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Enforcing Tolerance Through Intolerance: *Masterpiece Cakeshop*, Free Speech, and Religious Liberty

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Abstract

Everyone ultimately benefits from robust freedom of speech and religious liberty. Both sides of the same-sex marriage debate can and should be accommodated. This accommodation benefits all Americans by promoting pluralism, respect for the First Amendment, and ongoing civil discussion on controversial issues. The overwhelming majority of businesses are willing to perform services and provide goods for same-sex weddings. But that does not mean that every service provider ought to be forced to provide customized goods or services in support of same-sex marriage when doing so would violate his or her sincerely held beliefs. Americans who believe that marriage is between one man and one woman should enjoy the same freedoms as other citizens—including the right to think with their minds, speak with their mouths, and work with their hands according to their beliefs.

I. Introduction

In *Masterpiece Cakeshop v. Colorado Human Rights Commission*, the Supreme Court faces a choice between two very different visions of American civil society. The state of Colorado and a same-sex couple, Charlie Craig and David Mullins, who are being represented by the American Civil Liberties Union (ACLU) (the "Respondents"), propose a new reading of public accommodation laws that will treat opposition to or mere failure to support same-sex marriage as *ipso facto* sexual-orientation discrimination.[1] If the Court adopts this

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Key Points

- Colorado is using its public accommodation law, the Colorado Anti-Discrimination Act, to compel agreement on same-sex marriage.
- Disagreement about marriage or abortion cannot be regarded as a legally cognizable harm to dignity if freedom of thought, speech, and belief is to survive.
- The alleged "dignitary harms" of the same-sex couple in *Masterpiece Cakeshop* are intrinsically different than the objective, pervasive, systematic economic and social harms committed against African Americans.
- Recognizing Jack Phillips' religious objections to expressing support for same-sex marriage would take nothing away from those who support or participate in same-sex weddings.
- The beliefs that Phillips holds may be viewed as strange by some, but this is not an adequate justification—much less "a compelling state interest"—for the government to compel his speech or violate his religious freedom.

radical new definition of discrimination, Americans who believe that marriage is and should remain between one man and one woman could face grave repercussions, including exclusion from certain professions and marginalization in the public square. America's public discourse risks being narrowed down to the parameters of what cultural authorities deem socially acceptable.

Jack Phillips, a Christian cake artist from Colorado represented by Alliance Defending Freedom (ADF), argues that America should continue treading a broad path in which both supporters and opponents of same-sex marriage can live out their beliefs in the workplace. His decision not to create an artistic design (a wedding cake) for a same-sex wedding places him in a historic tradition of dissenters—including pacifists and opponents to the death penalty. Jack Phillips' arguments advance a society in which all persons are treated with dignity and respect, regardless of their sexual orientation or religious beliefs, and in which the right to disagree about same-sex marriage is also respected. Jack Phillips distinguishes between people and ideas on a regular basis. He serves all people, but occasionally declines to create specialty cakes because they convey messages about ideas that violate his beliefs, including hostility to America, hostility to faith, and hostility to gay people. Jack Phillips seeks to run his business without interference by the state, corporate America, celebrities, and politicians who urge the Supreme Court to use the law to enforce upon him their views of human sexuality and what constitutes a marriage.

The implications of this case go far beyond cake artists, florists, photographers, and other wedding vendors. If the Supreme Court adopts the ACLU's radical redefinition of discrimination, then any individual, business, or entity in a jurisdiction with a policy like Colorado's could face the same kind of punishment as Jack Phillips. This includes the myriad of faith-based charities, schools, and universities that serve Americans of all backgrounds and beliefs. And it includes any individual, business, or entity that wants to contract with or apply for grants, licenses, and accreditation from the government. It could also affect those who currently work in or aspire to enter business,[2] entertainment,[3] the military,[4] law,[5] counseling,[6] child welfare services,[7] and emergency services[8]—to name just a few professions. In each of these fields, individuals have been terminated or denied advancement because of their support for traditional marriage. One Michigan city went so far as to ban a farmer from selling fruit at a local market because he declined to host same-sex weddings at his privately owned farm.[9]

To protect the freedom of expression and freedom of religion of all Americans, the Supreme Court must continue to distinguish between people and the ideas they espouse. The government can support dignity and respect for all without trampling upon individual consciences and chilling speech in order to compel conformity to one view of same-sex marriage.

The two competing visions of America that are presented by Jack Phillips and the Respondents would yield starkly different outcomes. The Constitution and the Supreme Court's own precedents deeply respect the freedoms of all, even those whose opinions are the least popular. The ACLU itself once recognized this wisdom when it stated, "Censorship is like poison gas: a powerful weapon that can harm you when the wind shifts. Freedom of expression for ourselves requires freedom of expression for others. It is at the very heart of our democracy."[10]

II. The Uniqueness of the Civil Rights Movement and the Development of Public Accommodation Laws

The history of public accommodation laws overshadows this case, and a proper understanding of the origins of these laws will lead to a correct understanding of how they should be implemented today.

After America fought a civil war to end the race-based slavery that exploited African Americans economically, politically, and socially, more than half the states erected a system of laws based on the myth that Americans of different skin colors could be "separate but equal." Courageous men, women, and children like Medgar Evers, Rosa Parks, and Ruby Bridges risked their lives so they and others like them would be viewed as full human beings, equal to whites in every way. Many of those who fought to dispel this myth, such as Martin Luther King, Fred Shuttlesworth, Ralph David Abernathy, Andrew Young, and Joseph Lowery, were people of faith—just like Jack Phillips. With the passage of the 1964 Civil Rights Act, African Americans sought tangible access to material goods and services.

Many times, African American families would drive into a town, only to find that there were no hotels or restaurants willing to accommodate them.

In the seminal case *Heart of Atlanta Motel v. United States*,[11] a white motel owner fought to deny hotel rooms to African Americans, arguing that it would cause him to lose the business of white customers.[12] This case is emblematic of the social attitudes and market forces that perpetuated "separate but equal." If African Americans had not demanded the passage of the 1964 Civil Rights Act, the systematic denial of basic goods and services might have continued indefinitely.

Since the 1960s, state public accommodation laws have expanded drastically. They now cover much more than establishments facilitating interstate commerce, including any event or establishment that serves the public, from a parade to a florist to a graphic designer. These laws have also expanded to cover new classes based on ancestry, biological sex, citizenship status, religious beliefs, political viewpoints, military service, disabilities, marital status, and sexual orientation and gender identity (SOGI).[13]

The Consequences of Radically Redefining Public Accommodation Laws

The Respondents now introduce a new purpose for public accommodation laws. They argue that in the absence of any economic harm, public accommodation laws should remedy subjective "dignitary harms." They claim that by not creating a cake for Mr. Craig's and Mr. Mullins' wedding, Jack Phillips harmed their dignity. This new form of alleged harm is a far cry from the objective, pervasive, systematic economic and social harms committed against African Americans by white supremacists. The purported analogy is historically inaccurate and demonizes Jack Phillips in a manner that is completely unmerited by his statements and actions. Yet a commissioner from the Colorado Civil Rights Commission (CCRC) compared Jack Phillips to a slave owner and Nazi.[14]

The logical fallacies of the arguments made by the Respondents become more evident when compared to another landmark Supreme Court case on alleged discrimination. In *Bray v. Alexandria Women's Health Clinic*,[15] a case involving a lawsuit that had been filed against pro-life advocates who protested outside abortion clinics, the Supreme Court considered whether opposition to abortion constituted *ipso facto* class-based, invidious discrimination toward women that violated a federal civil rights law. The Court found that "[n]either common sense nor... precedents" supported the view that opposition to abortion could only be based on a demeaning view of women.[16] Similarly, here neither common sense nor precedent support the view that opposition to same-sex marriage can only be based on a demeaning view of individuals who identify as LGBT.

In its recent decision on same-sex marriage, *Obergefell v. Hodges*,[17] the Supreme Court clearly distinguished between support for traditional marriage and animus toward people on the basis of sexual orientation. Writing for the majority, Justice Anthony Kennedy stated that belief in traditional marriage is based upon "decent" and "honorable" premises.[18] The Court went even further to say that it did not intend to "disparage" belief in traditional marriage or the supporters of those beliefs.[19] Notwithstanding, when a Commissioner from the Colorado Anti-Discrimination Commission compared Jack Phillips to white supremacists and Nazis, the Commission clearly disparaged him.

The *Bray* Court observed that "there are common and respectable reasons for opposing" abortion, "as is evident from the fact that men and women are on both sides of the issue."[20] Similarly there are people who identify as homosexual and heterosexual on both sides of the same-sex marriage debate in America. Some lesbians oppose same-sex marriage on feminist grounds and because it is "heteronormative," embodying the view that heterosexuality is the preferred and normal sexuality.[21] In France, a group of gay men and women went so far as to protest *against* the legalization of same-sex marriage because of their belief that children should be raised by both mothers and fathers.[22]

The *Bray* Court held that opposition to abortion was "an irrational surrogate" for opposition toward women.[23] Similarly, here, opposition to same-sex marriage is "an irrational surrogate" for opposition toward individuals who identify as LGBT. The Respondents disregard the common sense distinction that the Supreme Court made in *Bray* between a class of people and an idea. By declining to follow the irrational comparison between opposition toward abortion and misogyny, the Court in *Bray* preserved a balance of freedoms between both sides in the abortion debate. Similarly, the Court should here balance the rights of those on both sides of the same-sex marriage debate by following its own precedent.

Just as protecting the rights of pro-life activists and medical professionals who decline to perform abortions did no harm to those who seek abortions,

protecting Jack Phillips' artistic expression will do no harm to people who celebrate same-sex weddings. Same-sex couples have ample access to goods and services for their weddings because cultural and market forces are aligned with them. Under Jim Crow, motel owners argued that serving African Americans would be bad for business.

Today, serving businesses know that being publicly gay-friendly is *good* for their bottom line. Supporters of same-sex marriage who provide goods to and services for same-sex marriages have a clear competitive advantage over those who do not. That not a single baker in Colorado has expressed solidarity with Jack Phillips indicates the powerful economic incentives for cake artists to provide cakes for same-sex weddings, although some may act out of fear of potential cultural, economic, or political repercussions if they do not. Apple Computer, Yelp, PayPal, and Salesforce,[24] celebrities like Chef Anthony Bourdain,[25] and 211 Democratic Members of Congress have all filed *amicus* briefs in *Masterpiece* on behalf of the Respondents.[26]

Jack Phillips treats all people with dignity and respect, including his gay customers. Jack Phillips has done business with gay people regularly for 24 years and continues to do so today for the same reasons. He welcomed Mr. Craig and Mr. Mullins into his store and offered to sell them anything off the shelf.[27] Jack Phillips *did not* decline to sell a cake to Mr. Craig and Mr. Mullins. He declined to bake them a special, customized cake for their marriage. In doing so, he treated them the same way he had treated other customers who wanted to celebrate occasions or express ideas that conflicted with his conscience. He politely told them he could not design a custom cake for their occasion because it violated his religious beliefs, just as he had told customers in the past who wanted him to bake custom cakes celebrating a divorce or a bachelor party or conveying an anti-gay message.

Mr. Craig and Mr. Mullins admit they suffered no economic harm. No fewer than 20 other cake designers offered to bake them custom cakes, and they ended up receiving their desired rainbow-layered cake for free.

There is no risk of economic harm to those who identify as LGBT in allowing Jack Phillips to follow his beliefs about marriage. Unlike lawsuits that were filed during the civil rights era, the lawsuits that are being filed today under public accommodation laws on the basis of SOGI are not about systematic denial of goods and services because of animus toward a class of people based on their sexual orientation. Rather, they are about disagreements over the meaning of marriage—and, arguably, the relentless pursuit and intimidation of those holdouts who do not subscribe to the view of same-sex marriage that currently reigns. When so many creative professionals will gladly provide services for same-sex weddings with no moral qualms, why use litigation to coerce the few remaining photographers, florists, or cake artists whose consciences will be violated by supporting such a union? Empirical evidence from Professor Andrew Koppelman of Northwestern University shows that in a country of more than 300 million people, "there have been no claims of a right to simply refuse to deal with gay people."[28]

The Respondents argue that if the Court allows Jack Phillips to decline to create a cake for a same-sex wedding, a flood of "denials of service" will ensue from other wedding service providers, including limousine drivers, caterers, and banquet halls. They argue that gays and even racial minorities will be faced with an onslaught of discrimination based on their status from any number of providers of goods and services.

Such dire predictions are simply not based in reality. Indeed, polling shows that the public support for same-sex marriage has *increased* since the *Obergefell* decision. The conflicts that have risen since the Supreme Court issued its opinion in *Obergefell* are all about those who will not succumb to public pressure to change their minds about marriage because of their sincerely held religious beliefs—something that several of the Justices on the *Obergefell* court warned would happen. In his dissenting opinion in *Obergefell*, for example, Justice Clarence Thomas wrote:

> Aside from undermining the political processes that protect our liberty, the majority's decision threatens the religious liberty our Nation has long sought to protect.... In our society, marriage is not simply a governmental institution; it is a religious institution as well.... Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.[29]

Not forcing pro-life medical professionals to participate in abortions after *Roe v. Wade*[30] did not lead to widespread denials of the procedures to women, because the dispute was never really about anti-woman animus; it was about the belief that every human life in the womb is sacred and should be preserved. Similarly, if the Court upholds Phillips' right not to participate in same-sex marriages, it will not lead to widespread denials of services to gay people, because the dispute is not about being anti-gay people—it is about religious beliefs that treat marriage as a sacred covenant between one man and one woman before God.

After *Roe v. Wade* changed the country's legal and cultural landscape, the Supreme Court preserved the freedom of speech and freedom of religion of pro-life Americans while allowing other Americans the ability to obtain an abortion. It can do the same now in the wake of *Obergefell* by allowing supporters of traditional marriage to think, speak, and work according to their beliefs while allowing other Americans access to services related to a same-sex marriage.

Colorado is misusing its public accommodation law, the Colorado Anti-Discrimination Act (CADA), to compel agreement on same-sex marriage. Colorado ordered Jack Phillips to design cakes for same-sex weddings, report all his decisions on cake orders to the state for two years, and educate his employees (some of whom are his family members) that he wrongfully discriminated against Mr. Mullins and Mr. Craig. To be true to his beliefs, pending the outcome of this case, Jack Phillips has withdrawn from the lucrative wedding-cake industry, and his store has lost 40 percent of its income.[31] Colorado has trampled upon one citizen's dignity to attempt to honor the dignity of other citizens. But Respondents confuse and conflate disagreement with dishonor. The Supreme Court, however, has always honored the ability of citizens to disagree with each other and has even praised the value of dissent and debate.

In 1949, for example, in *Terminiello v. City of Chicago*,[32] the Supreme Court overturned on First Amendment grounds the conviction of a Catholic priest for violating a "breach of peace" ordinance that banned speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[33] In doing so, the Court stated:

> Accordingly[,] a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.[34]

Similarly, in 1988, in *Hustler Magazine Inc. v. Falwell*,[35] the Supreme Court did not punish Hustler magazine's parody of the Christian minister Jerry Falwell having a sexual experience with his mother. Instead the Court said that dignitary harms must be endured to allow "adequate breathing space" to the freedoms protected by the First Amendment.[36] In recent years, the Court has provided breathing room for social progressives on issues like pornography and violence—to the great discomfort of social conservatives.[37] To be fair, it must now allow that breathing room to those with traditional values on sexuality, marriage, and the family.

The Court should cautiously consider how the Respondents' radical redefinition of discrimination could open up a Pandora's box. If authorities begin to treat differences of opinion as discrimination, this will stimulate interest in litigation among parties that feel they have suffered "dignitary harm" for a whole host of reasons. In our current political climate, these parties are many. Anti-discrimination laws include not only race, creed, and sexual orientation, but also prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, and place of residence. A wide variety of political and cultural groups could ask creative professionals to create messages supporting either "Black Lives Matter" or "Blue Lives Matter" or "All Lives Matter"—and each could claim discrimination if they are refused. Supporters of President Donald J. Trump could ask for "Make America Great Again" or "Deplorables" cakes and claim discrimination based on political beliefs if they are denied. Those

who support gun control and those who support gun rights could do likewise. If courts allow differences of opinion to become the basis for litigation, the possibilities are incredibly broad, if not endless.

As Justice William Brennan wrote for the majority in the Texas flag-burning case, *Texas v. Johnson*,[38] "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[39] The Court can protect the dignity and equality of every American without shielding us from speech that might create an "adverse emotional impact." Compelling Jack Phillips to utter a message he does not believe would be inconsistent with the Court's "longstanding refusal to punish speech."[40]

The Court's vision of society should include permitting ongoing honest disagreement about the meaning of marriage. This is what Justice Kennedy emphasized in *Obergefell* when he wrote for the majority:

> [T]hose who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The 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.... In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate.[41]

Disagreement about marriage or abortion cannot be regarded as a legally cognizable harm to dignity if freedom of thought, speech, and belief is to survive. And it has never been the role of the Court to shield us from hearing that others do not share our opinions. All are better off when we can make moral decisions for ourselves and live consistent with conscience.

III. Jack Phillips' Creative Cake Designs Are Art and Merit Free Speech Protection

In its free speech jurisprudence, the Supreme Court has identified two categories of expression that are relevant to this case: artistic expression[42] and expressive conduct.[43] The Supreme Court has applied the highest level of judicial review—strict scrutiny—to both. Under the standard of strict scrutiny, the law must further a compelling governmental interest and must be narrowly tailored to achieve that interest.[44]

The determination of whether Jack Phillips' cake designs constitute artistic expression or expressive conduct is crucial, therefore, to the Court's determination as to whether Colorado may compel him to do or say something he does not wish to do or say. The Supreme Court has stated that "artistic expression lies within....First Amendment protection"[45] and that it defers on both "esthetic and moral judgments" to artists.[46] If the Supreme Court determines that Jack Phillips' custom cake designs are artistic expression (pure speech), then it is highly likely that the Court will overturn Colorado's attempt to compel him to convey a message he does not believe or wish to convey by forcing him to design cakes expressing support for same-sex marriage.

In a landmark 1943 case, *West Virginia v. Barnette*,[47] Justice Robert Jackson, writing for the majority, stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."[48] *Barnette*, a case in which the Court upheld the right of two Jehovah's Witness sisters not to salute the American flag in school, has direct application to Jack Phillips. The *Barnette* Court found that by compelling the sisters to salute the flag (a form of expressive conduct), public authorities exceeded the constitutional limitations on their power to invade "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[49] Similarly, Colorado has invaded Jack Phillips' intellect and spirit by ordering him to design cakes in celebration of same-sex weddings.

The Supreme Court has defined artistic expression broadly, even holding that if a work "bears some of the earmarks of an attempt" at serious art,[50] it merits First Amendment protection. Courts have identified many forms of non-verbal and non-written art, such as drawing, painting, and sculpture. They have included non-traditional and unorthodox mediums in their definition of art, such as abstract paintings (Jackson Pollock), atonal music (Arnold Schoenberg), sexually

explicit materials, nude dancing, and even tattoos.[51] In *Pleasant Grove City v. Summum*,[52] the Court also recognized monuments as "government speech."[53] A wedding cake is essentially a temporary, edible monument to a couple's union. In *Brown v. Entertainment Merchs. Ass'n*,[54] in which the Court struck down a 2005 California law banning the sale of certain violent video games to children, the Court considered whether a new medium, video games, constituted artistic expression. In holding that it did, the Court evaluated whether the medium contained "familiar literary devices" and "features distinctive to the medium."[55]

Similarly, Jack Phillips and other cake artists incorporate literary themes into their cake designs. An *amicus* brief filed by cake designers on behalf of neither party illustrates the incorporation of "literary devices." One cake design features an "Alice in Wonderland" wedding cake, another celebrates a couple's Indian heritage, and another commemorates a couple's first meeting at the Oklahoma State Fair.[56] Phillips specially designs each of his cakes after consulting with the couple to learn their story and vision for their wedding and future. He incorporates personal themes (e.g., mountain climbing) into his custom wedding cakes. He uses his artistic skills, including sketching, painting, sculpting, baking, and construction to design each unique wedding cake.

Writers tell stories on a page, and painters tell stories on a canvas. Jack Phillips and other cake designers tell stories through the medium of cake design. Their art is no less expressive because it can be consumed. Ice sculptures and skywriting are forms of expression that are equally ephemeral. The creativity involved in custom cake design has long been recognized and protected by the federal government as intellectual property and provided with copyright protection.[57]

Custom cake designs also have artistic value that cannot be compared to off-the-shelf cakes purchased at a supermarket or even to the other items that Jack Phillips sells at Masterpiece Cakeshop. These custom creations take on special value because of the collaborative process between the couple and the designer and the unique story they agree to tell through the design of the cake. This artistic value is why Jack Phillips can charge customers several hundred dollars for custom wedding cakes that may feed the same number of people as a much less expensive off-the-shelf item. More well-known cake designers charge in the tens of thousands of dollars for their time and artistic input.[58]

But perhaps the clearest recognition of the artistic and expressive value of cake design comes from the state of Colorado itself. The Colorado Civil Rights Commission stated that an African American baker may decline to create a custom cake celebrating the racist ideas of a member of the Aryan Nation, and a Muslim baker may refuse to create a custom cake denigrating the Qur'an and, hence, his faith.[59] The CCRC also upheld the right of three cake designers to decline requests from religious customers for cakes criticizing same-sex marriage. According to the Administrative Law Judge whose decision was upheld by the Colorado Court of Appeals, "Where a message or symbol is 'offensive,' the cake artist has a 'free speech right to refuse' it."[60] When the customers who were refused request for cakes critical of same-sex marriage complained to the CCRC about religious discrimination, the CCRC dismissed their claims, even though creed is also a protected category under CADA.[61] Each of these five transactions show that the CCRC recognizes that custom cakes are artistic expression and that when a cake artist finds offensive the content of the message to be conveyed, he can refuse to bake the custom cake—but only so long as the CCRC *also* takes offense at the message that would be conveyed.

The Supreme Court has admonished states against doing exactly what the CCRC is doing in its application of CADA. In *Texas v. Johnson*, the Court stated that when avoiding personal offense is the purpose of a law limiting expressive conduct (flag-burning), that law is a content-based restriction, and strict scrutiny must be applied. In that case, the Court invalidated a Texas statute against burning the flag because it did not just seek to protect the physical integrity of the flag but had the invalid purpose of preventing offense being taken by those who witnessed the flag-burning. The Court held that the emphasis on offense as a form of "desecration" showed the law was not "unrelated to the suppression of free expression" and must therefore be subjected to "the most exacting scrutiny."[62]

The state of Colorado should have applied the same standard to Jack Phillips as to the other five cake designers. The state should have recognized that Phillips' cake designs are also artistic expression meriting First Amendment protection—including the right to refuse to express the message. The Respondents ignore the expressive nature of the cake design only when it suits their ideology. The Supreme Court should not follow suit.

The State of Colorado seeks to distinguish the aforementioned five cake requests—opposing same-sex marriage, supporting the Aryan Nation, and denigrating the Qur'an—from the same-sex wedding cake requested of Jack Phillips because Phillips did not discuss specific words or symbols with Mr. Mullins and Mr. Craig and because it was not clear what words or symbols they would have requested. This argument misses the point. What was clear from the outset of their conversation was that Mullins and Craig wanted Jack Phillips to create a cake for a same-sex wedding, which runs contrary to his conscience. The actual words or symbols that anyone would ask Jack Phillips to create for such an occasion should not be determinative.

There was *no* type of cake that Jack Phillips could custom-design for a same-sex wedding without violating his religious beliefs, just as there is no cake that an African American baker should have to create to celebrate a "white-supremacist message for the Aryan Nations church."[63] The Church of Satan has asked Jack Phillips to design a cake for Satan's birthday, yet there is no birthday cake that Phillips could create for Satan. Regardless of whether it contained any words or symbols, he could not in good conscience affiliate himself with such an occasion or its underlying meaning because of his sincerely held religious beliefs.[64]

In each case, it is the *idea* expressed by the occasion itself that is problematic, not merely the symbols or words that might also be used to convey that idea. For the same reason that the five bakers should not have to design cakes for ideas they find offensive, Jack Phillips should not have to design cakes for same-sex weddings. To make his right of refusal contingent on specific words or symbols would render his right meaningless. The First Amendment has always given full protection to artistic expression. Jack Phillips's custom-cake designs fall squarely into that category. Therefore, Colorado's application of its public accommodation law to his custom-cakes designs must pass the test of strict scrutiny.

IV. The Respondents' Theory Could Open the Door to State Compulsion of Many Forms of Expression

The Respondents contend that Jack Phillips' cake designs are not speech and that he declined to bake the wedding cake for Mr. Mullins and Mr. Craig because of their sexual orientation. Mr. Mullins' and Mr. Craig's own actions and statements, however, indicate that they viewed their wedding cake as a meaningful expression of their union, hence, a form of speech and not just another food item that their guests would consume. They went to a specialty cake shop recommended by their wedding coordinator to order a custom-designed wedding cake instead of purchasing an off-the-shelf cake. This was a conscious decision to spend more money in order to obtain the services of a skilled artist to create a custom design for them to celebrate their wedding.

Indeed, the wedding cake which they ultimately obtained (for free) had colored layers arranged in the pattern and sequence of a rainbow, the emblematic symbol of gay pride that is widely displayed on clothing, bumper stickers, and tattoos. The rainbow is the well-known symbol for LGBT-related events, venues, and causes. When the Obama Administration wanted to celebrate the Supreme Court's decision in *Obergefell,* it lit the White House in the colors of the rainbow. An official said the lighting was done "to demonstrate our unwavering commitment to progress and equality.... The pride colors reflect the diversity of the LGBT community."[65]

Mr. Craig's and Mr. Mullins' desire for their wedding cake to send a message about the meaning of their marital union is hardly surprising, especially since same-sex marriages were contested in Colorado at the time. Their choice of a cake to communicate a special message about their union is part of a broader cultural trend that has popularized no less than three TV shows, enabled one celebrity cake designer to charge up to $50,000 for a wedding cake, and created a genre of wedding-cake design literature.[66] That Mr. Craig and Mr. Mullins would choose a wedding cake to express their own ideas about the day many consider the biggest in their lives is entirely typical of Americans on the cusp of matrimony.

The Respondents claim that "[f]or all Phillips knew at the time, [they] might have wanted a non-descript cake that would have been suitable for consumption at any wedding."[67] But this hardly seems fitting for the magnitude of such a rare and unique occasion. If their desires were that generic, then the other items that they acknowledge Jack Phillips offered to sell them—cakes for showers or birthdays or brownies—could just as easily have served the purpose of "consumption."[68] That was clearly not the case. Mr. Craig and Mr. Mullins had a unique message they wanted to express about their wedding and

about same-sex weddings in general, which is why nothing less than a custom-designed wedding cake would do.

And even if the Supreme Court were to find that Jack Phillips' custom cakes were expressive conduct rather than artistic expression, his designs would still merit First Amendment protection. In *Texas v. Johnson*, the Supreme Court established that there are two elements of expressive conduct: (1) a subjective intent to convey a message, (2) coupled with the significant likelihood that this message will be understood by an objective observer.[69] Phillips' cake designs meet both prongs of this test—just as the messages expressed by burning an American flag, wearing a black armband, or juxtaposing a peace sign with an upside down American flag are understood to convey a clear message to a reasonable observer even though no words are uttered.

Jack Phillips expresses his beliefs both by the cakes that he designs and the cakes that he chooses not to design. The expressive nature of his cakes is why he refuses bachelor party, divorce, and Halloween cake orders. It is the messages that these cakes express, not the identity of customers or the chance to make profit, that drive Phillips' decisions. Contrary to the Respondents' argument, guests at a wedding who see a custom-designed cake will reasonably understand that the designer is in favor of the marriage because of the social context.[70]

This is why those who saw Johnson burn the flag at the end of the Republican Convention knew he was protesting the policies of the Reagan Administration. It would be the rare observer who would think that Johnson meant to express approval of the Reagan Administration by burning the flag or that the creative mind behind an elaborate rainbow-layered wedding cake disapproved of same-sex marriage.

If the Court sides with Colorado's overly expansive interpretation of public accommodation laws, a governmental entity could compel a wide variety of artistic expression and expressive conduct. The Respondents admit that they would, if given the opportunity, force many creative professionals to create custom expression in order to compel conformity with their views on marriage. During the hearings, they acknowledged that painters, sculptors, and graphic designers "operating as a public accommodation" would be forced to create custom designs for same-sex weddings.[71] It is not clear what, if any, form of artistic expression would be off-limits to the state of Colorado. In *Masterpiece Cakeshop*, the Court can take a clear step toward protecting the free flow of different ideas or toward a more closed society that penalizes non-conformists on same-sex marriage.

V. Applying Compelled Speech and Compelled Association Doctrine in the Context of Public Accommodations

The Respondents argue that public accommodation laws must trump free speech, free association, and freedom of religion in this case. However, they do not provide any valid distinction between Jack Phillips' expression and the expression of the South Boston Allied War Veterans Council that received First Amendment protection in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*.[72] In *Hurley*, the Supreme Court was faced with a similar attempt to apply a public accommodation law to force the Veterans Council to accept the participation of the Irish–American Gay, Lesbian and Bisexual Group of Boston (GLIB) in its annual St. Patrick's Day parade. Though the Massachusetts public accommodations law was content-neutral on its face, the Supreme Court found that Massachusetts applied it in a "peculiar way" to fundamentally alter "speech itself."[73] The Court unanimously held that Massachusetts erred by treating the parade's message, rather than the parade itself, as the public accommodation. Writing for the Court, Justice David Souter stated:

> Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.[74]

Here, too, Colorado has erred by treating Jack Phillips' cake designs (rather than access to the cake shop) as the public accommodation. In *Hurley*, the Veterans Council opened participation in their parade to all. Anyone could march in an approved unit and anyone could attend the parade. If Massachusetts had treated the parade itself as the public accommodation, the Veterans Council would have met the standard of the law. However, Massachusetts treated the parade's *message* as the public accommodation and ordered the Council to allow GLIB to march "as its own parade unit carrying its own banner" to communicate its message of gay pride which fundamentally altered the message of the parade as a whole.[75]

If the State of Colorado had treated the store (Masterpiece Cakeshop) as the public accommodation, Jack Phillips would have met the standard of the law because he served all. However, Colorado treated the wedding cake *itself* as the public accommodation and ordered Jack Phillips to alter the message he chooses to express (that the institution of marriage is between one man and one woman) both through the cakes he chooses to create and the orders that he declines. As the *Hurley* Court held, "When dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[76] Colorado has violated Jack Phillips' autonomy over his own speech just as Massachusetts violated the autonomy of the Veterans Council over their speech.

As Texas and several other states put it plainly in their *amicus* brief in support of Phillips, "customized pieces of art are not public accommodations (like restaurants and hotels)."[77] Under the Respondents' interpretation of public accommodation laws, it could be argued that movie theaters do not just need to open their doors to all customers (which they should), but that theater owners should open their movie screens to all requests from customers of a protected class. In the Respondents' vision of society, creative professionals like Jack Phillips are mere tools for the expression of any customer—so long as the state approves of that expression—like machines that perform the same task over and over rather than artists who imbue creativity and expression into each unique design.

The Respondents also fail to distinguish their case from the Supreme Court's ruling in *Boy Scouts of America v. Dale*.[78] In *Dale*, the Court denied an attempt by a gay scout leader to force the Boy Scouts of America to change their teaching about sexuality by accepting him as a scout leader. James Dale also asserted a discrimination claim on the basis of sexual orientation under New Jersey's public accommodations law. The Court held that "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of...ends" and that "freedom of association...plainly presupposes a freedom not to associate."[79]

Jack Phillips has the right to choose not to associate himself with same-sex weddings by not creating or delivering custom cakes to them. The *Dale* Court stated, "We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message."[80] Nor is the law "free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[81] Yet that is precisely what Colorado has done. It has impermissibly used its own "approved" views on marriage to interfere with and to discourage Jack Phillips' "disapproved" expressive message.

The Respondents' only effort to distinguish this case from that of *Hurley* and *Dale* is to argue that for-profit organizations like Masterpiece Cakeshop do not have First Amendment Rights like the South Boston Allied War Veterans Council and Boy Scouts of America, which were both nonprofit institutions. But this is not a distinction that the law makes. The Supreme Court has repeatedly and consistently upheld the free speech and free exercise rights of for-profit corporations.[82] Even the Colorado Court of Appeals recognized that Masterpiece's status as a for-profit bakery did not strip it of its First Amendment speech protections.[83]

VI. Application of Strict Scrutiny to Colorado's Public Accommodation Law Under Free Speech

Because Jack Phillips' cake design is artistic expression that is protected speech under the First Amendment, the Supreme Court should recognize his defense to the charge that he violated CADA.

Moreover, Colorado's application of its public accommodation law fails the test of strict scrutiny because Colorado does not have a compelling interest in enforcing agreement on its views about same-sex marriage as orthodoxy.

Colorado's ostensible justification for applying CADA to Phillips is to prevent status-based discrimination against a class of people on the basis of their sexual orientation. But the facts show that Colorado's definition of a protected class is actually based on support for same-sex marriage, not sexual orientation. This is evidenced by the state's inconsistent application of the law.

Colorado applies CADA in a manner that does not recognize discrimination on the basis of creed. When three cake artists denied requests by religious customers for cakes critical of same-sex marriage, Colorado did not view it as religious discrimination. When Jack Phillips said he did not discriminate because he regularly serves gay customers, Colorado called it a "distinction without a difference," but when the three cake artists denied discriminating on the basis of religion, Colorado said they were exempt from CADA because they regularly served people of all religions.[84]

Jack Phillips was actually asked by three people to create a custom cake for a same-sex wedding, Mr. Mullins, Mr. Craig, and Mr. Craig's heterosexual mother, Deborah Munn, who also felt aggrieved by Jack Phillips' decision to deny her request that he create a cake for her son's wedding. While this fact does not change the social disapproval Jack Phillips will face for his decision, it cannot be said that his decisions about custom cake orders are based upon the sexual orientation of the customer making the request, as opposed to the message that honoring such a request would convey. Additionally, Phillips has always served all customers, regardless of their sexual orientation, and continues to do so today. Moreover, some of his gay customers have expressed support for his freedom to create (or not create) custom cakes according to his beliefs.[85]

Colorado has applied its public accommodations law not to protect a class from discrimination but to protect a particular viewpoint from public disagreement. It cannot have a compelling interest in promoting its views about same-sex marriage when the Supreme Court itself has recognized that those with a contrary view are not motivated by outright bigotry—but rather hold their views based on "decent and honorable" premises. And Colorado cannot demonstrate that it has applied CADA in a manner that is narrowly tailored to its ostensible claim of preventing status-based discrimination on the basis of sexual orientation. Just as in *Bray,* Colorado is treating opposition to same-sex marriage as an "irrational surrogate" to discrimination on the basis of sexual orientation.

VII. Free Exercise Jurisprudence: A Tradition of Respecting Conscientious Objectors

America's accommodations for pacifists, pro-life advocates, and medical professionals because of their religious and moral convictions about life take nothing away from those who support war or abortion.[86] Nor is a physician's conscientious objection to circumcision tantamount to being anti-Semitic or anti-Muslim. Similarly, recognizing Jack Phillips' religious objections to expressing support for same-sex marriage would take nothing away from those who support or participate in same-sex weddings. Here, Colorado's application of its public accommodation law impermissibly burdens Mr. Phillips' religious exercise as well as his free speech rights[87] and is therefore a violation of a "hybrid" right as that term was used by the Supreme Court in the landmark case *Employment Division v. Smith*.[88]

In *Smith,* the Court considered whether Native American employees of the state of Oregon must be exempted from a law that banned the use of peyote (a hallucinogenic drug) because they used peyote as part of a religious rite and whether banning the drug's usage for this limited purpose violated the Free Exercise Clause of the First Amendment. In an opinion by Justice Antonin Scalia, the Court rejected this argument and held a neutral law of general applicability could be applied against the challengers even though its application would have an incidental effect on the practice of their religion.[89] In this case, the Court held that the law was not aimed at a physical act engaged in for a religious reason and that the law was applied to everyone who used peyote.[90] In so doing, the Court went to great pains to distinguish challenges based solely on the Free Exercise Clause from "hybrid" cases in which a challenge to an otherwise neutral law of general applicability is premised on the Free Exercise Clause in conjunction with other constitutional protections such as freedom of speech.[91] In such cases, Scalia acknowledged, the

Court has routinely ruled in favor of those seeking exemptions from the law.[92]

That is precisely the situation here. Colorado's application of its public accommodation law impermissibly burdens both Mr. Phillips' free speech and free exercise rights—exactly the situation faced by the Barnette sisters in West Virginia who refused to salute the American flag and by the Wooley family in New Hampshire who refused to display a license plate that said "Live Free or Die."[93] In both cases, the religious beliefs of the two families motivated their objections to expressive conduct that the state wanted to compel because the message that would be conveyed contradicted their religious beliefs. Here, too, Jack Phillips objects to the government forcing him to express support for same-sex marriage on his custom cake designs because of his religious beliefs.

However, even if the Court were to construe Phillips' challenge to be one based solely on a violation of the Free Exercise Clause, he should still prevail, because, unlike the peyote ban in Oregon, Colorado has not applied CADA in a neutral, generally applicable manner. Colorado does not apply CADA to protect individuals who order custom cakes expressing their religious beliefs about marriage when those beliefs contradict the state's support of same-sex marriage. But it does apply CADA to protect individuals who order custom cakes that agree with the state's support of same-sex marriage. And it does not enforce CADA against cake artists who decline to create custom cake *opposing* same-sex marriage—even though it does enforce CADA against cake artists who decline cakes *supporting* same-sex marriage.

Colorado's targeted and biased application of CADA is analogous to the way that the city of Hialeah, Florida, applied its law against animal slaughter in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[94] a case that followed *Smith* by three years. In that case, the city of Hialeah had a long-running dispute with members of the Santeria religion who engaged in ritual animal sacrifice. When the city passed an ordinance to prohibit animal slaughter except for purposes of food consumption, it created a wide variety of exemptions for kosher butchers, slaughterhouses, hunting, fishing, pest extermination, and euthanasia of stray animals. The only group against whom the council enforced its policy was the Santerians.

The Supreme Court found that the Hialeah City Council "gerrymandered with care" a facially neutral law to enforce its biases upon a particular group of people, a small religious minority whose beliefs did not conform to their own. A city councilman stated that Santeria is "in violation of everything this country stands for" and an attorney for the City stated that "[t]his community will not tolerate religious practices abhorrent to its citizens."[95] Similarly, during a public hearing, a Colorado Civil Rights Commissioner told Jack Phillips, "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust.... [W]e can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[96] The State's hostility toward Jack Phillips' religious beliefs is undeniable.

Like the city official in Hialeah, the Colorado Civil Rights Commissioner, acting on behalf of the State, expressed animus toward Phillips' religious beliefs, disparaged them publicly, and identified his "despicable" religious beliefs as the source of "hurt" toward others. This is precisely the kind of biased misapplication of the law against a person because of his or her religious beliefs that *Lukumi* proscribed. Such blatant official hostility to Jack Phillips' beliefs shows that Colorado "gerrymandered the law with care" to compel conformity with its beliefs on marriage.

The State of Colorado has imposed a heavy burden on Jack Phillips' religious exercise. It has forced him to choose between violating his conscience and continuing to provide cakes for weddings. Colorado forced him to choose between losing access to the most lucrative market in his industry or disobeying God, to whom he has dedicated his business and labor. Phillips named Masterpiece Cakeshop after Jesus, to whom he refers as his only master in reference to a Biblical passage that states that no one can serve two masters. Colorado now seeks to make him serve *its* interests by compelling him to express support for same-sex marriage through his custom cake designs.

In *Smith*, the Court stated that the government was not to use its power to violate religious beliefs. It identified several specific government actions as off-limits, including "compel[ling] affirmation of religious belief, punish[ing] the expression of religious doctrines it believes to be false, [and] impos[ing] special disabilities on the basis of religious views or religious status."[97] The Supreme Court found that Oregon's application of its law against the possession or

use of peyote did not breach these prohibitions and also noted that Oregon's application of its law did not "attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs."[98]

But Colorado's actions violate Jack Phillips' religious freedom in all the ways that the *Smith* Court expressly sought to forbid. Colorado's actions not only compel Phillips' external actions, they compel him to violate his internal beliefs.

- The CCRC ordered him to affirm *its* beliefs about marriage, a belief that is inherently religious for him.

- The CCRC seeks to punish the expression of a religious doctrine it believes to be wrong (that a valid marriage can only exist between one man and one woman) by forcing Phillips to create cakes for same-sex weddings.

- The CCRC has imposed a special disability on Phillips' ability to design expressive cakes because of his religious views, a burden that it does not impose on other cake artists who share the state's views on marriage.

- The CCRC ordered him to communicate that a marriage between two men is valid and worthy of celebration, in violation of a core tenet of his religion, that God ordained marriage to be between one man and one woman.

- The CCRC ordered him to teach his employees (including his children) that they must celebrate same-sex marriages by creating custom cake designs for them.

On every point, Colorado has failed to heed the *Smith* Court's admonitions not to onerously burden religious exercise for the illegitimate purpose of enforcing cultural orthodoxy.

The beliefs that Phillips holds may be viewed as strange and offensive by some, but this is not an adequate justification (much less "a compelling state interest") for the government to compel his speech or violate his religious freedom. To understand why it is wrong for the government to use its power to compel Phillips' speech to enforce the cultural orthodoxy of same-sex marriage, it is helpful to remember why the Supreme Court of the United States stopped forbidding speech to enforce religious orthodoxy.

In 1952, in *Joseph Burstyn, Inc. v. Wilson*,[99] the Supreme Court overturned a New York blasphemy law that prohibited the distribution of licenses for films deemed "immoral" or "sacrilegious." When state officials saw the film *The Miracle* by Italian director Roberto Rossellini, which depicted a girl who believed she was the Virgin Mary being impregnated by "Saint Joseph," they were outraged and denied a permit to the theater owner. The Supreme Court held that this violated the First Amendment. Writing for the majority, Justice Tom Clark stated: "The state has no legitimate interest in protecting any or all religions from views distasteful to them.... It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine."[100]

The Court was unequivocal: Feelings of offense and distaste could not justify government censorship. At the cost of the hurt feelings of religious believers, the Court prioritized speech. The Justices may well have sympathized with those whose religious feelings were offended, but the Court recognized that there was no material harm to anyone. Those who would be offended could easily avoid the film, and there were plenty of other films for them to watch. Today, Respondents argue that same-sex couples suffer "dignitary harm" when a particular cake designer, florist, or photographer declines to provide services for same-sex weddings—even though they can easily obtain these services from others who would not have to violate their consciences to provide them.

The Respondents urge the Supreme Court to put its thumb on the scale to ensure victory for their side of the same-sex marriage debate by using its power to punish the other side. Such a decision would serve to undermine a free, tolerant, and pluralistic society. Far too many people in the world are still subject to the illiberal principles and draconian punishments of laws that force them to choose between their consciences and prevailing religious, cultural, and political orthodoxies. Laws that either suppress or compel speech deepen divisions rather than encourage citizens to treat one another as equals, capable of reasoned debate. When the Supreme Court struck down blasphemy laws in the 1950s, it chose the higher ground of free speech over the easier, but more dangerous path of suppressing speech and pushing debate underground.

As a result of *Burstyn* and the other similar holdings described above, the Supreme Court has enabled America to continue as a nation of people with incredibly diverse opinions who mutually sustain our republic by tolerating one another's differences. When government authorities use laws to punish dissent from cultural orthodoxy, this sets us back to a time when personal offense was elevated over the freedom to think, speak, and work according to one's own beliefs.

VIII. Conclusion

The Supreme Court is faced with two starkly different visions of the country's future. One vision shuns the long-held American consensus that all citizens benefit when disagreements are expressed openly. The other vision preserves the careful balance that the Supreme Court has struck over decades of debate on controversies from the Vietnam War to abortion to the death penalty. For the sake of preserving national unity, the Court has drawn a clear line against compelling speech so that diverse and conflicting viewpoints can be expressed. On the issue of same-sex marriage, the considerations are no different—and the result should not be, either.

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Endnotes

1 The same-sex couple represented by the ACLU filed a complaint with the Colorado Civil Rights Division, the state agency that enforces the Colorado Anti-Discrimination Act (CADA). A Colorado Administrative Law Judge (ALJ) decided that Jack Phillips violated CADA. Phillips then appealed to the Colorado Civil Rights Commission, which upheld the ALJ's decision. He then appealed to the Colorado Court of Appeals, which affirmed. Phillips then sought, but was denied, review by the Colorado Supreme Court. Throughout this memo, there are references to the Colorado Civil Rights Commission (CCRC), which is the Respondent in the case as "Colorado or "the State of Colorado" because it is an official body of the state that enforces state law. *Colorado Civil Rights Commission*, Colo. Dep't of Reg. Agencies, https://www.colorado.gov/pacific/dora/civil-rights/commission (last visited Nov. 29, 2017).

2 Mozilla terminated its CEO, Brendan Eich, after he made a financial contribution in favor of California Proposition 8, a ballot initiative for the support of traditional marriage. Tony Bradley, *Backlash Against Brendan Eich Crossed a Line*, Forbes (April 5, 2014), https://www.forbes.com/sites/tonybradley/2014/04/05/backlash-against-brendan-eich-crossed-a-line/#6040c0fb6f8a.

3 HGTV canceled a show after its stars discussed their opposition to same-sex marriage. Lisa Respers France, *Benham Brothers Lose HGTV Show After "Anti-Gay" Remarks*, CNN (May 9, 2014), http://www.cnn.com/2014/05/08/showbiz/tv/benham-brothers-hgtv/index.html.

4 An Air Force Colonel was relieved of his duties for failing to sign a document in support of a colleague's same-sex spouse. Kyle Rempfer, *Air Force Colonel Appeals Discipline for Same Sex Marriage Discrimination*, Air Force Times (Oct. 28, 2017), https://www.airforcetimes.com/news/your-air-force/2017/10/28/air-force-colonel-appeals-discipline-for-same-sex-marriage-discrimination/.

5 Large law firms overwhelmingly defend same-sex marriage and are uncomfortable with publicly supporting traditional marriage. Prominent lawyers Paul Clement and Gene Schaerr chose to resign from their positions at large law firms in order to litigate on behalf of traditional marriage supporters. Joan Biskupic, *U.S. Law Firms Flock to Gay-Marriage Proponents, Shun Other Side*, Reuters (June 10, 2014), https://www.reuters.com/article/us-usa-court-gaymarriage-insight/u-s-law-firms-flock-to-gay-marriage-proponents-shun-other-side-idUSKBN0EL10820140610. *See also*, Ronald Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, The Heritage Found. (Oct. 6, 2016), http://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought (lawyers may risk violating ABA Model Rule 8.4(g) if they belong to a law-related organization that opposes gay marriage).

6 Julea Ward was suspended from a graduate program in counseling because she declined to counsel a man in a same-sex relationship. Mark Oppenheimer, *A Counselor's Convictions Put Her Profession on Trial*, NY Times (Feb. 3, 2012), http://www.nytimes.com/2012/02/04/us/when-counseling-and-conviction-collide-beliefs.html.

7 Catholic Charities was forced to withdraw from providing foster care and adoption services in Massachusetts, Illinois, and Washington, DC, because it uses traditional marriage as a criterion for vetting families seeking to adopt. *Catholic Charities Pulls Out of Adoptions*, Wash. Times (March 14, 2006), https://www.washingtontimes.com/news/2006/mar/14/20060314-010603-3657r/.

8 Former Atlanta Fire Chief Kelvin Cochran was terminated for a book he wrote in which he stated support for traditional marriage. Abby Ohlheiser, *Atlanta Fire Chief Suspended After Distributing his Religious Book to Employees*, Wash. Post (Nov. 26, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/atlanta-fire-chief-suspended-after-distributing-his-religious-book-to-employees/?utm_term=.34dd94f12f21.

9 Emily Monacelli, *Farmer Banned at City Market Over Gay Marriage Stance Has Day in Court*, Kalamazoo Times (Sept. 13, 2017), http://www.mlive.com/news/kalamazoo/index.ssf/2017/09/country_mill_farms_hearing.html.

10 *Censorship: Spotlight on Film*, ACLU, https://www.aclu.org/other/censorship-spotlight-film (last visited Nov. 29, 2017).

11 379 U.S. 241 (1964).

12 *See* Jurisdictional Statement and Brief at 23, 54, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (No. 515).

13 Brief for Petitioners at 42, Masterpiece Cakeshop v. Colorado Civil Rights Commission, No. 16-111 (Aug. 31, 2017), http://www.scotusblog.com/wp-content/uploads/2017/09/16-111-ts.pdf.

14 *Id*. at 42–43.

15 506 U.S. 263 (1993).

16 *Id*. at 269.

17 576 U.S. ___, 135 S.Ct. 2584 (2015), https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

18 *Id*. at 2602.

19 "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Id.*

20 *Bray*, 506 U.S. at 270. The Court held that there must be a "class-based, invidiously discriminatory animus [underlying] the conspirators' action" for it to violate civil rights law. *Id*. at 268. It is unreasonable to assume that opposition to abortion reflects hostility toward women, because there are other "common and respectable reasons" for opposing abortion other than a demeaning view of women. *Id*. at 270.

21 Tom Geoghegan, *The Gay People Against Gay Marriage*, BBC News (June 11, 2013), http://www.bbc.com/news/magazine-22758434. *See also, e.g.*, Paul Rosnick, *I'm Gay, and I Oppose Same-Sex Marriage*, The Federalist (April 28, 2015), http://thefederalist.com/2015/04/28/im-gay-and-i-oppose-same-sex-marriage/; Austin Ruse, *Legendary Gay Designers Oppose Gay Marriage, Gay Parenting, Surrogacy*, Breitbart (March 14, 2015), http://www.breitbart.com/big-government/2015/03/14/legendary-gay-designers-oppose-gay-marriage-gay-parenting-surrogacy/.

22 *See* Geoghegan, *supra* note 21.

23 *Bray*, 506 U.S. at 270.

24 Mikey Campbell, *Apple, Other Tech Companies Back LGBT Cause in Supreme Court Case Involving Wedding Baker*, Apple Insider (Oct. 26, 2017), http://appleinsider.com/articles/17/10/26/apple-other-tech-companies-back-lgbt-cause-in-supreme-court-case-involving-wedding-cake-baker.

25 Richard Wolf, *Colorado Baker's Free Speech v. Same Sex Marriage Case Floods High Court*, USA Today (Nov. 2, 2017), https://www.usatoday.com/story/news/politics/2017/11/02/free-speech-v-same-sex-marriage-case-floods-high-court/820672001/.

26 Julie Moreau, *Democrats, LGBT Groups Support Gay Couple Refused Service by Baker*, NBC News (Oct. 31, 2017), https://www.nbcnews.com/feature/nbc-out/democrats-lgbtq-groups-support-gay-couple-refused-service-baker-n816031.

27 Brief of the Colorado Civil Rights Commission in Opposition at 3, Masterpiece Cakeshop v. Colorado Civil Rights Commission, No. 16-111 (Oct. 23, 2017), http://www.scotusblog.com/wp-content/uploads/2016/12/16-111-BIO-CCRC.pdf ("Petitioners are willing to serve gay and lesbian customers and will create custom cakes for them for a variety of occasions. But Petitioners have a policy, based on Phillips's religious beliefs, of refusing to sell any wedding cake of any design to a same-sex couple.").

28 Brief for Petitioners, *supra* note 13, at 54 (referencing Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619 (2015)), http://lawreview.usc.edu/issues/past/view/download/?id=1000018).

29 *Obergefell*, 135 S.Ct. at 2638 (citations omitted).

30 410 U.S. 113 (1973).

31 Brief for Petitioners, *supra* note 13, at 2.

32 337 U.S. 1 (1949).

33 *Id*. at 3.

34 *Id*. at 4. *See also* Cohen v. California, 403 U.S. 15 (1971). In *Cohen*, the Supreme Court overturned a criminal conviction for disturbing the peace of a man who wore a jacket in the public corridors of a courthouse that displayed and expressed his opposition to the draft using a coarse expletive. Writing for the majority, Justice John Marshall Harlan II wrote that the First Amendment was designed to protect the marketplace of ideas. *Id*. at 24–25 ("To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance.... These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.").

35 485 U.S. 46 (1988).

36 *Id*. at 56.

37 *See* United States v. Alvarez, 567 U.S. 709 (2012) (striking down a criminal law forbidding false statements regarding receipt of military decorations or medals on First Amendment grounds); United States v. Stevens, 559 U.S. 460 (2010) (striking down a criminal law banning videos showing animals being crushed on First Amendment grounds).

38 491 U.S. 397 (1989).

39 *Id*. at 414.

40 Boos v. Barry, 485 U.S. 312, 322 (1988).

41 *Obergefell*, 135 S.Ct. at 2607.

42 Pac. Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 19–20 (1986) (applying strict scrutiny in a case of compelled speech).

43 Holder v. Humanitarian Law Project, 561 U.S. 1, 27–8 (2010) (describing how under *Texas v. Johnson*, 491 U.S. 397, 403 (1989), strict scrutiny should be applied to content-based regulations of expressive conduct and that under *United States v. O'Brien*, 391 U.S. 367 (1968), intermediate scrutiny standard only applies to content-neutral regulations of expressive conduct).

44 *Pac. Gas*, 475 U.S. at 1, 2 (applying strict scrutiny to invalidate Pacific Gas' regulation because it was not "a narrowly tailored means of serving a compelling state interest").

45 Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602 (1998).

46 Brown v. Entertainment Merchs. Ass'n, 564 U.S. 786, 790 (2011).

47 319 U.S. 624 (1943).

48 *Id*. at 642.

49 *Id*.

50 Kois v. Wisconsin, 408 U.S. 229, 231 (1972).

51 *See* Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (recognizing that even though some forms of expression do not convey a "particularized message," the Constitution would unquestionably shield the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll"). *See also* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (regarding the protection of sexually oriented telephone messages); Schad v. Borough of Mount Ephraim, 452 U.S 61, 66 (1981) (addressing an ordinance prohibiting nude dancing); Anderson v. City of Hermosa Beach, 621 F. 3d 1051, 1061 (9th Cir. 2010) (holding tattoos are speech protected by the First Amendment).

52 555 U.S. 460 (2009).

53 *Id*. at 470.

54 564 U.S. 786 (2011).

55 *Id*. at 790.

56 Brief for Cake Artists as *Amici Curiae* in Support of Neither Party at 9, 12, 13, Masterpiece Cakeshop v. Colorado Civil Rights Commission (No. 16-111) (Sept. 7, 2017), http://www.scotusblog.com/wp-content/uploads/2017/09/16-111_ac_cake_artists.pdf.

57 *Id*. at 37–39.

58 Caitlin Johnson, *Weinstock's Wedding Cakes for the Wealthy*, CBS (Feb. 8, 2007), https://www.cbsnews.com/news/weinstocks-wedding-cakes-for-the-wealthy/.

59 Brief for Petitioners, *supra* note 13, at 12.

60 *Id*. at 12, 40.

61 *Id*. at 36.

62 *Johnson*, 491 U.S. at 412.

63 Brief for Petitioners, *supra* note 13, at 12.

64 Kelsey Harkness, *Exclusive: Colorado Baker Asked to Make "Birthday Cake" for Satan*, Daily Signal (Oct. 13, 2017), http://dailysignal.com/2017/10/13/exclusive-colorado-baker-asked-to-make-birthday-cake-for-satan/.

65 Adam B. Lerner, *White House Set Aglow with Rainbow Pride*, Politico (June 26, 2015), https://www.politico.com/story/2015/06/white-house-set-aglow-with-rainbow-pride-119490.

66 Brief for the States of Texas, et al. at 12, Masterpiece Cakeshop v. Colorado Civil Rights Commission (No. 16-111) (Sept. 7, 2017), http://www.scotusblog.com/wp-content/uploads/2017/09/16-111_tsac_States-of-Texas.pdf.

67 Brief in Opposition at 3, Masterpiece Cakeshop v. Colorado Civil Rights Commission (No. 16-111) (Nov. 28, 2016), http://www.scotusblog.com/wp-content/uploads/2016/12/16-111-BIO-mullins-and-craig.pdf.

68 *Id*. at 3 ("He explained that he would sell the couple other baked goods, including 'birthday cakes, shower cakes,...cookies and brownies.' But, he said, 'I just don't make cakes for same-sex weddings.'").

69 *Johnson*, 491 U.S. at 404 (citing Spence v. Washington, 418 U.S. 405 (1974)); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). As noted previously, the Supreme Court recognized in *Hurley* that expression even though no particularized message was present. *See supra* note 51.

70 Brief in Opposition, *supra* note 66, at 9 ("No reasonable observer would understand the Company's provision of a cake to a gay couple as an expression of its approval of the customer's marriage, as opposed to its compliance with a non-discrimination mandate.").

71 Brief for Petitioners, *supra* note 13, at 42.

72 515 U.S. 557 (1995).

73 *Id*. at 572–73.

74 *Id*. at 573 (citations omitted).

75 *Id.* at 572–73.

76 *Id.* at 576.

77 Brief for the States of Texas et al., *supra* note 65, at 3.

78 530 U.S. 640 (2000).

79 *Id*. at 647–48 (quoting Roberts v. United States Jaycees, 468 U.S. 609 (1984).

80 *Id.* at 642.

81 *Id.* at 661.

82 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Burwell v. Hobby Lobby, 573 U.S. ___, 134 S.Ct. 2751 (2014). *See also* NY Times v. Sullivan, 376 U.S. 254 (1964).

83 Brief for the States of Texas et al., *supra* note 65, at n.3.

84 Brief for Petitioners, *supra* note 12, at 11.

85 Ian Snively & Peter Parisi, *2 Gay Men Explain Why They Support Baker's Refusal to Make Same-Sex Wedding Cake*, Daily Signal (Nov. 17, 2017), http://dailysignal.com/2017/11/17/two-gay-men-explain-why-they-support-bakers-refusal-to-make-same-sex-wedding-cakes/ (In a video shot outside Masterpiece Cakeshop, two gay men, T. J. and Matt explain, "We're here to buy stuff from him and support him, because we don't think any artist should be forced to create for something that violates their beliefs.").

86 *See* United States v. Seeger, 380 U.S. 163 (1965) (upholding moral objections to taking up arms). There are also pro-life conscience protections enshrined in the Church and Wheldon Amendments. Overview of Federal Statutory Health Care Provider Conscience Protections, U.S. Dept. of Health & Human Servs, https://www.hhs.gov/civil-rights/for-individuals/conscience-protections/factsheet/index.html (last visited Nov. 29, 2017).

87 U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion; or *prohibiting the free exercise thereof*, or abridging the freedom of speech").

88 494 U.S. 872 (1990).

89 *Id.* at 885, 878 ("It is a permissible reading of the text…to say that, if prohibiting the exercise of religion (or burdening the activity…) is not the object…but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

90 *Id.*

91 *Id.*

92 *Id.* at 882. The Supreme Court found that the Native Americans did not allege the Constitutional violation of any other right along with the free exercise claim and distinguished their case from other cases of compelled speech that involved both freedom of religion and free speech—such as *Wooley v. Maynard*, 430 U.S. 705 (1977) and *West Virginia v. Barnette*, 319 U.S. 624 (1943)—and freedom of religion, and freedom of association—citing *Roberts v. United States Jaycees*, 468 U.S. 609 (1983).

93 *Smith*, 494 U.S. at 882.

94 508 U.S. 520 (1993).

95 *Id.* at 541–42.

96 Petition for a Writ of Certiorari at 29, Masterpiece Cakeshop v. Colorado Civil Rights Commission (No. ___) (July 22, 2016), http://www.scotusblog.com/wp-content/uploads/2016/08/16-111-cert-petition.pdf.

97 *Smith*, 494 U.S. at 877 (citations omitted).

98 *Id.* at 882.

99 343 U.S. 495 (1952).

100 *Id.* at 505.