**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

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| CHELSY NELSON PHOTOGRAPHY, LLC and CHELSEY NELSON | PLAINTIFFS |
| v. | CIVIL ACTION NO. 3:19-CV-851-JRW |
| LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, *et al.* | DEFENDANTS |

# BRIEF FOR CENTER FOR RELIGIOUS EXPRESSION AND FOR THE FAMILY FOUNDATION AS *AMICI CURIAE* SUPPORTING PLAINTIFFS' COMPLAINT, SUPPORTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, AND OPPOSING DEFENDANTS' MOTION TO DISMISS

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## INTERESTS OF *AMICI CURIAE*

*Amicus Curiae* Center for Religious Expression ("CRE"), is a national non-profit legal organization based in Memphis, Tennessee. Its mission is to defend the Christian voice and conscience, representing legal interests of individuals and businesses in federal and state courts all over the country, including Kentucky.. *Amicus Curiae*, Family Trust Foundation of Kentucky, Inc. d/b/a The Family Foundation, is a nonprofit legal corporation duly organized under the laws of Kentucky and based in Lexington, Kentucky. Its mission is to promote the values that make the American family strong. This includes protecting fundamental civil liberties that underpin our society. The Family Foundation is very interested in the outcome of this matter due to its mission as well as its firm conviction that no one should ever be forced to write, publish, or otherwise create photographic images or other forms of messages that they cannot support in good conscience.

No party or their counsel participated in, or provided financial support for, the preparation and filing of this brief, nor has any entity other than *Amici* and its counsel participated in or provided financial support for the brief.

## CORPORATE DISCLOSURE

CRE and The Family Foundation are both 501c3 entities with the Internal Revenue Service and neither have another corporation with any ownership therein. Neither have any financial stake in the outcome of this litigation.

## INTRODUCTION

An integral aspect of the constitutional right to free speech in the First Amendment is that we all enjoy autonomy over the words we use and the messages we communicate. *Cf, Wooley v. Maynard*, 430 U.S. 705, 714 (1977). For this reason, photographer-blogger-storytellers, such as Chelsey Nelson (hereinafter "Ms. Nelson'), should never be required by the government to communicate messages that would violate their own conscience.

Louisville/Jefferson County Metro Government (hereinafter "Metro Government") violates this cardinal freedom by way of its Metro Ordinance § 92.05 (hereinafter "Fairness Ordinance") which demands that Ms. Nelson employ her creative expertise to capture, edit, write and publish messages she does not wish to communicate. The Metro Government marginalizes her deeply and closely held religious beliefs by mischaracterizing them as discrimination against persons based on their sexual orientation. *See* Defendant's Response In Opposition To Plaintiff's Motion For Preliminary Injunction (hereinafter "Response) at pp. 10-11. This would force Ms. Nelson to abandon her constitutional freedom to conduct business in today's marketplace causing immediate and irreparable harm. It would deprive her local community of a creative voice and a valued service. It would deny Ms. Nelson the opportunity to pursue her passion to apply her creative energy to a product that reflects her distinct perspectives, values and beliefs.

Antidiscrimination laws, no matter how noble their goal, cannot result in forcing a citizen to articulate and publish messages reflecting viewpoints that violate their own conscience. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Boston*, 515 U.S. 557, 573, 578 (1995) (invalidating application of antidiscrimination law to compel inclusion of pro-LGBT message in privately-run parade).

While this and other courts must initially gage whether an expressive activity intends to convey an idea and thus qualifies as speech meriting protection, *Cressman v. Thompson*, 719 F.3d 1139, 1149 (10th Cir. 2013), no such evaluation is needed here because Ms. Nelson includes words and images as an integral part of her chosen means of communication. Under any set of circumstances, words and images classify as pure speech. *Bigelow v. Virginia*, 421 U.S. 809, 817 (1975). All courts recognize that government entities may not compel citizens to speak against their own will. No one can be coerced by fiat to say what she does not wish to say.

Ms. Nelson and Chelsey Nelson Photography, LLC would be irreparably harmed if this matter is dismissed or if the preliminary injunction is not granted. The enforcement of the Fairness Ordinance would cause substantial lost revenue and likely put her and her company out of business due to the economic hardship caused.

## ARGUMENT

### I. Ms. Nelson Engages in Protected Speech Which May not be Compelled by the State

Creating a product that combines photography and blogging to convey stories carefully crafted to celebrate specific values amounts to expressive speech subject to the protections of the First Amendment. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (protected speech includes "written or spoken words" and "other mediums of expression" like "photographs."). A government violates the compelled speech protection of the First Amendment when it forces a speaker to communicate views that she would find objectionable or cause her to betray her convictions. *See Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463, 2464 (2018). The Metro Government violates this principle of compelled speech when it requires that Ms. Nelson create communications celebrating same-sex marriage contrary her sincerely held religious beliefs and personal values.

Selecting and writing particular words and messages is an obvious form of pure speech. *Bigelow*, 421 U.S. at 817. A government entity unconstitutionally targets pure speech and not conduct when "[t]he only 'conduct' which the State [seeks] to punish is the fact of communication [or refusal to do so]." *Cohen v. California*, 403 U.S. 15, 18 (1971). *See Bartnicki v. Vopper*, 532 U.S. 514, 526-27

& n. 11 (2001) (holding that law restricted "pure speech" where "what gave rise to statutory liability in this suit was the information communicated"). Metro Government crosses this line in threatening to punish Ms. Nelson for her refusal to convey certain messages.

Ms. Nelson is a creative professional willing to serve anyone regardless of race or sexual orientation or any other type of legal classification. She will work with those who identify themselves as LGBT photographers and she will provide editing services to business owners who identify a LGBT. *See,* Complaint at para. 203, 204, pp. 25. She does not inquire about potential clients' sexual orientation in the course of her business. *Id. at* para. 163, pp. 21. However, Ms. Nelson would decline to provide her services to create content that would promote activity that contradicts her religious beliefs. This includes messages that promote marriages other than a marriage between one man and one woman. *Id. at* para. 191, pp. 24.

Invoking the Fairness Ordinance, the Metro Government mischaracterizes Ms. Nelson's desire to avoid communicating a message that she disagrees with as "[discrimination] based on sexual orientation." Response at pp. 11. Metro Government demands that Ms. Nelson create photographs and write blog posts celebrating same-sex marriages just as she would in celebrating an opposite-sex marriage regardless of her convictions on the matter. They label her refusal to do so as "discriminatory." *Id. at* pp. 10.

Metro Government considers its compulsion acceptable because Ms. Nelson is engaged in business not subject to free speech protections. They compare this to the requirement to provide a university room that was upheld in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). Response at pp. 13-14. This analogy is amiss, for several reasons.

The characterization of Ms. Nelson's expressive creations as mere fungible services or "conduct," like supplying space, is inaccurate. Ms. Nelson's wedding celebration services are expressive in nature and convey a unique message through words and pictures. *See* Complaint at pp. 9-13. Ms. Nelson exercises significant editorial and oversight control in setting the aesthetic vision for projects, developing the story she tells, capturing and editing the images she uses, and choosing the words she employs. All this is in consideration of how she can best promote the wedding she is celebrating. *See id.* at pp.14-16, 19. No other photographer/blogger would bring the exact same artistic vision to the project. Thus, her service is not a fungible commodity. Pressganging such discretion to cause Ms. Nelson to convey a message she does not support is the very abuse the compelled speech doctrine is supposed to prevent. *Wooley*, 430 U.S. at 714.

For these reasons, *Rumsfeld* lends no support to Metro Government's position. The mandatory provision held constitutional in *Rumsfeld* did not compel the law schools to produce communications celebrating or approving the military, its

policies, its recruitment efforts, or its presence on campus. 547 U.S. at 62, 65.[1] *Rumsfeld* only required the provision of a room for interviews. *Id.* at 60, 66. In contrast, Metro Government's demands would require Ms. Nelson to create photos and words directly celebrating and approving ideas that conflict with her conscience. The burden imposed on Ms. Nelson "amounts to nothing less than a proposal to limit speech in the service of orthodox expression." *Hurley*, 515 U.S. at 579.

Unlike *Rumsfeld*, Metro Government regulates pure speech, not conduct. This is the distinction between requiring words and images versus requiring a room. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) ("[T]he processes of writing words…[and] painting a picture are purely expressive activities…"). The presence of an antidiscrimination law does not transform involuntary messages into conduct. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) (rejecting argument that public accommodation's production and editing of wedding videos was mere conduct under antidiscrimination law commenting, "[s]peech is not conduct just because the government says it is."); see also *Hurley*, 515 U.S. at 57273, 578 (application of

[1] The law schools' argument in Rumsfeld was that by providing access (through a room) to military recruiters they would be perceived as endorsing military policies. 547 U.S. at 64-65. The discrimination analog of such a "guilt-by-association" theory would be an unwillingness of Lorie to sell products or services to certain persons because the sale would send an implicit message endorsing the customer's lifestyle and status. However, Ms. Nelson provides all services to all persons regardless of status; she is only selective in the events and topics she chooses to promote through words. *See* Complaint at pp. 21-25.

antidiscrimination law unjustifiably compelled speech, despite law's purpose to prevent conduct of discriminating). Nor does expressive speech turn into conduct when they are sold for profit. *See Telescope Media Grp.*, 936 F.3d at 751 (speech did not become conduct merely because it was produced through for-profit enterprise); *Brush & Nib Studio*, 448 P.3d at 907-08 (for-profit sale of custom-designed wedding invitations did not render them mere "business activit[y]"); *see also Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (for-profit nature of motion pictures did not strip them of First Amendment protection).

Given the undeniably expressive nature of Ms. Nelson's wedding celebration services and boutique editing services, the unconstitutionality of compelling them is evident. Metro Government wrongly treats Ms. Nelson's communication as a public accommodation itself, contorting an antidiscrimination law to contravene the doctrine of compelled speech. *See Hurley*, 515 U.S. at 573 (application of law improperly treated parade – speech itself – as public accommodation). Ms. Nelson need not sell her conscience to sell her words. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (newspaper company has First Amendment right to refuse to publish political candidate's response to criticism published in the company's newspaper). Ms. Nelson's heart, mind, and speech are her own, not "a passive receptacle or conduit" for Metro Government or anyone else. *Tornillo*, 418 U.S. at 258.

## II. All Justices in the *Masterpiece Cakeshop* Decision Unanimously Recognized Words and Images Cannot be Compelled

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court considered a like matter by deciding whether Colorado could require a cake artist named Jack Phillips (Phillips) to create custom wedding cakes designed to celebrate same-sex marriages. 138 S.Ct. 1719, 1724 (2018). Much like Ms. Nelson, Phillips was happy to sell his pastry creations to anyone willing to buy them, regardless of status, but he did not want to custom design cakes promoting events and causes that contradicted his religious beliefs, a position that found him at odds with Colorado's application of CADA. *Id.* Phillips argued that custom design wedding cakes for same-sex unions promoted and celebrated a type of marriage that went against his faith. *Id.* And he consequently declined to design and prepare a cake for a same-sex wedding for a requesting couple, without entertaining any particular written inscription on it. *Id.*

The Colorado Civil Rights Commission punished Phillips for his decision, and the matter eventually came to the U.S. Supreme Court, where Phillips urged his rights to free speech and free exercise of religion. *Id.* at 1725-27. One issue before the Court was whether the act of baking a cake (as contrasted with writing words on the cake) qualified as speech for First Amendment purposes. *Id.* at 1723. Ultimately, the Supreme Court passed on the free speech question, ruling the

pervasive hostility shown by the Colorado Civil Rights Commission toward Phillips' religious beliefs in adjudicating his case violated his free exercise of religion. *Id.* at 1732. Yet, a review of each opinion in the *Masterpiece Cakeshop* decision reveals that every participating justice recognizes that antidiscrimination laws cannot be invoked to compel words.

The Majority opinion, written by Justice Kennedy and joined by Chief Justice Roberts and Justices Breyer, Alito, Kagan, and Gorsuch, noted that the free speech question was a difficult one in the context of Phillips' refusal because no inscription was envisioned for the cake. *Id.* at 1723-24. The Court contrasted Phillips' refusal with a refusal to "design a special cake with words or images celebrating the marriage," observing those "details might make a difference." *Id.* at 1723. The underlying assumption of the Majority was that a compulsion to inscribe words and images celebrating a particular marriage is clearly violative of free speech, whereas compelling the design of a cake without words or images posed a closer question. The Court cemented this thought in analyzing the William Jack cases where three bakers refused requests to bake cakes with specific words and images criticizing same-sex marriage that each baker found offensive. *Id.* at 1730. Analogizing those cases to Phillips' case, the Court found the Commission's inconsistent treatment signaled religious discrimination against Phillips "quite apart from whether the cases should ultimately be distinguished." *Id.* The Court left open the question of whether

a cake design without words could be compelled, while acknowledging that written words and images cannot be.

Justice Kagan, joined by Justice Breyer, wrote a separate concurrence that stressed this very distinction. *Id.* at 1732-33. They opined that it is proper to distinguish between declining to make a cake without words or images versus declining to make a cake with words and images. *Id.* at 1733. Justice Kagan wrote that the bakers in the William Jack cases could not have violated the law because they refused to "make a cake (one [with words and images] denigrating gay people and same-sex marriage) that they would not have made for any customer." *Id.* Though William Jack was refused the service he requested, Justices Kagan and Breyer understood that the bakers had a right to avoid construction of words and images expressing a message they opposed.

Justice Gorsuch, joined by Justice Alito, separately concurred as well and shared the same view on words and images, albeit from a dissimilar perspective. *Id.* at 1738. These two justices concluded that a custom-designed wedding cake for a same-sex wedding necessarily celebrated the union. *Id.* at 1738. Accordingly, they opined that the bakers in both the William Jack cases and Phillips should be equally free to decline an offer to produce a product that "advance[d] a message they deemed offensive." *Id.* at 1738-39. While Justice Gorsuch's opinion took issue with much

of Justice Kagan's, they found common ground in their agreement that citizens should not be forced to convey and present words and images they oppose.

Justice Thomas, joined by Justice Gorsuch, also concurred with the result of the Majority, but directly considered Phillips' free speech claim, deeming the issue too important to ignore. *Id.* at 1740. They found a custom-designed wedding cake, even one without words or images, expressive, communicating "'a wedding has occurred, a marriage has begun, and the couple should be celebrated.'" *Id.* at 1742-43 & n. 2. Figuring "the Constitution looks beyond written or spoken words as mediums of expression," Justice Thomas implicitly recognized that written words and images are even clearer examples of speech than "expressive conduct," and cannot be compelled. *Id.* at 1742.

Finally, Justices Ginsburg and Sotomayor dissented on the basis that they did not perceive a free exercise violation. *Id.* at 1748. Like Justice Kagan espoused, these justices believed it appropriate for the bakers in the William Jack cases to decline the requests based on their opposition to the requested message that would be conveyed via words and images. *Id.* at 1749. The justices noted that, by declining to generate a written message the bakers would not make "for any customer," they treated William Jack like anyone else – "no better, no worse." Id. at 1750. Justices Ginsburg and Sotomayor contrasted this arrangement from the Phillips' case because his refusal went beyond written messages and images. *Id.*

Despite significant disagreements between members of the Court on the issues before them in *Masterpiece Cakeshop*, every single justice agreed that citizens cannot be forced to convey messages they oppose and that they would not convey for anyone else, such as creating images or written words that they oppose. This common thread representing unanimous reasoning from the Supreme Court supports Ms. Nelson's position in this case. Metro Government cannot punish and coerce Ms. Nelson for abiding by her conscience in refusing to create images and convey words and messages that commend same-sex marriage. The issue is all but decided by the Supreme Court.[2]

## III. A Wide Consensus Concurs that Words and Images Cannot be Compelled under Antidiscrimination Law Rationale

A wide consensus also recognizes that antidiscrimination laws cannot, as is consistent with the First Amendment, compel written words and images.

### A. Parties and Amici Opposing Phillips in *Masterpiece Cakeshop*

In *Masterpiece Cakeshop*, the ACLU, representing the same-sex couple, argued that the bakers in the William Jack cases should be exonerated (while

[2] This issue as it relates to words was not foreign to the justices in Masterpiece Cakeshop. Colorado specifically argued that it was constitutionally appropriate for the State to enforce CADA to make Phillips equally inscribe "congratulatory text" on his cakes upon request. Brief for Respondent Colorado Civil Rights Commission at 24-25, Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S.Ct. 1719, available at http://www.scotusblog.com/casefiles/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. The Court's unanimous rejection of this notion is all the more telling.

simultaneously castigating Phillips) on the basis that a business owner's decision to employ designs or messages he or she would not create for anyone else is a valid practice. As they stated in their brief, it is not unlawful to "adopt[] policies that apply equally to all customers (for example, '*We won't write this message for anyone*')." Brief for Respondents Charlie Craig and David Mullins at 26, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (emphasis added), *available at* www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-coloradocivil-rights-commn/.

*Amici curiae* in support of the Respondents in *Masterpiece Cakeshop* echoed this idea. For example, the twenty (20) States that believed Jack Phillips should be punished explained that a business owner may properly decline to make products that include a written inscription because it would then be clear that the refusal is not "because of" the status of the customer. See, e.g., Brief of Massachusetts et al. as *Amici Curiae* in support of Respondents at 28, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, *available at* http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-coloradocivil-rights-commn/. The 211 members of Congress who opposed Philips and *Masterpiece Cakeshop* contended likewise, asserting "businesses are free to adopt neutral and generally applicable terms-of-service policies. For example, a business could adopt a terms-of-service policy refusing to sell products containing hate speech." Brief of 211 Members of

Congress as *Amici Curiae* in support of Respondents at 23 n.6, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, *available at* http://www.scotusblog.com/casefiles/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/.

Thirteen (13) First Amendment scholars who filed an amicus brief against Phillips expounded on their agreement with this principle:

> Had Masterpiece refused service because of a disagreement over the actual cake design, and if state law gave customers a right to sue in such circumstances, that hypothetical case might raise serious First Amendment questions about the extent to which the law may compel the actual content of a baker's artistic expression. Brief of First Amendment Scholars as Amici Curiae in support of Respondents at 28, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, *available at* http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltdv-colorado-civil-rights-commn/.

Correspondingly, another group of free speech scholars opposing Phillips wrote that "serious constitutional questions would be raised if [a nondiscrimination] statute compelled a baker to affix an offensive message to a cake he or she was asked to bake." Brief for Freedom of Speech Scholars as Amici Curiae supporting Respondents at 8, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, *available at* http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-coloradocivil-rights-commn/. Likewise, the National League of Cities, an advocate for municipalities throughout the United States, distinguished the

scenario in *Masterpiece Cakeshop* from a case where a printer was scrutinized for declining to print a message promoting a gay pride festival because in Phillips' case "[n]o actual images, words, or design celebrating same-sex marriage or the rights of LGBT individuals were ever at issue." *Amici Curiae* Brief of the National League of Cities in support of Respondents at 1, 27, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S.Ct. 1719, available at http://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-coloradocivil-rights-commn/.

The *Masterpiece Cakeshop* case had numerous parties and varied interests that weighed in on the matter, generating an unusually large number of *amici*, totaling 95 for both sides. See http://www.scotusblog.com/casefiles/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/. And yet, virtually everyone involved in the *Masterpiece Cakeshop* case recognized that words and images cannot be compelled to ensure compliance with an antidiscrimination law.

**B. Other Authorities**

*Masterpiece Cakeshop* and those involved in it are not the only ones to recognize this principle. For example, the Washington State court and those appearing in *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) voiced matching sentiment in a case concerning an antidiscrimination claim brought against a florist who declined a customer's request to design floral arrangement for his same-

sex wedding. At oral argument before the Washington Supreme Court, the attorney representing the same-sex couple contrasted a floral arrangement with work of a professional advertiser, explaining that if an advertiser was asked to "say certain words endorsing a certain message" and the advertiser "refuse[s] to say those words regardless of who asks him, whether the person is straight or gay, it's not discrimination based on sexual orientation." Video of Oral Argument at 49:5650:41, *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), available at https://www.youtube.com/watch?v=bOV2--oey6o. In ruling against the florist, the state high court relied on the distinction between a floral arrangement and words, depicting the latter as "forms of pure expression that are entitled to full First Amendment protection." 389 P.3d at 559 & n.13 (quotation omitted), vacated and remanded for reconsideration in light of *Masterpiece Cakeshop*, 138 S.Ct. 2671 (2018).[3]

The same distinction was observed by the Oregon Court of Appeals in *Klein v. Oregon Bureau of Labor and Industry*, a case, similar to *Masterpiece Cakeshop*, dealing with cake shop owners who were sued for declining to create a wedding cake

[3] On remand from the United States Supreme Court, the Washington Supreme Court found no religious hostility similar to that exhibited by Colorado and readopted its prior opinion. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019). A petition for certiorari from this decision has been filed. See Pet. For Cert., *Arlene's Flowers, Inc. v. Washington, et al.*, 19-333, available at https://www.scotusblog.com/case-files/cases/arlenes-flowers-inc-v-washington-2/.

for a same-sex wedding. 410 P.3d 1051 (Or. Ct. App. 2017) vacated and remanded for reconsideration in light of *Masterpiece Cakeshop*, 139 S.Ct. 2713 (2019).6 There, the state appellate court ruled against the cake shop, finding especially relevant the cake shop had not been "asked to articulate, host, or accommodate a specific message that [the owners] found offensive." *Id.* at 539. The court carefully distinguished the case from one concerning words, explaining:

> It would be a different case if [the government's] order had awarded damages against the Kleins for refusing to decorate a cake with a specific message requested by a customer ("God Bless This Marriage," for example) that they found offensive or contrary to their beliefs. [Citing *Masterpiece Cakeshop* and distinguishing the William Jack cakes]. *Id.* at 539-40.

The *Klein* court understood that a compulsion of specific words and messages would run afoul of the compelled speech doctrine. *Id.* at 537.

In line with this thinking, in the recent *Brush & Nib Studio* case, the Supreme Court of Arizona held a public accommodations law could not be enforced to make an art studio handwrite and paint custom wedding invitations containing words and images celebrating same-sex weddings. 448 P.3d at 915-916. So holding, the court emphasized how the creation of words and images constituted pure speech and not mere conduct or business activity that could not be properly subject to compulsion, referencing *Arlene's Flowers* and *Klein* as authorities recognizing this difference. *Id.* at 905-06, 917. Elaborating on the effort and time the studio spent exercising

artistic judgment in selecting, designing, and handwriting the celebratory words they placed on their custom wedding invitations, the court deemed the creative messaging activity the essence of pure speech that could not be compelled simply because the resulting product is sold for profit. *Id.* at 908-910, 917. Extending this principle to images and video, the Eighth Circuit concluded that film editing activity constitutes protected speech which may not be compelled by public accommodation laws. *See, Telescope Media Grp.* 936 F.3d 740.

Resounding a universally recognized doctrine, these courts and others concur that selecting and composing written messages images is pure speech that cannot be rightly compelled by the State. This case should be decided by this same doctrine.

## CONCLUSION

For the reasons set out herein and in Plaintiff's briefing, *Amici* asks this Court to grant the Petitioners' Motion for Preliminary Injunction and deny Defendants' Motion to Dismiss in this matter.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that the foregoing brief was filed electronically using the Court's CM/ECF system and the parties and parties in interest are registered therein in this case and will be served electronically by same this date February 12th, 2020.

Including:

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