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2 East 14th Ave., Denver, CO 80203

On Certiorari to the Colorado Court of Appeals,  
Case No. 2021CA1142

El Paso County District Court  
Hon. A. Bruce Jones, Case No. 2019CV32214

**Petitioners:** MASTERPIECE CAKESHOP INC.  
and JACK PHILLIPS

v.

**Respondent:** AUTUMN SCARDINA

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Case No. 2023SC00116

Court of Appeals Case No.:  
2021CA1142

District Court Case No.:  
2019CV32214

County: Denver

**Brief of Jewish Coalition for Religious Liberty, Coalition for Jewish Values,  
Summit Ministries, The Colson Center for Christian Worldview, American  
Muslim & Multifaith Women's Empowerment Council, and World Hazara  
Council USA as *Amici Curiae* in Support of Petitioners**

## Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 29(d) in that it contains 2,406 words.

The brief complies with the content and format requirements of C.A.R. 28(a)(2) & (3), 29(c), and 32.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, 29, and 32.

Respectfully submitted,

Covenant Law PLLC

*s/ Ian Speir*

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## **Identity and Interest of *Amici***

*Amici* are a diverse set of religious organizations or organizations that promote religious liberty, representing each of the Abrahamic faith traditions.

The Jewish Coalition for Religious Liberty is an incorporated organization of rabbis, lawyers, and communal professionals who practice Judaism and are committed to defending religious liberty. Coalition for Jewish Values (“CJV”) is the largest Rabbinic public policy organization in America, representing over 2,500 traditional, Orthodox rabbis. CJV promotes religious liberty, human rights, and classical Jewish ideas in public policy, through education, mobilization, and advocacy, including amicus briefs in defense of equality and freedom for religious institutions and individuals.

Summit Ministries and The Colson Center for Christian Worldview are Colorado-based ministries that educate adults and young people, equipping them to live as Christians and champion a biblical worldview.

The American Muslim & Multifaith Women’s Empowerment Council takes on the challenge of internal and external bigotry by empowering Muslim women on the frontlines. Inspired by their own journeys as immigrants who have prospered in America, they are proud American Muslim women leaders who unite to strengthen community, confront bigotry, celebrate cultural heritage, and build enduring bonds

with fellow Americans of all faiths. The mission of World Hazara Council USA is to provide advocacy and humanitarian assistance to at-risk Hazara and at-risk marginalized populations in their time of need, both in the United States and globally. It strives to be a resource to defend human rights and every person's freedom to live. This includes working to ensure that all Americans, including Hazara, can practice their faith freely.

### **Argument**

#### **I. The lower court's ruling threatens to compel all religious artists—Jews, Christians, and Muslims—to speak messages that violate their consciences.**

The viewpoint diversity secured by the First Amendment is especially important to religious artists, be they cake artists, web designers, videographers, or speechwriters. Such artists often have strong conscience-based objections to expressing certain messages. Forcing them to choose between expressing these messages or retiring from their chosen profession is exactly the sort of cruel dilemma the First Amendment was intended to avoid. The lower court's decision creates a multitude of problems for such artists—problems illustrated by this case, but that extend well beyond its factual particulars. *Amici* write to make the Court aware of these.

There are many circumstances where the context of a piece of art may change it from laudable or even benign into something that expresses a message the artist would never willingly utter. Suppose a customer commissions a sculpture of a young woman surrounded by shards of broken glass. Many Jewish artists would have no problem creating this sculpture for someone advocating more female representation in corporate boardrooms, to symbolize “breaking the glass ceiling.”<sup>1</sup> But a Jewish artist would object to creating an identical sculpture for a neo-Nazi intending to celebrate Kristallnacht, literally the “Night of Broken Glass,” a horrific pogrom against Jews in Nazi Germany that began on November 9, 1938.

Or consider examples closer to this case: a custom cake that says “Happy November 9th!” or a cake with no words and only sugar shards resembling shattered glass, a common cake-design technique.<sup>2</sup> Again for a Jewish artist, context would be essential for determining whether the cakes’ messages were commendable or condemnable. If these cakes were for celebrating a November 9 wedding anniversary

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<sup>1</sup> Such a sculpture was recently across from the New York Stock Exchange. See Sarah Cascone, “To Mark International Women’s Day, ‘Fearless Girl’ on Wall Street Has Been Surrounded by Frightening Shards of Broken Glass,” *Artnet*, Mar. 8, 2021, <https://news.artnet.com/art-world/fearless-girl-surrounding-menacing-shards-glass-1949974>.

<sup>2</sup> See, e.g., Chelsweets, “Shattered Glass Cake,” <https://chelsweets.com/shattered-glass-cake/> (last visited Dec. 6, 2023).

or a female colleague making CEO, no problem. But if they were intended for Kristallnacht celebrations, the problem is obvious, and governmental coercion to express such a message would be intolerable. Justice Alito flagged a similar hypothetical in *Masterpiece I*. See Tr. of Oral Arg. at 70, *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n* (No. 16-111).

Would Colorado courts really tell Jewish artists in these scenarios, “Sorry. We don’t think a glass-shard sculpture or cake has ‘inherent meaning.’ Since you would design these to celebrate female empowerment, you have to design them to celebrate antisemitism”? Would anyone seriously doubt that the Jewish artist had refused to make the cake because of the pro-Holocaust message that resulted from the combination of the artwork and its context? There is a logical straight line between these chilling hypotheticals and the lower court’s reasoning.

Similar situations in other religious and artistic contexts are easy to imagine. A Muslim videographer would not object to shooting custom footage for ads for a Middle East travel site. But she would likely object if the customer intended to use the footage to advertise a Middle East “missions trip” to proselytize for Christianity or another faith. Or consider Islamic calligraphy, a traditional form of art born of the Islamic prohibition on depicting certain imagery. A Muslim calligrapher would be thrilled to create a document with an artistic rendition of the name Mohammed to be

used in a mosque, but he would refuse to create the exact same document if it would be used in a disrespectful way, such as in a bathroom. Based on the Court of Appeals’ holding below, the First Amendment wouldn’t protect Muslim artists in these scenarios, since “the message” of the video footage and the calligraphy “in ... context” would be “generated by the observer based on their understanding of the purpose” and would not constitute expression directly attributable to the artist. *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, ¶ 78. Yet First Amendment protection has never been limited on that basis, and the lower court cited no authority for this restrictive interpretation.

## **II. The First Amendment’s protection against compelled speech is especially important to artists who adhere to minority faiths.**

Religious minorities may hold views that are unpopular or run contrary to the zeitgeist. It is precisely these views that the First Amendment protects. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (“It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.”). During the oral argument in *Obergefell v. Hodges*, Attorney General Verrilli admitted that if the Court recognized a right to same-sex marriage, it would create tension with the rights of individuals who hold traditional views about marriage. *See* Tr. of Oral Arg. at 38, *Obergefell v. Hodges* (No. 14-

556). Yet the Court affirmed that these views are “decent and honorable.” 576 U.S. 644, 672 (2015).

Over the past fifteen years, courts have, as predicted, seen a spate of cases in which close-knit artisanal companies have objected to expressing certain messages that implicate issues of marriage and sexuality. It is not coincidence that these cases have arisen in the small business community. Artists often choose to work in small, religiously homogeneous businesses precisely so they can follow their beliefs while plying their trade:

- Elane Photography LLC created customized artisanal wedding photographs. This company was owned by a husband and wife, Elaine and Jon Huguenin, who shared the same religious beliefs, and Elaine personally created the expressive photography. *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 2009 WL 8747805 (D.N.M. 2009).
- Telescope Media Group created customized artisanal wedding videos. This family company was owned by a husband and wife, Carl and Angel Larsen, who shared the same religious beliefs, and personally designed the creative wedding videos. *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090, 1097 (D. Minn. 2017), *aff'd in part, rev'd in part and remanded sub nom. Telescope Media Grp. v. Lucero*, 936 F.3d 740 (8th Cir. 2019).
- Brush & Nib Studio created customized artisanal wedding invitations. This close-knit company was owned by Joanna Duka and Breanna Koski, who shared the same religious beliefs, and personally designed the creative wedding invitations. *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 897 (Ariz. 2019).

Then, there are the cases like this one, arising out of Colorado’s ongoing attempt at “excis[ing] certain ideas or viewpoints from the public dialogue” and

“eliminat[ing] ... dissenting ideas about marriage.” *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (cleaned up). 303 Creative LLC created customized artisanal wedding websites. This small business only had one employee, Lorie Smith, its founder and “sole member-owner,” who personally performed the creative website design. *Id.* at 594, 579. And here, Masterpiece Cakeshop creates customized artisanal cakes for weddings and other occasions. This small company is owned by husband-and-wife Jack and Debbie Phillips, who share the same religious beliefs, and Jack personally designs the cakes. *See Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226, 1241 (D. Colo. 2019).

These artists bring their personal creativity, abilities, and perspective to their works. Their thoughts, conscientious beliefs, and faith profoundly shape what they can and cannot say, what they will design and won’t design, and what kind of projects they can and cannot take on. In these close-knit firms, the artists who perform the creative work share the same religious beliefs, and they object to creating a narrow set of specific expressive products whose messages implicate a matter of conscience. The creative work cannot be passed on to another in-house artist with different beliefs.

While the litigated cases thus far have largely involved artists that identify with the Christian faith, artists of other, minority faiths—Jews and Muslims in

particular—will be affected by the outcomes of these cases and the rules they establish. And the troubling implications for them only continue to grow. “Over time, some States, Colorado included, have expanded the reach of the[ir] nondiscrimination rules to cover virtually every place of business” and “to prohibit more forms of discrimination.” *303 Creative*, 600 U.S. at 590. The impact of these decisions will extend beyond both the Christian faith and marriage-related conflicts.

In *303 Creative*, where web design and photography were front and center, *amicus* Jewish Coalition for Religious Liberty highlighted for the Court the special problems that might be faced by Jewish artists:

Consider [a] hypothetical.... A Jewish man and a Jewish woman, who are engaged to be married, ask a Jewish website designer to build a website to celebrate their nuptials. No problem. Mazal tov! Another Jewish man and a Christian woman, who are engaged to be married, ask a Jewish website designer to build a website to celebrate their nuptials. Big problem. Don't stomp the glass. Many Jews consider intermarriage an existential threat to the future of Judaism....

Let's turn from marriage to adultery. An unmarried Jewish person asks a Jewish photographer to take a photograph for his JDate dating profile. Swipe right for the *shidduch* [matchmaking]. Next, a married Jewish person asks a Jewish photographer to take a photograph for his AshleyMadison.com dating profile. Swipe left for this *shanda* [a shameful thing]. After all, adultery is a violation of the Seventh Commandment.

In each of these examples, a Jewish artist would be compelled to betray his conscience.

These examples caught the attention of the Justices at oral argument. *See* Tr. of Oral Arg. at 72–75, *303 Creative LLC v. Elenis* (No. 21-476). Remarkably, Colorado told the Court that the state would in fact force Jewish artists to build the objectionable website, to take the adulterous photo. *Id.* at 73:21–23, 74:11–14, 75:11–14. When it issued its ruling vindicating artistic free speech, the Court didn’t just reject this state’s extreme position. It suggested it couldn’t be “[t]aken seriously.” *See 303 Creative*, 600 U.S. at 589. “Colorado’s logic,” the Court said, “would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty.” *Id.* at 589. It would force “an unwilling Muslim movie director to make a film with a Zionist message, or an atheist muralist to accept a commission celebrating Evangelical zeal, so long as they would make films or murals for other members of the public with different messages.” *Id.* (cleaned up) (quoting 6 F.4th 1160, 1198 (10th Cir. 2021) (Tymkovich, C.J., dissenting)). “[T]he First Amendment tolerates none of that.” *Id.* at 590.

The First Amendment’s protection doesn’t disappear simply because the government tries to recast a coerced message as being “generated by” an “observer” in “context,” as the lower court did here. 2023 COA 8, ¶ 78. In fact, Colorado claims to be able to mandate the design and creation of this cake precisely because it

“symbolize[s] a transition from male to female.” *See* App.013, ¶48. The cake’s message is not beside the point for either the designer or the state. Stated another way, the symbolism of the cake is the trigger both for Colorado’s nondiscrimination requirement and for Jack Phillips’ faith-based objection. As between these competing interests, the First Amendment has struck the balance: the artist’s freedom of speech prevails. The cake’s symbolic message—of a “transition”—is not a message that Phillips’s conscience will allow him to send. Nor is it one that many of his fellow artists, Jewish and Muslim, could send without violating the teachings of their faiths.

### **Conclusion**

The First Amendment protects all artists, and that protection is especially important to those with minority or countercultural beliefs. It is not just that the First Amendment tolerates difference and dissent. It ensures that expression is protected from the majority’s proclivity to silence speech and punish those who dare utter it. More fundamentally, it seeks to foster speech pluralism. That constitutional vision, grounded in the unique American creed of individual dignity and choice, requires that individuals, and artists especially, be able to express their beliefs without fear, be able to shape their own artistic messages—what they say and what they don’t—free of punishment and coercion. When artists create, when they speak up, and when

they keep silent, they are contributing to a diverse marketplace of ideas. Many will disagree with their message, and many will be troubled by their silence. That is as it should be. This is the ordinary course in a free society. No government and no citizen wielding the coercive tools of law may turn the contested public square into an echo chamber or closed forum. Enforcing silence and compelling speech in the name of a prescribed orthodoxy are equally anathema to our nation's First Amendment tradition. The judgment below should be reversed.

Respectfully submitted December 19, 2023,

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## Certificate of Service

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