No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL., PETITIONERS

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, IDAHO, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WEST VIRGINIA, AND WISCONSIN, THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, AND PAUL R. LE PAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

MICHAEL P. MURPHY
JOHN C. SULLIVAN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

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INTEREST OF AMICI CURIAE

Amici are the States of Texas, Alabama, Arizona, Arkansas, Idaho, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, West Virginia, and Wisconsin, the Commonwealth of Kentucky, and the Governor of Maine.[1] States do not have a legitimate interest in compelling citizens to engage in state-favored expression. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). On respondents' view, however, artists may be coerced—as a condition of earning a living through their artistry—to use their expressive talents on contested social and political issues as the government sees fit.

This compulsion of speech is constitutionally forbidden. And for good reason: Government power to order individuals to speak in a manner that violates their conscience is fundamentally at odds with the freedom of expression and tolerance for a diversity of viewpoints that this Nation has long enjoyed and promoted.

Amici are well-positioned to explain that States have a host of alternatives for promoting the availability of customized artistic works at same-sex weddings. For example, States can create online tools publicizing those artists who will create works celebrating same-sex weddings. Compelled private speech is thus not a necessary means to this end.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties' consents to the filing of this brief have been filed with the Clerk.

SUMMARY OF ARGUMENT

Governments in our Nation have long protected individual rights in furtherance of "a tolerant citizenry." *Lee v. Weisman*, 505 U.S. 577, 590 (1992). The crucial "mutuality of obligation" inherent to tolerance in a pluralistic society, *id.* at 591, was emphasized by this Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The Court held that the Constitution does not allow States to prohibit same-sex marriage, while simultaneously directing that the free-expression and free-exercise rights of private individuals who disagree with same-sex marriage should be "given proper protection." *Id.* at 2607.

This case is about the freedom of artistic expression that should be protected by government rather than threatened by it. As part of our fixed constellation of individual rights, no government—even one with the best of intentions—may commandeer the artistic talents of its citizens by ordering them to create expression with which the government agrees but the artist does not. Even worse here, the expression at issue deals with a topic that this Court recognized divides people of "good faith." *Id.* at 2594. The very purpose of the First Amendment's Free Speech Clause—and among its highest uses—is allowing opposing sides of a debate to express themselves as they see fit. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 484 (1957). The Constitution provides freedom of expression "in the hope that use of such freedom will ultimately produce a more capable citizenry and . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971).

Not only is free expression intrinsically valuable to our society, the art at issue in this case involves a particular type of ceremony that has been traditionally tied closely to religion and an issue on which there is a difference of opinion held "in good faith by reasonable and sincere people here and throughout the world." *Obergefell*, 135 S. Ct. at 2594. Public-accommodation concerns of past eras are not present here; customized pieces of art are not public accommodations (like restaurants and hotels), the artist plainly did not act out of invidious discrimination, and complainants had immediate access to other artists, in any event. If States wish to facilitate the commissioning of artistry for same-sex weddings, they must look to more nuanced and less invasive approaches.

Above all, States may not use their police power to truncate the First Amendment by compelling a person to create a piece of artwork—particularly one that violates the artist's conscience.

I. This case addresses an artist's liberty to refrain from engaging in expression—or to express dissent. Like other related cases, this case happens to arise in the context of expression regarding same-sex marriage. But the First Amendment principles that control here transcend, and will long outlast, the Nation's current dialogue about same-sex marriage.

Artistic work, whether viewed as pure speech itself or as conduct that is inherently expressive, has always received full First Amendment protection. Even when artistic works may seemingly lack any aesthetic or communicative value, this Court determined that those works will be treated as expression entitled to full protection under the First Amendment if the individual made a serious attempt at creating art. *See, e.g.*, *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (per curiam).

Designing and creating customized art for the centerpiece of a wedding deserves the strong protection afforded to artistic works, regardless of its medium. Creating custom designs and accompanying works celebrating a wedding is artistry—whether it takes the form of a painting on a canvas, a figure carved into ice, or piping and sculpting on a centerpiece wedding cake. Design and creativity go into all those genuine attempts at artistry; the result celebrates the emotional significance of a wedding. All these forms of art deserve the same First Amendment protection.

The protection given to artistic endeavors has never been subject to the decreased scrutiny applied to mere conduct with some expressive component. Respondents rely on precedent that allows preventing someone from *engaging* in such conduct that is partially expressive but partially non-expressive, such as burning a draft card. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Art, in contrast, by its nature is wholly expressive. Moreover, the state law here is "content-based," so it falls outside of *O'Brien* in all events. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

Most importantly, though, the government in this case went beyond *preventing* someone from affirmatively engaging in conduct, as did the government in *O'Brien*. Rather, the State here is *compelling* an artist to create artistic expression that he does not want to create. No precedent supports this, and *O'Brien*'s analysis simply does not apply to a person who refuses to speak. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 578 (1995) (holding unconstitutional an attempt at compelling expression by applying a public-accommodation law "to expressive activity . . . to require speakers to modify the content of their expression to whatever extent benefi-

ciaries of the law choose to alter it with messages of their own"). Because art is inherently expressive, the State's compulsory rule violates the First Amendment.

II. Colorado's rule barring Phillips' ability to choose when to create customized celebratory art also violates his free-exercise rights. Weddings have been considered a religious event for most people throughout history. The strong, historic link between that celebration and religious norms distinguishes conduct celebrating weddings from ordinary public accommodations regulated by other laws. That religious distinctiveness, combined with compelled-speech concerns, illustrates the infirmity of Colorado's regulation. Allowing the State to compel speech implicating sincerely held religious beliefs would be plainly inconsistent with this Nation's long-standing respect for individual liberty and personal autonomy.

All of this underscores why artists such as Phillips cannot be punished for declining a commission to create artistic expression that violates their conscience or religious beliefs. Phillips does not refuse to provide any service to complainants; he declined a commission to design and create a specialty piece celebrating a same-sex wedding. For that, the State of Colorado not only destroyed his business, it would now force him to reeducate himself and his employees regarding the government's mandated viewpoint. Pet. App. 57a-58a. That is not the result promised by a mutuality of tolerance and protection for people of "good faith" that happen to disagree on a social issue. *Obergefell*, 135 S. Ct. at 2594.

Colorado's punishment of Phillips is forbidden by the First Amendment.

ARGUMENT

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox ... or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642; *accord Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

Yet Colorado has declared that its officials may do exactly that—compel citizens to create works of artistic expression that violate their consciences. Colorado's defense based on public-accommodation laws is woefully misplaced; the State here is compelling speech to further its preferred orthodoxy. The decision below thus violates both the Free Speech and Free Exercise Clauses of the First Amendment. This Court should restore the "mutuality of obligation" necessary for a "pluralistic," "tolerant" society, *Weisman*, 505 U.S. at 590-91, as recognized by *Obergefell*. 135 S. Ct. at 2607.

The record shows that Phillips has no invidious animus toward the complainants or anyone else. His choice not to design artwork was solely a matter of religious conviction and personal expression with respect to the nature of one type of event. The court of appeals held, however, that Phillips' artistic expression can be compelled because it is supposedly mere conduct without a discernible message. Pet. App. 28a-30a. This holding not only used the wrong test but also incorrectly applied that wrong test: Art does not fall under *O'Brien*'s "expressive conduct" test in the first place, and content-based restrictions like the one here are removed from that analysis altogether.

The court of appeals then concluded that the law satisfied rational-basis review. Pet. App. 49a-50a. But the First Amendment requires a much more searching

inquiry. And Colorado has made no showing—because it cannot—that same-sex couples are unable to obtain artistic works for wedding ceremonies. Broad-based invocation of "anti-discrimination" is inappropriate in the specific context here. The First Amendment has long tolerated, and has indeed protected, disagreement in our pluralistic society. Any harm from a psychological effect that someone might claim when another person holds different beliefs cannot override First Amendment protections. Nor does this sort of harm match the harm suffered by the artists that Colorado would compel, on pain of losing their livelihood, to create customized artistic expression that violates their conscience.

Colorado attempts a comparison to preventing same-sex couples from being turned away from restaurants or hotels. But preventing such *non-expressive* conduct is fundamentally different from compelling artistic commissions protected by the First Amendment.

In all events, when a State targets a specific group or message, even a facially neutral law is unconstitutional. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543-46 (1993). The Colorado law at issue is being used to punish artists on one side of a political and social argument, as Colorado has granted exceptions providing that cake artists do *not* have to make cakes *disapproving* of same-sex marriage. But because the Founders had a "mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

Both the freedom of expression and the freedom of religion protect the right of an artist to not create certain types of art. Colorado's attempt to compel Phillips to create art must be rejected.

I. As Artistic Works, Commissioned Wedding Cake Designs Are Protected by the First Amendment's Freedom of Expression and May Not Be Compelled.

Jack Phillips' custom-designed cakes celebrating weddings are artistic expression. They are protected under the First Amendment, and government cannot compel him to create them. *See, e.g.*, *Wooley*, 430 U.S. at 714 (upholding "the right to refrain from speaking").

A. Because artistic works are inherently expressive, they receive full First Amendment protection and cannot be compelled.

1. The Court long ago recognized art's inherently expressive nature and developed a tradition of protecting artistic works, even works that some might find offensive. *See, e.g.*, *Kois*, 408 U.S. at 231. Thus, artistic works, with very limited exceptions not present here,[2] presumptively fall within the First Amendment's broad protections. *See, e.g.*, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-67 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guar-

[2] Freedom of speech is cabined only by a few "'historic and traditional [exclusions]'—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted). There is no allegation that Phillips' choice not to create a commissioned wedding cake somehow threatened physical harm, was thought to incite anyone to violence, Pet. Br. 9-10, or was obscene, *see Miller v. California*, 413 U.S. 15, 23-37 (1973) (allowing censorship of obscene materials that lacked "serious literary, artistic, political, or scientific value").

antee."). Likewise, the creation or sale of art has never been subject to commercial-speech doctrines.[3] *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("We fail to see why operation for profit should have any different effect in the case of motion pictures.").

This Court's precedents broadly define what qualifies as art. If the work in question has "artistic . . . value"—*Miller*, 413 U.S. at 23—or even "bears some of the earmarks of an attempt" at art—*Kois*, 408 U.S. at 231—then the First Amendment's strong protections apply. *See also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246-56 (2002) (invalidating ban on *virtual* child pornography in part because it "prohibit[ed] speech despite its serious literary, artistic, political, or scientific value").[4]

The wide berth of what qualifies as artistic expression can be seen most clearly in the realm of sexually explicit material: "material dealing with sex *in a manner . . . that has* literary or scientific or *artistic value* . . . may not be branded as obscenity and denied constitutional protection." *Jacobellis v. State of Ohio*, 378 U.S.

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[3] Even under the commercial-speech doctrine, content-based restrictions on expression—like that here, *see infra* pp.19-20—are presumptively invalid. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). The court of appeals recognized that "Masterpiece's status as a for-profit bakery [did not] strip[ ] it of its First Amendment speech protections." Pet. App. 32a. The court did, however, use that for-profit status as part of the "'context"' for wrongly determining that people would assume Phillips was merely conducting his business in accordance with the law by creating cakes for same-sex weddings. *Id.*

[4] Child pornography may be prohibited regardless of any claimed artistic value. *New York v. Ferber*, 458 U.S. 747, 756-65 (1982). *Ferber*, however, "presented a special case" involving "'conduct in violation of a valid criminal statute"' tied to a compelling interest. *Stevens*, 559 U.S. at 471.

184, 191 (1964) (emphases added); *see also Kois*, 408 U.S. at 231 ("[W]e believe that [the sexually explicit] poem bears some of the earmarks of an attempt at serious art.").

The First Amendment's protections apply equally to artistic expression that may not be literal speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (upholding a time-place-manner restriction on music, but recognizing that the First Amendment's protections apply to regulations of music). And unlike "symbolic speech," *see, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (flag burning), with artistic expression it is unnecessary to inquire as to the speaker's message or whether it will be understood by viewers. Art in its various forms is "unquestionably shielded" by the First Amendment—even if it is nonsensical poetry (Lewis Carroll's Jabberwocky), awkward instrumentals (Arnold Schönberg's atonal musical compositions), or seemingly incomprehensible paintings (Jackson Pollock's modern art). *Hurley*, 515 U.S. at 569.

There is no reason to fear differentiating between what is art and what is not. This Court has already drawn that line. It is certainly true that not every "expressive" action a person takes qualifies as art, but expression is protected when it has "serious" artistic value, *Miller*, 413 U.S. at 23-37, or "bears some of the earmarks of an *attempt at serious art*," *Kois*, 408 U.S. at 231 (emphasis added). An objective observer, then, only need recognize the speaker's subjective genuine attempt to create art—and need not appreciate the art's message, beauty, technique, or anything else in order for the creation to be treated as artistic expression protected by the First Amendment.

2. It is no answer to say that the government is somehow not compelling speech because an artist does

not have to create works of art for *anyone*. Pet. App. 29a (noting Colorado's requirement that "Masterpiece sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner"). The Jehovah's Witness students in *Barnette* did not have to attend public school. 319 U.S. at 626. And the challenger in *Wooley* did not have to drive a car. 430 U.S. at 717. These observations, of course, are entirely beside the point, as they do not respect the individual's personal liberty. Accepting these points as valid rationales for compelling speech would simply tolerate unconstitutional conditions on First Amendment rights. That is why this Court has held that a newspaper not only has the right to publish political expression, but also has the right not to be compelled to publish replies to such expression. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243-44, 256-58 (1974).

Examples abound of artistic expression that the government cannot compel. A painter is free to decline a commission for a political-themed mural. A sculptor is free to decline a commission for a religious statue.[5] And a cake designer should be equally free to decline an order either celebrating or disapproving same-sex marriage. The bottom line is simple: "The government may not ... compel the endorsement of ideas that it approves." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012).

B. Commissioned cake designs are artistic works.

Art, by its common definition, is the "expression or application of human creative skill and imagination, typ-

[5] Respondents would even dispute an artist's ability to decline commissioned works if the painter or sculptor "was operating as a public accommodation" that "solicit[ed] business from the general public." Pet. App. 332a.

ically in a visual form such as painting or sculpture, producing works to be appreciated primarily for their beauty or emotional power." New Oxford Am. Dictionary 89 (3d ed. 2010). When Phillips accepts a commission to design and create a custom work, his creation is unquestionably an expression of "human creative skill and imagination" made to be appreciated for its beauty and the ideas it represents. It is unsurprising that cakes are regarded as "works of art often created specially by cake design artists" and are "as novel and as beautiful as many paintings and sculptures." Hannah Brown, *Having Your Cake and Eating It Too: Intellectual Property Protection for Cake Design*, 56 IDEA: J. Franklin Pierce for Intell. Prop 31, 33-34 (2016). More than just an item of food, cakes are often "the embodiment of a plan or design drawn up by an artist." *Id.* at 55.

Even though cake design has been viewed as art for centuries, cake artists today receive more recognition for their creations than at any other time in history. Cake art has found enormous popularity through reality television shows like *Amazing Wedding Cakes*, *Cake Boss*, and *Ace of Cakes*. There are many art institutes and colleges offering training classes and associates degrees in cake decorating. *See Wedding Cake Design School*: Learn.org (Aug. 24, 2017), https://perma.cc/G8BY-2YMB. This includes the Institute of Culinary Education's 12-week course that trains students in various methods of cake decorating, including advanced sugarwork, hand-sculpting, airbrushing, and hand-painting. *The Art of Cake Decorating*, Institute of Culinary Education (2017), https://perma.cc/8WFE-KHED. One college even awards a Bachelor's of Science in Baking and Pastry

Arts. Johnson and Wales University in Rhode Island (Aug. 23, 2017), https://perma.cc/5R5D-U8SG.

This art form finds its highest expression in the wedding cake. As it has been for centuries, the wedding cake is rich with symbolism and meaning. Roman weddings culminated with the groom breaking a cake of wheat or barley over the bride's head as a symbol of good fortune. Carol Wilson, *Wedding Cake: A Slice of History*, 5:2 Gastronomica: The Journal of Critical Food Studies (May 5, 2005), https://perma.cc/H2HL-9PSF. Rather than being a mere "food item" for the wedding, the cake was part of the celebration denoting that a wedding had taken place. *See* Pet. Br. 6-7. The now-traditional white, icing-covered bridal cake first appeared sometime in the seventeenth century. Wilson, *Wedding Cake*, *supra*. Because white icing on a cake symbolized purity and prosperity, a pure white color was highly prized. *Id.*

Cake design changed greatly in the 1800s with the increasing availability of sugar and the inventions of baking powder, baking soda, and temperature-controlled ovens. The first icings were whipped with sugar and eggs and poured over the cake to harden into a smooth, shiny surface that was ideal for decorating. Liz Williams, *The Artistry and History of Cake Decorating*, International Food Information Council Foundation: Food Insight (Oct. 9, 2012), https://perma.cc/244J-85S3. Early decorations were molded from marzipan or other sugar-based pastes and sculpted into intricate and beautiful designs. *Id.*

Today, unlike in the past, it is routinely expected that wedding cakes will uniquely express a couple's personality and match the theme of the couple's wedding: "Ask any summer bride: her wedding cake . . . is the ultimate vehicle for self-expression." Abigail Tucker, *The*

Strange History of the Wedding Cake, Smithsonian.com (July 13, 2009), https://perma.cc/5XFV-QNJW. Wedding cakes also afford cake artists a wide opportunity for creative expression. Wilson, *Wedding Cake*, *supra*, ("[C]ake designers continually strive to set new trends."). The design can involve many hours of labor, sculpting, piping, coloring, and structuring, and are often so elaborate that "the happy couple [may not] have the heart to devour the masterpiece." Tucker, *The Strange History of the Wedding Cake*, *supra*. This helps explain the high prices. A designer like Phillips will typically charge between $400 and $800 for an average-sized custom cake. Pet. Br. 7. Famous cake artists like Sylvia Weinstock may charge $50,000 or more for one of their wedding cake designs. Caitlin Johnson, *Weinstock's Wedding Cakes for the Wealthy*, CBSNews.com (Feb. 8, 2007), https://perma.cc/5L6Z-4YWW. To save on costs, "elaborate cakes are sometimes crafted out of Styrofoam." Tucker, *The Strange History of the Wedding Cake*, *supra*.

When a cake artist consults with a couple on designing a custom wedding cake, the cake artist will consider a broad palette of color, texture, theme, shape, and décor options. Toba Garrett, Wedding Cake Art and Design 2 (2010). The décor, or design, of the cake is the reason a prospective couple selects a particular cake artist. *Id.* at 7. Every cake artist has a style and body of work in that style—which is why cake artists show portfolios of their work. *Id.*; *see also* Elizabeth Marek, *How To Make It In The Cake Decorating World*, Artisan Cake Company (Mar. 25, 2013), https://perma.cc/9HZ8-PCDF (noting that there is at least one website dedicated to stopping cake photo thieves). After that, the clients will generally pay a consultation fee—from $50-

$150—as the "cake artist begins sketching an idea of what the client is looking for." Garrett, *supra*, at 10.

Phillips implements precisely such artistic steps in his custom designs. After consulting with the client, he begins each cake with a sketch of the design and then sculpts it into the final product, using artistic techniques to paint and mold the work along the way. To see one of Phillips' cakes is to appreciate the level of artistry, creativity, and skill incorporated within each of his custom works. *See* J.A. 170 (photograph example of Phillips' cakes); *see also Jack Phillips Creates a Masterpiece!*: Masterpiece Cakeshop (Aug. 30, 2017), https://perma.cc/DQ9Z-NEVC. The creations at issue here—and what the Colorado Civil Rights Commission's sweeping order compelled Phillips to create, Pet. App. 57a—is not a mere white sheet cake, any more than a commissioned portraitist is selling the white canvas on which he paints. Once the artist's creativity and special talents in designing, decorating, or arranging are applied to the blank canvas of a cake, the difference is night and day.

In short, Phillips creates art, and the expressions created by wedding-cake artists convey ideas just as surely as the more basic symbols found to be protected speech in other cases. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (acknowledging the implicit message in a black armband); *Stromberg v. California*, 283 U.S. 359, 361, 369 (1931) (recognizing the symbolic value in a "red flag"). Phillips' cake art enjoys the free-speech protections of any other expressive form of communication.[6]

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[6] Impermissible government restrictions on private artistic expression, such as Phillips', are inherently different from the government ordering its own employees to conduct their official du-

C. An expressive-conduct analysis does not apply to visual art or content-based restrictions, yet commissioned cake designs are protected by the First Amendment even under an expressive-conduct analysis.

The lower court's primary rationale for rejecting Phillips' free-speech claim is that his art is merely conduct that can be regulated under the "expressive conduct" analysis set forth in *O'Brien*, *Texas v. Johnson*, and *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam). *See* Pet. App. 26a-30a. That test was never fashioned to be applied to a work of art. The creation of art, like the physical act of moving one's vocal chords to form audible words, has never been thought to represent proscribable "conduct." An extension of those expressive-conduct cases to artwork would be inconsistent with the rationale that underlies them.

Furthermore, the expressive-conduct test from *O'Brien* is not applicable when specific expression is targeted for its disfavored content—as is the case here. In any event, commissioned cake designs are expression protected by the First Amendment even under *O'Brien*'s expressive-conduct test.

1. Contrary to the lower court's reasoning, the rule governing mere conduct with some expressive quality does not apply to the creation of art. *Cf.* Pet. App. 28a. The expressive-conduct precedent invoked below involved the burning of a draft card, which, although it may not have been art, was clearly expressive conduct. *O'Brien*, 391 U.S. at 376. The complication was that the First Amendment did not protect the non-expressive

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ties so as to effectuate the government's policies. *Cf., e.g.*, *Davis v. Miller*, No. 15A250 (U.S. 2015).

element of the conduct—destroying a government form necessary to the effectuation of a constitutional power of Congress (raising armies). Had O'Brien made and burned a *copy* of his completed draft card—the copy itself having no use in the government's program—the result would have been different. But because the government had a substantial interest in O'Brien not destroying the government form at issue, the Court held that he could not justify doing so in the name of free speech.[7]

The result differed when this Court examined the placement of a peace sign on an upside-down American flag. *Spence*, 418 U.S. at 406. *Spence* also rejected "'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" *Id.* at 409 (quoting *O'Brien*, 391 U.S. at 376). But the Court held that the "activity, combined with the factual context and environment in which it was undertaken, le[d] to the conclusion that [Spence] engaged in a form of protected

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[7] While *O'Brien* is typically used to justify the use of something less than strict scrutiny with regard to expressive conduct, it also indicated that the regulation at issue cannot burden speech more than is necessary to further the governmental interest at stake. 391 U.S. at 377 (noting that "the incidental restriction on alleged First Amendment freedoms [must be] *no greater than is essential* to the furtherance of that interest" (emphasis added)). The real issue was that the draft card was essentially the government's property and related to an important governmental interest requiring that it not be destroyed. *Id.* at 381. In the present case, however, States could achieve their goal of access to wedding expression services without *any* burden being imposed on speech. *See infra* pp. 25-26. Nevertheless, this type of analysis is unnecessary here because compelling any type of speech based on content is unconstitutional.

expression." *Id.* at 410. This Court reached that conclusion by determining that Spence had "[a]n intent to convey a particularized message" and that "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11.

For government to justifiably establish limitations on expressive conduct, context is the key. Burning an American flag outside of the Republican National Convention, as in *Texas v. Johnson*, was protected expression calculated to display a message of displeasure with the renomination of President Reagan. 491 U.S. at 406. As *O'Brien* recognized, it may be necessary on occasion for a court to inquire into whether the expressive conduct has significant non-expressive aspects—where the message and action do not perfectly overlap. That is because *O'Brien* addressed the violation of a law aimed at conduct beyond the expression.

But that is not so with works of art. Unlike mere conduct, art is protected whether or not there is a "succinctly articulable message." *See Hurley*, 515 U.S. at 568-69. And when the medium chosen by the artist to convey the expression is visual art—be it a painting, a sculpture, or a cake design—the art constitutes the entirety of the "conduct," and there is no non-expressive element left to be regulated. *See id.* at 567. Thus, free-speech protection for artwork does not depend on assessing the degree of communicativeness of its message—which need not even be "'understood by those who view it'" for protection to attach. *Johnson*, 491 U.S. at 404; *see Hurley*, 515 U.S. at 569 (citing works of art meaningless to most observers); *see also supra* Part I.A (noting this Court's categorical First Amendment protection for even attempts at art); Jed Rubenfield, *The*

First Amendment's Purpose, 53 Stan. L. Rev. 767, 773 (2001) (recognizing that art "defies the Spence test").

2. Even besides the fact that art is categorically protected by the First Amendment without needing to analyze *O'Brien*'s expressive-conduct test, this test does not apply on the facts of this case for an independent reason. Enforcement of the law at issue here is "related 'to the suppression of [Phillips'] free expression,'" so this case is "outside of *O'Brien*'s test altogether." *Johnson*, 491 U.S. at 410. After all, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Colorado's enforcement of its law here is aimed at furthering one particular message (a celebration of same-sex marriage) while stifling the opposing message (a disapproval of same-sex marriage). Colorado punished Phillips for declining to design wedding cakes that celebrate a message contrary to his faith-based understanding of marriage—even though Phillips has served and would serve same-sex couples any non-commissioned item that he previously made and offers for sale to the general public at his store, and even though he would design custom works for same-sex couples for other types of events. Pet. App. 4a ("Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but advising Craig and Mullins that he would be happy to make and sell them any other baked goods.").[8]

[8] A proprietor refusing to sell a product that was already created and offered for sale for public consumption would be a different fact pattern—one in which any possible expression would have already been created and thus not necessarily compelled.

In contrast, Colorado granted exemptions from its cake-designing mandate for artists who refused to create cakes *disapproving* of same-sex marriage. As petitioner notes (Pet. Br. 13), the Colorado Civil Rights Commission granted an exception to the State's anti-discrimination law when a putative patron ordered cakes that displayed two groomsmen holding hands in front of a cross with a red "X" over the image. *See* Pet. App. 297a-325a. The Colorado Court of Appeals reasoned that such a denial was justified "because of the offensive nature of the requested message." *Id.* at 20a n.8. Colorado's targeted enforcement against only one particular message takes the law outside of a mere conduct regulation, and into the realm of unconstitutional viewpoint discrimination.

Nor can Colorado evade the inherently expressive nature of the art at issue here by inapt appeals to public-accommodation laws. There is a fundamental difference between ensuring that individuals have, on the one hand, access to commodities such as food and shelter and, on the other hand, the ability to compel the creation of custom artwork by a specific artist. If the inability to compel an artist to accept a commission is a harm, the harm is merely a dignitary-type harm that has always been understood as an acceptable cost under the First Amendment for enjoying the pluralistic society treasured in this Nation. And any government compulsion attempting to eliminate that sort of harm necessarily works serious First Amendment injury to artists—forcing them to design and create state-preferred expressive works, on pain of losing their means of livelihood.

The "enduring lesson" taught by this Court's precedent is that "government may not prohibit expression"—including dissent from celebrating certain cere-

monies—"simply because it disagrees with its message." *Johnson*, 491 U.S. at 416. The State of Colorado cannot punish Phillips for refusing to create expression that furthers the State's prevailing orthodoxy.

3. Regardless, even if Phillips' commissioned cake designing is treated as mere conduct, as opposed to art, it is still expression entitled to full First Amendment protection under *O'Brien*'s expressive-conduct test. Designing and creating a wedding cake conveys messages and themes of at least the same communicative quality as marching in a parade—and therefore should be equally protected by the First Amendment. *See Hurley*, 515 U.S. at 569-70; *cf. Tinker*, 393 U.S. at 505-06 (treating pure symbolic act as "closely akin to pure speech . . . entitled to comprehensive protection under the First Amendment").

The parade in *Hurley*, like art, was expressive in and of itself. 515 U.S. at 569-70. Because expressive conduct was at issue, the parade was treated as speech: parade organizers could not be compelled to include other speech with which they disagreed. *Id.* at 572-73 (preventing organizers from having "to alter the expressive content" of their private conduct). The overlap between the conduct and speech was complete, leaving no room to apply the state non-discrimination law.

The same is true with designing and creating custom wedding cakes. The commissioned cake itself is expressive in and of itself. It is therefore fully protected by the First Amendment, regardless of which particular doctrine applies.

D. Commissioned art sold to others is still the artist's personal speech protected by the First Amendment.

1. Just because an artist sells his commissioned expression to others does not negate the fact that the First Amendment protects that artist's expression. *See Joseph Burstyn*, 343 U.S. at 501-02. The buyer may very well want to endorse, adopt, or join in an artist's expression. But the buyer's wishes do not allow the buyer (or the State) to compel an artist's expression. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (even if speech would be joint between multiple speakers, one speaker cannot compel speech from another).

The lower court sought to excuse the State's compulsion of speech by assuming that an outside observer would know that the compelled expression in this case was not an endorsement of same-sex marriage but rather merely Phillips' compliance with the State's mandate. Pet. App. 31a. Such an inquiry is entirely irrelevant to the First Amendment analysis under this Court's compelled-expression precedents.

Colorado's basic position is that compelled speech is acceptable if everyone knows that it is compelled. *Id.* at 32a-34a. The State reasons that everyone will know that the compelled speech is not *really* the speech of the artist. But that is exactly why Colorado's law is infirm.

This reasoning turns the First Amendment on its head—just as it does this Court's holdings in *Wooley* and *Barnette*. After all, one could have simply declared that everyone would understand that the "Live Free or Die" message on a license plate was compelled and thus really belonged only to the government. *Wooley*, 430 U.S. at 715. Or one could blithely announce that stu-

dents are merely complying with the law when they salute the flag. *Barnette*, 319 U.S. at 642. Yet this Court has recognized that compelled speech is infirm *because* it is compelled. When compelled speech is allowed, it will result in governments seeking to enforce a preferred orthodoxy. That is why Colorado's authority "to compel a private party to express a view with which the private party disagrees" must be "stringently limit[ed]." *Walker*, 135 S. Ct. at 2253 (citing *Hurley*, 515 U.S. at 573; *Barnette*, 319 U.S. at 642).

2. The court of appeals tried to justify its inquiry into whether a reasonable observer would understand Phillips' expression as an endorsement of same-sex marriage by relying on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47, 64 (2006). Pet. App. 30a-31a. That is wrong for at least two reasons.

First, art, by its nature, is inherently expressive. *See supra* Part I.A. In contrast, the speech–conduct divide in *FAIR* was important because the law there regulated *only* the school's conduct—allowing military recruiters equal access to rooms in the law school. 547 U.S. at 60. As this Court noted, the law at issue "neither limit[ed] what law schools may say nor require[d] them to say anything." *Id.* But when art is at issue, a court is incorrect to assume that no message is being conveyed.

Second, even under an inapplicable reasonable-observer test, a reasonable observer in this type of situation would see the expression as the artist's speech. Giving as much weight to the role of the patron as possible, commissioned art should only be treated at most as the joint speech of the artist and the patron. An artist's creation is his expression, no matter the source of inspiration, the subject of the art, or the patron that pays for it. Were it otherwise, "the First Amendment

[would not] protect painting by commission, such as Michelangelo's painting of the Sistine Chapel." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010). Neither can an artist's creation reasonably be treated as government speech. *Cf. Walker*, 135 S. Ct. at 2246-52. This again differs from *FAIR* because, unlike allowing recruiters to use school property, art reflects the artists' own design choices, and thus is uniquely identified with the artist.

E. The First Amendment categorically prohibits compelled private artistic expression, yet Colorado's compulsion of speech is unconstitutional even if strict-scrutiny review applies.

1. Government cannot compel private artistic expression—ever. So here, "it is both unnecessary and incorrect to ask whether the State can show that the statute is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment) (internal quotation marks omitted).

Even if strict-scrutiny review did apply, government never has a sufficient interest to compel private artistic expression. Private artistic expression inherently espouses ideas that must come from the artist's nuanced work. *See supra* Part I.A. And "[t]he government may not … compel the endorsement of ideas that it approves." *Knox*, 567 U.S. at 309.

It is unsurprising, then, that this Court has never allowed a government entity to compel art or expressive conduct. A government cannot force a citizen to engage in or endorse expression—whether saluting a flag, *Barnette*, 319 U.S. at 642, or even passively carrying a message on a license plate, *Wooley*, 430 U.S. at 717.

And, unlike a cable company hosting someone else's message, for example, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), the artistic endeavor here is designed and created directly by the person that the government is seeking to coerce. *Id.* at 641. Also unlike a cable company, there is no concern of creating a bottleneck for people seeking the expression at issue. *Id.* at 652, 656.

Moreover, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576. That concern is only heightened in the context of private artistic expression, which is intimately connected to the artist. Government has no authority to invade that sphere of an artist's personal autonomy and dignity.

2. In all events, Colorado's compulsion of speech here is not narrowly tailored to furthering a sufficient state interest.[9]

States need not compel artistic expression from conscientiously-objecting private citizens for States to accomplish the goal of ensuring that same-sex couples have access to artistic expression supporting their same-sex wedding ceremony. A State, for example, could create or facilitate an online listing of artists willing to design and create artistic works for same-sex weddings, and couples could then use this list as a ref-

[9] Even mere conduct subject to *O'Brien*'s expressive-conduct test cannot be curtailed unless the regulation is narrowly tailored—that is, "the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Turner*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799).

erence to commission nearby artists to create artistic works for same-sex weddings.[10] Resources like this already exist in the private sector. *E.g.*, Pridezillas, A Wedding Resource for the LBGT Community (2013), https://perma.cc/U8U4-WFCH.

The facts of this very case show that government does not have to compel private artistic expression for same-sex couples to have access to artists for their weddings. After Phillips declined the request to design a cake for the same-sex wedding at issue here, complainants received offers for free custom wedding cakes—and eventually accepted one of those offers. J.A. 184-85.

Colorado cannot define its interest as "anti-discrimination," broadly speaking. Not only would such a sweeping definition open the door for government-compelled speech, that interest would not be implicated on the facts of this case. As the record shows, Phillips sells cakes and baked goods to all customers, regardless of sexual orientation; he just objects to creating commissioned expression for same-sex weddings. *See* Pet. App. 4a. Moreover, even Colorado did not (at least at that time) equate opposition to same-sex marriage with discrimination based on sexual orientation. After all, the State did not even allow same-sex marriage when it put

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[10] A State also could define "public accommodations" in the manner done so by the federal government, so as not to capture businesses that—by their nature—selectively choose clients. *See* 42 U.S.C. § 2000a (applying accommodation statute only to establishments such as hotels, restaurants, and stadiums); *see also Amy Lynn Photography Studio, LLC v. City of Madison*, No. 2017-cv-00555 (Dane Cty. Ct. Aug. 11, 2017) (affirming that Wisconsin's analogous anti-discrimination law does not apply in similar circumstance to this case).

the anti-discrimination provision at issue here into effect. J.A. 169.

The situation here thus parallels the "peculiar way" that the State in *Hurley* interpreted its law—when no individual had been discriminated against because of their sexual orientation, but only because of the message at stake. 515 U.S. at 572-73 (finding compelled expression unconstitutional where the State interpreted its law to make "speech itself" the "public accommodation"). Unfortunately, Colorado is not alone in the peculiar way it has interpreted its law. Recently, some other States, too, have been compelling artistic expression in the name of "anti-discrimination." For example:

- The State of Washington commanded a floral designer to design and create custom floral arrangements for same-sex weddings, even though it violated her good-faith belief about celebrating such ceremonies. *Arlene's Flowers, Inc. v. Washington*, No. 17-108 (U.S. pet. filed July 14, 2017); *see generally* Amicus Brief of the State of Texas et al., *Arlene's Flowers, Inc. v. Washington*, No. 17-108 (U.S. filed Aug. 21, 2017).

- New Mexico found a wedding photographer in violation of the State's anti-discrimination law when she declined, on the basis of freedom of conscience, a commission to photograph a same-sex commitment ceremony. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014). As one Justice of the New Mexico Supreme Court candidly acknowledged, the photographer was "compelled by law to compromise" her beliefs as "the price of citizenship." *Id.* at 79-80 (Bosson, J., specially concurring).

- Other artists have been forced to design and craft hand-painted wedding invitations for same-sex weddings. *Brush & Nib Studio, LC v. City of Phoenix*, No. CV 2016-052251 (Ariz. Sup. Ct. Maricopa Cty. Sept. 16, 2016).

- Oregon fined a business $135,000 for declining to design and create a custom wedding cake for a same-sex wedding, and then ordered the owners to stop publicly communicating that their religious convictions prevented them from creating such expression. Final Order at 42-43, *In re Klein*, Nos. 44-14 & 45-14 (Or. Bureau of Labor & Indus. July 2, 2015), https://perma.cc/PF4B-5P4J.

Even worse here, Colorado did not stop at compelling speech—the Civil Rights Commission ordered Phillips and his employees to submit to reeducation on this issue. Pet. App. 58a. Compounding its affront to Phillips' constitutional rights, Colorado has now commanded him to teach the State's preferred orthodoxy to his family members and friends that work for him. *Id.* at 57a-58a.

In glaring contrast, this Court has recognized the "good faith," "decent and honorable" beliefs of those that hold opposing viewpoints on the issue of same-sex marriage. *Obergefell*, 135 S. Ct. at 2594, 2602. The First Amendment rights of those conscientious objectors who refuse to create private artistic expression must be "given proper protection." *Id.* at 2607.

II. Compelling Artists to Create Customized Art for Events That They Cannot Celebrate Consistent with Their Religious Beliefs Also Violates Free-Exercise Rights.

Not only does Colorado's application of the law at issue violate Phillips' freedom of speech, it impermissibly burdens his free exercise of religion. The Colorado Court of Appeals rejected this claim by holding that (1) the "anti-discrimination" measure was a generally applicable law of the sort upheld under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990), and (2) the "'hybrid-rights'" theory recognized by *Smith* was inapplicable because "the Commission's order does not implicate [Phillips'] freedom of expression." Pet. App. 46a. The first premise is mistaken, as confirmed by the law's content-based application. And the second premise blinks the reality of a law aimed directly at compelling artistic expression.

A. Regulations are not generally applicable laws subject to *Smith* if they are "a religious gerrymander, an impermissible attempt to target . . . religious practices." *Lukumi*, 508 U.S. at 535 (citation and quotation marks omitted). "Facial neutrality is not determinative"; rather, courts must carefully examine "the circumstances of governmental categories." *Id.* at 534 (quotation marks omitted). In this inquiry, "the effect of a law in its real operation," such as whether it "excludes almost all [practices] except for religious [practices]," is "strong evidence" of a religious gerrymander. *Id.* at 535-36.

Colorado's regulation meets that test for a religious gerrymander. As explained above, Colorado allows cake artists to decline commissions to create artistic works

with works disapproving same-sex marriage. *See supra* p. 20. But artistic works celebrating same-sex marriage are treated differently; artists cannot decline *those* commissions. And this occurs against the background of *Obergefell*'s correct recognition that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable *religious or philosophical premises*." 135 S. Ct. at 2602 (emphasis added).

In short, as with the ordinance in *Lukumi*, the Colorado regulation here is a religious gerrymander—even if neutral on its face, it is being applied in a way to single out a belief about marriage with a distinctive religious prominence and origin. Just as in *Lukumi*, therefore, *Smith*'s framework for analyzing generally applicable laws does not apply here. Instead, the Colorado law must "survive strict scrutiny." 508 U.S. at 546. And it cannot. *See infra* Part II.C.

B. *Smith* also preserved strict-scrutiny review under the Free Exercise Clause for even generally applicable laws when the *rights* at issue create a "hybrid situation"—that is, the case involves both free-exercise rights and other constitutionally-protected rights. 494 U.S. at 882. For example, some "cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion." *Id.* (quoting *Wooley*, 430 U.S. at 713). *Smith* thus envisioned that a free-exercise challenge could be bolstered, for example, by free-speech or parental-rights claims: "a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). Those are all instances where "the

conduct itself must be free from governmental regulation." *Id.*[11]

Some courts have argued that the "other constitutional protection[]," *id.* at 881—besides the Free Exercise Clause claim—must be an independently viable claim. But requiring the "other" non-free-exercise part of the hybrid-rights claim to stand on its own would render *Smith*'s hybrid-right theory a nullity. It would make the Free Exercise Clause claim superfluous in that context, contrary to *Smith*'s holding. The best account of *Smith*'s hybrid-situation explanation is to allow free-exercise concerns to raise any substantial or colorable claim regarding a companion fundamental right (such as free speech) to the level of a violation. Pet. Br. 47.

Not only has Phillips alleged a compelled-speech claim that is substantial, at the least, his claim is enhanced in this case by its interplay with his right to free exercise of religion. Throughout history, weddings have often been tied to religious ceremonies. *Obergefell*, 135 S. Ct. at 2594-95. This link not only distinguishes marriage from the goods and services regulated by other forms of public-accommodation laws, it prevents Colorado's attempt at compelling Phillips to create customized artwork for this ceremony. The State is not just attempting to compel speech; it is compelling what Phillips genuinely understands as *religious* speech.

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[11] The Colorado Court of Appeals noted that "Colorado's appellate courts have not applied the 'hybrid-rights' exception" and cited *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 656 (10th Cir. 2006), as casting "doubt on its vitality." Pet. App. 46a. The lower court rejected the hybrid-rights claim here, however, based on its erroneous belief "that the Commission's order does not implicate Masterpiece's freedom of expression." *Id.*

So, as *Smith* presaged, this is a case dealing with "the communication of religious beliefs"; it goes beyond *Smith*'s general rule that individuals must conform their behavior to neutral laws of general applicability, where hybrid rights are not at stake. 494 U.S. at 879-82. At the very least, this case presents a hybrid-right situation in which art that Phillips understands to have religious significance cannot be compelled by government. *See generally Letter from Thomas Jefferson to Richard Douglas*: Rotunda National Archives, Founders Online (Feb. 4, 1809) ("No provision in our Constitution ought to be dearer to man, than that which protects the rights of conscience against the enterprizes of the civil authority."), https://perma.cc/Q3MW-7RLD.

C. Complainants here have suffered no tangible harm, and the State has less-restrictive means available for ensuring that same-sex couples can find artists to create works for their wedding ceremonies. *See supra* pp. 25-26.

Nor is there any invidious animus here. As noted, Phillips sells cakes and baked goods to all individuals, objecting only to designing and creating commissioned cakes for same-sex weddings. Phillips is thus not discriminating on the basis of sexual orientation; he is exercising his good-faith right to create only artistic expression consistent with the tenets of his faith. *See* Pet. App. 288a (Phillips genuinely believed that making the cake "would have been a *personal endorsement* and *participation in* the ceremony and relationship that they were entering into"); *see also id.* at 285a (Phillips would not design wedding cakes for heterosexual polygamists either, if such unions became legal: "I will design and create wedding cakes for the wedding of one man and one woman, regardless of the sexual orientation of the customer.").

Colorado has compelled religious speech—plain and simple. And that is anathema to the First Amendment.

CONCLUSION

The judgment of the Colorado Court of Appeals should be reversed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

STEVE MARSHALL
Attorney General of Alabama

MARK BRNOVICH
Attorney General of Arizona

LESLIE RUTLEDGE
Attorney General of Arkansas

LAWRENCE G. WASDEN
Attorney General of Idaho

M. STEPHEN PITT
General Counsel to the Governor of Kentucky

JEFF LANDRY
Attorney General of Louisiana

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

MICHAEL P. MURPHY
JOHN C. SULLIVAN
Assistant Solicitors General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

BRENT A. DAVIS
Chief Counsel to the
Governor of Maine

JOSHUA D. HAWLEY
Attorney General of
Missouri

TIM FOX
Attorney General of
Montana

DOUG PETERSON
Attorney General of
Nebraska

ADAM PAUL LAXALT
Attorney General of
Nevada

WAYNE STENEHJEM
Attorney General of
North Dakota

MIKE HUNTER
Attorney General of
Oklahoma

ALAN WILSON
Attorney General of
South Carolina

MARTY J. JACKLEY
Attorney General of
South Dakota

HERBERT H. SLATERY III
Attorney General and
Reporter
Tennessee

SEAN D. REYES
Attorney General of
Utah

PATRICK MORRISEY
Attorney General of
West Virginia

BRAD SCHIMEL
Attorney General of
Wisconsin

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