Nos. 22-5884 / 22-5912

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHELSEY NELSON PHOTOGRAPHY, ET AL.,
Plaintiffs-Appellees and Cross-Appellants,

v.

LOUISVILLE-JEFFERSON COUNTY, KY METRO GOV'T, ET AL.,
Defendants-Appellants and Cross-Appellees.

On Appeal from the United States District Court for the
Western District of Kentucky
No. 3:19-cv-851-BJB

BRIEF OF *AMICUS CURIAE* AARON AND MELISSA KLEIN IN SUPPORT OF PLAINTIFFS-APPELLEES

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March 1, 2023

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INTEREST OF AMICUS CURIAE[1]

In 2007, Aaron and Melissa Klein opened a bakery in Gresham, Oregon, called "Sweet Cakes by Melissa." Like the plaintiffs-appellees 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 marriage, 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"

[1] Counsel for amicus 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 amicus curiae made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for Appellees consented in writing to the filing of this brief. Counsel for Appellants did not consent. A Motion for Leave to File Brief of *Amicus Curiae* Aaron and Melissa Klein in Support of Plaintiffs-Appellees was filed concurrently with this brief.

but upheld the remainder of the state agency's decision. *Klein v. Or. Bureau of Lab. & Indus.*, 410 P.3d 1051, 1086–87 (Or. Ct. App. 2017). In 2019, the 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 therefore 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.

This Court's decision in *Chelsey Nelson Photography* will establish precedent as to whether governments can force artists like Chelsey Nelson 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.

SUMMARY OF ARGUMENT

The district court correctly concluded that Chelsey Nelson's wedding photography and blogging is pure speech protected by the First Amendment. *Chelsey Nelson Photography, LLC v. Louisville/Jefferson County Metro Gov't*, No. 3:19-cv-851-BJB, 2022 WL 3972873, *11 (W.D. Ky. Aug. 30, 2022). As the court found, Ms. Nelson's expression through her photography and blogging is pure speech because "it is intended to and likely to in fact convey a message." *Id*. Ms. Nelson "uses photographs of weddings to convey her view of the world, as shaped by her values and faith." *Id.* She intends "to celebrate what she believes to be God's design for marriage, with the hopes of convincing others that it is worthy of pursuit." *Id.* Weddings are also inherently expressive events, so Ms. Nelson's wedding photography and blogs clearly convey a message of support for the marriage being formed. Ms. Nelson's art is protected regardless of whether it is commissioned. As the court noted, free speech protections extend to both for-profit and not-for-profit art. *Id.* at *12. And this Court has clearly established that "[s]peech is protected even though it is carried in a form that is sold for profit." *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003).

The Fairness Ordinance at issue here (the "Ordinance") unconstitutionally restricts Ms. Nelson's protected speech, as the district court found. The First Amendment prohibits governments from requiring speakers to express views antithetical to their beliefs, but the Ordinance threatens to punish Ms. Nelson unless she does just that. *Nat'l Inst. of Family & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring). Appellants cannot compel Ms. Nelson to express views that are contrary to her beliefs because they do not agree with her religious viewpoint. When governments either restrict or compel speech in order to prevent certain religious ideas or opinions, they are engaging in unconstitutional viewpoint discrimination.

Finally, coercing speech from small business owners will not lead to the utopian marketplace Appellants envision. Instead, it will force creative artists to close their business doors, destroying their livelihoods and creating inferior markets for all. Such an outcome will harm many and benefit none. Oregon bakers Aaron and Melissa Klein experienced the cost of government-coerced speech firsthand. The state of Oregon imposed a financially devastating $135,000 fine—plus a gag order—on the Kleins for declining to create a custom wedding cake for a same-sex wedding. As a result, the Kleins were forced to shut down their family-owned business, have undergone almost a decade of litigation defending their religious decision, and have suffered personal attacks, property vandalism, and death threats

against themselves and their five children. No one should be subjected to such consequences for simply wishing to stay silent.

This brief addresses the unacceptably high human cost that results when the government arrogates to itself the power to compel artists to speak government approved messages. To prevent such a cost from being levied against creative professionals, it is imperative that this Court affirm the district court's decision that Ms. Nelson's wedding photography and blogging is pure speech protected by the First Amendment, and the Ordinance unconstitutionally restricts Ms. Nelson's protected speech. Any contrary decision will chill free speech, cause markets to falter, and force artists to choose between violating their conscience or losing their business.

ARGUMENT

I. The District Court Correctly Held Photography Is Art and Art Is Speech Protected by the First Amendment.

The First Amendment protects the expressive speech, including through photography, of all Americans. As courts have recognized, 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]hotographs" 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.); *Coleman v. City of Mesa*, 284 P.3d 863, 869–70, 872 (Ariz. 2012) (Visual arts are pure speech because they "predominantly serve to express thoughts, emotions, or ideas."). The protections underlying the Free Speech Clause stem from "a profound commitment to protecting communication of ideas" including those in "pictures, films, paintings, drawings, and engravings . . . ." *Kaplan v. California*, 413 U.S. 115, 119 (1973). This Court has made clear that photography is protected by the First Amendment. *ETW Corp.*, 332 F.3d at 924 ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including . . . photographs . . . .").

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 Feb. 21, 2023) (noting artists "manifest" their "inner state" to create art). This self-expression results in an intimate connection between the artist, the art she creates, and the message her art expresses. The personal identification each artist feels with her creation makes art a form of deeply personal, artistic self-expression worthy of First Amendment protection. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. Of Bos.*, 515 U.S. 557, 576 (1995) (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, Ms. Nelson "uses photographs of weddings to convey her view of the world, as shaped by her values and faith." *Chelsey Nelson Photography,* 2022 WL 3972873 at *11. She puts much time and energy into making her photography original and expressive. For example, Ms. Nelson uses her artistic judgment to make technical decisions such as exposure, perspective, composition, background, and subject poses. *Id.* She also choreographs and poses the bride and groom and their family and guests, edits the photos to emphasize certain lighting, and curates blogs for each couple. *Id.* Ms. Nelson takes these photographs in a manner that "depicts marriage in a 'positive and uplifting way' to celebrate what she

believes to be God's design for marriage, with the hopes of convincing others that it is worthy of pursuit." *Id.* Her photography "convey[s] distinct messages" that "are hardly interchangeable." *Id.* Therefore, this Court should affirm that Ms. Nelson's photography is pure speech protected by the First Amendment.

A. Custom Wedding-Related Art Always Conveys an Expressive, Protected Message About the Wedding Because Weddings Are Expressive Events.

Custom, wedding-related art is doubly protected speech. The First Amendment protects original art as pure speech, and it also protects speakers from being compelled to promote, support, or otherwise contribute to a wedding because weddings are themselves expressive events. The First Amendment forbids compelled contributions to an expressive event. *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 "simply to support speech by others, not to utter the speech itself" violates the First Amendment).

A wedding is an intrinsically expressive event that "offer[s] symbolic recognition" of a couple's union, where "a couple vows to support each other," while "society pledge[s] to support the couple." *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015). Every component of a wedding—from the venue to the officiant, to the music, to the garments, to the cake—contributes to the wedding's overall message. 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*, 515 U.S. at 581. In the same way, the government cannot compel a wedding party to accept a particular artist's work or compel the artist to participate in the wedding.

Like the district court here, many courts have found that artists engage in speech when they contribute their art to a wedding. *See Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 908 (Ariz. 2019) (the plaintiffs' "custom wedding invitations" are "protected by the First Amendment" as "pure speech"); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750–51 (8th Cir. 2019) (wedding videography serves as a "medium for the communication of ideas about marriage" and is thus "a form of speech that is entitled to First Amendment protection") (internal quotation marks omitted).

An artist's work is her own protected, expressive speech, particularly when her art is created to support the expressive event of a wedding. The Free Speech Clause protects the right of such artists to only support expressive events with which they agree. This Court should affirm that Ms. Nelson's wedding related photography and blogging is "pure speech" protected by the First Amendment because it conveys a message of support for the marriage being formed. The government may not compel artists to support any expressive event in violation of their beliefs or convictions.

B. Original, Expressive Art Is Pure Speech Regardless of Whether the Art Is Commissioned or Non-Commissioned.

The First Amendment fully protects both commissioned and non-commissioned art. This is true even when art is conceptualized in collaboration with a customer or created with a profit motive. *Hurley*, 515 U.S. at 569; *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 801 (1988). As the district court recognized, when a client commissions art from an artist, both client and artists are engaged in expressive activity. *Chelsey Nelson Photography*, 2022 WL 3972873 at *11 ("The Pulitzer, after all, goes to the photographer, not her subjects.").

The First Amendment also protects art created for a commercial purpose. A speaker is "no less a speaker because he or she is paid to speak." *Riley*, 487 U.S. at 801. Art—such as the photographs and blogs created by Ms. Nelson and the custom cakes created by the Kleins—does not receive a diminished degree of First Amendment protection "merely because" it is "sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988). If it were not so, vast swaths of expressive art would be excluded from the protection of the First Amendment, from Leonardo da Vinci's Last Supper painting commissioned by the Duke of Milan[2] to the Human Rights Campaign's blue and yellow "equal" logo

[2]Alicja Zelazko, Last Supper, ENCYCLOPEDIA BRITANNICA ONLINE, https://bit.ly/3zaHk8O (last accessed Feb. 21, 2023). The First Amendment's protection of free speech assuredly protects religious speech. *Capital Square Review*

commissioned from artist Robert Stone.[3] Artists must engage in self-expression to create both commissioned and non-commissioned original artwork. This Court has established that "[s]peech is protected even though it is carried in a form that is sold for profit" and "[t]he fact that expressive materials are sold do not diminish the degree of protection to which they are entitled under the First Amendment." *ETW Corp.*, 332 F.3d at 924–25. This Court should affirm the district court, clarifying that the First Amendment fully protects both commissioned and non-commissioned art.

C. Restricting Religious Viewpoints is Discrimination.

The district court correctly found that the Ordinance unconstitutionally suppresses Nelson's protected expression.

The Supreme Court has clearly prohibited governments from discriminating "against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). Importantly, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This viewpoint discrimination occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a

and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("[A] free-speech clause without religion would be Hamlet without the prince.").

[3] HUMAN RIGHTS CAMPAIGN, Our Logo, https://www.hrc.org/about/logo (last accessed Feb. 21, 2023).

subject." *Id.* It is "presumptively unconstitutional" under the First Amendment. *NIFLA*, 138 S. Ct. at 2371. Even "a law disfavoring 'ideas that offend' discriminates based on viewpoint, in violation of the First Amendment." *Iancu*, 139 S. Ct. at 2301 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017)).

This discrimination is especially problematic when governments compel a speaker to express views antithetical to their beliefs. *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) ("Governments must not be allowed to force persons to express a message contrary to their deepest convictions."). But that is exactly what Appellants would have Ms. Nelson do. Here, because Ms. Nelson photographs and blogs opposite-sex weddings consistent with her faith, the Ordinance threatens to punish Ms. Nelson unless she agrees to also photograph and blog about same-sex weddings. *Chelsey Nelson Photography*, 2022 WL 3972873 at *15. Her photography conveys her views of the world, shaped by her faith and biblical beliefs. Because Appellants disagree with her viewpoint, the Ordinance requires Ms. Nelson to also propound contrary views that violate her religious conscience. Appellants cannot discriminate against Ms. Nelson's speech because of the views it expresses, and demanding participation in another's speech is repugnant to freedom of speech principles. *See McGlone v. Metro. Gov't of Nashville*, 749 Fed. Appx. 402, 406–07 (6th Cir. 2018). Therefore, this Court should affirm that Ms. Nelson's photography

is pure speech protected by the First Amendment and the Ordinance unconstitutionally restricts Ms. Nelson's protected speech.

II. 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 Appellants envision. 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 Devastated Aaron and Melissa Kleins' Lives and Destroyed Their Business.

The Kleins' story illustrates the consequences of government compelled speech on small, family-owned businesses. In 2007, Aaron and Melissa Klein opened a bakery in Gresham, Oregon, called "Sweet Cakes by Melissa," specializing in custom-designed, artistically crafted cakes. Pet'r's Br., ER.373, *Klein v. Or. Bureau of Lab. & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017) (Case No. A159899).[4] Aaron and Melissa operated Sweet Cakes as an expression of their Christian faith, in accord with their religious convictions. *Id.* at ER.365–66, 373–74. The Kleins chose to

[4] ER refers to the Excerpts of the Record filed in Pet'r's Brief, *Klein v. Or. Bureau of Lab. & Indust.*, 410 P.3d 1051 (Or. Ct. App. 2017) (Case No. A159899).

create wedding cakes, in part, to celebrate marriages, which their faith taught them to view as the blessed and sacred union of one man and one woman. *Id.* at ER.365–67, 373–76. Aaron and Melissa joyfully served all customers who came to their bakery, including those of all protected classes. *Id.* at ER.368, 376; ER.275. The Kleins' long-standing commitment to serving all customers was an expression of their faith—namely, the belief that all people are made in the image of God, deserving of dignity and respect. *Id.* at ER.365, 373.

Like Ms. Nelson, the Kleins would only create original art consistent with their faith. *Id.* at ER.368, 376.[5] Aaron and Melissa were asked to design and create a custom wedding cake to celebrate a same-sex wedding, but their religious beliefs would not allow them to do so. *Id.* at ER.369. They believed that contributing to the wedding would express their support for the marriage, a statement contrary to their religious beliefs that marriage is the sacred union of one man and one woman. *Id.* at ER.365–67, 373–76.

When Aaron and Melissa declined to contribute their art to the wedding, an Oregon administrative agency found that the Kleins violated Oregon's public accommodation law, OR. REV. STAT. § 659A.403. *In the Matter of Melissa Elaine Klein, dba Sweetcakes by Melissa*, Nos. 44-14 & 45-14 at 22 (Or. Bureau of Lab. &

[5] The Kleins declined to craft any cakes that would force them to express messages inconsistent with their faith, such as cakes celebrating divorce, cakes with profanity, or cakes advocating harm to others. *Id.* at ER.368, 376.

Indus., July 2, 2015) (order). For declining to support a single same-sex wedding, Oregon imposed a financially devastating penalty of $135,000 against the Kleins.[6] *Id.* at 42. Oregon also punished Aaron and Melissa for discussing their religious faith in media interviews by imposing a "gag order" on them, ordering them not to publicly discuss their views regarding marriage in the future. *Id.* at 42–43.

The penalty—along with an internet-orchestrated boycott campaign against the bakery—forced Aaron and Melissa to close their Gresham, Oregon bakery, which they had worked for years to build. Pet'r's Br., ER.370, *Klein v. Or. Bureau of Lab. & Indus.* (Or. Ct. App. 2017). "Having to shut down the shop was devastating," Melissa said.[7] "Watching something our family had worked so hard [to build] just disappear in such a short time—it crushed me. I felt like I'd lost a part of myself."[8] The closure was especially painful for the Kleins because it represented not only the loss of their "second home" but their legacy because the Kleins had planned to pass the bakery down to their children.[9] Years after the Kleins closed the

[6] This $135,000 financial exaction was styled as monetary damages for declining to bake a wedding cake and the "mental" and "emotional distress" that the declination allegedly had upon the same-sex couple in question. *In the Matter of Melissa Elaine Klein, dba Sweetcakes by Melissa*, Nos. 44-14 & 45-14 at 33–34 (Or. Bureau of Lab. & Indus., July 2, 2015).

[7] FIRST LIBERTY INSTITUTE, In Sweet Cakes by Melissa Case, The Search for Sweet Justice Continues, (Feb. 4, 2022), https://bit.ly/3yO7ka0.

[8] *Id.*

[9] Kelsey Bolar, Bakers Accused of Hate Get Emotional Day in Court, DAILY SIGNAL (Mar. 2, 2017), https://dailysign.al/3LtWE2V.

bakery doors, Melissa said she still misses the bakery "every day."[10] The trauma of the Kleins' years-long litigation battle was worsened by hostile media outlets hounding them for interviews and anonymous attackers vandalizing their property, breaking into their home, and making expletive-laced death threats against the Kleins and their five children.[11] Rivaling the loss of the Kleins' business was the loss of their due process rights. The state commissioner who made the final ruling on the Kleins' case, issuing the improper gag order and unconstitutional damage award, made statements online and in media interviews clearly indicating he had prejudged the Kleins as guilty before their case came before him.[12] The commissioner also engaged in religious discrimination by stating that the Kleins used religion as "an excuse" for their actions and penalizing the Kleins for using religious speech in an interaction entirely separate from the declination of service.[13] The bias and discrimination of the commissioner resulted in an egregious violation of the Kleins' rights under *Masterpiece Cakeshop*, 138 S. Ct. 1719. *See Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1114, 1124–27 (Or. Ct. App. 2022)

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[10] *Id.*

[11] 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.

[12] Pet'r's Supp, Reply Br. 4–6, ASER.11, *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108 (Or. Ct. App. 2022) (Case No. A159899).

[13] *Id.* at 6–8, ASER.2, 8–11, ASER.9, 35.

(holding BOLI's handling of the damages portion of the case violated the Kleins' constitutional rights under the Free Exercise clause).

The incident giving rise to the case took place almost a decade ago, yet the litigation is still ongoing.[14] The Kleins challenged the constitutionality of the Oregon government's draconian actions against them in Oregon state court in April 2016. Pet'r's' Opening Br. 2–3, *Klein*, 410 P.3d 1051. Over the years, appellate courts have incrementally issued rulings in favor of Aaron and Melissa. In 2017, the Oregon Court of Appeals struck the "gag order" but upheld the remainder of the state agency's decision. *Id.* at 1086–87. In 2019, the Supreme Court granted a writ of certiorari in the Kleins' case, then remanded it for reconsideration in light of *Masterpiece Cakeshop*, 138 S. Ct. 1719. *Klein v. Or. Bureau of Lab. & Indus.*, 139 S. Ct. 2713 (Mem) (2019). On remand, 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 under *Masterpiece Cakeshop*, 138 S. Ct. 1719, and therefore violated the Kleins' Free Exercise rights. *Klein v. Or. Bureau of Lab. & Indus.*, 506 P.3d 1108, 1114, 1124–27 (Or. Ct. App. 2022) ("[W]hen viewed in the light of Masterpiece Cakeshop, BOLI's handling of the damages portion of the case does not reflect the neutrality toward religion required by the Free Exercise Clause."). The court also struck the damages award issued by the state agency but upheld the

[14] The incident in question occurred on January 17, 2013. *Klein*, 410 P.3d at 1057.

remainder of the state agency's liability finding against the Kleins. *Id.* at 1128. The court remanded the case to the same non-neutral state agency to reassess damages, which it did at $30,000. *Id.*; *Klein*, 506 P.3d 1108, *petition for cert. filed*, No. 22-204. 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). The Kleins appealed this decision to the U.S. Supreme Court in September 2022. Aaron and Melissa's story is a tragic example of the extraordinary damage caused by government coercion. As the Kleins' case illustrates, public accommodation laws, like the one at issue here, do not lead to utopian markets and harmonious communities but to the destruction of lives, businesses, and communities. Such outcomes harm many and benefit no one.

B. 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 specializing in wedding-related art—have experienced trauma, public disgrace, loss of access to markets, and years of litigation for refusing to speak the government's preferred message. One noteworthy victim of government coercion is Colorado cake artist Jack Phillips.[15] Phillips has undergone years of stressful and expensive

[15] *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719 (2018).

litigation over his desire to only create art that aligns with his beliefs.[16] Another victim 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.[17] Additionally, the owners of Elane Photography were not only fined for refusing to speak the government's message but lost their business.[18]

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.[19] 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.[20]And a pro-life photographer was forced to engage in litigation over her right to decline to take promotional photos for Planned

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[16] *E.g.*, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015); *Scardina v. Masterpiece Cakeshop Inc.*, No. 19CV32214 (Colo. Dist. Ct. June 15, 2021).

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

[18] *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.

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

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

Parenthood.[21] By affirming the district court, 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.

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

Appellants would have this Court rubberstamp the government's compelling artists of all beliefs and backgrounds 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, a fiercely atheist videographer can be compelled 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). A feminist t-shirt printer can be forced to design shirts for a fraternity initiation because there is a close relationship between fraternity initiations and the male sex. A Democrat speechwriter can be required to write a speech for a Republican candidate,[22] and an unwilling Muslim movie director can be coerced to make a film with a "Zionist message." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1199 (10th Cir. 2021) (Tymkovich, C.J., dissenting).

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[21] 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).

[22] 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).

A world where local 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. This Court should affirm the district court to avoid paving the way to such a future.

D. Enforcing the First Amendment Will Ensure That Both Free Speech and Free Markets Can Flourish.

Appellants claim their interest in ensuring "equal access to publicly available goods and services" justifies their compulsion of artistic speech from small business owners. *Chelsey Nelson Photography*, 2022 WL 3972873 at *18. However, 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, Appellants must adopt reasonable accommodations to its public accommodation laws to protect 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."). Equitable accommodations

will allow state and local governments to facilitate access to markets without requiring artists to betray their faith. Such 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. This Court should affirm that governments may not compel artistic speech in violation of the artists' convictions. By upholding broad First Amendment protections for artistic speech, this 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 judgment of the district court should be affirmed.

Dated: March 1, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 5,253 words.
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Dated: March 1, 2023

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