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Certiorari to Court of Appeals
Case No. 21CA1142
Opinion by Judge Schutz, Dunn and Grove,
JJ., concur

Petitioners

Masterpiece Cakeshop, Inc. and Jack Phillips

v.

Respondents

Autumn Scardina

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Supreme Court Case
Number: 2023SC116

**AMICI BRIEF OF CERTAIN COLORADO STATE LEGISLATORS
OF THE 74th GENERAL ASSEMBLY IN SUPPORT
OF PETITIONERS**

Certificate of Compliance

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d)

It contains 2931 words.

The amicus brief complies with the content and form requirements set for in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Barry K. Arrington

Barry K. Arrington

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**STATEMENT OF IDENTITY AND
INTERESTS OF *AMICI CURIAE***

Pursuant to CAR 29 *Amici Curiae*, Colorado State Legislators of the 74th General Assembly submit this brief.

Sen. Mark Baisley represents the citizens of Colorado living in Senate District 4, including all or portions of Chaffee, Custer, Douglas, Fremont, Jefferson, Lake, Park, and Teller Counties.

Rep. Brandi Bradley represents the citizens of Colorado living in House District 39, including portions of Douglas County.

Rep. Scott Bottoms represents the citizens of Colorado living in House District 15, including portions of El Paso County.

Rep. Ken DeGraaf represents the citizens of Colorado living in House District 22, including portions of El Paso County.

Rep. Stephanie Luck represents the citizens of Colorado living in House District 60, including all or portions of Chaffee, Custer, Fremont, Pueblo, and Teller Counties.

Sen. Kevin Van Winkle represents the citizens of Colorado living in Senate District 30, including portions of Douglas County.

Unlike the State officials who compelled and censured the Petitioner's speech in the case at bar, *amici* Colorado Legislators are

politically accountable to the people of Colorado. Sworn to uphold the Constitution, they hold a special commitment to constitutional governance under the Rule of Law. This understanding includes a deep respect for the constitutional limits on the exercise of government power, including the First Amendment. *Amici Curiae* are profoundly concerned by the willingness of State authorities to, by force of law and punishment: 1) censure viewpoints and ideas inconsistent with preferred political preferences; and 2) compel viewpoints and ideas consistent with preferred political preferences. *Amici Curiae* file this brief, therefore, to encourage this Honorable Court to guide legislative, executive, and judicial authorities toward a sound constitutional basis for understanding how the First Amendment properly limits the exercise of government power.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS FREEDOM OF EXPRESSION OF ONE'S PERSONAL CONSCIENCE AND RELIGIOUS IDENTITY

The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and express conflicting political and religious viewpoints. Under this aegis, the government must not interfere with its citizens living out and

expressing their freedoms but embrace the security and liberty only a pluralistic society affords.

Ubiquitous special preferences for sexual orientation and gender identity (hereinafter SOGI), imposed by states in the name of protecting freedom, too often threaten fundamental First Amendment liberties. These government actions necessarily require religious people to relinquish their right to artistic expression inhering in their personal religious identity.

Government SOGI preferences, enforced via censored and compelled speech regulation, too often unconstitutionally collide with the expression protected by the First Amendment. State enforcement of speech directives advancing such preferences frequently weaponize State action to eliminate the First Amendment as an important constitutional constraint on the exercise of State authority. Indeed, religious people in our nation face a far more onerous predicament than the drafters and ratifiers of the Constitution and Bill of Rights could ever have imagined.

The beacon of liberty fails to shine when freedom dies on the pulpit of the civil authority's demands to supplant its will and opinion of

morality for that of its citizens. The promise of liberty amounts to nothing more than empty subterfuge when the State punishes its citizens for expressing their thoughts and views inhering in their personal identity. Persecution of religious identity via compelled speech imposed by the State upon Petitioner, must not stand in the United States. The First Amendment, promulgated to protect free expression and religious tolerance, requires reversal of the Court of Appeals overreaching judgment.

Colorado Officials Failed to Understand how Liberty Interests Recognized by the U.S. Supreme Court in *Obergefell*, Reinforce Rights Expressly Protected by the First Amendment

The First Amendment to the United States Constitution protects a religious person's freedom of expression, especially artistic expression of thoughts, conscience, and viewpoints inhering in one's personal identity. U.S. Const. amend. I.

Unless this Court affirmatively acts to correct the Court of Appeals' disturbing diminishment of the First Amendment and its systemic misapplication by Colorado officials and legislators, Colorado's action compelling and censoring speech and religious conscience, as a practical matter, denudes any meaningful constitutional protection for liberty as a limit on the exercise of State power.

A religious person’s artistic expression of thoughts, conscience, and viewpoints, inherent in her personal religious identity, is entitled to at least as much constitutional protection as those who find their identity in their sexuality.

In *Obergefell v. Hodges*, the U.S. Supreme Court found in the Constitution a right of personal identity for all citizens. 576 U.S. 644 (2015).¹ The Justices in the majority held that: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.” *Id.* at 651-52; see also *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018). *Obergefell* affirmed, therefore, not just freedom to define one’s belief system, but freedom to express one’s conscience associated with it.

Because *Obergefell* defined a fundamental liberty right as including “most of the rights enumerated in the Bill of Rights,” and “liberties [that] extend to certain personal choices central to individual dignity

¹ While *amici* question the cogency of the substantive due process jurisprudence that birthed the court-created liberty articulated in *Obergefell*, they expect government to follow the now-established constitutional Rule of Law, including when it protects the personal identity and viewpoints of religious people.

and autonomy, including intimate choices that define personal identity and beliefs,” this understanding of personal identity must broadly comprehend factual contexts well beyond the same-sex marriage facts of that case. 576 U.S. at 645. Understanding then that the Court meant for the rules established in *Obergefell* to protect all individuals equally without preference, the right of personal identity applies not just to those who find their identity in their sexuality and sexual preferences – but also to citizens who define their personal identity through their religious conscience communicated in their artistic thoughts and expression.

Recently the U.S. Supreme Court in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), held that “denying a generally available benefit solely on account of *religious identity* imposes a penalty on [First Amendment liberty].” *Id.* at 2019 (emphasis added). The concept of “religious identity” was recognized twice in the majority opinion of the Court and in the concurrences of Justice Gorsuch, Justice Thomas, and Justice Breyer. *Id.* at 2019, 2024, n. 3, 2025, 2026. And *Obergefell* specifically recognized that adherence to divine precepts and

religious principles (i.e., religious identity) is “central” to the “lives and faiths” of religious individuals. *Obergefell*, 576 U.S. at 680.

Many Christian people, like Petitioner, find their identity in Jesus Christ and the ageless, sacred tenets of His Word in the Holy Bible. For followers of Jesus, adhering to His commands is the most personal choice central to their individual dignity and autonomy. A Christian person’s artistic expression of thoughts, conscience, and viewpoints inhering in such personal religious identity, is entitled to at least as much constitutional protection as those who find their identity in their sexuality.

There can be no doubt that *Obergefell’s* personal identity jurisprudence informs against government authorities who use public policy to discriminate against religious people by compelling and censoring expression. Indeed, government must not use its power in ways hostile to religion or religious viewpoints under this new “autonomy” paradigm. *Masterpiece Cakeshop*, 138 S. Ct. at 1731. Certainly, government ought to protect and not impede the free expression of conscience. *Cf. Trinity Lutheran*, 137 S. Ct. at 2022 (holding the government violates the Free Exercise Clause if it conditions a generally available public benefit on

an entity giving up its religious character); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014) (holding the RFRA applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (barring an employment discrimination suit brought against a religious school). State actions must uphold constitutionally protected freedoms, not grant special protections for some, while coercing others to engage in expression adverse to their personal identity and conscience.

Contrary to *Obergefell's* holding, the Court of Appeals' holding eviscerated the constitutional right to free speech and identity and allowed the State to claim a government interest in subjectively selective infringement on artistic expression and conscience. If government can compel citizens in their speech to dishonor God or else lose their livelihoods, we are far down the road to tyranny, a tyranny not so dissimilar from that which caused so many to flee so far to our shores all those years ago. This Court should reverse the Court of Appeals' diminishment of the liberty protected by the Free Speech Clause, especially

considering *Obergefell's* recognition of constitutional protection afforded to personal identity in this area.

Indeed, under the U.S. Supreme Court's holdings, expressing "religious and philosophical objections" to SOGI issues are constitutionally protected. *Masterpiece Cakeshop*, 138 S. Ct. at 1727, (holding that "[t]he 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" (citing *Obergefell* 135 S.Ct. at 2607)).

For Petitioner and other religious people in the current cultural environment, though, that right regularly manifests as a mirage. In practice, State and local government authorities often elevate SOGI identities above all others, especially religious identities, and in so doing, forget the long and tragic history that the First Amendment aimed to correct. Special preferences embodied in government SOGI classifications, like those in the case at bar, exalt certain ideas and viewpoints over others and signal official disapproval of certain expressions, especially those grounded in a religious identity that authorities currently

deem offensive or unpopular. By this exercise of power, Colorado does not end prejudice, it instead endorses a form of it. “Just as no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive.” *Masterpiece Cakeshop* 138 S. Ct. at 1731 (internal quotations and citations omitted).

A State’s obligation to respect the Constitution’s free expression guarantees requires it to act in a manner that tolerates, without passing judgment upon, or presupposing the illegitimacy of, religious ideas and viewpoints. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1731 (citing *Church of Lukumi Babalu Aye*, 508 U.S. 520, 534, 547 (1993) (internal quotes omitted)).

While the Court of Appeals analysis wrongly deemed a government interest justified the State’s conscience quashing action, it intentionally ignored how Colorado’s imposition of SOGI preferences unavoidably introduces hostility and inequity toward the viewpoints and identity of many religious people. Indeed, special SOGI preferences, like

those present here, require religious people to surrender their right to freely express their viewpoints, conscience, and personal identity.

For “freedom of speech” to have meaning, it must include the right to express one’s ideas, viewpoints, and identity without fear of government punishment or coercion, irrespective of the popularity of that speech. Likewise, for the “free exercise” of religion to have meaning, it must include the right to hold and manifest beliefs without fear of government punishment or coercion.

Unique and diverse individuals will disagree in a free society on important issues. Some may even find the divergent ideas, viewpoints, or identities of their fellow citizens deeply offensive. For society to remain free, though, it is imperative that they not also be compelled by the State to express them.

The government imposed compelled speech advancing SOGI preferences in the case at bar substantially interferes with Petitioner’s freedom of expression. Colorado ought not require people of conscience to disavow who they are to engage in artistic or other forms of expression. Imposing such conditions inevitably chills, deters, and discourages the exercise of First Amendment rights. Here Colorado officials expressly

required Petitioner to renounce his religious character and identity to artistically express himself in an otherwise accessible marketplace.

These officials do so even though artistic expression of viewpoints and conscience inhering in one's personal identity is not invidious discrimination. *Amici* legislators condemn invidious discrimination and hold no animus toward anyone. Rather they seek respectful consideration of all ideas and viewpoints and reject the notion that honest disagreement based on religious conscience equates with bigotry. Colorado authorities, however, have advanced a different view. Both in practice and in principle, they improperly seek to elevate, through the power of the State, SOGI preferences above other identities.

Amici legislators ask this Court to reinstate a proper constitutional understanding of the First Amendment such that all identities are honored equally with rules not subject to State preferences or politics. Each of the *amici* legislators represents a different district within Colorado, which includes diverse populations of varied and often conflicting identities. The duty of the *amici* legislators includes an obligation to protect all of those they serve, not to favor some of them. They understand it is their responsibility not to interfere with the sincere

expressions of their constituents' identities so as to foster the healthy exchanges innate in a free society, to create a space for a fair debate without State imposed prejudice.

As *Masterpiece Cakeshop* recognized, when First Amendment freedoms are at stake “these disputes must be resolved with tolerance [...]” 138 S. Ct. at 1732. In fulfillment of this aim, *amici* legislators ask the Court to recognize the conflicting identities of their varying constituencies and treat them all fairly using the same standard, free from any unconstitutional interference via the State’s political preferences. Offense to an expression, by the State or by anyone, is not the line where freedom should end. It is often the necessary intersection where opposing views freely meet.

Obergefell’s personal identity jurisprudence informs and reinforces the First Amendment’s free speech protections, as well as protections for religious liberty. Government action not only must avoid censoring and compelling a citizen’s speech to facilitate policies contrary to their conscience protected by the First Amendment, it must especially do so when the expression inheres in their personal identity. In this light, the Appellate Court erred by finding that a sufficient government interest

justified the State's substantial interference with liberty protected by the First Amendment. Such an error must not stand.

For artists, who view the world through their personal religious identity, God and His Word are real, and therefore really matter. It is part of who they are. *Amici* legislators, who have a duty to protect their constituents, are concerned about the increased censorship imposed by Colorado authorities upon viewpoints that contradict current political preferences. Under our Constitution, Christian people should not have to choose between fidelity to their religious identity or participation in the marketplace. Yet, here, Colorado prohibits expression inherent to Petitioner's religious identity, while compelling speech wholly incompatible with it. By making faith-informed artistic expression illegal via compelled speech, Colorado deprives people of faith of their dignity.

Prohibiting an idea or viewpoint, informed by ageless sacred tenets, because it is not presently politically preferred, prevents thousands of years of wisdom from informing the public ethic. The perilous global challenges we face today ought to begin with preserving freedom of expression, thought, conscience, and religion. The idea that God created humans in His image, and that all human life has dignity – that we are

endowed by our Creator with certain rights – ended slavery, advanced the rights of women, and provided the foundation for the civil rights movement that laws like the one here now misuse. Preserving unalienable First Amendment freedoms promotes good governance, peace, stability, prosperity, and charity. Os Guinness, *The Global Public Square* (2013). Moreover, this fundamental liberty provides the foundation for understanding the inherent value of every human being, thereby promoting the inviolable dignity and worth of all human life.

Conversely, when government suppresses expression of religious identity and the free expression of religious ideas, it often results in tragic consequences. From the Inquisition to the current Russian regime, authoritarian restrictions on this fundamental liberty have led to tyranny and the abuse of basic human rights. We are, therefore, in the midst of a high-stakes battle over the character of the American nation. The extent to which unbridled State power governing speech and religious conscience prevails over the plain meaning of the First Amendment will determine: 1) whether unalienable liberty for free speech and religious conscience will continue to be relevant as an objective limit on

government action; or 2) whether the State replaces the Framers' intent with its own personal social policy views.

Amici legislators are keenly aware of the stakes. Despite the holding in *Masterpiece Cakeshop*, Colorado officials continue to demonstrate, distinguish, and rationalize a misunderstanding of First Amendment principles as they expand the scope of civil rights law without restraining the unconstitutional application of it. The case at bar is yet another example of this confusion, but it presents an important opportunity to finally and more fully correct the course for Colorado, as well as all States, between discrimination and liberty. First Amendment principles must protect all identities and viewpoints, not just State preferred ones.

CONCLUSION

For the reasons provided in this brief, *Amici Curiae* urge this Court to grant the petition and restore the right of all persons to exercise fundamental freedoms under the First Amendment by reversing the decision of the lower court.

Respectfully submitted,
/s/ **Barry K. Arrington**

Barry K. Arrington

CERTIFICATE OF SERVICE

The undersigned certifies that on April 21, 2023, he served a true and correct copy of the foregoing via the Court's electronic filing system on counsel of record.

/s/ Barry K. Arrington

Barry K. Arrington