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 FOR PETITIONERS

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QUESTION PRESENTED

Whether applying Colorado's public-accommodation law to compel artists to create expression that violates their sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

PARTIES TO THE PROCEEDING

Petitioner Masterpiece Cakeshop, Ltd. ("Masterpiece") is a small Colorado corporation owned by Petitioner Jack Phillips, an individual and citizen of Colorado, and his wife, Debra Phillips.

Respondent Colorado Civil Rights Commission ("the Commission") is an agency of the State of Colorado. Respondents Charlie Craig and David Mullins are individuals and citizens of Colorado.

CORPORATE DISCLOSURE STATEMENT

Petitioner Masterpiece is a Colorado corporation wholly owned by Jack and Debra Phillips. It has no parent companies, and no entity or other person has any ownership interest in it.

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INTRODUCTION

Jack Phillips's love for art and design began at an early age. Discovering that he could blend his skills as a pastry chef, sculptor, and painter, he spent nearly two decades in bakeries owned by others before opening Masterpiece Cakeshop twenty-four years ago. Long before television shows like *Cake Boss* and *Ace of Cakes*, Phillips carefully chose Masterpiece's name: it would not be just a bakery, but an art gallery of cakes. With this in mind, Phillips created a Masterpiece logo depicting an artist's paint palate with a paintbrush and whisk. And for over a decade, a large picture has hung in the shop depicting Phillips painting at an easel. Since long before this case arose, Phillips has been an artist using cake as his canvas with Masterpiece as his studio.

Phillips is also a man of deep religious faith whose beliefs guide his work. Those beliefs inspire him to love and serve people from all walks of life, but he can only create cakes that are consistent with the tenets of his faith. His decisions on whether to design a specific custom cake have never focused on *who* the customer is, but on *what* the custom cake will express or celebrate.

At issue here is whether Phillips may decline requests for wedding cakes that celebrate marriages in conflict with his religious beliefs. The First Amendment guarantees him that freedom because his wedding cakes, each one custom-made, are his artistic expression. Much like an artist sketching on canvas or a sculptor using clay, Phillips meticulously crafts each wedding cake through hours of sketching, sculpting, and hand-painting. The cake, which serves

as the iconic centerpiece of the marriage celebration, announces through Phillips's voice that a marriage has occurred and should be celebrated. The government can no more force Phillips to speak those messages with his lips than to express them through his art.

The Colorado Court of Appeals and the Commission have conceded that some cakes are artistic expression protected under the First Amendment. Pet.App.34a-35a; Colo. Opp. Br. at 15. But Phillips's custom wedding cakes, they have told us, are not among them. Thus, the Commission ordered him either to create custom cakes that celebrate same-sex marriages or to stop designing wedding cakes altogether. But just as the Commission cannot compel Phillips's art, neither may the government suppress it. The Commission's order violates First Amendment freedoms at every turn.

The Commission's actions have also devastated Phillips and his family. By effectively forcing him to stop designing wedding cakes, the Commission stripped Phillips of roughly 40% of his family income, which caused him to lose most of his employees. As if this were not bad enough, the Commission also ordered Phillips to reeducate his remaining staff, nearly all of whom are his family members, by essentially teaching them that he was wrong to operate his business according to his faith. Moreover, the Commission imposed intrusive reporting requirements that force Phillips to give a running tally to the government detailing how he exercises his artistic discretion.

The Commission dismisses the First Amendment when it is most needed—to help people in a pluralistic society navigate through sincere differences on matters "that touch the heart of the existing order." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Marriage does just that, functioning as a "keystone of our social order" and holding a "sacred" place in the lives of many. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594, 2601 (2015). The Commission must respect Phillips's freedom to part ways with the current majority view on marriage and to create his wedding cakes consistently with his "decent and honorable" religious beliefs. *Id.* at 2602. Instead, the Commission punished him, demeaned his beliefs, and marginalized his place in the community.

Equally important, a ruling against Phillips threatens the expressive freedom of all who create art or other speech for a living. Respondents Charlie Craig and David Mullins argued below that the Commission can force fine-art painters to create paintings celebrating ideas that they deem objectionable. Pet.App.332a-33a. It is difficult to imagine a view more at odds with the First Amendment and our nation's pluralistic values.

There is a better way—one that allows the Commission to ensure that businesses do not refuse to serve people simply because of who they are, but protects individuals like Phillips from being forced to create expression about marriage that violates their core convictions. The path to civility, progress, and freedom does not crush those who hold unpopular views, pushing them from the public square. It allows free citizens to determine for themselves "the ideas and beliefs deserving of expression, consideration,

and adherence." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (plurality opinion)). That is the path this Court should take; it is the only one consistent with the First Amendment.

DECISIONS BELOW

The Colorado Court of Appeals' decision is reported at 370 P.3d 272, and reprinted in the Petition for Writ of Certiorari Appendix at Pet.App.1a-53a. The Supreme Court of Colorado's order denying review is not reported, but is available at No. 15SC738, 2016 WL 1645027 (April 25, 2016) and reprinted at JA259-60.

The Administrative Law Judge's ("ALJ") decision is not reported, but is reprinted at Pet.App.61a-91a. The Colorado Civil Rights Commission's order adopting the ALJ's opinion is not reported, but is reprinted at Pet.App.56a-60a.

STATEMENT OF JURISDICTION

On April 25, 2016, the Colorado Supreme Court denied Petitioners' request for review, leaving in place the Colorado Court of Appeals' decision rejecting Petitioners' claims under the First and Fourteenth Amendments. Petitioners timely filed their petition for writ of certiorari with this Court on July 22, 2016, which was granted on June 26, 2017. The Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISIONS

The texts of the First and Fourteenth Amendments to the United States Constitution are found at Pet.App.92a. The relevant portions of the Colorado Anti-Discrimination Act are set forth at Pet.App.93a-95a.

STATEMENT OF THE CASE

A. Factual Background

1. *Phillips's Work as a Cake Artist.* After discovering his artistic talents in high-school art class, Phillips has spent the last forty years honing the craft of elaborate custom cake design. Joint Appendix ("JA") 160. He and his wife own their own family business, Masterpiece Cakeshop, where for the last twenty-four years Phillips has made custom cakes and developed a reputation for his exceptional designs. JA157, 190. Phillips opened Masterpiece to gain greater artistic freedom, better integrate his faith and work, and provide employment for his family and others in the community. JA163-64.

Phillips approaches cake design as an art form. He creates his custom cakes by using several fine-art skills such as sketching, sculpting, and painting. JA160-62; *The Essential Guide to Cake Decorating* 5 (2001) ("*Essential Guide*"). Even Masterpiece's logo, which features an artist's paint palate with a paintbrush and whisk, reflects Phillips's artistic approach. JA160, 172. All who enter his shop are greeted by a drawing of Phillips sketching himself at an easel. JA160, 173.

2. *Phillips's Wedding Cakes.* Throughout the years, Phillips has focused his custom work on wedding cakes. Before the Commission forced him to stop, custom wedding cakes accounted for approximately 40% of Phillips's business.[1]

The tradition of creating special cakes for weddings dates as far back as Roman times. *Essential Guide*, *supra*, at 8. The wedding cake developed "not as an integral part of a[] meal but as a festive or celebratory" component of the newlyweds' union. Simon R. Charsley, *Wedding Cakes and Cultural History* at 46 (1992). In modern Western culture, the wedding cake has become the iconic centerpiece of the celebration. *Id.* at 121; Wendy A. Woloson, *Refined Tastes: Sugar, Confectionery, and Consumers in Nineteenth-Century America* 168 (2002). It is "a veritable institution. A wedding without it would be a wedding without protocol, a rite without confirmation." Charsley, *supra*, at Foreword.

Wedding cakes are inseparable from the nearly ubiquitous cake-cutting ritual that accompanies them. Guests gather around as the couple cuts the cake together and feeds it to each other—their "first joint action" as newlyweds. *Id.* at 123. It is a celebratory performance, which itself is infused with rich symbolism and meaning, and which has the specially designed cake at its center. *See* Claire Stewart, *As Long As We Both Shall Eat* 137 (2017)

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[1] Mark Hemingway, *Is Cake an Artistic Medium?*, The Weekly Standard, Aug. 29, 2017, http://tws.io/2goeHPr (last visited Aug. 29, 2017).

(explaining that during the "cutting of the cake," the couple feeds "each other a slice in a gesture of unity").

The modern wedding cake is a "highly distinctive structure[]" and "a widely meaningful element of 'western culture'" that serves as a "marker[] for weddings." Charsley, *supra*, at 121; *see also* Woloson, *supra*, at 168 (noting that a wedding cake is "a tangible proclamation of marriage"). It is a "piece[] of custom-made art," Woloson, *supra*, at 178, which typically costs between $400 and $800, *see* Toba Garrett, *Wedding Cake Art and Design* 8 (2010). Wedding cakes are an artistic medium through which cake designers speak using their "expertise and artistry." Woloson, *supra*, at 178.

Phillips's wedding cakes fit squarely within this genre. Each one is a custom-made, elaborately designed, intricately constructed, and typically tiered masterpiece. JA170, 174.

JA174; *see also* Masterpiece Cakeshop Wedding, http://masterpiececakes.com/wedding-cakes/ (last visited Aug. 29, 2017). No matter their precise markings or decorations, the cakes tell all who see

them that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." JA162.

Phillips specially crafts every wedding cake he creates. Before designing it, he meets with the couple to learn their desires, personalities, preferences, and wedding details. JA161. Then he sketches the design on paper (often multiple times), sculpts it into shape, creates ornamental and symbolic details to place on it, and decorates it using artistic techniques like hand-painting, air-brushing, and sculpting, JA161-62; *see also* Garrett, *supra*, at 5 (explaining that wedding cakes involve "sculpting, food painting, and hand-shaped ornaments made out of a sugar material").

Phillips's artwork serves as a focal point of the marriage celebration and, through it, his expression is present there. JA162. Also, Phillips himself is present when he delivers and sets up the cake, *id.*, and sometimes interacts with the couple's family and friends, JA163. Many who have seen Phillips's work at a wedding have later commissioned him to create a custom cake for them. *Id.*

3. *Phillips's Faith.* Phillips is a Christian who strives to honor God in all aspects of his life, including how he treats people and runs his business. JA157, 163. Phillips closes Masterpiece on Sundays so that he and his employees can attend religious services. JA164. And because of his faith, he pays his employees above the market rate and helps them with financial and personal needs outside of work. JA163-64.

Phillips gladly serves people from all walks of life, including individuals of all races, faiths, and sexual

orientations. JA164. But he cannot design custom cakes that express ideas or celebrate events at odds with his religious beliefs. JA158-59, 164-66. For example, Phillips will not design cakes that celebrate Halloween; express anti-family themes (such as a cake glorifying divorce); contain hateful, vulgar, or profane messages (such as a cake disparaging gays and lesbians); or promote atheism, racism, or indecency. JA165. These limitations on Phillips's custom work have no bearing on his premade baked items, which he sells to everyone, no questions asked.

As core tenets of his faith, Phillips believes that marriage is a sacred union between one man and one woman, and that it represents the relationship of Jesus Christ and His Church. JA157-58. The wedding signifies that the "two [have] become one flesh" and that no one should separate "what God has joined together." *Id.* Regardless of whether Phillips's wedding clients plan an overtly religious event, he believes that all weddings are sacred and that they create an inherently religious relationship. *Id.* Because weddings and marriage have such religious significance to Phillips, he would consider it sacrilegious to express through his art an idea about marriage that conflicts with his religious beliefs. JA157-59. For this reason, he will not design custom cakes that celebrate any form of marriage other than between a husband and a wife. JA159.

4. *Craig and Mullins's Request.* In July 2012, Charlie Craig and David Mullins visited Masterpiece with Craig's mother, Deborah Munn. JA168. At the time, Colorado did not recognize same-sex marriages. JA169.

Craig and Mullins were browsing a photo album of Phillips's custom-design work, JA39, 48, 89, when Phillips sat down with them at his consultation table, JA168. After Phillips greeted the two men, they explained that they wanted him to create a cake for their wedding. *Id.* Phillips politely explained that he does not design wedding cakes for same-sex marriages, but emphasized that he was happy to make other items for them. *Id.* Craig, Mullins, and Munn expressed their displeasure and left the shop. JA43, 168.

Munn called Phillips the next day and asked why he declined their request. JA39-40. Phillips explained that it was because of his religious beliefs about marriage, and he also told her that Colorado did not recognize same-sex marriages. JA169. Over the years, Phillips has declined other requests to design custom wedding cakes that celebrate same-sex marriages, all the while affirming his willingness to create other cakes for LGBT customers. JA62-63, 169.

After Craig and Mullins posted online that Phillips declined their wedding-cake request, people picketed and boycotted Masterpiece. Another local cake artist offered to design a free wedding cake for Craig and Mullins, an offer they accepted. JA184-85. Craig and Mullins then married in Massachusetts (because same-sex marriage was not licensed in Colorado at the time), and they had a multi-tiered, rainbow-layered wedding cake at their reception in Colorado. JA175-76. Following wedding customs, they cut the cake together and fed it to each other in celebration of their union. *Id.*

B. Procedural Background

1. *Division Proceedings.* Craig and Mullins filed formal charges with the Colorado Civil Rights Division ("the Division")—the state agency responsible for enforcing the Colorado Anti-Discrimination Act ("CADA")—alleging that Phillips engaged in sexual-orientation discrimination. JA47-52. In March 2013, the Division issued a probable-cause determination against Phillips, JA69-86, explaining that even though Phillips told Craig and Mullins that he would "create birthday cakes, shower cakes, or any other cakes for them," JA73, his decision not to custom design "a cake for a same-sex wedding" violated CADA, JA76.

The Division issued a notice of hearing and formal complaint indicating that a proceeding would be held before an ALJ. JA87-100. After the ALJ granted Craig and Mullins's motion to intervene, JA102, the parties filed cross-motions for summary judgment, which the ALJ resolved through a written decision against Phillips, Pet.App.61a-88a.

The ALJ regarded "as a distinction without a difference" Phillips's argument that he declined Craig and Mullins's request not because of their status as gay men, but because he could not in good conscience create a wedding cake that celebrates their marriage. Pet.App.69a. Based on this, the ALJ held that Phillips violated CADA. Pet.App.69a-72a.

The ALJ then rejected Phillips's free-speech defense even though the ALJ's decision recognized that the First Amendment applies to non-verbal "mediums of expression such as art." Pet.App.74a. Free-speech protection, in the ALJ's view, hinged on

whether a particularized "message or symbol" is part of a cake's design. Pet.App.75a. Where a message or symbol is "offensive," the ALJ determined, a cake artist has a "free speech right to refuse" it. Pet.App.78a. Thus, according to the ALJ, an African American cake designer could refuse to create a cake with a white-supremacist message for the Aryan Nations church, and an Islamic cake artist could turn down a religious group's request for a cake denigrating the Quran. *Id.* But because Craig and Mullins did not specify whether they wanted words or designs on their wedding cake, Pet.App.75a, the ALJ explained that Phillips had "no free speech right" to decline their request, Pet.App.78a. The ALJ also analyzed and dismissed Phillips's free-exercise defense. Pet.App.79a-87a.

2. *Commission Proceedings.* Phillips appealed to the Colorado Civil Rights Commission—an agency composed of seven members. *See* Colo. Rev. Stat. § 24-34-303(1). The Commission issued a final order adopting the ALJ's ruling on the same day that the commissioners deliberated about the case. Pet.App.56a-58a; JA196-207. That order requires Phillips to (1) design wedding cakes that celebrate same-sex marriages if he creates cakes that celebrate opposite-sex marriages, (2) reeducate his staff (which includes his family members) on CADA compliance, and (3) submit quarterly compliance reports for two years describing all orders that he declines and the reasons for the denial. Pet.App.57a-58a.

3. *Colorado Court of Appeals.* Phillips appealed the Commission's order to the Colorado Court of Appeals, JA208-16, and that court affirmed, Pet.App.1a-53a. As an initial matter, the court

accepted that Phillips declined Craig and Mullins's request "'because of' [his] opposition to same-sex marriage, not because of [his] opposition to their sexual orientation." Pet.App.12a-13a. Nonetheless, the court reasoned that CADA requires no "showing of 'animus'" against individuals, Pet.App.18a, and held that Phillips violated the statute by declining "to create a wedding cake for Craig[] and Mullins' same-sex wedding celebration," Pet.App.21a-22a.

The court then rejected Phillips's free-speech defense, Pet.App.28a-36a, holding that he "does not convey a message supporting same-sex marriages merely by abiding by the law," Pet.App.30a, because "a reasonable observer would understand that [his] compliance with the law is not a reflection of [his] own beliefs," Pet.App.31a. The court distinguished three other cases—decided while this one was pending—in which the Commission found no religious discrimination when cake designers declined a religious man's requests to create custom cakes with religious messages criticizing same-sex marriage or same-sex relationships. JA230-58. The court explained that those "bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message." Pet.App.20a n.8. Yet Phillips's speech-based reasoning—his desire not to create custom cakes that celebrate marriages in conflict with his faith—was grounded on his religious "opposition to same-sex marriage," which the court deemed unlawful. *Id.*

The court then rejected Phillips's free-exercise arguments. It held that "CADA is generally applicable, notwithstanding its exemptions," because

a law "is generally applicable so long as it does not regulate only religiously motivated conduct." Pet.App.42a. Moreover, CADA is neutral, the court concluded, because it "forbids all discrimination based on sexual orientation regardless of its motivation." Pet.App.43a. The court also dismissed Phillips's hybrid-rights argument because even if that theory exists, "it would not apply here" since "the Commission's order does not implicate [Phillips's] freedom of expression." Pet.App.46a.

The court next determined that CADA satisfies rational-basis review. Pet.App.50a. It held that "states have a compelling interest in eliminating [sexual-orientation] discrimination" and explained "that statutes like CADA further that interest," Pet.App.49a, by (1) avoiding "adverse economic effects" and (2) "ensur[ing] that the goods and services provided by public accommodations are available to all of the state's citizens," Pet.App.50a.

4. *Colorado Supreme Court.* Phillips sought but was denied review in the Colorado Supreme Court. Pet.App.242a-53a; JA259-60. This Court then granted Phillips's petition for writ of certiorari on June 26, 2017.

SUMMARY OF ARGUMENT

Phillips serves all people, but cannot convey all ideas or celebrate all events. He seeks to live his life, pursue his profession, and craft his art consistently with his religious identity. The First Amendment guarantees him that freedom.

The Free Speech Clause protects more than words. Phillips's custom wedding cakes—which he

intricately and artistically forms with his own hands for the purpose of celebrating his clients' marriages—are his protected expression. Each of them serves as "a short cut from mind to mind," *Barnette*, 319 U.S. at 632, declaring to all onlookers that the couple is now joined in marriage and that this is an occasion for jubilation. His custom cakes necessarily express ideas about marriage and the couple, and as a result, they are entitled to full constitutional protection.

This Court's compelled-speech doctrine forbids the Commission from demanding that artists design custom expression that conveys ideas they deem objectionable. Thus, a cake artist who serves all people, like Phillips does, cannot be forced to create wedding cakes that celebrate marriages at odds with his faith. This Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), guarantees no less. Dismissing that governing authority, the Commission violated the "individual dignity and choice" that the First Amendment promises to artists. *Cohen v. California*, 403 U.S. 15, 24 (1971).

The Free Exercise Clause also forbids the Commission from applying CADA to target Phillips and likeminded believers for punishment. Cake artists who support same-sex marriage may refuse requests to oppose it. But Phillips may not decline requests to support it. Such a one-sided application of CADA—under which people of faith who share Phillips's beliefs always lose—defies the requirements of neutrality and general applicability. Moreover, the Commission has not only ordered Phillips to participate in celebrating what he regards as a religious event, it has forced him to do so through

his expression. This confluence of free-exercise and free-speech rights forms a strong hybrid-rights claim, which subjects the Commission's actions to strict-scrutiny review.

The Commission's application of CADA in this case cannot withstand the rigors of strict scrutiny. While the Commission has an interest in ensuring that businesses are open to all people, it has no legitimate—let alone compelling—interest in forcing artists to express ideas that they consider objectionable. Much less does the Commission have a compelling interest in mandating that people of faith celebrate what they consider to be sacred events. Moreover, the Commission's actions are not narrowly tailored because Respondents have not even shown that protecting Phillips's First Amendment rights would undercut the interests they seek to achieve. Because strict scrutiny is not satisfied, the Commission violated Phillips's freedom under both the Free Speech and Free Exercise Clauses.

Hanging in the balance is more than Phillips's freedom to ply his craft without forfeiting his conscience. At stake is his and all likeminded believers' freedom to live out their religious identity in the public square. The First Amendment promises them that basic liberty.

ARGUMENT

I. Compelling Phillips to Create Artistic Expression that Celebrates Same-Sex Marriage Violates the Free Speech Clause.

Phillips's free-speech analysis proceeds in four parts. First, the Free Speech Clause applies because

Phillips's custom wedding cakes are his artistic expression. Second, this Court's compelled-speech doctrine forbids the Commission from ordering Phillips to express or celebrate what he cannot in good conscience support. Third, no less than strict scrutiny applies because not only has the Commission sought to compel Phillips's artistic expression, it has discriminated based on both content and viewpoint. Finally, as Part III demonstrates, the Commission cannot satisfy its heavy burden under strict scrutiny.

A. The Free Speech Clause Applies to Phillips's Custom Wedding Cakes.

The Free Speech Clause protects both expression and expressive conduct. This Court must initially decide whether Phillips's custom wedding cakes are artistic expression. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60-68 (2006) ("*FAIR*") (assessing whether the litigants were engaged in speech before asking if their conduct was expressive). Because his wedding cakes clearly qualify as expression, expressive-conduct analysis is unnecessary. *See Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (declining to reach the expressive-conduct issue). The court below, however, confused these principles by first considering expressive-conduct analysis and never addressing whether Phillips's custom-designed wedding cakes constitute artistic expression. *See* Pet.App.28a-36a. Asking the right questions in the right order leads to the inescapable conclusion that the Free Speech Clause safeguards Phillips in this case.

1. Phillips's Custom Wedding Cakes Are His Artistic Expression.

"[T]he Constitution looks beyond written or spoken words as mediums of expression," *Hurley*, 515 U.S. at 569, and protects artistic expression as pure speech, *see, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002) (noting that the First Amendment protects expression with artistic value); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (accepting as a first principle that "artistic speech" qualifies for full First Amendment protection).

Protected artistic expression is a broad category. It includes traditional forms of visual art such as "pictures, films, paintings, drawing, and engravings," *Kaplan v. California*, 413 U.S. 115, 119 (1973), encompassing even abstract works like the unintelligible "painting[s] of Jackson Pollock," *Hurley*, 515 U.S. at 569. And it extends further still, shielding atonal instrumentals, *see id.* (mentioning Arnold Schöenberg's music), and even sexually explicit materials, *see Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964). To qualify for First Amendment protection, artistic expression need not contain a "succinctly articulable" or "particularized message." *Hurley*, 515 U.S. at 569.

Following this Court's lead, the federal courts of appeals have recognized forms of protected artistic expression as diverse as tattooing, *Buehrle v. City of Key* West, 813 F.3d 973, 976 (11th Cir. 2015); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010), custom-painted clothing, *Mastrovincenzo v. City of N.Y.*, 435 F.3d 78, 96 (2d

Cir. 2006), and stained-glass windows, *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985); *see also Cressman v. Thompson*, 798 F.3d 938, 952-53 (10th Cir. 2015) (explaining that the First Amendment protects original artistic expression as "pure speech").

Phillips's custom wedding cakes are his artistic expression because he intends to, and does in fact, communicate through them. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (concluding that video games are protected expression because they "communicate"); *Cressman*, 798 F.3d at 952-53 (explaining that "the animating principle behind pure-speech protection" is "safeguarding self-expression"); *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007) (similar). Those ornately decorated, elaborately constructed, and typically tiered cakes serve as the centerpiece of wedding celebrations. Their iconic presence at weddings—functioning as temporary monuments to a most memorable occasion—speaks to all who see them. *Cf. Pleasant Grove City v. Summum*, 555 U.S. 460, 470-71 (2009) (discussing the expressiveness of monuments).

In one sense, those cakes announce a basic message: that this event is a wedding and the couple's union is a marriage. JA162. But in another sense, Phillips's wedding cakes—endowed with all their grandeur—declare an opinion too: that the couple's wedding "should be celebrated." *Id.*; *see Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) ("The core of the message in a wedding is a celebration of marriage and the uniting of two people ...."). Each of his wedding cakes also expresses unique aspects of

the couple's personalities and abstract messages such as Phillips's "sense of form, topic, and perspective." *White*, 500 F.3d at 956. Like any good work of art, Phillips's wedding cakes convey messages that address not only "the intellect" but also "the emotions" of observers. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). The end product reflects a vision brought to life by Phillips.

For all these reasons, couples commission Phillips to design a wedding cake for them. Although they and their guests eventually eat it, that happens well after family and friends admire it, the couple takes photographs with it, and all witness the cake-cutting celebration. No one pays significant sums for an ornate wedding cake just for its taste.

As with other visual artists, Phillips's artistic design process involves extraordinary effort: drawing the cake on paper (often many times); painting elaborate designs and decorations on it; and sculpting the cake's form and its decorations. *See* JA161-62; *Essential Guide*, *supra*, at 5 (noting that the cake artist has "mastered" the arts of "sculpture" and "painting"). It does not matter that Phillips writes, paints, and sculpts using mostly edible materials like icing and fondant rather than ink and clay. "[T]he basic principles of freedom of speech … do not vary when a new and different medium for communication appears." *Brown*, 564 U.S. at 790 (quotation marks omitted). Phillips is as shielded by the Free Speech Clause as a modern painter or sculptor, and his greatest masterpieces—his custom wedding cakes—are just as worthy of constitutional protection as an abstract painting like Piet Mondrian's Broadway Boogie Woogie, a modern sculpture like Alexander

Calder's Flamingo, or a temporary artistic structure like Christo and Jeanne-Claude's Running Fence.[2]

The First Amendment protects Phillips's wedding cakes regardless of whether he writes words on them or adorns them with bride and groom figurines. All his wedding cakes are custom-designed and distinctly recognizable as "markers for weddings." Charsley, *supra*, at 121. Each of them communicates messages about marriage and the couple.

That is why Phillips declined Craig and Mullins's request before learning all the details of the wedding cake they wanted. They were reviewing photographs of custom cakes when they told Phillips that they wanted him to make a cake for their wedding. When he heard this, Phillips immediately knew that any wedding cake he would design for them would express messages about their union that he could not in good conscience communicate. Expressing such messages would contradict the core of his beliefs about marriage.

Indeed, Phillips, like many adherents of the Abrahamic faiths, believes that marriage has a "spiritual significance," *Turner v. Safley*, 482 U.S. 78, 96 (1987), to the point of being "sacred," *Obergefell*, 135 S. Ct. at 2594; *see* JA157-58 (explaining Phillips's

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[2] The First Amendment shields not only Phillips's custom cakes, but also the process by which he creates them. *See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582 (1983) (nullifying a tax on paper and ink used to produce some publications in part because the tax "burden[ed] rights protected by the First Amendment"); *Brown*, 564 U.S. at 792 n.1 ("Whether government regulation applies to creating, distributing, or consuming speech makes no difference.").

religious beliefs about marriage). What he expresses through his custom wedding cakes carries great religious meaning for him. Consequently, he considers sacrilegious the ideas that he would express if coerced into creating custom wedding cakes that celebrate same-sex marriages. JA158-59.

Evidence indicates that Craig and Mullins intended to ask Phillips to design "a rainbow-layered [wedding] cake" for them.[3] In fact, that is the very cake that another cake artist later created for their wedding. JA175-76. Given the rainbow's status as the preeminent symbol of gay pride, Craig and Mullins's wedding cake undeniably expressed support for same-sex marriage.[4] Because a cake like that is so obviously expressive, it should easily fall within the Commission's concession (and the Colorado Court of Appeals' finding) that a wedding cake "could … be expressive and could therefore implicate the First Amendment," Colo. Opp. Br. at 15, particularly if it "feature[s] specific designs … that are offensive" to its creator, *id.* at 11; *see also* Pet.App.20a n.8, 34a-35a.

This concession raises another problem for the Commission. It leaves no doubt that the Commission's rigid order—which requires Phillips to craft wedding cakes for same-sex marriages if he designs them for

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[3] Mark Meredith and Will C. Holden, *Cake Shop Says Business Booming*, Fox 31 Denver, July 30, 2012, http://bit.ly/2uQZhJO (reprinted in Addendum to Brief at 25a-27a); Craig and Mullins's Rebuttal to Phillips's Position Statement at n.1 (reprinted in Addendum at 23a-24a n.1).

[4] *See* Katherine McFarland Bruce, *Pride Parades: How a Parade Changed the World* 170 (2016) (explaining that "cultural symbols like the rainbow flag" are "associat[ed] with the LGBT community").

opposite-sex marriages, Pet.App.57a—infringes Phillips's expressive freedom. For example, if Phillips inscribes a Bible verse declaring that a husband and wife become "one flesh" in marriage, JA157, he must write those same words about a same-sex marriage and express a written message that he believes to be false. Demanding that violates even the Commission's narrow view of what the First Amendment protects.

2. Alternatively, Phillips's Creation of Custom Wedding Cakes Constitutes Expressive Conduct.

Phillips's creation of custom wedding cakes at least qualifies as a form of expressive conduct. This Court has historically used a two-prong test to determine whether someone is engaged in expressive conduct. That test considers, first, whether "[a]n intent to convey a particularized message was present," and second, whether "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Wash.*, 418 U.S. 405, 410-11 (1974)). *Hurley* modified that test at least for cases involving visual art, explaining that a "particularized message" is not a prerequisite for constitutional protection. 515 U.S. at 569.

Phillips need only show that a viewer would understand his custom wedding cake, set in the broader context of the wedding festivities, as expressing some message. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004). The Colorado Court of Appeals erred in requiring Phillips to meet a higher bar, although it is one that he satisfies in any event. *See* Pet.App.29a-

30a (requiring that Phillips's actions "convey[] a particularized message celebrating same-sex marriage").

A person viewing one of Phillips's custom wedding cakes would understand that it celebrates and expresses support for the couple's marriage. *See supra* at 19-20. Phillips plays a direct and substantial role in creating that expression. He not only designs and handcrafts the cake, which is a thoroughly artistic process, *see supra* at 8, he delivers it to the event, JA162, and often interacts with the wedding guests, JA163. All this serves to further associate Phillips with his cake and the wedding. In fact, many who view Phillips's designs at a wedding later ask him to create a cake for them. *Id.*

In *Spence*, this Court held that displaying an upside-down American flag with a peace symbol during a time of international and domestic turmoil is expressive conduct. 418 U.S. at 410 (noting the importance of "the context"). Here, this Court should also conclude that handcrafting the centerpiece displayed at an inherently celebratory event like a wedding is expressive conduct.

The Colorado Court of Appeals took a different route, concluding instead "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." Pet.App.30a. The court, however, considered the wrong question. The expressive-conduct inquiry should ask whether Phillips's custom wedding cakes—which he not only designs but also delivers to the wedding celebration—

constitute expressive conduct. Because they do, the Free Speech Clause applies.

Given that the First Amendment protects Phillips's wedding cakes, the Court next must decide whether the Commission's order contravenes compelled-speech principles.

B. The Commission Has Violated the Compelled-Speech Doctrine.

"The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster … an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. This promise applies with full force to the creation of art, which is why "'esthetic and moral judgments about art … are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.'" *Brown*, 564 U.S. at 790 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000)). Our "cultural life rest[s] upon this ideal." *Turner Broad.*, 512 U.S. at 641 (plurality opinion). No other approach would sufficiently safeguard the "individual freedom of mind," *Wooley*, 430 U.S. at 714, or "comport with the premise of individual dignity and choice" that underlies the First Amendment, *Leathers v. Medlock*, 499 U.S. 439, 449 (1991) (quoting *Cohen*, 403 U.S. at 24).

Upon these principles, this Court has developed the compelled-speech doctrine, which forbids the government (1) from forcing citizens (or businesses) to express messages that they deem objectionable or (2) from punishing them for declining to convey such messages. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of*

N.C., Inc., 487 U.S. 781, 795-801 (1988) (forbidding the state from requiring paid commercial fundraisers to disclose the percentage of money that they give to their clients); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 9-21 (1986) (plurality opinion) ("*PG&E*") (forbidding the state from requiring a business to include a third party's expression in its billing envelope); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974) (forbidding the state from requiring a newspaper to publish a third party's article).

Of particular note, this Court has recognized that states may not apply public-accommodation laws like CADA to compel or otherwise interfere with expression. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656-59 (2000); *Hurley*, 515 U.S. at 572-75. Yet as states have dramatically expanded those laws, the "potential for conflict" between them and First Amendment rights "has increased" substantially. *Dale*, 530 U.S. at 657; *see id.* at 656 n.2 ("Some municipal ordinances have even expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology").

That conflict manifested itself in *Hurley*. There, the organizers of Boston's St. Patrick's Day Parade invited members of the public to march in their parade, accepted nearly every group that applied, 515 U.S. at 562, permitted LGBT individuals to participate, *id.* at 572, but refused an LGBT group's request to march as a distinct contingent, *id.* at 561-62. The Massachusetts courts held that the parade organizers had engaged in unlawful discrimination

and ordered them to include the group. *Id.* at 561-65.

This Court unanimously reversed. *Id.* at 581. The Court explained that the state applied its public-accommodation law "in a peculiar way," *id.* at 572, when it required the parade organizers to alter the content of their expression to accommodate "any contingent of protected individuals with a message," *id.* at 573. This violated the First Amendment right of speakers "to choose the content of [their] own message," *id.*, and decide "what merits celebration," *id.* at 574, even if the state or some individuals deem those choices "misguided, or even hurtful," *id.* at 573-74.

Hurley establishes that the state cannot apply a public-accommodation law to force individuals engaged in expression to alter what they communicate, much less to celebrate something that they deem objectionable. This is particularly true for speakers, like the parade organizers in *Hurley*, who exclude no class of people but merely decline to express certain ideas. Phillips fits squarely in that mold. He engages in expression through his custom wedding cakes, and he will gladly create art for anyone (including LGBT individuals) so long as the requester does not ask him to create expression that he considers objectionable. JA169. *Hurley* guarantees him that freedom.

The Commission here committed the same error as the state in *Hurley*: it declared Phillips's artistic expression "itself to be the public accommodation." *Hurley*, 515 U.S. at 573. In so doing, the Commission directly interfered with Phillips's artistic discretion.

It effectively declared that if Phillips communicates on a topic that implicates a protected classification, he must express a contrary message upon request. That, however, "mandates orthodoxy" of expression, "not anti-discrimination." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012).

In addition, the Commission has "exact[ed] a penalty on the basis of the content" of Phillips's speech and forced him to express views different from his own. *Tornillo*, 418 U.S. at 256. Because he chose to design art celebrating marriages between one man and one woman, the Commission required him to violate his faith by celebrating opposing ideas. Since Phillips cannot do that, the Commission's order has forced him to shut down his wedding business completely, slashing his income by 40%, forcing the loss of most of his staff, and silencing his artistic voice on marriage. By enthroning itself as master of Phillips's artistic voice, the Commission invaded the freedom that the First Amendment promises to artists. *See Playboy*, 529 U.S. at 818.

Worse yet, the Commission's order—which the Colorado Court of Appeals affirmed in full—deepens the compelled-speech injury in two ways. First, the order demands that Phillips report to the Commission every single order that he declines for two years. Pet.App.58a. But the very notion of artistic freedom chafes at a requirement that Phillips must give an account to the government for the use of his artistic discretion. Second, the Commission's order requires Phillips to reeducate his staff, including his family members, by essentially telling them that he was wrong to operate Masterpiece consistently with his religious beliefs. *Id.* No one should ever be compelled

to teach others that religious exercise core to their identity is mistaken. By mandating that, the Commission has doubled-down on its compelled-speech violation. *See Barnette*, 319 U.S. at 634 (noting that the state cannot force an individual "to utter what is not in his mind").

1. The Colorado Court of Appeals Misconstrued the Compelled-Speech Doctrine.

The Colorado Court of Appeals' compelled-speech analysis suffers from a foundational flaw: it placed dispositive weight on what it thought a hypothetical person observing Phillips's decision not to "create [a wedding cake] for a gay couple" might perceive. Pet.App.34a. That analysis misses the mark in two ways.

First, the court focused on the wrong thing. It looked for expression only in Phillips's decision not to create a wedding cake celebrating a same-sex marriage, but it should have analyzed whether "the wedding cake itself[] constitutes … expression." Pet.App.28a. *Hurley*, after all, did not ask whether the parade organizers' "conduct" in declining the LGBT group's request was expressive; it considered whether the parade itself was. *See* 515 U.S. at 568-69; *see also FAIR*, 547 U.S. at 63-64 (discussing *Hurley*, *PG&E*, and *Tornillo* and focusing on "the expressive quality of a parade, a newsletter, [and] the editorial page of a newspaper").

Second, the court below fixated on third-party perceptions. This Court, however, has not treated that consideration as an essential component of compelled-speech analysis. *Wooley*, for example,

found a compelled-speech violation even though, as the dissent emphasized, no observer of a car would reasonably conclude that the driver "endorse[d]" or affirmed belief in the state motto on the license plate. *See* 430 U.S. at 722. Similarly, *PG&E* struck down a state order requiring a business to transmit a third party's newsletter in its billing envelope, even though the newsletter explicitly stated that it was not the business's speech. *See* 475 U.S. at 6-7, 15 n.11 (plurality opinion). Third-party perceptions are not dispositive in compelled-speech analysis.

That makes perfect sense because the compelled-speech doctrine protects each individual's freedom to decide which ideas are worthy of expression and to refuse to convey contrary views. *See Agency for Int'l Dev.*, 133 S. Ct. at 2327. Whether the Commission invades Phillips's "freedom of mind" does not ultimately depend on what others perceive. *Wooley*, 430 U.S. at 714. Otherwise, the Commission could force a writer to draft a novel if the author's identity remained secret. Nothing supports such a cramped understanding of expressive freedom.

Under its perceptions-focused analysis, the Colorado Court of Appeals reasoned that even if the public would "infer[]" from Phillips's custom wedding cake "a message celebrating same-sex marriage," Pet.App.30a, people would know that this message was not "a reflection of [Phillips's] own beliefs" but merely his "compliance with" CADA, Pet.App.31a. Since all compelled speech is mandated by law, however, that reasoning would negate compelled-speech protection entirely. It would transform legal coercion from a predicate of a compelled-speech violation to its antidote. If "the government made me

do it" eliminates compelled-speech concerns, the doctrine itself would cease to exist.

The court below also suggested that Phillips can alleviate any compelled-speech concerns by publishing a disclaimer that CADA requires him "not to discriminate." Pet.App.36a. Although disclaimers may ameliorate First Amendment concerns in some contexts, *see, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980), they cannot undo a mandate requiring individuals to create expression they deem objectionable, because the Commission may not "require speakers to affirm in one breath that which they deny in the next," *Hurley*, 515 U.S. at 576 (quoting *PG&E*, 475 U.S. at 16).

The court below also reasoned that Phillips's custom wedding cakes, to the extent they communicate at all, convey ideas belonging only to his customers. Pet.App.30a. Accepting that argument would effectively create a "commissioned art" exception to the First Amendment.[5] But a professional artist, much like the paid commercial fundraisers in *Riley*, "is no less a speaker because he or she is paid to speak." 487 U.S. at 801. Just as commissioned painters' works are their artistic voice, so too Phillips's custom wedding cakes are his own expression.

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[5] Accepting this argument would also jeopardize the freedom of newspapers, publishing companies, media outlets, and internet corporations, all of which disseminate speech (like articles, books, and advertisements) attributed to others. *But see Tornillo*, 418 U.S. at 258 (holding that the state cannot force a newspaper to print a politician's article).

Nor did the court below correctly apply this Court's decision in *FAIR*. *See* Pet.App.30a-31a. In that case, a group of law schools that disagreed with the military's former "Don't Ask, Don't Tell" policy objected to a funding condition that required them to host military recruiters. *FAIR*, 547 U.S. at 51. They claimed that providing those recruiters access to empty rooms would violate their expressive freedom by creating the false appearance that "they see nothing wrong with the military's policies." *Id.* at 65.

This Court analyzed the law schools' speech arguments separately from their expressive-conduct claim. *See id.* at 60-68. The speech arguments lacked merit, this Court held, because the schools are "not speaking when they host interviews and recruiting receptions." *Id.* at 64. Empty rooms do not speak. Here, however, the Commission is hijacking Phillips's artistic expression, forcing him to design wedding cakes celebrating ideas marriage that conflict with his faith. *FAIR* is thus distinguishable.

Nor does *FAIR* foreclose Phillips's expressive-conduct argument. The Court there rejected the law schools' expressive-conduct claim because any expressiveness in the conduct compelled—giving military recruiters equal access to rooms—"is not created by the conduct itself but by the speech that accompanies it." *Id.* at 66. What is compelled here, however—a custom-designed wedding cake—is itself artistic expression. The court below overlooked this critical distinction and misapplied *FAIR*.

2. Respondents' Extreme Arguments Pose Far-Reaching Threats to Expressive Freedom.

Craig and Mullins, joined by the Commission below, have insisted that the First Amendment does not protect artists or other professionals when they create expression "on behalf of clients." Appellees' Amended Answer Br. at 12 (Colo. Ct. App.) ("Appellees Ct. App. Br."). The compulsion of speech that would result under that theory is staggering, reaching far beyond cake artists. Illustrating the breadth of the coercion that they seek, Craig and Mullins's counsel claimed at oral argument below that CADA would require "a fine art painter" to "paint a commissioned picture that celebrates gay marriages." Pet.App.332a-33a; *see also Arlene's Flowers, Inc. v. Wash.*, Pet. for a Writ of Cert. at 287a, 293a-94a (No. 17-108) (July 14, 2017) ("*Arlene's Flowers* Cert. Pet.") (arguing, in the words of the Washington Attorney General, that the state's public-accommodation law can force a poet to write an objectionable poem and a floral designer to spell out with flowers "God bless this marriage").

The Commission has since backed off the hardline approach taken below. When opposing Phillips's petition for a writ of certiorari with this Court, the Commission admitted that a cake artist's custom wedding work "could … be expressive" and thus entitled to "First Amendment" protection. Colo. Opp. Br. at 15. It also conceded that cake artists have the freedom to refuse "to create cakes that feature specific designs or messages that are offensive" to the creators. *Id.* at 11.

But the Commission's change of heart appears to be litigation posturing since it continues to take its more extreme position in *303 Creative, LLC v. Elenis*, No. 16-cv-02372-MSK-CBS (D. Colo.) (excerpts of relevant filings reprinted in Addendum). There, a custom website designer named Lorie Smith seeks an injunction ensuring that the Commission cannot compel her to design websites that express ideas (such as support for same-sex marriage) in conflict with her conscience. *See* Addendum at 12a-20a (reciting relevant stipulated facts from the case, including the stipulation that all Smith's "website designs are expressive in nature, as they contain images, words, symbols, and other modes of expression"). The Commission has argued that if Smith creates websites for weddings, CADA requires her to write words and design images that celebrate same-sex marriages. Addendum at 2a-3a. The Commission justifies its position by insisting that Smith's "website design service is … not constitutionally protected speech." Addendum at 6a.

Such a narrow reading of the First Amendment threatens the expressive freedom of countless artists and other professionals who create speech for a living. If Respondents have their way, laws like CADA will empower the government to punish (and banish from entire professions) individuals like Phillips who serve all people but decline to express all ideas or celebrate all events. Consistent with *Hurley*, this Court should firmly reject such a constrained reading of the First Amendment. Artists and other speakers must remain free to create expression as their consciences dictate—not as the state demands. Any other outcome would replace the First Amendment's majestic

guarantees with "a mere shadow of freedom." *Barnette*, 319 U.S. at 642.

C. The Commission's Content-Based and Viewpoint-Based Application of CADA Demands No Less Than Strict Scrutiny.

Ordering citizens to engage in unwanted artistic expression is such an affront to First Amendment freedoms that no less than strict scrutiny will do. *See PG&E*, 475 U.S. at 19-20 (plurality opinion) (applying strict scrutiny in a case of compelled speech). That exacting standard is doubly warranted here because this application of CADA discriminates based on content and viewpoint.

Content-based discrimination occurs in at least two ways. First, this Court in *Riley* recognized that "[m]andating speech that a speaker would not otherwise make necessarily alters the content" and constitutes "a content-based regulation of speech." 487 U.S. at 795. Because this application of CADA mandates artistic expression that Phillips would not otherwise create, it amounts to a content-based application. Second, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Phillips triggered CADA only because he addressed the topic of marriage through his art (i.e., because he designed custom cakes for opposite-sex weddings). Penalizing an artist because of the topics on which he has chosen to speak is decidedly content based. *See Tornillo*, 418 U.S. at 256 (noting that the right-of-reply statute was content based because it was triggered only when the

newspaper spoke on the topic of politicians). Indeed, by its own terms, CADA applies to a refusal to express something only when the requested topic or message implicates a classification listed in the statute. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

Going beyond mere content discrimination, the Commission has engaged in viewpoint discrimination as well. Like the state directive invalidated in *PG&E*, the Commission's order here requires Phillips to express ideas diametrically opposed to his own. 475 U.S. at 12-13 (plurality opinion) (finding viewpoint discrimination where the state forced a business to disseminate speech that was contrary to its views). In addition, the Commission's application of CADA favors cake artists who support same-sex marriage over those like Phillips who do not. Even though CADA forbids discrimination based on religion, JA307, the Commission has allowed three cake artists to refuse a religious customer's request to create custom cakes with religious messages *criticizing* same-sex marriage, *see* Pet.App.20a n.8; JA230-58. In sharp contrast, though, the Commission has harshly punished Phillips for declining to express ideas *supporting* same-sex marriage. Such blatant viewpoint discrimination requires strict-scrutiny review.

By playing favorites on the issue of same-sex marriage, the Commission has undermined Phillips's freedom to engage in an "open and searching debate" on that topic. *Obergefell*, 135 S. Ct. at 2607. Real dialogue cannot exist if one side is compelled to either promote and celebrate the other side's position or face the loss of family businesses, vocations, and (in some cases) even personal assets. *See Arlene's Flowers* Cert.

Pet. at 5 (entering judgment for civil penalties, damages, and attorneys' fees and costs against a floral designer in her personal capacity). That sort of coercion hardens hearts and steels resolve, and it ostracizes those whose views the government penalizes. Avoiding these sorts of harms is why the First Amendment forbids the government from favoring some speakers over others.

Notably, strict scrutiny applies even if the Court concludes that Phillips's wedding-cake artistry is expressive conduct (instead of artistic expression). The Colorado Court of Appeals implied that if Phillips's protected activity is expressive conduct, the applicable standard would be the test established in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *See* Pet.App.27a-28a. Not so. Regardless of whether a case involves expression or expressive conduct, "*O'Brien* does not provide the applicable standard" for reviewing a law that discriminates based on content in its application. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (citing *R.A.V.*, 505 U.S. at 385-86). Just as government action that censors expressive conduct because of its message must survive strict scrutiny, *see Holder*, 561 U.S. at 27-28 (discussing *Cohen*, 403 U.S. at 16-19); *Johnson*, 491 U.S. at 411-12, a state that punishes a person for declining to express certain messages must also satisfy that exacting standard.

Part III of this brief addresses strict scrutiny. Because the Commission cannot satisfy it, Phillips should prevail on his free-speech claim.

II. Compelling Phillips to Design Custom Wedding Cakes that Celebrate Same-Sex Marriage Violates the Free Exercise Clause.

For many, including Phillips, marriage has inherently religious significance. Regardless of whether his clients plan an overtly religious wedding, Phillips views those events as forming and celebrating a fundamentally religious relationship. JA157-58. His role as a cake artist is to design a celebratory centerpiece for the wedding festivities, and he considers himself "an *active* participant" in that sacred event. JA162. The Commission, however, has ordered Phillips to make art for and participate in events that have deep religious meaning to him. For the Commission to get away with that, the Free Exercise Clause must be drained of all its substance. Nothing in this Court's jurisprudence remotely suggests that the government can invade such a hallowed sphere. On the contrary, the Free Exercise Clause exists precisely to ensure that no one should ever have to endure what Phillips has experienced at the hands of the Commission.[6]

A. CADA Is Not Neutral or Generally Applicable as Applied.

The manner in which the Commission applies CADA is neither neutral nor generally applicable, and as a result, it "must undergo the most rigorous of

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[6] The Free Exercise Clause protects Phillips and his closely held family business. As this Court recently explained, affirming Masterpiece's free-exercise rights "protects the religious liberty of the humans who own and control" that family-owned company, which in this case is Phillips and his wife. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Two cases encapsulate this Court's doctrine on neutrality and general applicability. *Employment Division v. Smith* held that "an across-the-board criminal prohibition" on illegal drug use satisfied both of those requirements, 494 U.S. 872, 884 (1990), while *Lukumi* concluded that ordinances gerrymandered to punish adherents of one faith fell "well below the minimum standard necessary to protect First Amendment rights," 508 U.S. at 543. Here, the Commission's discriminatory application of CADA distinguishes this case sharply from *Smith*. By punishing Phillips while protecting cake artists who support same-sex marriage, the Commission's actions raise many of the neutrality and general-applicability concerns articulated in *Lukumi*.

1. The Commission Has Not Neutrally Applied CADA.

"Official action that targets [specific] religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. The Free Exercise Clause "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs." *Id.* at 534 (quotation marks and citations omitted). To unmask this, neutrality analysis considers "the effect of a law in its real operation," *id.* at 535, and "the interpretation given to the [statute]" by the state, *id.* at 537.

The Commission has applied CADA to target Phillips's religious beliefs for adverse treatment. Cake artists who support same-sex marriage may

decline to oppose it, while those who oppose same-sex marriage must support it. *See supra* at 36. In no world is that a neutral interpretation of the law.

Highlighting this differential treatment, the Commission has offered markedly inconsistent analysis when considering whether these two groups of cake artists violate CADA. First, the court below said that the other cake artists could refuse an order because of "the offensive nature of the requested message." Pet.App.20a n.8. But it is undisputed that Phillips declined Craig and Mullins's request because he too did not want to express ideas that offend his religious convictions about marriage. To be sure, the requested cakes criticizing same-sex marriage included words. But that is no basis for treating Phillips worse. His custom wedding cakes are "highly distinctive structures" that function as "markers for weddings," and as such, they inherently express ideas about marriage. Charsley, *supra*, at 121. Accordingly, Phillips's speech-based decision is entitled to at least as much respect as the speech-based decisions of others.

Second, both the Commission and the court below regarded criticism of same-sex marriage as offensive, while dismissing any suggestion that support for same-sex marriage might be offensive to some. Pet.App.20a n.8; JA237, 246-47. Not only does that logic openly disfavor Phillips's views, it rests on a notion—offensiveness—that the state has no business invoking when regulating matters of speech and religion. *See Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion).

Third, for the three cake designers who refused to criticize same-sex marriage, the court below considered essential the fact that they served people of all faiths. Pet.App.20a n.8. But for Phillips, his willingness to serve customers of all sexual orientations was dismissed out of hand as a "distinction without a difference." Pet.App.69a; *see also* Pet.App.19a.

Fourth, the court below told Phillips (1) that his custom wedding cakes do not communicate anything, (2) that even if they did, the expression was not his but his clients, and (3) that no one would attribute meaning to his cakes beyond compliance with CADA. Pet.App.29a-31a. Yet the court did not subject the other cake artists to anything remotely resembling that analysis; instead, it readily accepted that their cakes would communicate a message and that they could refuse to express it. Pet.App.20a n.8.

Fifth, the Commission's one-sided construction of CADA affords broader protection to LGBT consumers than to people of faith. Indeed, the Commission has expanded CADA's sexual-orientation protection by refusing to distinguish between speech and status in that context, while simultaneously diminishing the statute's religious protection by distinguishing between the speech and status of religious people. Such preferential treatment for one group over another contravenes basic notions of neutrality.

Furthermore, the Commission's discriminatory reading of CADA extends beyond cake designers. Although CADA does not require expressive professionals to create materials with offensive written designs or words, Pet.App.20a n.8, the

Commission insists in the *303 Creative* case that a graphic designer would violate that statute if she declines to build websites with specific designs or words celebrating same-sex marriage. *See* Addendum at 2a-3a, 6a. The Commission thus applies different rules to all expressive professionals depending on their views about same-sex marriage: supporters get a pass, but opponents get punished.

A review of all these situations reveals something striking: people of faith who do not support same-sex marriage always lose. Whether they are the customer requesting an expressive item or the professional declining to create it, the Commission consistently opposes them. This unequal application of the law impermissibly "single[s] out" a specific religious belief "for discriminatory treatment." *Lukumi*, 508 U.S. at 538; *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165-68 (3d Cir. 2002) (holding that a selective application of a law against a particular religious practice triggers strict scrutiny).

The reason for this discriminatory treatment is not difficult to discern, for the Commission hardly conceals its disdain for Phillips's religious views. At a deliberative hearing in this case, one commissioner, with no disagreement from the others, had this to say:

> I would also like to reiterate what we said in the hearing or the last meeting. 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, whether it be – I mean, we – we 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.

Pet.App.293a-94a. No one with Phillips's beliefs stands a chance before a government agency that is brazen enough to say such things.

Rather than constraining the Commission's hostility toward Phillips's beliefs with well-defined standards, CADA (at least as the Commission has applied it) permits an "'individualized governmental assessment of the reasons for the [allegedly unlawful] conduct.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884). As the facts here demonstrate, the Commission deems some reasons for declining a request acceptable and others illegal based in part on the "offensiveness" of the requested speech. *See, e.g.*, Pet.App.20a n.8, 78a; JA237, 246-47; Colo. Opp. Br. at 11. But such a hopelessly vague standard—which entails at least as much discretion as the "good cause" standard that *Smith* mentioned, *see* 494 U.S. at 884, and the "test of necessity" that *Lukumi* addressed, 508 U.S. at 537—gives the state far too much leeway to "devalue[] religious reasons" for declining a request. *Id.*; *see also Matal*, 137 S. Ct. at 1764 (plurality opinion) (forbidding government reliance on the offensiveness of speech). And devaluing Phillips's religious reasons for declining Craig and Mullins's request is exactly what the Commission has done.

But the Commission did not stop there. It actually declared Phillips's religious beliefs about marriage to be discriminatory in and of themselves. Pet.App.19a ("[O]ne's opposition to same-sex marriage is discrimination"). And in so doing, it effectively

banned Phillips and all likeminded believers from the wedding industry. *See* Pet.App.45a. Yet construing CADA to exclude people with a specific religious belief from a specific vocation is not neutral in any sense of the word. *Cf. Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021-22 (2017) (explaining that the government cannot force religious groups or individuals to choose between exercising their faith and pursuing a benefit otherwise available to the public). Nor is that interpretation of CADA consistent with this Court's call to respect, rather than "disparage[]," Phillips's "decent and honorable" beliefs. *Obergefell*, 135 S. Ct. at 2602.

2. The Commission Has Not Generally Applied CADA.

A law is not generally applicable if it fails to prohibit nonreligious conduct that endangers the state's asserted "interests in a similar or greater degree" than Phillips's decision not to celebrate same-sex marriages. *Lukumi*, 508 U.S. at 543. *Lukumi*'s general-applicability analysis focused on the underinclusiveness and selective application of the laws at issue there. *See id.* at 542-45. Both of those factors establish that CADA is not generally applicable here.

First, CADA is substantially underinclusive in its efforts to achieve the Commission's asserted interests. Respondents have emphasized throughout this litigation the state's interest in preventing dignitary harms. *See* Appellees Ct. App. Br. at 36. Yet the state's anti-religious application of CADA imposes dignitary harm on religious artists like Phillips. *See*

infra at 55-56. And more broadly, CADA allows any expressive professional to refuse to create speech of that they deem objectionable, even if those messages are closely associated with a customer's protected status. Pet.App.20a n.8. Allowing professionals to decline those requests permits the same sorts of harms to consumers that the Commission claims an interest in eliminating here. Hence, CADA is not generally applicable. *See also infra* at 56-58 (discussing underinclusiveness in greater detail).[7]

Moreover, "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543. As discussed in the previous section, the Commission has done just that. It has selectively applied CADA to target artistic and expressive professionals who have a religious objection to celebrating same-sex marriages. Combining this selective application with the substantial underinclusiveness discussed above leads to only one possible conclusion—CADA is not generally applicable.

Smith confirms this. It involved a criminal law that applied across the board and imposed a

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[7] By including exemptions within CADA, the state itself has recognized that it does not have a general or absolutist interest in eliminating discrimination. *See, e.g.*, Pet.App.93a (exempting "church[es], synagogue[s], mosque[s], or other place[s] that [are] principally used for religious purposes" from CADA's scope); Pet.App.95a (permitting public accommodations to treat men and women differently when doing so has "a bona fide relationship" to the goods or services they provide).

straightforward ban on the use of "controlled substances." 494 U.S. at 874, 884; *see also id.* at 879-80 (discussing a law prohibiting all young children from selling publications, *see Prince v. Mass.*, 321 U.S. 158, 160-61 (1944), and a Sunday-closing law that applied to all merchants selling certain goods, *see Braunfeld v. Brown*, 366 U.S. 599, 600 (1961)). CADA is nothing like that. It lacks broad application because of its significant underinclusiveness and selective application. And the Commission's unequal treatment of similarly situated cake artists proves that CADA is anything but straightforward in its application. Thus, CADA is not the sort of generally applicable law that *Smith* intended to insulate from strict-scrutiny review. Accordingly, this application of CADA must satisfy that demanding standard.

B. This Application of CADA Infringes a Hybrid of Phillips's Free-Exercise and Free-Speech Rights.

Phillips's free-exercise claim invokes strict scrutiny for another reason: because the Commission's order infringes a hybrid of First Amendment rights. This is squarely supported by *Smith*'s holding that strict scrutiny applies in "hybrid situation[s]" where a free-exercise claim is linked with "other constitutional protections, such as freedom of speech." 494 U.S. at 881-82.

Two examples of hybrid-rights cases that *Smith* specifically cited were *Wooley* and *Barnette*, noting that the state action in those cases implicated "freedom of religion" and "compelled expression" together. *Id.* at 882. When a person's free-exercise claim is connected with "communicative activity," as

Phillips's is here, *Smith* held that strict scrutiny applies. *Id.*; *see also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 159 n.8 (2002) (discussing the hybrid-rights doctrine). The Colorado Court of Appeals thus erred in expressing "doubt on [the] validity" of the hybrid-rights doctrine. Pet.App.46a.

Although the hybrid-rights theory is rooted in *Smith*, this Court has yet to specify the precise framework for analyzing those claims. The standard that best comports with *Smith* requires an individual raising a hybrid-rights argument to present a "colorable claim" that the government's action infringes on a companion right. The Fifth, Ninth, and Tenth Circuits all use that test. *See, e.g.*, *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009) (asking whether the party had "a colorable claim" on its companion right); *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (explaining that a hybrid-rights claim requires the party to "make out a 'colorable claim' that a companion right has been violated"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004) (similar).

Applying that standard here, Phillips has established a hybrid-rights claim, and the Colorado Court of Appeals erred in concluding that he did not. Pet.App.46a. As previously discussed, Phillips has demonstrated a strong free-speech interest in declining to create artistic expression that violates his beliefs about marriage. *See supra* at 16-37. Combining that with his robust free-exercise interest produces a hybrid-rights claim that subjects this

particular application of CADA to strict scrutiny. *See Smith*, 494 U.S. at 881-82.[8]

III. Respondents Cannot Satisfy Strict Scrutiny.

Because this application of CADA infringes Phillips's rights under the Free Speech and Free Exercise Clauses, Respondents must prove that it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (quotation marks omitted); *see also Playboy*, 529 U.S. at 818 (explaining that the burden rests with the government and the government does not get "the benefit of the doubt"). On multiple occasions, states that have applied public-accommodation laws to infringe First Amendment liberties have been unable to satisfy heightened forms of constitutional review. *See, e.g.*, *Hurley*, 515 U.S. at 578-79; *Dale*, 530 U.S. at 659. The Commission's efforts fare no better.

Respondents argued below that "Colorado has a compelling interest in eradicating discrimination in all forms." Appellees Ct. App. Br. at 36 (quotation marks omitted). Yet that characterization of the state interest is far too broad. Strict scrutiny "look[s] beyond broadly formulated interests justifying the general applicability of government mandates" to see whether that standard "is satisfied through application of the challenged law" to "the particular" party. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *see also*

[8] If the rules established in *Smith* do not protect Phillips here—in other words, if the Commission can compel him to create artistic expression about an inherently religious issue like marriage—then the standards adopted in that case should be reevaluated.

Attorney Gen. v. Desilets, 636 N.E.2d 233, 238 (Mass. 1994) ("The general objective of eliminating discrimination of all kinds … cannot alone provide a compelling State interest …."). In this context, as *Hurley* illustrates, the Court should focus not on CADA's general purpose of preventing "denial[s] of access to (or discriminatory treatment in) public accommodations," but on its "apparent object" when "applied to expressive activity in the way it was done here." 515 U.S. at 578.

The Commission must show that it has a compelling interest in forcing cake artists who otherwise serve LGBT customers to violate their consciences by creating custom wedding cakes that celebrate same-sex marriages. Unlike most applications of CADA, this one would force Phillips to create artistic expression and thus "modify the content" of his speech. *Id.* But as *Hurley* explained, permitting the Commission to compel speech in that manner would "allow exactly what the general rule of speaker's autonomy forbids." *Id.* Even this cursory look at strict-scrutiny analysis thus reveals that Respondents cannot satisfy it.

Diving deeper, it becomes clear that the Commission's broadly cast interest in punishing Phillips includes three specific purposes: (1) the state's concern with ensuring that same-sex couples planning their weddings have ample access to cake artists; (2) its interest in avoiding adverse economic effects that might accompany certain forms of discrimination; and (3) its interest in protecting the dignity of same-sex couples. None of those interests satisfies strict scrutiny under these circumstances.

A. The State's Asserted Access Interest Is Not Undermined Here, and Its Efforts to Advance It Are Not Narrowly Tailored.

The Colorado Court of Appeals referenced the Commission's interest in ensuring that "goods and services … are available to all of the state's citizens." Pet.App.50a. But Respondents have introduced no evidence suggesting that same-sex couples have problems accessing cake artists, or any other creators of expression, willing to celebrate their weddings.

Nor could they. *See* Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 Ind. L.J. 693, 721 (2017) ("[T]here is no evidence of widespread denials of service to gay customers"). The evidence shows that Craig and Mullins acquired (free of charge) a custom-made, rainbow-layered wedding cake from another local cake artist. JA175-76, 184-85. Nothing suggests that they had difficulties doing that. And as our amici explain, same-sex couples in the greater Denver area (where Phillips is located) have ample access to cake artists who will design custom cakes for same-sex weddings. *See generally* Am. Br. Law and Economics Scholars at Part II.A.

In light of this, affirming Phillips's religious and expressive freedom in these circumstances does not undermine the Commission's asserted interest in ensuring that same-sex couples have access to custom wedding cakes. And for the same reasons, punishing Phillips is not narrowly tailored to advance that interest. The state need not strip away Phillips's freedom for same-sex couples to obtain the artistic wedding cakes they seek.

B. The State's Asserted Economic Interest Is Neither Implicated Nor Supported by Evidence.

The court below said that this application of CADA advances the state's interest in avoiding "adverse economic effects," because punishing Phillips "prevents the economic and social balkanization prevalent when businesses decide to serve only their own 'kind.'" Pet.App.50a. But that court itself recognized that when Phillips told Craig and Mullins that "he does not create wedding cakes for same-sex weddings," he also said that "he would be happy to" sell them anything else in his shop. Pet.App.4a. That does not remotely resemble the "your kind isn't welcome here" discrimination that the court below thought would have deleterious economic effects. That interest, therefore, cannot satisfy strict scrutiny because it is not even implicated by these facts. *See Johnson*, 491 U.S. at 407-10 (dismissing an interest asserted by the state because it was "not implicated on the[] facts").

Additionally, strict scrutiny requires the Commission to show that forcing Phillips to create custom wedding cakes for same-sex marriages is "actually necessary" to solve an "actual" economic "problem." *Brown*, 564 U.S. at 799. "[A]mbiguous proof" or a mere "predictive judgment" "will not suffice"; the Commission must demonstrate a "direct causal link" between the allegedly adverse economic effects and allowing Phillips to decline requests for custom wedding cakes that conflict with his faith. *Id.* at 799-800. But the Commission has produced no

evidence whatsoever on that point, and thus it has failed to satisfy strict scrutiny.[9]

C. The State's Dignitary Interest Does Not Satisfy Strict Scrutiny.

Respondents focused much of their arguments below on the Commission's interest in preventing discrimination that "deprives persons of their individual dignity." Appellees Ct. App. Br. at 36. Yet an interest in avoiding some dignitary harms—though a real concern in certain circumstances—cannot override Phillips's First Amendment freedoms and his own equally important dignitary interests.

1. The State's Dignitary Interest Is Not Compelling in this Case.

"'[C]ontext matters' in applying the compelling interest test." *Gonzales*, 546 U.S. at 431 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)). The context here is a conscientious man of faith who does not engage in invidious discrimination against any class of people. He will create his custom art for everyone, including LGBT patrons, but he declines all requests (regardless of the requester's identity) to create custom artistic expression that conflicts with his faith. Phillips did not categorically refuse to serve

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[9] The Colorado Court of Appeals cited one document to support its discussion of the state's alleged economic interests. *See* Pet.App.50a (citing Mich. Dep't of Civil Rights Report). That 2013 report discussed the circumstances in a different state (Michigan), relied extensively on anecdotes and anonymous statements, and focused heavily on the limitations facing same-sex couples before they could marry. Such feeble evidence does not come close to carrying the state's heavy burden under strict scrutiny.

Craig and Mullins; he only declined to create a custom wedding cake that would celebrate their marriage, while offering to sell them any other items in his store or to design for them something for another occasion. That is neither invidious nor based on the slightest bit of animosity. Rather, it is a reasonable exercise of his artistic discretion based on a "decent and honorable" religious belief about marriage. *Obergefell*, 135 S. Ct. at 2602. Notwithstanding Craig and Mullins's response, the Commission simply does not have a compelling interest in punishing Phillips in this case.

Indeed, *Hurley* established that the state's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. The Court there recognized that "the point of all speech protection … is to shield just those choices of content that in someone's eyes are … hurtful." 515 U.S. at 574. An interest in preventing dignitary harms thus is not a compelling basis for infringing First Amendment freedoms. *Cf. Johnson*, 491 U.S. at 409 (explaining that "[i]t would be odd" to conclude that the hurtfulness of an expressive decision is the reason both "for according it constitutional protection" and for stripping it of that protection). Some dignitary harms must be tolerated in order to provide "adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

Freedom from compelled speech would be illusory if a person like Phillips could not explicitly decline requests to create custom artistic expression for speech-based reasons. Hence, an artist's statement

that he cannot engage in specific expression must be protected, and avoiding a dignitary harm in the listener cannot override it. *See, e.g.*, *Matal*, 137 S. Ct. at 1764 (plurality opinion) (rejecting an asserted "interest in preventing speech expressing ideas that offend" because "we protect the freedom to express the thought that we hate" (quotation marks omitted)); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("'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.'" (quoting *Johnson*, 491 U.S. at 414)); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (expressing grave doubts about the government's "interest in protecting the dignity" of listeners from harmful speech since that is "inconsistent with our longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience" (quotation marks and alterations omitted)).

The broader social context confirms the absence of a compelling dignitary interest here. First, no one is claiming "a right to simply refuse to deal with gay people." Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. Cal. L. Rev. 619, 643 (2015). Phillips's concern is about the integrity of his own expression—not the inquiring individual's protected status. Second, not only is support for same-sex marriage the majority cultural position; it has reached an all-time high with 62% of Americans favoring it. *Support for Same-Sex Marriage Grows*, Pew Research Center, June 26, 2017, http://pewrsr.ch/2sX3VBN. Third, few cake artists (or

other expressive professionals, for that matter) will decline to celebrate same-sex marriages because anyone who follows that path must be willing to endure steep market costs and the hostile opposition that people like Phillips have experienced.[10] Respondents' asserted dignitary harms thus do not rise to a compelling level. Indeed, this Court has countenanced far worse. *See, e.g.*, *Snyder*, 562 U.S. at 454-56 (permitting outrageous and "particularly hurtful" speech).

The Commission seems to think that it will eliminate dignitary harms through this and similar applications of CADA, but that ignores the dignitary interests on Phillips's side of the case. For the Commission to brand as discriminatory Phillips's core religious beliefs, compel him to stop creating his wedding designs, and ostracize him as a member of the community inflicts untold dignitary harm not only on him, but also on his fellow believers. *See Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (explaining that "free exercise is essential in preserving the[] … dignity" of religious adherents). People of faith endure extreme emotional turmoil when their government orders them to do something that they sincerely believe will be "displeasing" to "the sovereign God of the universe." JA159.

Unlike the dignitary harm that Craig and Mullins raise, which results from a private actor's decision not

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[10] *See Desilets*, 636 N.E.2d at 238, 240 (explaining that business owners obtain no "financial advantage" by asserting these sorts of religious convictions, and noting that strong "[m]arket forces … discourage" people of faith from declining their customers' requests).

to create expression, the government itself inflicts the dignitary harm that Phillips must endure. *Cf. Obergefell*, 135 S. Ct. at 2596 (emphasizing that "the state itself" was interfering with the dignity of same-sex couples). Hence, the dignitary interests of Phillips and all others who share similar religious beliefs about marriage weigh strongly against applying CADA under these circumstances.

2. The State's Efforts to Advance Its Dignitary Interest Are Not Narrowly Tailored.

The Commission's attempts to end dignitary harms by punishing business owners who serve all people but decline to express all messages is vastly underinclusive and thus not narrowly tailored. Substantial underinclusiveness "is alone enough to defeat" an asserted state interest. *Brown*, 564 U.S. at 802; *see also Reed*, 135 S. Ct. at 2231-32.

The Colorado Court of Appeals has established, and the Commission has acknowledged, that cake artists may decline requests for cakes with "designs or messages" that they consider objectionable. Colo. Opp. Br. at 11; *see also* Pet.App.20a n.8. If the Commission applies that rule evenhandedly, that means Phillips or another cake artist may decline a same-sex couple's request for a wedding cake that bears written messages or specific designs. But allowing that would have at least as much of an effect on the couple's dignitary interests as what Respondents claim here. In fact, the dignitary harm asserted in that scenario would likely be greater because the couple would be forced to discuss the

details of their desired custom cake before the cake designer could decline the request.

The court below also found that CADA allows business owners to express their "religious opposition" to "same-sex marriage" when operating in the marketplace. Pet.App.35a, 45a; *see Terminiello v. City of Chi.*, 337 U.S. 1, 5 (1949) ("[T]he gloss which [a state court] place[s] on [a state law] gives it a meaning and application which are conclusive on us"). While CADA forbids business owners from "displaying or disseminating" a "written, electronic, or printed communication" "stating that [they] will refuse to provide [their] services" to people of a particular sexual orientation, Pet.App.35a & n.11, the court below held that business owners may speak their "religious … opposition to same-sex marriage" to all their customers, Pet.App.45a. Yet permitting that would likely inflict greater dignitary harm than politely declining to design a custom cake.

The state has also left the citizenry at large free to express various reasons why "same-sex marriage should not be condoned," *Obergefell*, 135 S. Ct. at 2607, and to engage in "hurtful speech" that "inflict[s] great pain," including virulent anti-gay epithets, *Snyder*, 562 U.S. at 461. Also, CADA permits "church[es], synagogue[s], mosque[s], [and] other place[s] that [are] principally used for religious purposes" to refuse same-sex couples seeking a location to marry or host a reception. Pet.App.93a.

By permitting all this speech and conduct that risks comparable dignitary harm to same-sex couples in both commercial and noncommercial contexts, CADA "is wildly underinclusive when judged against

its asserted [dignity-based] justification." *Brown*, 564 U.S. at 802. As a result, this application of the statute cannot survive strict scrutiny. *See, e.g.*, *Boos*, 485 U.S. at 327 (explaining that the legislature's failure to "protect 'dignity'" in similar contexts demonstrates that the law is not narrowly tailored); *Brown*, 564 U.S. at 801-02 (explaining that a law seeking to limit aggression in children by banning violent video games but failing to ban similar media that also creates aggression is substantially underinclusive); *Reed*, 135 S. Ct. at 2231-32 (explaining that a law forbidding the posting of some signs was "hopelessly underinclusive" in attempting to further the town's interests in "aesthetics" and "traffic safety" because the town allowed other signs to proliferate).

CADA also fails the narrow-tailoring requirement because less restrictive alternatives are available to achieve the state's interest. In particular, the Commission could interpret CADA to allow a professional who serves all people to decline requests to create specific artistic expression or other speech because of what it would communicate. Even if the Commission construed CADA that way, the statute would still prohibit refusals by any professional who categorically declines to work with a class of people. CADA would also apply to artists and other expressive professionals like Phillips when doing something other than creating speech or art. This narrowing construction thus would not exclude Phillips from CADA when, for example, he is selling premade items to the public. *See Hurley*, 515 U.S. at 580-81 (explaining that a state can compel access to a publicly available benefit but not to speech). And finally, this reading of CADA would not affect

employment-nondiscrimination laws or the many professionals who do something other than design artistic expression or otherwise create speech for their clients.

Respondents insist that any interpretation of CADA that does not punish Phillips would fatally undermine the statute's purpose. Appellees Ct. App. Br. at 38-39. That is not true. Again, the court below recognized, and the Commission admitted, that cake artists may decline to create custom cakes with designs or messages that they deem objectionable, even when that speech is intertwined with a customer's protected status. Colo. Opp. Br. at 11; Pet.App.20a n.8; *see also* Pet.App.78a (discussing hypothetical African American and Muslim cake artists who would not be punished under CADA). This existing limitation on CADA's reach disproves Respondents' argument that the statute's effectiveness will be "necessarily undercut" if Phillips's liberty is protected. *Gonzales*, 546 U.S. at 434.

More generally, nondiscrimination laws regularly include exceptions and significant coverage gaps. Title II of the Civil Rights Act of 1964, for example, applies only to a limited category of businesses like hotels, restaurants, and places of public entertainment. 42 U.S.C. § 2000a(b). And Title VII allows businesses to discriminate in hiring decisions that are "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1); *see also* 29 C.F.R. § 1604.2(a)(2) (explaining that Title VII allows production studios to make classifications when "necessary for the purpose of authenticity or

genuineness … e.g., [selecting] an actor or actress"). But none of these or similar gaps in coverage have prevented nondiscrimination laws from furthering their purposes.

Undeterred, Respondents speculate that protecting Phillips in this case will open the floodgates to other people of faith seeking similar freedom. Appellees Ct. App. Br. at 38-39. "Yet hardly any of these cases have occurred: a handful in a country of 300 million people." Koppelman, *supra*, at 643. Against this backdrop, this Court should reject, as it has done time and again, the speculative and unsupported slippery-slope arguments that Respondents raise here. *See, e.g.*, *Gonzales*, 546 U.S. at 435-36 (rejecting the government's "slippery-slope" argument that "[i]f I make an exception for you, I'll have to make one for everybody, so no exceptions"); *Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) (same); *Hobby Lobby*, 134 S. Ct. at 2783 (rejecting the government's argument about "a flood of religious objections" because it "made no effort to substantiate [its] prediction"); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 719 (1981) (noting the lack of "evidence in the record" to suggest that providing a religious accommodation would create the widespread concerns that the state raised); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (dismissing the state's unfounded speculation about "the filing of fraudulent claims by unscrupulous claimants feigning religious objections"). Courts must not "assume a plausible, less restrictive alternative would be ineffective." *Playboy*, 529 U.S. at 824.

Finally, Respondents also have expressed an interest in minimizing the instances in which an

expressive professional like Phillips declines a same-sex couple's wedding-related request. But the market already provides existing means to address this, such as private websites apprising consumers of professionals in a geographical area who will celebrate same-sex weddings. *See* GayWeddings, http://gayweddings.com/ (last visited Aug. 29, 2017); *cf. Brown*, 564 U.S. at 803 (discussing the video-game industry's "rating system"). If the Commission thinks that more must be done, it could make similar resources available to the public. That would provide a ready alternative that protects the interests of all involved. Thus, the Commission's efforts to coerce and punish Phillips are neither necessary nor narrowly tailored.

CONCLUSION

Time and again, this Court has applied the First Amendment to pave the way for people with diverging views on core issues to live together. It should do so again in this case. Robust religious and expressive freedoms advance pluralism, protect other civil liberties, and promote true tolerance and civility. These freedoms benefit everyone, no matter their beliefs about same-sex marriage. To remain on this path toward liberty for all, this Court should reverse the judgment of the Colorado Court of Appeals and hold that the Commission's order fundamentally conflicts with Phillips's First Amendment freedoms.

Respectfully submitted,

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