carpenter, LLC v. James*, 575 F. Supp. 3d 353 (W.D.N.Y. 2021), *appeal docketed*, No. 22-75 (2d Cir. Jan. 13, 2022).<sup>12</sup>

Line-drawing of this nature simply creates ambiguity and uncertainty. And given the constitutional damage done by permitting the government to compel speech, this Court should be exceedingly suspicious of efforts like Oregon’s to play puppet-master over private businesses that it has defined as public accommodations. *See Janus v. Am. Fed’n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (“When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions.”).

At the very least, this Court should resolve, in the affirmative, the unanswered free speech question from *Masterpiece*—that the customization of a wedding cake is art worthy of protection under the First Amendment. *Masterpiece*, 138 S. Ct. at 1740 (Thomas, J., concurring in part) (“The Court does not address this [free-speech] claim because it has some uncertainties about the record.”)<sup>13</sup>; *Nat’l Inst. of Fam.*

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<sup>12</sup> <https://www.ca2.uscourts.gov/decisions/isysquery/479f9a91-d177-4157-999d-0eb02035e0fd/11-20/list/>; *see id.* at 11:16–11:57 (describing the hypothetical of a caterer who also blogs “about the story that their food tells” in the wedding context).

<sup>13</sup> In the time since *Masterpiece*, courts have sharply divided over whether bespoke wedding services should be protected under the First Amendment or yield to public accommodation laws. *See Chelsey Nelson Photography, LLC v. Louisville/Jefferson Cty. Metro Gov’t*, No. 3:19-cv-851, 2022 WL 3972873, at \*1 n.1 (W.D.

*and Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) (“This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these.”).

**A. Many layers of artistry are baked into custom wedding cake design, including First Amendment protected expressions—painting and sculpting.**

The Ninth Circuit understood that if *elements* of a certain type of expression are already protected, the *expression itself* is shielded by the First Amendment. See *Hermosa Beach*, 621 F.3d at 1055 (“We hold that tattooing is purely expressive activity fully protected by the First Amendment[.]”); *id.* at 1061 (“Tattoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection.”). Painting and sculpting are protected art forms, and those protections do not evaporate when the medium becomes edible.

“The First Amendment’s fundamental purpose . . . is to protect all forms of peaceful

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Ky. Aug. 30, 2022) (“The Eighth Circuit and Arizona Supreme Court have held that governments may not compel wedding-related speech in this context. . . . But the Tenth Circuit, along with the New Mexico and Washington Supreme Courts, have upheld the application of similar public-accommodations laws to similar vendors.”).

expression in all of its myriad manifestations.” *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996). “[P]ictures, films, paintings, drawings, and engravings . . . have First Amendment protection.” *Kaplan v. California*, 413 U.S. 115, 119–20 (1973); see also *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015) (“Although the Supreme Court has never explicitly defined the entire universe of artistic expression safeguarded by the First Amendment, it has cast the amendment’s protections over a variety of artistic media including movies, . . . music without words, . . . and nude dancing[.]”); *Bery*, 97 F.3d at 696 (2d Cir. 1996) (“[P]aintings, photographs, prints and sculptures . . . are entitled to full First Amendment protection.”); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (“The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.”).

Unconventional, eccentric, colorful wedding cake inspirations are spilling out of every corner of the internet in 2022. In the age of social media and Pinterest, couples no longer feel tethered to traditional three-tiered, white wedding cakes. Thus, while traditional wedding cakes still constitute protected speech, the modern custom wedding cake artist only expands the messaging component of the

cake: such cakes are likely to combine multiple art forms to create a confectionary masterpiece.<sup>14</sup>

Artists like the Petitioners “must be adept at a multitude of artistic endeavors beyond simply ‘baking.’ They must have visual-arts skills to design a cake that is pleasing to the eye—painting, drawing, and sculpting.” Amicus Brief for Cake Artists at 4–5, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111). Just as a tattoo artist considers “color, light, shape, size, . . . literal meaning, symbolic meaning, historical allusion, religious import, and emotional content[.]” so too does a cake artist. *Hermosa Beach*, 621 F.3d at 1057; see Petition for Writ of Certiorari at 34, *Klein v. Or. Bureau of Labor and Indus.*, — S. Ct. — (2022) (No. 22-204) (Melissa Klein’s “clients expect, and [she] intend[s], that each cake will be uniquely crafted to be a statement of each customer’s personality, physical tastes, theme and desires.”) (internal quotation and citation omitted). “[C]ake artists are entitled to no less protection under the law for their expressive content than any other artist.” Amicus Brief for Cake Artists at 31, *Masterpiece*, 138 S. Ct. 1719 (No. 16-111).

Imagination is the only limit as to what form a wedding cake will take. Painting and sculpting merely

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<sup>14</sup> “Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.” *Bery, v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

scratch the surface of the multitude of artistic expressions that can be applied to cake.<sup>15</sup>

For instance, one wedding cake artist offers courses to “pipe, paint or sculpt with delicious buttercream[.]” *Cake School*, EMMA PAGE CAKES, <https://www.emmapagecakes.co.uk/cake-school> (last visited Oct. 6, 2022).



*Id.*

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<sup>15</sup> “As long as curious and outspoken members of our society find new and creative ways to express themselves, and as long as governments find new and creative ways to regulate those people, courts will confront hard questions.” *Chelsey Nelson Photography*, 2022 WL 3972873, at \*14.



*Wedding Cakes*, EMMA PAGE CAKES,  
<https://www.emmapagecakes.co.uk/wedding-cakes-nav> (last visited Oct. 6, 2022).



*Id.*

Another artist offers “bespoke, hand painted wedding cakes[.]” *Wedding Cakes*, EMILY HANKINS, <https://www.emilyhankins.co.uk/wedding-cakes> (last visited Oct. 6, 2022).



*Id.*



*Bespoke hand painted wedding cakes*, EMILY HANKINS, <https://www.emilyhankins.co.uk/> (last visited Oct. 6, 2022).

Cakes can also be sculpted to resemble anything the couple can fathom.



*2019 Weddings: Real Cakes*, BELLWETHER EVENTS,  
<https://bellwetherevents.com/weddings/2019-white-buttercream-wedding-cakes/> (last visited Oct. 6, 2022).



*Football Wedding Round-Up: Other Southern Favorites,* SOUTHERN WEDDINGS,



<https://southernweddings.com/2014/09/18/football-wedding-round-southern-favorites/> (last visited Oct. 6, 2022).



*Id.*

Yes, wedding cakes are generally eaten. But this Court should hold that the First Amendment does not evaporate when an artist's medium involves consumable food:

The principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper. This distinction has no significance in terms of the constitutional protection afforded the tattoo; a form of speech does not lose First Amendment protection based on the kind of surface it is applied to.

*Hermosa Beach*, 621 F.3d at 1061. In short, cake is merely a painter's canvas and a sculptor's clay.

**B. First Amendment protections for speech apply to commissioned messages, which can come in countless forms.**

It is well settled that “[s]peech is protected even though it is carried in a form that is sold for profit.” *ETW Corp.*, 332 F.3d at 924. As such, “a speaker is no less a speaker because he or she is paid to speak.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). “[T]his Court has repeatedly rejected the notion that a speaker’s profit motive gives the government a freer hand in compelling speech.” *Masterpiece*, 138 S. Ct. at 1745 (Thomas, J., concurring in part).

In the context of wedding websites, the dissenting opinion of Chief Judge Tymkovich of the Tenth Circuit Court of Appeals aptly described how artists engage in messaging while they also conduct their business:

[Plaintiff], like some other businesses that espouse religious sentiments, is simply informing the public that she operates her business in accordance with her faith. And as an artist, she will not create commissioned messages contrary to her beliefs. Her business is firmly nondiscriminatory. Her policy applies to all clients: . . . she would not create a same-sex

wedding website—even a prototype for a non-existent couple—for anyone, regardless of sexual orientation. Her statement simply informs potential clientele of the constraints of her faith, and the First Amendment protects [Plaintiff’s] right to do so.

*303 Creative*, 6 F.4th at 1201 (Tymkovich, C.J., dissenting); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 751 (8th Cir. 2019) (“[I]n holding that motion pictures are protected by the First Amendment, the Supreme Court explicitly rejected the idea that films do not fall within the First Amendment’s aegis simply because they are often produced by large-scale businesses conducted for private profit.”) (internal brackets and quotation marks omitted).

Wedding cakes possess numerous expressive elements, as they contain unique designs, colors, and styles and are individualized for each client. The artist’s motivation for producing the wedding cake may be seen to have dual purposes of decoration and consumption. *See also Chelsey Nelson Photography*, 2022 WL 3972873, at \*11 (“Wedding photographers, like wedding singers, convey distinct messages and are hardly interchangeable—as anyone who’s ever planned a wedding or watched *The Wedding Singer* surely understands.”).

The difficult conflicts between free speech protections and antidiscrimination extend not merely to questions involving same-sex weddings, or to individuals who are gay. As noted in a recent oral

argument before the Second Circuit Court of Appeals in *Emilee Carpenter v. James*, numerous other conflicts may arise:

Let me just offer a couple of examples. New York has said that it has the ability to regulate the speech of public accommodations when they become public accommodations. New York's law also broadly defines public accommodations to include all types of things. So, for example, if a speechwriter offered her services to the public, creating speech, and writing speeches and that speech writer was a pacifist, she could be required to write a speech celebrating war, celebrating the military, for a military veteran, at a high school ROTC event. Or for example, if an atheist singer, who sang at birthdays or corporate events, was asked to sing at a[n] Easter Service for a Church, under New York's theory, they would have to sing at that Church service, just the same as they would sing in other services as well.

*See supra* n. 12, Oral Argument at 7:50–8:42; *see also Elane Photography, LLC v. Willock*, 309 P.3d 53, 72 (N.M. 2013) (rejecting the argument that African-Americans would be forced to photograph Ku Klux Klan rallies, based only on the fact that New Mexico public accommodations law did not cover political viewpoint discrimination).

But it goes much further than traditionally expressive professions. In 2022, this Court may take notice that business owners often engage in commercial practices as a form of expressing their strongly held beliefs and opinions; that includes the decision to reject certain customers. *See, e.g.,* Avi Selik & Sarah Murray, *The owner of the Red Hen explains why she asked Sarah Huckabee Sanders to leave*, WASHINGTON POST (June 25, 2018)<sup>16</sup> (“I explained that the restaurant has certain standards that I feel it has to uphold, such as honesty, and compassion, and cooperation.”); *San Mateo restaurant owner won’t serve customers wearing MAGA hats*, ABC 7 NEWS (Feb. 1, 2019)<sup>17</sup> (“A San Mateo restaurant owner says customers will not be served if they are wearing a ‘Make America Great Again’ hat.”); Justin Baragona, *Fox News Anti-‘Cancel Culture’ Warriors Applaud Diner Owner for Banning Biden Supporters*, THE DAILY BEAST (Sept. 1, 2021)<sup>18</sup> (“If you voted for and continue to support and stand behind the worthless, inept and corrupt administration currently inhabiting the White House that is complicit in the death of our servicemen and women in Afghanistan, please take your business elsewhere,’ reads the sign from owner Angie Ugarte.”); Eric Nofziger, *Neil Young and others battle Spotify amidst Joe Rogan COVID-19 misinformation scandal*, THE BUTLER COLLEGIAN

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<https://www.washingtonpost.com/news/local/wp/2018/06/23/why-a-small-town-restaurant-owner-asked-sarah-huckabee-sanders-to-leave-and-would-do-it-again/>

<sup>17</sup> <https://abc7news.com/maga-make-america-great-again-kenji-lopez-alt-wursthall-restaurant/5114591/>

<sup>18</sup> <https://www.thedailybeast.com/fox-news-anti-cancel-culture-warriors-applaud-diner-owner-for-banning-biden-supporters>

(Feb. 8, 2022)<sup>19</sup> (“Following a controversial episode of the ‘The Joe Rogan Experience’—a podcast exclusive to Spotify hosted by ex-‘Fear Factor’ emcee Joe Rogan—legendary singer-songwriters Neil Young and Joni Mitchell removed the bulk of their music catalog from the streaming service.”).

The Court must also consider the possibility that individuals—whether it be Petitioners or others—engage in speech of this nature as an act of rejecting the rapid change in American society. *See Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting) (“[T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?”); *see also 303 Creative*, 6 F.4th at 1215 (Tymkovich, J., dissenting) (“So it is in protecting the right to hold these beliefs that we understand the true resilience of the First Amendment.”).

At the same time, provocateurs have made a point of harassing and intimidating business owners who refuse to endorse messages contrary to their principled beliefs. Only this Court’s intervention in these issues can prevent further harassment. *See Jack Phillips Of Masterpiece Cakeshop Ordered To Pay Fine For Refusing Transgender Cake Order*, CBS

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<sup>19</sup> <https://thebutlercollegian.com/2022/02/neil-young-and-others-battle-spotify-amidst-joe-rogan-covid-19-misinformation-scandal/>

NEWS (June 16, 2021)<sup>20</sup> (“In Tuesday’s ruling, Denver District Judge A. Bruce Jones said Autumn Scardina was denied a cake that was blue on the outside and pink on the inside to celebrate her gender transition on her birthday because of her transgender status in violation of the law.”); Joy Pullman, *LGBT Activists Have Been Using Courts To Harass This Christian Baker For Ten Years*, THE FEDERALIST (Jan. 17, 2022)<sup>21</sup> (“Immediately after the Supreme Court decision in Phillips’s first case, LGBT activists hauled Phillips back into court, not once but twice more, again with clear personal animus.”); *Chelsey Nelson Photography*, 2022 WL 3972873, at \*7 (referring to the City of Louisville’s efforts to hire discrimination “testers” who can attempt to patronize businesses and then initiate public enforcement actions for violations); *accord Lochner v. New York*, 198 U.S. 45, 70 (1905) (Holmes, J., dissenting) (relying on a treatise for the proposition that the profession of a baker was among the hardest and most laborious jobs, in part due to “the erratic demands of the public”). It is thus critical that this Court issue its ruling swiftly—and broadly—to offer clear instruction on how these disputes ought to be resolved.

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In 2015, this Court took the dramatic step of announcing that the U.S. Constitution required states to change their definition of marriage. *Obergefell*, 576 U.S. at 688 (Roberts, C.J., dissenting) (“As the

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<sup>20</sup> <https://www.cbsnews.com/colorado/news/jack-phillips-transgender-cake/>

<sup>21</sup> <https://thefederalist.com/2022/01/17/lgbt-activists-have-been-using-courts-to-harass-this-christian-baker-for-ten-years/>

majority acknowledges, marriage ‘has existed for millennia and across civilizations.’ . . . For all those millennia, across all those civilizations, ‘marriage’ referred to only one relationship: the union of a man and a woman.”). At the time, the Court nevertheless recognized the constitutional protections for individuals like Petitioners. *Id.* at 680 (opinion of the Court) (“The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”).

Many states, like Oregon, have gone further than *Obergefell*; these states interpret their public accommodation laws to require all businesses not just to equally serve gay individuals generally, but to participate in *celebrating* same-sex weddings *specifically*. Indeed, other states’ laws barring sex discrimination—and not sexual orientation discrimination specifically—in public accommodations may be interpreted to have the same scope as Oregon’s. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020) (“Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking.”).

Additionally, many states have laws expressly covering gender identity discrimination, meaning that businesses cannot decline to serve an individual based on their transgender status. In Colorado, a trial court



recently upheld the state’s antidiscrimination law requiring a baker—Jack Phillips from the *Masterpiece Cakeshop* case—to create a custom cake for a transgender transition. See Findings of Fact and Conclusions of Law, *Scardina v. Masterpiece Cakeshop Inc.*, No. 19-cv-32214, \*28 (Denver Dist. Ct., June 15, 2021)<sup>22</sup> (“The anti-discrimination laws are intended to ensure that members of our society who have historically been treated unfairly, who have been deprived of even the every-day right to access businesses to buy products, are no longer treated as ‘others.’ This case is about one such product—a pink and blue birthday cake—and not compelled speech.”). After *Bostock*, such conflicts are even more likely to occur and reoccur.

Using a public accommodation law as a gun-to-the-head means of forcing Petitioners to create artwork that violates their conscience is unconstitutional. Speech and expression protected by the First Amendment come in many forms, and in this instance the form is cake. The medium may be novel, but the concept remains the same: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word

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<sup>22</sup> <https://adflegal.org/sites/default/files/2021-06/Scardina%20v.%20Masterpiece%20-%20District%20court%20findings%20of%20fact%20and%20conclusions%20of%20law%20-%2006-16-2021.pdf>

or act their faith therein.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).



**CONCLUSION**

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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