No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP LTD., ET AL.,
Petitioners,
v.
COLORADO CIVIL RIGHTS COMMISSION, ET AL.
Respondents.

ON WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether forcing a religious objector to participate in a wedding ceremony violates the Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit law firm that protects the free expression of all religious faiths. Becket has appeared before this Court as counsel in numerous religious liberty cases, including *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and *Zubik* v. *Burwell*, 136 S. Ct. 1557 (2016).

Becket is concerned that the outcome of this case could affect both the conscience rights of religious wedding vendors and religious people more broadly to live out their beliefs as full members of our pluralistic American society. In particular, forcing religious wedding vendors to participate in wedding ceremonies despite their scruples will lead to intractable—and completely avoidable—societal conflict. Becket files this brief to explain that forcing religious wedding vendors to participate in wedding ceremonies is not only entirely unnecessary, it also violates the Constitution.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Every party in this case agrees that weddings are imbued with meaning, both for the individuals and families involved and for the community that surrounds them. Weddings are frequently religious events. And as this Court put it in *Obergefell* v.

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[1] No party's counsel authored any part of this brief. No person other than *Amicus* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Hodges, marriage is "a keystone of our social order." 135 S. Ct. 2584, 2601 (2015).

The disagreement centers instead on how American society should deal with deep-seated differences over the nature and meaning of marriage. Some would enlist the government in the task of eradicating religious objections to same-sex marriage. Others would have the traditional vision of marriage restored. Still others would have government—including the courts—stand aside and allow citizens to persuade one another of their positions. As the Court recognized in *Obergefell*, the problem is not the existence of a multiplicity of good faith views about marriage, but rather the enshrining of a single view into law which can be used to "demean[]," "stigmatize[]," and exclude those who did not accept it, treating them as "outlaw[s]" and "outcast[s]." 135 S. Ct. at 2600, 2602. Just as the Court held that it was wrong for Obergefell to be made an outcast for living and expressing his understanding of marriage, it is just as wrong for Colorado to make Phillips an outlaw and an outcast for living and expressing his.

Fortunately the Constitution—indeed, several parts of the Constitution—provide a pathway for resolving this dispute. To decide this case and provide guidance for other religious wedding vendor litigation, the Court can rely on a long line of precedent under the First Amendment and the Due Process Clause. As we describe below, forcing religious wedding vendors to participate in wedding ceremonies is prohibited by the Constitution. The idea of coerced participation in or celebration of what is often a religious ritual—so reminiscent of the Test Acts enforced in 18th Century

England—would have been anathema to the Founders. And the Religion Clauses, the Free Speech Clause, and the Due Process Clause each forbid the government from forcing individuals to support wedding ceremonies despite religious objection.

Nor can Colorado meet its strict scrutiny burden by pointing to broadly-conceived dignitary interests. To the contrary, it cannot show that it will further its interests at all by forcing Phillips to participate in wedding ceremonies he disagrees with. The reality is that with respect to participation in wedding ceremonies, dignity is and ought to be a two-way street.

ARGUMENT

I. The Constitution prohibits governments from forcing individuals to participate in wedding ceremonies.

Wedding ceremonies, like baptisms, bar/bat mitzvahs, funerals, or other life-cycle events, are events of great social and personal significance to those being married, those who attend, and those who help prepare and carry out the ceremony. The importance American society places on wedding ceremonies is evident in the time and effort Americans expend on them: many Americans spend years planning and preparing for wedding ceremonies and the average cost of a wedding is now over $25,000. And of course weddings are often religious events.

Asking someone to participate in or celebrate a wedding ceremony is no small matter. And given the millennia-old connection between religion and weddings, it is no surprise that there are wedding vendors who object to participating in one form of wedding or

another based on their religious beliefs. As we demonstrate below, those conscientious objections are protected under the Religion Clauses, the Free Speech Clause, and the Due Process Clause.

A. The Constitution and this Court have often protected religious individuals from having to participate in specific rituals.

Both the Founders and this Court have treated participation in or support for specific rituals or ceremonies as carrying both great meaning, and potential conflict, for individuals with religious objections.

For their part, the Founders were keenly aware of existing conflicts between conscience and ceremony in the British Empire of the late 18th century, and ensured that the Constitution would prevent them. For example, the First Test Act required among other things that those bearing any "office[] civil or military" take public oaths of supremacy and allegiance and "receive the sacrament of the Lord's supper, according to the usage of the church of England * * * in some parish church, upon some Lord's day, commonly called Sunday, immediately after divine service and sermon."[2] The Test Acts struck at Catholics and Nonconformists such as Presbyterians and Quakers alike;

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[2] 25 Car. II c.2, sec. 2 (1672) ("An Act for preventing Dangers which may happen from Popish Recusants."); see also the Corporations Act, 13 Car. II st.2, c.1 (1661) (targeting Presbyterians with sacrament requirement).

non-Anglican believers of all stripes could not participate in the communion ritual and thus were unable to engage in a number of professions within government and academia. "It was against this background that the First Amendment was adopted." *Hosanna-Tabor*, 565 U.S. at 183. The Founders responded with the Test Clause: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[3]

Similarly, the Founders ensured throughout the Constitution that those who could not take oaths due to religious scruples could "affirm" their obligations instead.[4] This accommodation of religious objections to participating in a public ceremony mirrored existing state practice: "By 1789, virtually all of the states had enacted oath exemptions." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1468 (1990).

Like the Founders, this Court has long recognized that ceremonies are vehicles of public meaning, and that allowing objectors not to participate is the right way to balance public needs with private scruples. Local legislative prayer, for example, is not designed to "force truant constituents into the pews." *Town of Greece, N.Y.* v. *Galloway*, 134 S. Ct. 1811, 1825 (2014). Instead, even though some citizens may welcome a prayer, that "does not suggest that those who disagree are compelled to join the expression or approve its con-

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[3] U.S. Const. art. VI, § 3.

[4] U.S. Const. art. I, § 3, cl. 6; art. II, § 1, cl. 8; art. VI, § 3; amend. IV.

tent." *Ibid.* (citing *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943)). In *Barnette* itself, the Court demonstrated great solicitude for religious objectors, while not limiting the ability of others to conduct the ceremony. *Barnette*, 319 U.S. at 635 ("power exists in the State to impose the flag salute discipline upon school children in general").

Similarly, in *Lee* v. *Weisman* the Court focused on compelled participation in a ceremony, looking at the question of "whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform." 505 U.S. 577, 599 (1992). The Court concluded that the inducement to conformity was the dangerous part of the defendant government's approach: "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise." *Ibid.*

The thread common to both the Constitutional provisions and this Court's decisions is that government may not force individuals, under threat of penalties, to participate in ceremonies to which they religiously object.

B. The Religion Clauses prohibit governments from forcing individuals to participate in wedding ceremonies.

Given the Founders' concerns about forced participation in ceremonies, it should be no surprise that the Religion Clauses protect religious individuals from forced participation in religious events that violate their religious beliefs. In looking at how they are applied to compelled participation in and support for wedding ceremonies, it is important to recognize that

the Religion Clauses are complementary. They are meant to "be read together * * * in light of the single end which they are designed to serve"—namely, "[t]he fullest realization of true religious liberty." *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring). As an example, in *Hosanna-Tabor* the Court held that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." 565 U.S. at 181. The same is true here—both Religion Clauses bar the government from requiring individuals to help celebrate a wedding ceremony over their religious objections.

For example, in *Barnette*, the Court protected the right of Jehovah's Witnesses not to participate in the Pledge of Allegiance. 319 U.S. at 641. The Court did not undervalue the importance of the patriotic ceremony in question; if anything the Pledge ceremony was even more weighty because it was made in time of war. *Ibid.* ("The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own."). Instead, it recognized that "freedom to differ is not limited to things that do not matter much." *Id.* at 642. If forcing a pledge of allegiance to the United States flag "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," *ibid.*, then requiring religious objectors to participate in a wedding ceremony against their religious beliefs *a fortiori* contradicts the Religion Clauses, which provide "absolute" protection to that internal space. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940); *Torcaso* v. *Watkins*, 367 U.S. 488, 496

(1961) (noting that religious test "invade[d] the appellant's freedom of belief and religion").[5]

Coercion to participate in religious ceremony was also a central theme in *Zorach* v. *Clauson*, 343 U.S. 306 (1952). There, the Court considered a released time program whereby students were allowed to leave school for religious instruction during the school day. *Id.* at 308. The Court upheld the program, finding that accommodating religious beliefs "respects the religious nature of our people and * * * their spiritual needs," *id.* at 314, but only after explaining that no coercion was present in the program that induced students to participate, *id.* at 311.

In so ruling, the six-Justice *Zorach* majority emphasized that the government "may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." 343 U.S. at 314. Three Justices dissented, all on the theory that the released time program *was* coercive. Justice Black argued that the program used "compulsory public school machinery" of the state to "channel children into" the program, *id.* at 316-17, and allowed the state "to steal into

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[5] Although *Barnette* is typically thought of as a Free Speech Clause case, the Jehovah's Witness plaintiffs brought the lawsuit primarily under the Free Exercise Clause. See First Amended Complaint, *Barnette* v. *West Va. Bd. of Educ.*, No. 242, (S.D. W. Va. filed Sep. 15, 1942) at 12 (pledge requirement "unreasonably abridge[s] the rights of said parents and children freely to worship Almighty God according to His written law and the dictates of conscience" and "unlawfully force[s] and coerce[s] said children to engage in a religious 'rite' or ceremony contrary to their conscientious objection thereto").

the sacred area of religious choice," *id.* at 320. Justice Jackson, with whom Justice Frankfurter agreed, argued that that the program was "founded upon a use of the State's power of coercion." *Id.* at 323. Thus, although they disagreed over whether the released time program in question was in fact coercive, all nine Justices agreed that the state may not wield its authority to coerce participation in a religious event and remain in compliance with the First Amendment.

Similarly, in *Lee* v. *Weisman*, the Court found a violation of the Establishment Clause because government officials had required participation in a religious exercise: "Even for those students who object to the religious exercise, their attendance and *participation* in the state-sponsored religious activity are in a fair and real sense *obligatory*." 505 U.S. at 586 (emphasis added). And even though the ceremony in question lasted for only "two minutes or so," the state had nevertheless "in effect required participation in a religious exercise" that could not be characterized as "*de minimis*." *Id.* at 594. This logic applies with greater force to religious wedding vendor objections to participating in a wedding ceremony. In *Lee*, the objector plaintiff did not have to do anything but attend. But in the typical religious wedding vendor case, the vendor is required by the State to participate in, facilitate, and help celebrate the wedding ceremony.

The *Lee* Court also did not credit the government's argument that the plaintiff's participation was "voluntary"—even though she would still receive her diploma if she missed the ceremony. "Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions." 505 U.S. at 595. In the Court's view, the idea that one

could avoid government compulsion by remaining absent from one's own high school graduation was "formalistic in the extreme." *Ibid.* Here, of course, the consequences are even more grave—Phillips is not merely missing a graduation ceremony, but must "choose another career." See JA207 ("if a businessman wants to do business in the state" he needs to "compromise"). Cf. *Elane Photography, LLC* v. *Willock*, 309 P.3d 53, 80 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (Bosson, J., concurring) (giving up religious objections to participating in wedding ceremony as photographer "is the price of citizenship").

In addition, the historical meaning of the Establishment Clause points away from debarring religious dissenters from certain professions. See, *e.g.*, *Town of Greece*, 134 S. Ct. at 1819 (quoting *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (opinion of Kennedy, J.)) ("[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"). Judges and scholars concur in identifying six "general features" of an historical establishment: (1) state control over church "doctrine, governance, and personnel"; (2) "compulsory attendance" at religious services; (3) mandatory "financial support"; (4) "prohibitions on worship in dissenting churches"; (5) "use of church institutions for public functions"; and (6) religious "restrictions of political participation." *Felix* v. *City of Bloomfield*, 847 F.3d 1214, 1216 (2017) (Kelly, J. and Tymkovich, C.J., dissenting) (quoting Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of a Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003)); see also Douglas Laycock, *Regulatory Exemptions of Religious*

Behavior and the Original Understanding of the Establishment Clause, 81 Notre Dame L. Rev. 1793, 1798-99 (2006) (concurring with the six categories).

In the context of nationwide religious wedding vendor litigation, the most relevant features of an historical religious establishment are compulsory attendance at religious rituals, compulsory financial support, and the suppression of dissenting religious views. Refusing to create religious exemptions to state anti-discrimination laws has the effect of ensuring ideological conformity among wedding vendors, and does so by suppressing the views of religious dissenters, who would be forced to attend or help celebrate religious rituals. Depriving religious wedding vendors of their ability to conduct business is a form of religious disqualification that is little different from historic religious disqualifications for public office, offices in the military, and other professions that were designed to buttress a particular religious establishment.[6]

Finally, *Employment Division* v. *Smith* poses no bar to the Free Exercise defense here. In *Smith*, plaintiffs claimed an individual constitutional right to use peyote. 494 U.S. 872 (1990). The Court rejected the claim, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Id.* at 879 (internal citation omitted). That standard is not satisfied here. Pet. Br. at 38-46. *Smith* recognized

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[6] For example, most countries in medieval Europe forbade Jews from participating in certain professions such as medicine or law. The Test Acts had a similar effect on Catholics and Nonconformists in early modern England.

that *Torcaso* and *McDaniel* v. *Paty* carve out areas of free exercise with which the state may not interfere. 494 U.S. 872, 877 ("the government may not compel affirmation of religious belief" or "impose special disabilities on the basis of religious views or religious status") (citing *Torcaso*, 367 U.S. 488; *McDaniel* v. *Paty*, 435 U.S. 618 (1978)); see also *Hosanna-Tabor*, 565 U.S. at 190 ("*Smith* involved government regulation of only outward physical acts").

This case fits within those categories. *Smith* dealt with a law prohibiting conduct, not coercing it. Indeed, it distinguished *Barnette* for just that reason. 494 U.S. at 882. *Smith* considered *Barnette* to be a "hybrid situation" in which free exercise and free speech rights combined to require an exemption to a "compulsory flag salute." *Ibid*. *Smith* also conceded that freedom of association as a hybrid claim alongside the free exercise of religion would trump a neutral and generally applicable law. *Ibid.* ("an individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort towards those ends were not also guaranteed") (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984) (changes in original)). Government coercion of participation in a wedding celebration implicates both of those rights. Indeed, *Smith* specifically anticipated the problem of applying public accommodation laws to Religion Clause claims. See *Smith*, 494 U.S. at 882 (citing *Roberts*, 468 U.S. at 622) (noting that "it is easy to envision a case in which a challenge" dealing with public accommodation laws "would likewise be reinforced by Free Exercise Clause concerns").

C. The Free Speech Clause prohibits governments from forcing individuals to participate in wedding ceremonies.

Even apart from the protections of the Religion Clauses, Colorado cannot force Phillips to participate in or support a wedding because of the Free Speech Clause. That is because, regardless of whether wedding cakes are expressive (they are), there can be no doubt that *weddings themselves* are highly expressive. As the Ninth Circuit has explained:

> The core of a wedding ceremony's 'particularized message' is easy to discern, even if the message varies from one wedding to another. Wedding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community. * * * The core of the message in a wedding is a celebration of marriage and the uniting of two people in a committed long-term relationship.

Kaahumanu v. *Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012).

Same-sex weddings have an important additional expressive component. As the Seventh Circuit explained, "Marriage confers respectability on a sexual relationship." *Baskin* v. *Bogan*, 766 F.3d 648, 658 (7th Cir. 2014). Same-sex weddings thus "in the long run* * * may convert some of the opponents of such marriage by demonstrating that homosexual married couples are in essential respects" like heterosexual married couples. *Ibid*.

Many people and many religious wedding vendors may relish the chance to participate in and support these messages, and particularly for same-sex couples who were long excluded from marriage. But the Free Speech Clause forbids the government from *requiring* anyone to do so. "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977).

The prohibition on forced support for another's speech is broad. It extends not only to forced spoken support, but also to forced conduct. See, *e.g.*, *Barnette*, 319 U.S. at 642 (government cannot force citizens "to confess by word or act their faith" in approved orthodoxies); *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989) ("Nor may the government, we have held, compel conduct that would evince respect for the flag.").[7] The prohibition also protects an unwilling person from having to lend her property or space to carry another's expression. See, *e.g.*, *Wooley*, 430 U.S. at 715 (license plates); *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n of Cal.*, 475 U.S. 1, 15 (1986) (utility bills); *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (editorial page). And it even covers situations in which the forced support is extended beyond personal participation into purely financial assistance. See, *e.g.*, *Harris* v. *Quinn*, 134 S. Ct. 2618, 2644 (2014) (noting the

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[7] In this regard, whether the Court decides that Phillips' cakes are artistic expressions (as Petitioners correctly explain at Pet. Br. 18-23) or conduct (as the court below incorrectly believed), the result is the same, because government cannot force Phillips to support another's expression either way.

"bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support").

This prohibition cannot be avoided merely by using conditional phrasing for the coercion (i.e., the individual is only forced to support message A because she already supports message B). Colorado attempts this formulation by claiming that Phillips is only being required to participate in and facilitate same-sex weddings because he participates in and facilitates opposite-sex weddings. Pet.App.29a ("This includes a requirement that Masterpiece sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner."). But that is just the marriage version of the equal space rule rejected by this Court in *Tornillo*. *Tornillo,* 418 U.S. at 256 ("The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter."). Just as surely as a state could not pass a law forbidding bakers from baking cakes to celebrate same-sex weddings, no state can force them to do so as a condition of helping celebrate other marriages.

Colorado cannot save its unconstitutional coercion by saying Phillips is permitted to tell the world that he is violating his beliefs because of government coercion. Pet.App.34a-36a. That approach would allow Phillips to continue celebrating opposite-sex weddings "only at the price of evident hypocrisy." *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2331 (2013) ("*AOSI*"). And that approach would allow governments to force unwilling individuals to

support all manner of expressive events—political rallies, religious sacraments, parades, books—so long as the individual were permitted to say "the government made me do it." But the First Amendment grants the right "to decline to foster such concepts." *Wooley*, 430 U.S. at 714. For example, in *Wooley*, the Court rejected the argument that Wooley's First Amendment rights would be satisfied by allowing him to affix "a conspicuous bumper sticker" saying that he disagreed with the motto. *Id.* at 722 (Rehnquist, J., dissenting).

None of this is to say that Colorado is forbidden from seeking to send its own messages in support of marriage in general or same-sex marriages in particular. But the First Amendment forbids the government from choosing a particular path—here, forced participation in a wedding ceremony or support from unwilling citizens—to foster that message. See, *e.g.*, *Johnson*, 491 U.S. at 418 ("It is not the State's ends, but its means, to which we object.").

The Free Speech Clause requires that we protect speech we find harsh and distasteful. See, *e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 448 (2011) ("God Hates Fags."). And it means that we allow speakers to "at times, resort[] to exaggeration, to vilification * * * and even to false statement." *Cantwell*, 310 U.S. at 310. Here, where Phillips seeks only to refrain from creating a cake to celebrate an event with which he disagrees—where he is not even accused of the harsh speech of *Snyder* or the exaggeration, vilification, or false statement discussed in *Cantwell*—the First Amendment protects him from government coercion.

D. The Due Process Clause prohibits governments from forcing individuals to participate in wedding ceremonies.

Colorado's attempt to punish Phillips is also forbidden by this Court's substantive due process jurisprudence. Substantive due process is a two-way street—it protects people on both sides. The same principles that precluded the states from dictating a single government-enforced understanding of marriage in *Obergefell* likewise preclude Colorado from punishing Phillips for refusing to participate in or support a particular marriage.

This Court's substantive due process precedents have long recognized the transcendent importance of marriage. *Griswold* observed that marriage is "sacred" and "noble" and "promotes a way of life." *Griswold* v. *Connecticut*, 381 U.S. 479, 485-86 (1965). *Casey* spoke of marriage as one of the choices "central to personal dignity and autonomy" and encompassed within the individual's "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 851 (1992) (plurality); accord *Lawrence* v. *Texas*, 539 U.S. 558, 573-74 (2003) (quoting *Casey*). Both *Casey* and *Lawrence* recognized the importance of allowing people to make their own decisions about deeply important matters such as marriage, without government coercion: "Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* at 574.

Obergefell likewise recognized that, for millions of people, marriage "is sacred" and forms "a keystone of our social order." *Obergefell*, 135 S. Ct. at 2594, 2601.

And the Court emphasized that because marriage is a deeply important and "transcendent" institution, individuals must remain free to make their own "personal choice[s]" about it, without government coercion. *Obergefell*, 135 S. Ct. at 2594, 2599-2604.

Yet even while finding a constitutional right to same-sex marriage, the Court emphasized that millions of people hold the "decent and honorable" belief that marriage is limited to opposite-sex unions. *Obergefell*, 135 S. Ct. at 2602.[8] *Obergefell* mirrored the Court's abortion decisions, which acknowledged the existence of alternative views and the appropriateness of protecting those who disagreed against forced participation. See, *e.g., Doe* v. *Bolton*, 410 U.S. 179, 197-98 (1973) (noting Georgia's "appropriate protection[s]" for healthcare workers who could not participate in or support abortion); *Casey*, 505 U.S. at 852 (noting that abortion is "fraught with consequences * * * for the persons who perform and assist in the procedure").

The constitutional problem addressed in *Obergefell* arose not from the mere existence of competing views about marriage, but only when one particular view of marriage "becomes enacted law and public policy" thereby putting "the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes" those who seek to live by a contrary view. *Obergefell*, 135 S. Ct. at 2602. The "full promise of liberty" requires allowing "individuals to engage in intimate association

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[8] The Commission below incorrectly arrived at the opposite conclusion, stating that "opposition to same-sex marriage * * * is tantamount to discrimination on the basis of sexual orientation." Pet.App.20a n.8.

without criminal liability," and forecloses government from making citizens "outlaw[s]" or "outcast[s]" for pursuing a less popular view of marriage. *Id.* at 2600.

These precedents establish that marriage is too important—too "sacred," too "transcendent," too closely connected to the deep questions of life and human dignity—to allow government to dictate a single definition of marriage and punish those who disagree. As *Griswold*, *Casey*, *Lawrence*, and *Obergefell* make clear, marriage is one of a core group of deeply personal and important matters about which people must remain free to make their own decisions, without "compulsion of the State." Just as Ohio could not punish Obergefell—it could not make him an "outlaw" or an "outcast" in the eyes of the law for pursuing his understanding of marriage—nor can states punish those who cannot participate in and support same-sex marriages.[9] Rather, our Constitution was "made for people of fundamentally differing views." *Roe* v. *Wade*,

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[9] See Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 877 (2014) ("One of the ironies of the culture wars is that religious minorities and gays and lesbians make essentially parallel demands * * * * I cannot fundamentally change who I am, they each say. You cannot interfere with those things constitutive of my identity; on the most fundamental things, you must let me live my life according to my own values. We can honor both sides' version of that claim if we will try."); Mark L. Rienzi, *Substantive Due Process As a Two-Way Street: How the Court Can Reconcile Same-Sex Marriage and Religious Liberty*, 68 Stan. L. Rev. Online 18 (2015) ("When the

410 U.S. 113, 117 (1973) (quoting *Lochner* v. *New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

Colorado has violated that even-handed principle here. By punishing Phillips for failing to participate in or support a marriage he disagrees with—particularly where Colorado exempts other businesses that disagree with other messages, Pet.App.20a n.8—Colorado is using the power of government to dictate a preferred understanding of marriage. Phillips' ability to live by his faith "is essential in preserving [his] own dignity and in striving for a self-definition shaped by [his] religious precepts." *Burwell* v. *Hobby Lobby*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). And the Due Process Clause has long been understood as providing protection for those seeking to live out their lives or pursue their occupation in accordance with their religious beliefs. See, *e.g.*, *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (Fourteenth Amendment liberty "[w]ithout doubt" includes "the right of the individuals to contract, to engage in any of the common occupations of life"). Yet for seeking to live and pursue his occupation according to his own religious understanding of marriage, Phillips has been "demean[ed],"

Court recognizes a right because it is deeply personal and important, governments are not free to force unwilling parties to participate in or support the exercise of that right."); cf. Michael McConnell and Nathan Chapman, A Step Backward for Freedom of Conscience (Mar. 1, 2011), http://www.hoover.org/research/step-backward-freedom-conscience (*Roe*'s "privacy rationale implies a broad freedom of conscience for relevant health care workers. The state may no more use the force of law to resolve these moral questions for doctors, nurses, or pharmacists than it may for patients or couples. The government may not decide the moral questions, either way.").

"stigmatize[d]," and made into an "outlaw" or at least "outcast" in the eyes of the law. *Obergefell*, 135 S. Ct. at 2602. That result cannot be squared with *Obergefell* or this Court's historic Due Process jurisprudence.

II. Colorado is barred from proceeding against Phillips.

The principles described above apply with full force here. Forcing Phillips to make a cake that is the centerpiece of a meaning-laden wedding ceremony is forcing Phillips to participate in and facilitate that ceremony.

Colorado defends against this conclusion by treating religion as something that can be compartmentalized. In private, Phillips can be religious all he wants. But once he engages in commerce, he must ignore his religious identity and comply. But Colorado's approach would allow Phillips his freedom only at the "price of evident hypocrisy." *AOSI*, 133 S. Ct. at 2331.

Moreover, Colorado's actions cannot satisfy strict scrutiny. And given the historical context and the fundamental rights at stake here, the Court should undertake an "independent examination" of the record to ensure a vigorous protection of religious freedom. *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

A. Forcing Phillips personally to create a custom-designed cake for a same-sex wedding ceremony is unconstitutional forced participation in a wedding ceremony.

Phillips's deep religious convictions concerning marriage are undisputed. He believes that the Bible

reveals "God's intention for marriage" as "the union of one man and one woman." JA157. He believes that any other form of marriage is a grave moral wrong and that God forbids him from "participat[ing] or encourag[ing] it in any way." JA158-59. He has stated unequivocally that doing so would "violate my core beliefs" and that "I will not deliberately disobey and violate the commands of the sovereign God of the universe." JA159.

Phillips is mindful that his work "communicates that a wedding has occurred, a marriage has begun, and the couple should be celebrated." JA160. Because he is associated with the communicative aspects of his work, he is careful about the message that his participation sends. He will not participate in weddings that "are not legally recognized," such as polygamous weddings or weddings involving someone whose divorce has not been finalized. JA159.

Phillips's religion dictates other limitations on his work as well. He does not sell cakes or other products with alcohol in them. JA164. He does not sell Halloween-themed cakes or baked goods, even though it costs him significant revenues. JA165-66. He also will not create cakes with anti-American, or anti-family themes, or with hateful or vulgar messages. JA165.

Religion Clauses. On these undisputed facts, Phillips's decision not to create cakes for certain events is a sincere religious exercise. If Colorado sought to coerce Phillips to officiate at, be a party to, or attend a wedding ceremony, there would be no question that the Religion Clauses would be a full defense. For Phillips—and for millions of other Americans, of many different religious faiths—a wedding ceremony

is an inherently religious event. And anyone invited to any wedding knows that deciding to attend or not to attend can be a matter fraught with complexity because of the significant religious, social, and even financial implications that marriage often entails. That is even truer today as the definition of marriage has become an issue of intense public and religious debate.[10] In that context, coercing Phillips to personally support a marriage ceremony against his religious convictions is a violation of his Free Exercise rights. The government simply has no power to force anyone to celebrate, clap, salute, praise or otherwise support another's religious event.

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[10] Indeed, a google search of "should I attend a gay wedding" reveals many articles in which people sincerely debate and analyze how their faith treats the question of mere attendance. See, *e.g.*, Peter Ould, Should I attend the wedding of a gay friend or family member, Christianity Today (Mar. 17, 2015) http://www.christianitytoday.com/ct/2015/march/gay-wedding-attend-christian-marriage-family.html (answers ranging from yes, to show "unconditional love" for a friend, to no, because marriage "has a public dimension, and the wedding ceremony and the celebration mark this" in a way that conflicts with one writer's faith). And of course people of a variety of faiths wrestle with similar questions about the religious significance of attending an interfaith wedding (see, e.g., Rabbi Chaim Tabasky, Attending a Mixed Wedding, http://www.yeshiva.co/ask/?id=2408); a non-church wedding (see, *e.g.*, Patti Armstrong, Should Catholics Attend the Wedding When a Baptized Catholic Marries Outside the Church?, National Catholic Register (Aug. 11, 2015), http://www.ncregister.com/daily-news/the-other-marriage-debate); or a party with alcohol (*see, e.g.*, Islamhelpline, http://www.islamhelpline.net/node/8146).

It is also little different from other historical efforts to compel attendance at religious rituals, compel financial support, or suppress dissenting religious views. Refusing to grant religious exemptions to Colorado's anti-discrimination law has the effect of ensuring uniform commercial support for same-sex weddings. And it does so by suppressing the dissenting religious views of services providers like Phillips. Depriving him of the right to conduct business because of this religious decision is—at its essence—no different than being kept from certain public offices because of one's religion.

It is not enough to say that Phillips is only tangentially involved in the wedding ceremonies and not really "participating." For a dissenter who "has a reasonable perception that she is being forced by the State to [act] in a manner her conscience will not allow, the injury is no less real." *Lee*, 505 U.S. at 593.

Free Speech Clause. The communicative aspect of Phillips's work also cannot reasonably be disputed. Weddings in general—and certainly weddings with large fancy cakes—are communicative, in that they send and celebrate messages about the couple, their love, and society. If Phillips's decision *not* to create a cake to celebrate a wedding sends a message of "opposition to same-sex marriage," Pet.App.20a n.8, it cannot be unreasonable for him to conclude that agreeing to create the cake sends the opposite message.

But by enforcing the Colorado anti-discrimination law against Phillips without regard to his free speech rights, the government is telling him to "get with the program" in a way that badly distorts the marketplace of ideas by strengthening service providers who toe

the government line and financially crippling those who refuse to say what the government demands. Colorado has no authority to force Phillips to "confess by word or act" his faith in the State's view of marriage or his support for another's religious ceremony. *Barnette* 319 U.S. at 642.

Substantive Due Process. Finally, it is also undisputed that Phillips' objection was to participating in and facilitating a wedding ceremony, as opposed to any concern about sexual orientation. *See* JA167-168; *see also* Pet.App.12a-13a. (objection "to same-sex marriage, not * * * [to] sexual orientation"). This is true in the run of the cases, in which religious objectors have consistently, and over significant periods of time, served all individuals, regardless of sexual orientation, objecting only to facilitating certain marriage ceremonies as religious rites that would violate their own convictions.[11]

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[11] See Pet.App.4a (Petitioner "happy to make and sell [to couple] any other baked goods"); *State* v. *Arlene's Flowers, Inc.*, 389 P.3d 543, 550 (Wash. 2017) (florist had always served "gay and lesbian customers in the past for other, non-wedding-related flower orders"); *Gifford* v. *McCarthy*, 137 A.D.3d 30, 37 (N.Y. App. Div. 2016) (objectors "would happily host wedding receptions, parties, or other events for couples in same-sex relationships," just not "wedding ceremonies" (internal quotation marks omitted)); Final Order at 76-77, *In Re Sweetcakes by Melissa*, Case. Nos. 44-14 & 45-14 (Comm'r. Bureau Labor & Indus. Or. July 2, 2015) (objector claimed refusal of service "was not on account of * * * sexual orientation, but on * * * objection to participation in

Where such facts are established, with no evidence of invidious, status-based discrimination, substantive due process plainly demands deference to Phillips's deeply held convictions that preclude him from participating in wedding ceremonies, which like few other events are fundamental to their understanding of the meaning and purpose of life. See *Casey*, 505 U.S. at 851; *Lawrence*, 539 U.S. at 573-74.

Substantive due process protections must go both ways. Just as the Court concluded that the law could not compel a prior majoritarian view concerning same-sex marriage, *Obergefell*, 135 S. Ct. at 2594, 2599-2604, the Court should not compel the contrary view against Phillips or others now. Only that course of con-

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the event for which the cake would be prepared"); Br. of Elane Photography, LLC. at 5, *Elane Photography* v. *Willock*, No. CV-2008-06632, Ct. App. No. 30,203, (N.M. Ct. App. June 2, 2010) ("What is crucial for Elane Photography is the message conveyed by its photos, not the sexual orientation of the people in its photos." (internal record cites omitted)); Complaint ¶¶ 22, 76-79, *Country Mill Farms, LLC* v. *City of East Lansing*, No. 1:17-cv-00487 (W.D. Mich. May 31, 2017) (operator of farm "gladly s[old] produce to all comers at the Market" and had "employed people from a wide variety of racial, cultural, and religious backgrounds, including members of the LGBT community"); Complaint ¶ 7, *Amy Lynn Photography Studio, LLC* v. *City of Madison*, No. 30701 (Cir. Ct., Dane Cty. Wisc. March 7, 2017) (photographer "serve[d] individuals of every sexual orientation and every political belief"); Complaint ¶¶ 7, 93-96, *Odgaard* v. *Iowa Civil Rights Comm'n*, No. CVCV046451 (Polk County D. Ct. Oct. 7, 2013) ("The Odgaards welcome all customers into the Gallery, regardless of their * * * sexual orientation," have "hired gays and lesbians," and have "provided goods and services to gays and lesbians").

duct can preserve a pluralistic society where individuals of sometimes deeply opposing views can nonetheless live peaceably side by side.

B. Colorado cannot satisfy strict scrutiny.

Colorado has not met its burden of proving that its actions survive strict scrutiny.

1. Colorado has identified no compelling state interest in proceeding against Phillips specifically.

In proving that its actions satisfy strict scrutiny, Colorado must first identify a compelling governmental interest in applying its laws "to the person," *i.e.* to Phillips. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (RFRA "to the person" standard the same as *Sherbert* standard). The identified interest must be "of the highest order[.]" *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 137 S. Ct. 2012, 2024 (2017). In the proceedings below, Respondents and the court below identified "individual dignity," "eradicating discrimination in all forms," and ensuring that "goods and services * * * are available to all of the state's citizens" as the interests Colorado sought to further. Appellees Ct. App. Br. at 36; Appellees Ct. App. Br. at 36; Pet.App.50a. None qualifies as a compelling interest, *as applied specifically to Phillips*.

Dignitary harm. Respondents defend the Commission's interest in preventing discrimination that "deprives persons of their individual dignity." Appellees Ct. App. Br. at 36. But as the appellate court below noted, in general if a baker declined to bake a cake

for a gay couple, they would "have no way of deciphering whether the baker's conduct took place because of its views on same-sex marriage or for some other reason." Pet.App.34a. The only reason that Respondents Craig and Mullins did know is because of the specific words Phillips used to express his inability to participate in the wedding ceremony. JA39-40, 48, 89, 168. In other words, the purported harm is entirely derivative of Phillips' chosen speech and religious viewpoint—how he couched the denial—and Colorado's interest boils down to an interest in punishing the expression of that viewpoint.

But the Court has consistently held that a government's desire to protect people from emotional harm—even far more acute emotional harm than is present here—does not constitute a compelling government interest sufficient to punish or coerce expression.

For example, it is difficult to imagine more excruciating humiliation, degradation, or emotional harm than that endured by the father of a fallen soldier who saw Westboro Baptist picketers with signs stating "God Hates Fags," "You're Going to Hell," and "God Hates You" at the funeral of his son, a Marine killed in Iraq. *Snyder*, 562 U.S. at 448. A jury found this conduct so outrageous, and the father's resulting mental anguish so acute, that it awarded over $10 million in damages. *Id.* at 450, 456.

But this Court disagreed, upholding the "bedrock principle underlying the First Amendment" that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder*, 562 U.S.at 458 (citing *Johnson*, 491 U.S. at 414); *see also National Socialist Party of*

Am. v. *Village of Skokie*, 432 U.S. 43, 43 (1977). Any other result would "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California*, 403 U.S. 15, 21 (1971).

And this Court has gone even further, refusing to treat "stigmatic injury" as an injury at all for purposes of Article III standing, even where the alleged stigmatic injury was a form of "denigration* * * on the basis of race." *Allen* v. *Wright*, 468 U.S. 737, 754 (1984). That is not to say that if someone were "personally denied equal treatment" there would not be an Article III injury. *Id.* at 755.[12] But stigma or dignitary interests alone are not themselves actionable—there must be some separate invasion of a legal right. *Id.* at 755-56. And if the "stigmatic injury" of "racial denigration" does not even constitute an injury for purposes of Article III, then *a fortiori* dignitary harms related to refusal to participate in a same-sex wedding ceremony cannot constitute compelling governmental interests for purposes of strict scrutiny.

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[12] Craig and Mullins allege "unequal treatment." But the Court of Appeals concluded that Phillips objected to preparing the cake "'because of' [his] opposition to same-sex marriage, not because of [his] opposition to their sexual orientation." Pet.App.12a-13a. Therefore, any harm centers not on Craig and Mullins' personal characteristics, but on the wedding ceremony Phillips could not help celebrate. That does not constitute unequal treatment based on protected categories. As Justice Kagan pointed out during argument in *Obergefell*, "[T]here are many rabbis that will not conduct marriages between Jews and non-Jews, notwithstanding that we have a constitutional prohibition against religious discrimination." *Obergefell* Arg. Tr. at 26:9-15. Similarly, there are Orthodox Jewish wedding vendors who would not help celebrate a marriage between a Jew and a non-Jew.

Nor is the government entitled to a unique "avoiding emotional harm" trump card in the context of public accommodations. In *Boy Scouts of America* v. *Dale*, it was no doubt emotionally distressing for a gay scout leader to be expelled from the Boy Scouts. Indeed, unlike this case, which involved an easily-replaced business transaction, Dale was expelled from a program that had been a major part of his life. 530 U.S. 640, 665 (2000). Yet this Court held that the government's effort to spare Dale this emotional harm still failed First Amendment scrutiny. *Id.* at 660-61; *see also Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995) (exclusion of LGBT group was "hurtful," but still protected).

In *Snyder* and *Dale*, the plaintiffs could point to emotional harm caused by groups that wished to completely exclude or even condemn them. That is not the case here. Phillips is willing to serve LGBT individuals and offer them products off the shelf or by designing a birthday cake. Pet.App.4a, 12a-13a. Phillips simply cannot use his artistic talents to participate in a wedding ceremony through custom designing a wedding cake. If anything, the State's interest is even weaker here than in *Snyder* and *Dale*.

Eradicating discrimination. Respondents also argue that "Colorado has a compelling interest in eradicating discrimination in all forms." Appellees Ct. App. Br. at 36 (quotation marks omitted). But strict scrutiny requires courts to "look[] beyond broadly formulated interests" and instead "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431 (emphasis added). In *Wisconsin* v. *Yoder*, for example, this Court did not analyze the government's interest

in compulsory public education generally. 406 U.S. 205 (1972). It assessed the government's interest in making the *specific Amish children* before the court attend *one more year* of public education instead of trade-oriented education provided by their families. *Id.* at 214-15.

Here, Phillips would have sold Craig and Mullins anything off the shelf or created a birthday cake for them, JA73; he simply and politely explained that he would not custom-design a cake for a same-sex wedding. Pet.App.4a; JA76, 168. But Colorado chose to enforce its public accommodation law in a "peculiar" way that coerced personal participation in a private marriage ceremony, rather than focusing on invidious discrimination against a class of individuals "as such." *Hurley*, 515 U.S. at 572.[13]

Respondents must justify forcing a closely-held business to create customized-designed items and participate in a deeply symbolic religious ceremony contradictory to the owners' sincerely-held religious beliefs, when the same items are readily available—even for free—from many vendors in the same community. JA184-85. Respondents cannot simply assert that Colorado has a compelling interest in this sort of compulsion. See *Attorney Gen.* v. *Desilets*, 636 N.E.2d 233,

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[13] This Court has noted that this type of "peculiar" enforcement is much more likely to collide with other important civil rights, such as speech, association, and free exercise. *Hurley*, 515 U.S. at 572-73; *see also Dale*, 530 U.S. at 657 (as states have "expanded" their use of public accommodation laws, "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased").

238 (Mass. 1994) ("The general objective of eliminating discrimination of all kinds * * * cannot alone provide a compelling State interest * * * ." "[T]he analysis must be more focused.").

Availability of goods and services. The Colorado Court of Appeals also made brief references to the Commission's purported interest in ensuring that "goods and services * * * are available to all of the state's citizens," and that "adverse economic effects" are avoided. Pet.App.50a. But Respondents have introduced no evidence suggesting that accommodating Phillips would impair the ability of same-sex couples to access wedding services in Colorado or that there will be any "adverse economic effects" in Colorado unless the State proceeds against Phillips. To the contrary, the record here shows that that the goods and services Respondents sought were readily available, even for free, from many other vendors. *E.g.*, JA184-85.

2. Proceeding against Phillips is not the least restrictive means of furthering Colorado's stated interests.

Even if one were to assume that Colorado's interests were compelling, there is no evidence that driving Phillips out of business is the least restrictive alternative available for Colorado to further its interests. First, even were dignitary harm a compelling governmental interest, proceeding against Phillips does not actually further that goal. The court below held that business owners may speak their "religious * * * opposition to same-sex marriage" to all their customers, Pet.App.45a. So Phillips could have told the couple that he was willing to bake their cake even though he

vehemently opposed their marriage. Such lawful communication would have been at least as emotionally painful—if not more—than politely declining to bake a cake.

Second, Respondents argue that "Colorado has a compelling interest in eradicating discrimination *in all forms*." Appellees Ct. App. Br. at 36 (quotation marks omitted) (emphasis added). But the Commission has undermined its own goal by allowing three other bakers 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. The Commission also adopted the ALJ's reasoning that a baker could decline to create a cake with a design or symbol that was "offensive," including "a white-supremacist message for the Aryan Nations church," or "a religious group's request for a cake denigrating the Koran." Pet.App.78a; Pet.App.56a-58a; JA196-207. The "consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which * * * is alone enough to defeat it." *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786, 802 (2011). This precaution is important because "[u]derinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Ibid.* The facts of this case leave little doubt that Phillips is being punished for his viewpoint.

Third, when evaluating Colorado's "marginal interest in enforcing the challenged government action in that particular context," it is clear that accommodating Phillips would not undermine Colorado's interest in eliminating discrimination. *Holt*, 135 S. Ct. at 863

(quotation marks and citation omitted). The government frequently offers exemptions to anti-discrimination statutes while still furthering its anti-discrimination goals. *See, e.g.*, 42 U.S.C. § 2000e-1(a) (religious exemption to Title VII); 42 U.S.C.A. § 2000e-2(e)(2) (religious exemption to Title IX); 20 U.S.C. § 1681 (religious exemption to Title IX); 42 U.S.C. § 12113(d) (religious exemption to the ADA). Further, numerous other less restrictive alternatives are available to the Commission to combat discrimination, including only applying CADA to prohibit discrimination against a class of individuals as opposed to policing wedding ceremonies.

* * *

This Court's *Obergefell* decision is built upon values of diversity, tolerance, and respect for the rights of others to form their own views about deeply important questions like sex, marriage, and religion without compulsion by the government. That is why *Obergefell* emphasized that the constitutional problem in that case arose not from the fact that there are many different viewpoints about marriage in our pluralistic society, but from using the law to promote one particular viewpoint. Penalizing Phillips for living out his understanding of marriage is just as wrong as penalizing Obergefell was. Doing so would represent a profound misunderstanding of this Court's message in *Obergefell*. And—most importantly—it does not advance any compelling government interest.

This Court will surely someday have to reconcile competing civil rights claims in a case that requires painful concessions from both sides. But this is not that case. LGBT customers can obtain their desired

services from many willing vendors, and religious individuals such as Phillips need not forfeit their livelihood. There is room enough in our pluralistic democracy for all of them to live according to their respective views of sex, marriage, and religion.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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SEPTEMBER 2017