No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND
JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,

Respondents.

On Writ of Certiorari to the
Colorado Court of Appeals

BRIEF OF *AMICUS CURIAE* THE FIRST AMENDMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether applying Colorado's public accommodations law to compel Petitioners to create artistic expression contrary to Petitioner Phillips' beliefs about marriage violates the Free Speech Clause of the First Amendment.

The First Amendment Lawyers Association believes it is unnecessary for the Court to decide the Free Exercise Clause issue raised by Petitioners, or to base its analysis on Petitioner Phillips' religious beliefs, whether or not those beliefs are sincerely held.

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INTERESTS OF *AMICUS CURIAE*[1]

The First Amendment Lawyers Association ("FALA") is an Illinois-based, not-for-profit organization comprised of approximately 200 attorneys who represent businesses and individuals engaged in constitutionally protected activities involving the exercise of freedom of speech and of the press. FALA's members practice throughout the United States, Canada, and elsewhere in defense of the First Amendment and free speech and, by doing so, advocate against all forms of governmental censorship. Since FALA's founding in the 1960s, its members have been involved in many of the landmark cases that helped define and strengthen protections for freedom of expression.

As attorneys who routinely defend unpopular speakers and causes, FALA's members celebrate this Court's decisions that have recognized long-overdue constitutional protections for those who have been marginalized and excluded from society, whether or not those cases involved First Amendment issues. Such cases include *Loving v. Virginia*, 388 U.S. 1 (1967), *Brown v. Louisiana*, 383 U.S. 131 (1966), and *Lawrence v. Texas*, 539 U.S. 558 (2003), among many others. The Court's confirmation of a constitutional basis for marriage equality is an important part of the continuing movement toward this nation's pledge

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[1] All parties have consented to this *amicus curiae* brief through letters of consent filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

to protect individual liberties. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

As Justice Kennedy wrote for the Court, "[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," and "[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." *Id.* at 2593, 2598.

Central to these ideas is the core principle that it is not the business of government to dictate how people should live or what they should believe, which is also a fundamental premise of the First Amendment. For "[i]f 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." *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Thus, while the state cannot deny the benefits of marriage based on sexual orientation, it is equally barred from compelling others to agree with same-sex marriage or to show support for the practice by speech or symbolic act.

The First Amendment question presented in this case does not turn on the "possession of particular religious views or the sincerity with which they are held." *Id.* at 634. Accordingly, the Free Speech Clause issue presented for review is entirely disposi-

tive, and the Court need not reach the Free Exercise Clause question.

FALA does not endorse Petitioners' actions or the motives on which they are based. The question is solely whether the government may compel a person to speak or to create an artistic work in the service of some social objective, however worthy. One need not agree or disagree with the message in order to protect the rights of a reluctant messenger. Those who defend the Constitution "must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people." *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009) (citation omitted), *aff'd*, 562 U.S. 443 (2011).

FALA is involved in this case to affirm the First Amendment's essential presumption that "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)). History teaches that "the point of all speech protection" as being "to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995). If that lesson is lost, First Amendment protections are diminished for all Americans.

STATEMENT

The Colorado Civil Rights Commission held that Masterpiece Cakeshop and its owner, Jack C. Phillips, violated the Colorado Anti-Discrimination Act ("CADA"), § 24-34-601(2), C.R.S. 2014, for declining to create a custom-designed wedding cake for the same-sex marriage of Charlie Craig and David Mullins. (Pet. App. 62a-63a). The Commission found that Phillips believes decorating wedding cakes is a form of art and creative expression, and that, as a Christian, participating in a same-sex wedding by creating a wedding cake would violate Biblical teachings. (Pet. App. 66a). Nevertheless, it upheld the Administrative Law Judge's conclusion that "[t]he act of preparing a cake is simply not 'speech' warranting First Amendment protection." (Pet. App. 56a, 75a-76a).

The facts on which the decision was based were sparse but undisputed. Craig and Mullins went to Masterpiece Cakeshop in July 2012 and asked Phillips to design and create a wedding cake for their marriage. Phillips declined, but told them "I'll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings." (Pet. App. 65a). The conversation was brief, and the two men left the store without discussing what the cake would look like or whether it might display some specific message. (Pet. App. 65a).

The couple filed a complaint with the Commission that Phillips had denied them service under the Colorado Public Accommodation Law, which provides, in pertinent part:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

Section 24-34-601(2), C.R.S. Phillips responded that his actions did not violate the law, but argued further that compelling him to custom design a wedding cake would violate his rights of free speech and the free exercise of religion. (Pet. App. 63a).

The Commission rejected his arguments. With respect to the Free Speech Clause, the Commission found Phillips was "only asked to bake a cake, not make a speech," which refusal could not be compared to "forcing a person to pledge allegiance to the government or to display a motto with which they disagree." (Pet. App. 77a-78a). It distinguished hypothetical scenarios asking whether a baker could refuse to make a design for the Westboro Baptist Church with anti-homosexual slogans, or a black baker could refuse to make a cake for the Aryan Nation with white supremacist messages, or an Islamic baker could decline to make a cake denigrating the Koran. In such cases, it would be "the explicit, unmistakable, offensive message that the bakers are asked to put on the cake that gives rise to the bakers' free speech right to refuse." (Pet. App. 78a).

The Commission ordered Phillips to cease discriminating and to adopt remedial measures, including

"comprehensive staff training" and to make quarterly compliance reports for a period of two years. Phillips also was ordered to provide reasons for any denial of service during this period. (Pet. App. 58a).

The Colorado Court of Appeals affirmed. In rejecting Phillips' Free Speech Clause argument, it applied this Court's test for symbolic speech set forth in *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (*per curiam*), and held the conduct at issue was not inherently expressive because there was no evidence of an intent to send a "particularized message" nor any great likelihood "the message would be understood by those who viewed it." (Pet. App. 26a). The court identified the conduct at issue as selling wedding cakes, and held the Commission's order "does not force [Masterpiece Cakeshop or Phillips] to engage in compelled expressive conduct in violation of the First Amendment." (Pet. App. 36a).

SUMMARY OF ARGUMENT

The First Amendment protects both the right to speak and the right to refrain from speaking as part of a broader concept of "individual freedom of mind." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citation omitted). There is no disagreement about whether the Constitution prohibits the state from compelling speech, but the Court of Appeals erroneously held that creating a custom, artistic design is not expression protected by the Free Speech Clause.

As if channeling Samuel Goldwyn's immortal line "if you want to send a message, call Western Union,"[2] the court based its ruling on a too literal-minded understanding of First Amendment protections for symbolic speech. Citing *Spence*, it asked whether "Masterpiece conveys a particularized message celebrating same-sex marriage, and whether the likelihood is great that a reasonable observer would both understand the message and attribute that message to Masterpiece." (Pet. App. 29a-30a).

But this is the wrong question. When it comes to artistic expression, First Amendment protection does not depend on having a "particularized message." If it did, much of what we commonly regard as art – including non-representational painting or sculpture, instrumental music, dance, mime, or other non-verbal expression would be excluded from constitutional immunity. Thus, the relevant questions for purposes of deciding this case are whether art is "speech" within the meaning of the First Amendment, and if so, can the government require a person to create it?

Once properly framed, the answers are clear: Artistic expression most certainly is protected and it

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[2] Leonard Lyons, *Heard in New York: Samuel Goldwyn Gets a Message*, DALLAS MORNING NEWS, Apr. 17, 1943, at 4. Variations of the quote also have been attributed to George Bernard Shaw, Ernest Hemingway, Dorothy Parker, Humphrey Bogart, George S. Kaufman, Moss Hart, Marlon Brando, Harry Warner, and Harry Cohn. *See If you have a message, call Western Union (variant Samuel Goldwyn 1943)*, listserv.linguistlist.org/pipermail/ads-l/2012-January/115893.html.

offends the First Amendment to compel its creation or performance. Contrary to the decision below, this Court held in *Hurley* that First Amendment protection is not conditioned on the existence of a "narrow, succinctly articulable message," 515 U.S. at 569, and the Court of Appeals cited no authority for the proposition that acts of creative expression can be compelled by the state.

The Court should decide this case under the Free Speech Clause of the First Amendment and not the Free Exercise Clause. Applying the compelled speech doctrine to bar the government from requiring individuals to create expressive works will resolve the issue while avoiding doctrinal confusion. It is thus unnecessary to address whether the Free Exercise Clause precludes enforcement of the Colorado public accommodation law.

ARGUMENT

THE FIRST AMENDMENT PROHIBITS ENFORCING ANTI-DISCRIMINATION LAWS TO COMPEL THE CREATION OF EXPRESSIVE WORKS

A. The Parties Agree That the Colorado Anti-Discrimination Act Could Not Be Applied to Compel Speech

The First Amendment's Free Speech Clause necessarily protects the freedom "of both what to say and what *not* to say." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988). "The right to speak and the right to refrain from speaking are complementary components of the broader

concept of 'individual freedom of mind,'" *Wooley*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637), a bedrock principle this Court has applied in various contexts. *See*, *e.g.*, *Barnette*, 319 U.S. at 636-37 (compelled flag salute); *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327-32 (2013) (compelled statement of agreement with government policy); *Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) (compelled support for union); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (compelled right of reply to editorials); *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 9-16 (1986) (compelled messages in billing envelopes); *Hurley*, 515 U.S. at 574-75 (compelled inclusion of marching unit in a parade). Because "*all* speech inherently involves choices of what to say and what to leave unsaid," the First Amendment necessarily must protect the right not to speak at all. *Pacific Gas*, 475 U.S. at 11, 16.

This constitutional principle limits application of state or federal public accommodation laws like the Colorado statute at issue here. In *Hurley*, for example, this Court held unanimously that a Massachusetts civil rights law dating back to 1865 could not be applied to require organizers of Boston's St. Patrick's Day parade to include a gay unit that the organizers claimed affected their intended message. Although it observed that "[p]rovisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination," the law cannot be applied in a way that treats the "the sponsors' speech itself to be the public accommodation," and doing so

violates the fundamental First Amendment rule "that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 572-73. Such a remedy is "beyond the government's power to control." *Id.* at 575.

This is true even if the law is not designed to compel particular approved messages or to penalize disfavored ones, but is adopted for the "broader objective" of "forbidding acts of discrimination toward certain classes to produce a society free of the corresponding biases." *Id.* at 578. The Court held that even for such a benign purpose, "[r]equiring access to a speaker's message" as a means "to produce speakers free of . . . biases" is a "decidedly fatal objective." *Id.* at 578-79. Such a purpose "grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Id.* at 579.

There appears to be little controversy about this central premise, as both the Commission and the Court of Appeals below agreed that the First Amendment can limit the state's ability to compel expression, even when it comes to making cakes. For example, the Commission historically had upheld the right of bakers to decline customers' requests for offensive messages on cakes, and had concluded they were not discriminating on the basis of creed when refusing to make Bible-shaped cakes with the inscription, "Homosexuality is a detestable sin.

Leviticus 18:2."[3] In such cases, the Commission explained "it is the explicit, unmistakable, offensive message that the bakers are asked to put on the cake that gives rise to the bakers' free speech right to refuse." (Pet. App. 78a). The Court of Appeals likewise acknowledged that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment protections may be implicated." (Pet. App. 34a-35a).

In this case, however, the Commission and court concluded that no such rights were affected, for, as the Commission put it, Masterpiece Cakeshop was "only asked to bake a cake, not make a speech." (Pet. App. 78a). The court upheld this conclusion, stating that "the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it." (Pet. App. 30a).

The decision below thus misapplied this Court's holdings involving both compelled speech and symbolic expression. Artistic expression need not convey a "particularized message" to qualify for First Amendment protection, and there is no way to avoid

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[3] *See*, *e.g.*, *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 25, 2015), http://perma.cc/5K6D-VV8U; *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015), http://perma.cc/35BW-9C2N; *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015), http://perma.cc/JN4U-NE6V.

a constitutional confrontation when the state decides it can force individuals to create art.

B. The First Amendment Prohibits State Action Compelling the Creation of Artistic Works, Including Wedding Cakes

1. The First Amendment and Art

As First Amendment jurisprudence developed during the 20th Century, scholars debated whether art necessarily was covered by the Free Speech Clause.[4] This Court answered in the affirmative, and took the position that "[t]he Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed." Such judgments "are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000).

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[4] For example, Amherst College President Alexander Meiklejohn theorized the First Amendment existed principally to protect only "public speech," or speech related to politics and self-government, which he considered to be "unabridgeable." Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25-27 (1948). This view was criticized by, among others, First Amendment scholar Zechariah Chafee, who wrote that Meiklejohn's view failed to protect such things as books, plays, scholarship, and the arts. Zechariah Chafee, Jr., *Book Review*, 62 HARV. L. REV. 891, 899-900 (1949). In response, Meiklejohn ultimately modified his position, concluding that literary and artistic expressions were versions of "public speech" protected by the First Amendment. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257, 262-63.

Accordingly, the Court has held in numerous contexts that painting, music, poetry, and other forms of art are "unquestionably shielded" by the First Amendment. *Hurley*, 515 U.S. at 569. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected . . . and live entertainment, such as musical and dramatic works[,] fall within the First Amendment guarantee."); *Burstyn v. Wilson*, 343 U.S. 495, 501 (1952) ("[M]otion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."). This Court has affirmed that "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 158 (1946). In no case has it ever suggested that constitutional protection for art depends on whether the intended message is sufficiently "particularized."

Nor can the act of creating art be recast as "conduct" in order to avoid First Amendment scrutiny. As the Ninth Circuit explained in holding that the physical acts involved in creating tattoos are protected as pure speech, "writing and painting can be reduced to their constituent acts, and thus described as conduct," but "we have not attempted to disconnect the end product from the act of creation."

Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061-62 (9th Cir. 2010). Thus:

> [W]e have not drawn a hard line between the essays John Peter Zenger published and the act of setting the type. *Cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983) (holding that a tax on ink and paper "burdens rights protected by the First Amendment"). The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds.

Id. In other words, the First Amendment fully applies even though "the processes of writing words down on paper, painting a picture, and playing an instrument" all involve conduct. *Id.* The same principle applies in this case.

Symbolic speech cases such as *Spence* and *United States v. O'Brien*, 391 U.S. 367 (1968), addressed a different issue, where this Court sought to determine whether such acts as taping a peace symbol to an inverted American flag or burning a draft card were intended to communicate messages. Not all action is inherently expressive, and this Court was not willing to accept the view "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376. In *O'Brien*, the Court assumed without deciding that the destruction of a

draft card as a form of protest was intended as symbolic speech, but held that the government could regulate the "nonspeech" elements of the act so long as the impact on First Amendment freedoms was "incidental." *Id.* at 376-77.

In *Spence*, because the petitioner chose not to articulate his views through written or spoken words, it was necessary to determine "whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." 418 U.S. at 409. This Court held that Spence's unorthodox display of the flag with a makeshift peace symbol affixed "was not an act of mindless nihilism" because, when viewed in context, an "intent to convey a particularized message was present" and "the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11. But nothing in *Spence* suggested a "particularized message" or the "likelihood of viewer understanding" are prerequisites to constitutional protection generally, and subsequent decisions make clear they are not.

Hurley distinguished *Spence* and emphasized that "a narrow, succinctly articulable message is not a condition of constitutional protection." 515 U.S. at 569. The Court, in reversing the decisions below, rejected determinations by the Massachusetts Supreme Court and trial court that the case could be disposed of on the basis that a parade's expressive purpose was "impossible to discern." *Hurley*, 515 U.S. at 564. It observed that, if the First Amendment were "confined to expressions conveying a 'particularized message,'" it "would never reach the

unquestionably shielded painting of Jackson Pollack, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Id.* at 569. If First Amendment protection depended on clarity of the artist's message and the level of audience comprehension, it is difficult to say how much of the art world could claim constitutional protection.

But it is one thing to say "art" is covered by the First Amendment and quite another to say baked goods may be protected as such. It would trivialize the First Amendment to suggest "an apparently limitless variety of [baking] can be labeled 'speech.'" *Cf. O'Brien*, 391 U.S. at 376. But that is not the claim in this case. It was never suggested that the simple act of making a cake is somehow expressive, that an unadorned sheet cake is speech, or that a baker could simply refuse to do business with certain customers because of his beliefs. Rather, the case turns on a threshold question: Can the Petitioners' custom-designed wedding cakes be considered products of artistic expression?

In this case, both the Commission and the Court of Appeals agreed that the answer is yes, and that Petitioners approached the work as "a form of art and creative expression." But this was not enough for the Commission and Court of Appeals to apply the First Amendment to the present situation because they started from an erroneous premise that there must be a "particularized message," and that the baker's "free speech right to refuse" depended on whether the customer wanted to include an offensive inscription or some more definite message. (Pet. App. 78a, 216a-217a). Such reasoning ignores this

Court's teachings that artistic expression is constitutionally protected whether or not it presents a particularized message.

Many forms of ephemeral art clearly involve creative expression but lack an articulable viewpoint or polemic content. Examples include ice sculpture, sidewalk art, flower arrangements, tattoos, and impromptu poetry or song. Such creations may have no message beyond bringing beauty into the world, yet they are constitutionally protected as speech. And where the artistry results in the custom design of a wedding cake, the First Amendment should apply as well.[5]

The principles at issue here perhaps would be easier to understand if this were a more traditional First Amendment case where the State of Colorado for some reason tried to ban the creation of certain artistic designs. If that were the case, few would doubt the government's action might infringe freedom of expression, and no one would ask whether the art targeted for censorship conveyed a particularized message. But the issue is more complicated because

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[5] No doubt some may be more artistic than others. The record in this case is limited because the parties never discussed what the cake design might involve. If the transaction were one in which the customer merely placed an order and the only thing that was "customized" about the wedding cake was choice of flavors or colors, and which pre-fab topper to use, there would be little to suggest the baker was involved in a creative or artistic endeavor. But the court below accepted the Commission's finding that the Petitioner created unique designs for customers as an act of artistic expression. (Pet. App. 213a).

this case presents a compelled speech question where the general validity of the state's public accommodation law is assumed. If Masterpiece Cakeshop may be required to do business with all those under the law's protection, why can't the state force Jack Phillips to create a custom wedding cake?

The answer is that there is no precedent in First Amendment law that permits the government to compel the creation or performance of a work of art.

2. The Show Must Go On?

This is not a simple "refusal to serve" case like those challenging segregated lunch counters arising from the civil rights movement of the 1960s. *See*, *e.g.*, *Lombard v. Louisiana*, 373 U.S. 267 (1963). Masterpiece Cakeshop is a place of public accommodation and its proprietor told the complainants "he would be happy to make and sell them any other baked goods" but was unwilling to design a cake for their same-sex marriage. (Pet. App. 4a). Thus, while there is no doubt the bakery operates as a place of public accommodation, can the same be said of Jack Phillips' creative mind?

This Court touched on this question in *Hurley*, when it declined to require inclusion of a gay contingent in Boston's St. Patrick's Day parade under Massachusetts' public accommodations law. It held the First Amendment does not permit treating "the sponsors' speech itself to be the public accommodation" because speakers have the autonomy to control their own message. *Hurley*, 515 U.S. at 572-73. By the same reasoning, artists in a free society retain autonomy to control their creative output.

Masterpiece Cakeshop may be a place of public accommodation, but Jack Phillips is not. In short, creativity cannot be coerced.

Relevant authority sometimes is hard to find for certain propositions because the underlying legal principles are so self-evident. *See Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011). And so it is with the idea that the government cannot compel an artist to create or perform a work of art. This Court has decided no cases (to date) holding the First Amendment bars the state from compelling a sculptor to sculpt a statue, a composer to compose a symphony, or – as in this case – an artistic baker to create an original design. But the lack of case law does not make the controlling principles any less obvious. Such cases have not come up *because* the principles are so straightforward.

The First Circuit found this to be true when it held the Massachusetts Civil Rights Act ("MCRA") could not be enforced to require the Boston Symphony Orchestra to stage a performance of Stravinsky's *Oedipus Rex* or to pay damages for non-performance. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988) (*en banc*).[6] The case arose when the BSO cancelled a performance of *Oedipus Rex*, for which actress

[6] The court observed that, "[f]or constitutional purposes, it makes no difference whether the state seeks to compel expression directly by 'forcing' the artist to perform, or by imposing civil liability for refusing to perform; either form of coercion is burdensome to rights of free expression." *Redgrave*, 855 F.2d at 905 n.18.

Vanessa Redgrave had been engaged to serve as the narrator, in the wake of protests arising from Redgrave's support for the Palestinian Liberation Organization and her views about Israel. *Id.* at 890-91. She sued the BSO for breach of contract and for violating the MCRA, which authorized claims against private persons or organizations who interfere "by threats, intimidation[,] or coercion, . . . with the exercise . . . of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth." *Id.* at 901 (quoting Mass. Gen. L. ch. 12, §§ 11H – I (1986)).[7]

The First Circuit examined this Court's case law on compelled speech and, in an opinion joined by then-Judge Breyer, found that "[p]rotection for free expression in the arts should be particularly strong when asserted against a state effort to *compel* expression." *Id.* at 905. It added that "[w]e see no reason why *less* protection should be provided where the artist refuses to perform; indeed, silence traditionally has been more sacrosanct than affirmative expression." *Id.* at 906. The court was "unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression," and observed that doing so would be "completely unprecedented." *Id.* In the nearly thirty

[7] The MCRA provided a state statutory remedy for violations of constitutional rights without requiring state action. Under this provision, Redgrave argued that the BSO's cancellation violated her right to freedom of expression as protected by Massachusetts law.

years since that *en banc* decision, the First Circuit's take on the state of the law still rings true.

The court in *Redgrave* recognized the profound First Amendment implications of compelling artistic speech but chose not to base its opinion on constitutional grounds (perhaps because of the lack of specific guidance from this Court). Instead, it decided the case under state law after certifying questions to the Massachusetts Supreme Judicial Court. *Id.* at 903. Yet it still couched this holding in constitutional terms after analyzing the plurality, concurring, and dissenting opinions of the Supreme Judicial Court, observing that "[a]ll three groups indicated, in tones ranging from strong suggestion to outright certainty, a view that the BSO should not be held liable under the MCRA for exercising its free speech right not to perform." *Id.*

The First Circuit thus grappled with much the same conflict as the one presented in this case. Here, the Colorado Civil Rights Commission viewed the issue as a conflict between the Petitioners' First Amendment right to free expression and Respondents' "right to be free of discrimination in the marketplace." (Pet. App. 78a). It found Phillips' First Amendment claims were insubstantial, and held he could be compelled to "perform" his art. In contrast, the First Circuit expressed "grave concerns about the implications of such a conflict." *Redgrave*, 855 F.2d at 904. It explained that, "unlike in the typical discrimination case, there are free speech interests on the defendant's side of the balance," which it characterized as a right to "artistic integrity." *Id.* at 904-06. The court observed that

the symphony sought to vindicate a constitutional right "not to be penalized for failing to perform an artistic work where the BSO believes that its expression will be compromised or ineffective." *Id.* at 905 (emphasis omitted). [8]

The outcome in *Redgrave* would have been different had the First Circuit insisted on some showing the BSO had some particularized message, or that it wanted to avoid being seen as endorsing Vanessa Redgrave's political cause. The court found the cancellation of the contract with Redgrave was not "intended to be a form of symbolic speech or a 'statement' by the BSO." *Redgrave*, 855 F.2d at 895. Rather, "[t]he BSO assert[ed], simply, a right to be free from compelled expression." *Id.* at 905. The circuit court affirmed that right, albeit not as a matter of First Amendment law, without requiring the BSO to prove it was seeking to send – or avoid sending – some particular message.

And so it is here. Petitioners in this case are seeking affirmation of that same right under basic commands of the First Amendment. This Court should use the opportunity to make clear the government cannot constitutionally compel the creation of artistic expression.

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[8] The First Circuit also observed that "the right to speak, or not to speak, free of governmental interference – would, of course, outweigh Redgrave's merely statutory right under the MCRA." *Redgrave*, 855 F.2d at 908 n.22.

C. Upholding Petitioners' Right to be Free From Compelled Expression Under the First Amendment's Free Speech Clause Helps Avoid a Constitutional Morass

Some no doubt will argue that recognizing a right to be free from compelled artistic speech will open a gaping loophole in public accommodation law and will spawn myriad constitutional questions about the definition of "art," but the opposite is true. Protecting artistic expression is a limited and doctrinally consistent solution to the problem. And it is a far more tailored and less problematic approach than if the Court were to address this question under the Free Exercise Clause.

The potential for doctrinal confusion already exists under the Court of Appeals' holding that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment protections may be implicated." (Pet. App. 34a-35a). Whether a given message is sufficiently "particularized," however, must be decided case-by-case. The only examples the court below cited involved refusals by bakers to inscribe cakes with Biblically-inspired anti-gay messages. But these examples hardly exhaust the possibilities.

What about *designs* that "convey a particularized message celebrating same-sex marriage?" Could a baker refuse to top his cake with figures of two brides or two grooms by arguing such symbols "celebrate" gay marriage? And what of the rainbow-themed wedding cake the Respondents ultimately received from another shop? (Pet. App. 289a-291a).

Could a baker who objected to the imagery raise a successful First Amendment challenge against being forced to use "pro-gay colors?" The Court of Appeals doesn't say, and its reasoning provides no way to predict the answer. Each cake presents a new case and, potentially, a new standard.

Such confusion is best avoided by a straightforward rule that artistic expression cannot be compelled. A rule that focuses on the nature of the business also would be a more focused exception to the law's application. Certain professions normally associated with weddings have inherent artistic or expressive functions (*e.g.*, photographers, florists, or musicians) but most do not. One example of a business subject to the law (cited by the Court of Appeals) involves renting a pavilion for an event, and it is difficult to imagine how such an accommodation might plausibly be characterized as speech.[9] Of course questions will arise as to whether certain businesses or professions are practicing expressive art, but deciding those cases will be far less difficult than having to evaluate each potential inscription, symbol, color, shape, or design to determine if it is sufficiently "particularized."

For similar reasons, this Court should not reach the question of whether Petitioners' refusal to design a cake for a same-sex wedding is protected under the Free Exercise Clause. The analysis under the Free Speech Clause is fully dispositive and presents far

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[9] Pet. App. 31a (quoting *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 614509, at 13 (N.J. Div. Civil Rights, Oct. 22, 2012), http://perma.cc/G5VF-ZS2M).

fewer difficult implications than if this were treated as a religious question.

Any exemption based on the Free Exercise Clause would be far broader. For example, if the Westboro Baptist Church opened a diner, a religiously-based right to refuse service would permit the group to deny a seat at their lunch counter to anyone the members of the church dislike – which in their case is pretty much everyone. And such a right would not require determining whether the service they provided is in any way expressive. An exemption to public accommodation laws based on the Free Exercise Clause thus would be virtually limitless, because it would create a potential loophole for any bigot who waves a Bible or Koran at the law. Perhaps because of the inherent difficulties of resolving such religious questions, the Court did not address the Free Exercise Clause issue presented in *Snyder v. Phelps*, 562 U.S. 443, and decided the case under the Free Speech Clause.

It is not necessary for this Court to address the Free Exercise Clause question presented because this case may be resolved as a matter of compelled speech. *Compare Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), with *Barnette*, 319 U.S. at 642. It should do so by holding the Free Speech Clause does not permit the government to require creation of artistic or expressive works.

CONCLUSION

We may wish all people could agree that a decision by two human beings to commit to one another should be celebrated, not reviled, and that no creed would seek to denigrate such a union. But above all, our constitutional system protects matters of conscience, and it is not up to the state to dictate individual beliefs, however misguided they may otherwise be. As Justice Jackson observed in *Barnette*, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." 319 U.S. at 642. It is equally fundamental that the government has no authority to force individuals to engage in expressive acts, even if for a benign purpose. Accordingly, the decision below should be reversed.

Respectfully submitted,

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