

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

On Petition for Writ of Certiorari to the
Colorado Court of Appeals, Case No.
2021CA1142, Judges Schutz, Dunn, Grove
DISTRICT COURT, COUNTY OF DENVER
District Court Judge: The Hon. A. Bruce Jones
District Court Case No. 19CV32214

Petitioners: MASTERPIECE CAKESHOP
INC., and JACK PHILLIPS,
and
Respondent: AUTUMN SCARDINA.

Attorneys for Amici Aaron and Melissa Klein:

Jeffrey C. Mateer
David J. Hacker
Courtney A. Jones
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy.
Suite 1600
Plano, TX 75075
Telephone: (972) 941-4444
cjones@firstliberty.org

Eric Kniffin

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CASE NO. 2023SC00116

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

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Colorado

Appellate Rules (C.A.R.), including:

1. This brief complies with the requirements of C.A.R. 28(a)(2) and C.A.R. 28(a)(3).
2. This brief complies with the requirements of C.A.R. 32. This brief has been prepared in proportionally spaced typeface with 14-point Times New Roman font.
3. This brief complies with the requirements of C.A.R. 29.
4. This brief complies with the requirements of C.A.R. 53(g) because, excluding the parts of the document exempted by C.A.R. 28(g)(1), it contains 3,115 words.

Dated: April 27, 2023.

/s/ Eric Kniffin

Eric Kniffin
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE¹

In 2007, Aaron and Melissa Klein opened a bakery in Gresham, Oregon, called “Sweet Cakes by Melissa.” Like the Petitioners in this matter, the Kleins’ business involved creating original art consistent with their faith.

In 2013, Aaron and Melissa were asked to create a custom cake for a same-sex wedding. Due to their religious beliefs, they could not, in good conscience, use their art to celebrate the event, so they declined to create the cake. For this single declination, an Oregon state agency ruled that the Kleins violated the state’s public accommodation law and imposed a financially devastating penalty of \$135,000 against the Kleins. Aaron and Melissa were forced to shut down their family bakery, which they had worked for years to build, and were punished with a “gag order” whereby the Oregon government restricted their freedom to discuss their case in public. The incident giving rise to the case took place almost a decade ago, yet the litigation is still ongoing.

Appellate courts have incrementally issued rulings in favor of Aaron and Melissa since that time. In 2017, the Oregon Court of Appeals struck the “gag order” but upheld the remainder of the state agency’s decision. *Klein v. Or. Bureau of Lab.*

¹ Counsel for amici curiae authored this brief in its entirety. No attorney for any party authored any part of this brief, and no one apart from counsel for amici curiae made any monetary contribution intended to fund the preparation or submission of this brief. A Motion for Leave to File Brief of *Amici Curiae* Aaron and Melissa Klein in Support of Petitioners was filed concurrently with this brief.

& Indus., 410 P.3d 1051, 1086–87 (Or. Ct. App. 2017). In 2019, the United States Supreme Court granted a writ of certiorari in the Kleins’ case, then remanded the case for reconsideration in light of *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719 (2018). On remand in January 2022, the Oregon Court of Appeals concluded that the state agency’s handling of the damages portion of the case was not neutral toward the Kleins’ religion and thus violated the Kleins’ Free Exercise rights. *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1124–27 (Or. Ct. App. 2022). Nevertheless, the Oregon Court of Appeals upheld the agency’s liability finding against the Kleins. *Id.* at 1128. In May 2022, the Oregon Supreme Court declined to review the Oregon Court of Appeals’ decision. *Klein v. Or. Bureau of Lab. & Indus.*, No. S069313 (Or., May 5, 2022) (order denying review). In September 2022, the Kleins filed a petition for a writ of certiorari with the Supreme Court.

The Court’s decision here will establish precedent as to whether governments can force artists like Jack Phillips and the Kleins to speak messages through their art that violate their consciences. The Kleins know far too well the tremendously high human cost of government coercion. As amici, the Kleins have a strong interest in ensuring the First Amendment protects all artists’ right to speak freely or refrain from speaking at all, in accordance with the artists’ convictions.

ARGUMENT

I. The Requested Custom Cake in This Case Is Speech Because it Expresses a Message.

The requested custom cake at issue in this case—with a blue exterior and pink interior—is speech because it celebrates and symbolizes a gender transition. The protections underlying the Free Speech Clause stem from “a profound commitment to protecting communication of ideas.” *Kaplan v. California*, 413 U.S. 115, 119 (1973). Visual arts are pure speech because they “predominantly serve to express thoughts, emotions, or ideas.” *Coleman v. City of Mesa*, 284 P.3d 863, 869–70, 872 (Ariz. 2012).

Artists and patrons use certain colors in art to communicate ideas, because “colors are associated with specific meanings based purely on how we instinctively would react to situations related to the color and how we continue to experience them in the world.” *How Did Pink and Blue Become Gender Colors*, Colors Explained, <https://www.colorexplained.com/pink-and-blue/> (last accessed Apr. 18, 2023). Pink and blue have symbolized gender, female and male, in our society for decades. Jeanne Maglaty, *When Did Girls Start Wearing Pink?*, Smithsonian Magazine (Apr. 7, 2011), <https://www.smithsonianmag.com/arts-culture/when-did-girls-start-wearing-pink-1370097/> (noting that today’s colors, pink for girls and blue for boys, were established in the 1940s). Gender “encompass[es] nearly every social interaction in contemporary life,” and pink and blue are widely used to communicate

ideas about gender. Burton F. Peebles, *Blurred Lines: Sexual Orientation and Gender Nonconformity in Title VII*, 64 Emory L.J. 911, 952 (2015) (explaining how newborns are photographed in pink or blue to indicate their gender); Maglaty, *supra* (noting that “the pink fad” for girls’ merchandise “spread from sleepers and crib sheets to big-ticket items such as strollers, car seats and riding toys”); Colors Explained, *supra* (observing that pink is the color that represents the fight against breast cancer).

Importantly, gender-reveal parties have become extremely popular, “and through them pink and blue became stand-ins for the arrival of a baby boy or girl.” Dora Vanette, *How Pink and Blue Became Gendered Colors*, A Women’s Thing (Dec. 24, 2020), <https://awomensting.org/blog/pink-and-blue/>. Custom gender-reveal cakes, filled with pink or blue filling, are often used at these parties to reveal the gender of the baby. *What Is A Gender Reveal Party? (And How Do You Throw One?)*, Gender Reveal Guide, <http://genderrevealguide.com/plan-your-party-plan/what-is-a-gender-reveal-party/> (last accessed Apr. 18, 2023). In fact, “[t]he classic gender reveal moment is the cutting of the cake.” *Id.* In this way, the gender-reveal cake is much more than a decorative dessert—it is the medium used to communicate a message about one’s gender. The cake is critical to communicating this message, i.e., the gender reveal, and the cake and the communication are inseparable.

Gender transition celebrations, where the communication advanced is the individual's transition from one gender to the other, is an idea derived from the gender-reveal party. *Scardina v. Masterpiece Cakeshop, Inc.*, No. 19CV32214, ¶ 48 (Colo. Dist. Ct. June 15, 2021) (“The symbolism of the requested design of the cake is also apparent given the context of gender reveal cakes.”). Like the gender-reveal, a custom cake is often the important symbolic piece used to communicate the individual's gender transition. See Nicole Pelletiere, *Friends throw ‘it’s a boy’ party to celebrate buddy’s transition from female to male*, Good Morning America (May 30, 2018), <https://www.goodmorningamerica.com/living/story/friends-throw-boy-party-celebrate-buddys-transition-female-55512081> (noting that a big blue cake with the words “Congrats! It’s a boy!” was used to celebrate a gender transition); see also Alicia Lee, *A mom threw a belated gender reveal party for her transgender son 17 years after she ‘got it wrong’*, CNN (July 16, 2020), <https://www.cnn.com/2020/07/16/us/gender-reveal-party-transgender-son-trnd/index.html> (a cake with blue and pink sprinkles and a question mark on top was used to celebrate the individual's gender transition). The gender transition cake uses colors to symbolize and celebrate the individual's gender transition and is critical to communicating that message. As the trial court noted here, Respondent “explained that the design [of this cake] was a reflection of her transition from male-to-female.” *Scardina*, No. 19CV32214 at ¶ 48. “The color pink in the custom cake represents

female or woman” and “[t]he color blue in the custom cake represents male or man.” *Id.* Respondent also “testified that the requested cake was to be used at a family celebration of her . . . gender transition.” *Id.* The record shows that the requested custom cake is a medium used to communicate the idea of Respondent’s transition from male-to-female. The requested custom cake is inseparable from that idea. Thus, the requested custom cake at issue here—with a blue exterior and pink interior—is speech.

The First Amendment forbids compelled contributions to another’s speech. *See United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (even in the commercial speech context, “mandated support” where businesses are required to “support speech by others” violates the First Amendment). Just as the government cannot compel a parade to accept an unwanted parade float, the government cannot compel a parade float to participate in a parade. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 581 (1995). In the same way, the government cannot compel a consumer to buy a custom cake from a particular cake baker or compel the cake baker to create a particular custom cake for the consumer. For this reason, this Court should grant Petitioners’ petition for review and find that the requested custom cake at issue here—with a blue exterior and pink interior—is speech because it communicates an idea by celebrating and symbolizing a gender

transition and, therefore, the First Amendment protects Mr. Phillips from being compelled to create this gender transition cake.

II. Jack Phillips’ Custom Cakes Are Art and Art Is Pure Speech Deserving of Broad First Amendment Protection.

Mr. Phillips’ custom cakes are also his own speech. Courts recognize art is expressive when it conveys a message or idea. *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (“[P]aintings, photographs, prints and sculptures” are speech because they “always communicate some idea or concept.”); *White v. City of Sparks*, 500 F.3d 953, 955–56 (9th Cir. 2007) (Even art that merely conveys the artist’s “sense of form, topic, and perspective” is expression worthy of protection.).

Original artistic work deserves protection as pure speech because it is inherently self-expressive. Artists give of themselves—their emotional energy, creative talents, and aesthetic judgments—to express their artistic vision in original art. See John Hospers, *Philosophy of Art*, ENCYCLOPEDIA BRITANNICA ONLINE, <https://bit.ly/3yQaFpa> (last accessed Apr. 19, 2023) (noting artists “manifest” their “inner state” to create art). This self-expression results in an intimate connection between the artist, the art he creates, and the message his art expresses. The personal identification each artist feels with his creation makes art a form of deeply personal, artistic self-expression worthy of First Amendment protection. See, e.g., *Hurley*, 515 U.S. at 576 (stating that self-expression exists where the speaker is “intimately connected with the communication advanced”).

Original artwork requires broad First Amendment protection to ensure artists are not forced to use their expressive gifts to communicate messages antithetical to their beliefs.

As the district court found, “Mr. Phillips uses artistic techniques and tools to create intricate custom cakes, which convey the message of the cake . . . by the design of the cake itself.” *Scardina*, No. 19CV32214 at ¶ 41. He invests time, energy, and his talents in each of his custom cakes. *Id.* at ¶ 43. In doing so, he “use[s] his artistic skills for even simple tasks, such as selecting and applying colors.” *Id.* at ¶ 41. Mr. Phillips “uses these skills to create cakes unique to a celebration and to express an intended message.” *Id.* He “thinks of himself as a participant at the event he creates a cake to celebrate.” *Id.* at ¶ 42. Mr. Phillips wants to communicate through his custom cakes, and “[w]hen he creates a cake, he feels he is ‘agreeing with the message and taking part in [the occasion].’” *Id.* For these reasons, Mr. Phillips’ custom cakes are inherently self-expressive and entitled to First Amendment protection as pure speech.

The Free Speech Clause protects the right of such artists to only create art with which they agree. An artist’s work is his own protected, expressive speech. Therefore, this Court should recognize that Mr. Phillips’ custom cakes are pure speech protected by the First Amendment and grant Petitioners’ petition for review.

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

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

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

The risk to artistic business owners from compelled expression laws is not hypothetical. Artists throughout the nation—particularly creative professionals—have experienced trauma, public disgrace, loss of access to markets, and years of litigation for refusing to speak the government's preferred message. Government coercion of speech devastated Aaron and Melissa Kleins' lives and destroyed their business. They have undergone years of stressful and expensive litigation out of a desire to create original art consistent with their faith.² The trauma of the Kleins' years-long litigation battle was worsened by hostile media outlets hounding them for

² The incident in question occurred on January 17, 2013, yet the litigation is still ongoing. *Klein v. Or. Bureau of Lab. & Indus.*, 410 P.3d 1051, 1057 (Or. Ct. App. 2017) (Case No. A159899).

interviews and anonymous attackers vandalizing their property, breaking into their home, and making expletive-laced death threats against the Kleins and their five children.³ Another victim of government-coerced speech is Barronelle Stutzman, the Washington state floral artist-in-residence of Arlene's Flowers who nearly lost her business and her home over her commitment to remain true to her faith.⁴ Additionally, the owners of Elane Photography were not only fined for refusing to speak the government's message but lost their business.⁵

The dangers of government-compelled speech extend beyond the wedding context. A Kentucky printer was embroiled in years of lawsuits for declining to print shirts promoting a gay pride parade.⁶ A family farm was banned from a farmers market for its views on marriage and is in the middle of an ongoing legal battle over its First Amendment rights.⁷ And a pro-life photographer was forced to engage in

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

⁴ See, e.g., Pet. for Reh'g at 11, *Arlene's Flowers, Inc. v. Washington*, No. 19-333 (U.S. July 27, 2021).

⁵ See, e.g., *Willock v. Elane Photography, LLC*, HRD No. 06-12-20-0685, at 20 (H.R. Comm'n of N.M. Apr. 9, 2008), <https://bit.ly/3AEt6e3>; Richard Wolf, *Same-Sex Marriage Foes Stick Together Despite Long Odds*, USA Today (Nov. 15, 2017), <https://bit.ly/3m2czwk>.

⁶ *Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands On Originals*, 592 S.W.3d 291, 294–95 (Ky. 2019).

⁷ *Country Mill Farms, LLC v. City of E. Lansing*, 280 F. Supp. 3d 1029, 1041–42 (W.D. Mich. 2017).

litigation over her right to decline to take promotional photos for Planned Parenthood.⁸ By reversing the Colorado Court of Appeals, this Court will recognize the human cost that results when governments stigmatize religious beliefs and force artists to choose between their faith and their livelihoods.

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

Respondent asks the Court to rubberstamp government coercion of artists to express messages with which they disagree, as long as the conduct to which the speaker objects is ostensibly related to a statutorily protected class. Under this logic, Colorado can compel a fiercely atheist videographer to film a Catholic communion ritual because there is a “close relationship” between Catholic rituals (the conduct) and practitioners of the Catholic religion (a protected class). The state can force a feminist t-shirt printer to design shirts for a fraternity initiation because there is a close relationship between fraternity initiations and the male sex. And Colorado could require a Democrat speechwriter to write a speech for a Republican candidate,⁹ or force an unwilling Muslim movie director to make a film with a “Zionist

⁸ Compl., *Amy Lynn Photography Studio, LLC v. City of Madison*, No. 17-cv-000555 (Dane Cnty. Cir. Ct. Mar. 7, 2017), <https://bit.ly/3yNS229> (the incident in question occurred in Madison, WI).

⁹ Some jurisdictions consider “political affiliation” or “political ideology” a protected class, *e.g.*, D.C. Code § 2-1411.02 (2001); V.I. Code tit. 10, § 64(3) (2006); Seattle, Wash. Mun. Code §§ 14.06.030(B)(5).

message.” *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1199 (10th Cir. 2021) (Tymkovich, C.J., dissenting).

A world where governments can require artists, entertainers, writers, and producers to use their expressive gifts to communicate messages that violate their convictions is a world where the First Amendment has been rendered meaningless. The Court should grant Petitioners’ petition for review and reverse the Colorado Court of Appeals to avoid paving the way to such a dystopian future.

C. Enforcing the First Amendment Ensures that Both Free Speech and Free Markets Flourish.

If a government truly wants to ensure access to robust markets, the last thing it should do is compel or silence speech from artistic business owners. Such coercion will not increase access to goods and services but will instead devastate the commercial marketplace, driving small, family-run art shops out of business and leading to inferior markets for all. This is because an artist who is ordered to speak a message with which she disagrees, or to refrain from speaking about her beliefs, will often close her business rather than violate her deepest convictions. Instead of coercing speech from artistic professionals, Colorado must accommodate artists’ free speech. *Hurley*, 515 U.S. at 573 (state public accommodation laws may not violate “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”). Doing so will allow state and local governments to facilitate access to markets without

requiring artists to betray their faith. These accommodations may include allowing artists to select the messages they wish to create, exempting artists who create expressive speech from the public accommodation laws, or modifying the definition of a “place of public accommodation” to exempt expressive businesses. 303 *Creative*, 6 F.4th at 1203–04 (Tymkovich, C.J., dissenting). Such reasonable steps will allow governments to achieve their interests without unnecessarily abridging free speech.

The Court should grant Petitioners’ petition for review and find that the First Amendment protects Mr. Phillips from being compelled to use his artistic talents to create a gender transition cake in violation of his convictions. Artists like Mr. Phillips and the Kleins have the right to speak freely or refrain from speaking at all, in accordance with the artists’ convictions. By upholding broad First Amendment protections for artistic speech, the Court can promote a tolerant, equitable society where both free markets and free speech can flourish. The First Amendment requires no less.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' petition for review and reverse the judgment of the Colorado Court of Appeals.

Dated: April 27, 2023.

Respectfully submitted,

/s/ Eric Kniffin

JEFFREY C. MATEER*
DAVID J. HACKER*
COURTNEY A. JONES*
FIRST LIBERTY INSTITUTE
2001 West Plano Parkway
Suite 1600
Plano, Texas 75075
(972) 941-4444
jmateer@firstliberty.org

ERIC KNIFFIN, #48016
KNIFFIN LAW PLLC
102 South Tejon St.
Suite 1100
Colorado Springs, CO 80903
eric@kniffin.law
(719) 212-3291

Counsel for Amicus Curiae

(Motion for admission pro hac vice pending)

CERTIFICATE OF SERVICE

I certify that on April 27, 2023, I served a true and correct copy of the foregoing upon all counsel of record, via the Colorado Courts E-Filing system.

/s/ Eric Kniffin
Eric Kniffin