No. 16-111

In The

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMM'N, ET AL.,

Respondents.

On Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is the national law firm for liberty, litigating in state and federal courts nationwide in defense of private property rights, educational choice, economic liberty, and free speech. Much of its free speech practice is devoted to protecting occupational speech—speech that an individual undertakes for pay. Many of the Institute's occupational-speech clients face government regulators and sometimes even government attorneys who take the position that their speech is entitled to less First Amendment protection because they are paid for speaking rather than doing so for free. Fortunately, Article III judges have consistently rejected this argument and nearly as consistently ruled in favor of the Institute's clients. *See, e.g., Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (reviewing First Amendment challenge brought by tour guides); *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013) (reviewing First Amendment challenge brought by diet-and-fitness coach); *Rosemond v. Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015) (reviewing First Amendment challenge brought by psychologist and newspaper columnist).

All of these clients, however, would be in danger if this Court were to adopt the lower court's holding that the mere fact of payment can be used to reduce the

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this *amicus* brief. No portion of this brief was authored by counsel for any party, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

level of First Amendment protection accorded to one's speech. Accordingly, the Institute files this brief to urge the Court—regardless of how it addresses the other issues in this case—to expressly reject this reasoning and reaffirm the long line of cases holding that the First Amendment applies with equal force to paid and unpaid speech alike.

SUMMARY OF THE ARGUMENT

The difference between speaking for pay and speaking for free matters quite a bit to the speaker: For many, it is the difference between being a tour guide and just being a know-it-all; between being a comedian and just being a wiseacre; between being a reporter and just being a gossip. But for all the difference that paid versus unpaid speech makes for the speaker, it has historically made no difference to this Court. The opinion below, though, breaks new ground by holding that people who speak for pay are entitled in certain circumstances to less First Amendment protection than they would receive if they spoke only as volunteers. That holding is both dangerous and wrong, and—regardless of how the Court resolves the other issues in this case—it should be expressly rejected here.

The opinion of the lower court in this case departed from this Court's longstanding treatment of paid speech. Instead, it held (in addition to other conclusions not addressed in this brief) that, to the extent

Petitioners' cake designs were speech, Petitioners were entitled to less protection against compelled speech than they otherwise would have received because they sold their speech in commerce rather than giving it away for free. This was error, and to the extent this Court addresses this aspect of the holding below, it should squarely and expressly disclaim it, for two primary reasons.

First, nothing in this Court's jurisprudence stands for the proposition that courts can afford less protection to speech simply because the speaker was compensated for it. To the contrary: The Court has expressly and repeatedly rejected that argument, and it has expressly and repeatedly struck down laws that were designed to penalize people who were paid for speaking. Americans do not sacrifice their First Amendment rights simply because they exercise them for pay, and this Court should reaffirm as much here.

Second, adopting the lower court's creation of a new, less protective standard for compelled-speech claims brought by paid speakers would create a host of insoluble line-drawing problems as lower courts try to discern which speakers are speaking only because they are being paid and which are simply accepting money in the course of saying things they actually believe. Moreover, adopting a constitutional distinction between paid and unpaid speech here would be grafting a distinction onto state antidiscrimination laws that, by and large, they themselves do not recognize: Many states have applied antidiscrimination laws to nonprofit and for-profit transactions alike, without

concern for whether a regulated entity is primarily "commercial" in nature.

To be sure, this case raises other contested legal and factual questions that may render the lower court's discussion of paid speech moot. But to the extent this Court reaches the paid-speech holding of the lower court, it should recognize it for what it is—a dangerous and unwieldy departure from longstanding precedent—and reject it accordingly.

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ARGUMENT

I. This Court has consistently held that compensated speech receives the same First Amendment protection as uncompensated speech.

The opinion below conflicts directly with this Court's longstanding rule that the First Amendment protects speech equally regardless of whether a speaker is paid or unpaid. To be sure, the Colorado Court of Appeals prefaced its analysis with the assurance that it did not "suggest that Masterpiece's status as a for-profit bakery strips it of its First Amendment speech protections." 370 P.3d 272, 287 (Col. Ct. App. 2015). But it nonetheless found the bakery's for-profit status essential "context" for analyzing the free-speech claim in this case. *Id.* (internal quotation marks omitted). And that context, in the lower court's view, made all the difference:

> The public recognizes that, as a for-profit bakery, Masterpiece charges its customers for its goods and services. The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product. Nothing in the record supports the conclusion that a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an endorsement of same-sex marriage, rather than a reflection of its desire to conduct business in accordance with Colorado's public accommodations law.

370 P.3d at 287.

In other words, the opinion below simply acknowledges that someone speaking for pay is not *stripped* of First Amendment protection, but it then uses the fact of paid speech to *reduce the extent* of that protection. That is precisely what this Court has repeatedly warned courts not to do. The teachings of this Court's precedents are that "the degree of First Amendment protection is not *diminished* merely because . . . speech is sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) (emphasis added) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). Indeed, any number of this Court's First Amendment precedents address the regulation of paid speech—and these precedents uniformly treat that speech as fully protected. *See, e.g., Simon & Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S.

105 (1991) (book publishing); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (movie theaters); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (newspaper industry); *accord Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011) ("While the burdened speech results from an economic motive, so too does a great deal of vital expression.").

This concern for the full protection of paid speech has also extended into the realm of compelled speech. In *Riley v. National Federation for the Blind*, the Court confronted a charitable-solicitation law that (among other things) required professional solicitors, before appealing for donations, to disclose the proportion of previous contributions that had actually been turned over to charity. 487 U.S. 781, 795 (1988). The Court explicitly analyzed this requirement as a "content-based restriction on speech." *Id.* While the Court acknowledged the State's interest in disclosure, it found a "prophylactic rule of compelled speech, applicable to all professional solicitations" far too burdensome and insufficiently tailored to survive First Amendment scrutiny. *Id.* at 798. Importantly, earlier in the opinion, the Court emphasized that it made no difference for First Amendment purposes whether it analyzed the law as a restriction on the *charities*' speech or on the *professional solicitors*' speech. *Id.* at 794. The paid nature of the solicitors simply did not affect the analysis.

Indeed, it would be odd if this Court's jurisprudence penalized speakers who accept money for their speech because the Court has repeatedly held that laws or rules that penalize speakers for accepting

money for their speech violate the Constitution. In *United States v. National Treasury Employees Union*, for example, the Court rejected a federal law that prohibited certain federal employees from accepting honoraria for their private speech. 513 U.S. 454 (1995). There, the Court's concern was specifically that lower-salaried employees like the Respondents in that case would be limited to speaking for free, and therefore would be unlikely to speak much at all. *Id.* at 469-70. While legislators and executives could expect many invitations to speak or write about topics related to their work, "invitations to rank-and-file employees usually depend only on the market value of their messages." *Id.* at 469. Denying them compensation for their speech would "inevitably diminish their expressive output." *Id.* at 470. Absent any evidence of honoraria-induced corruption among rank-and-file employees, the burden of requiring them to speak for free was unconstitutional. *Id.* at 477.

A similar principle was at work in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). In analyzing Colorado's disclosure requirements for signature-gathering campaigns for ballot initiatives, the Court rejected a requirement that campaigns disclose the names of paid (but not volunteer) signature gatherers, along with how much they had been paid, as insufficiently justified to find First Amendment scrutiny. *Id.* at 203.

In sum, this Court's precedents consistently hold that the First Amendment protection for speech does not vary up or down depending on whether a speaker

is paid. And this Court's precedents also reject laws that attempt to prevent speakers from choosing to accept money for their speech or to impose special burdens on those speakers who choose to speak for pay. The lower court's opinion departs from this long-settled rule of law by forcing speakers to make a choice: Either they speak for free and retain the full force of this Court's protections against compelled speech, or they accept compensation for their speech and lose some portion of that protection. That is a choice of a sort this Court has expressly forbidden. Paid speech, as this Court has consistently recognized, is an essential part of our national discourse, whether it emanates from books, newspapers, journalists, comedians, political activists, or anyone else. The Constitution does not require someone whose speech is valuable enough that others want to pay for it to choose between accepting that compensation and retaining the protections of the First Amendment. To the extent the lower court's opinion holds otherwise, that holding should be expressly rejected.

II. The Court should not create an exception to its long line of compensated-speech decisions in this case.

As discussed above, this Court has a long and consistent history of treating those who speak for pay identically to those who speak for free under the First Amendment. There is no reason to depart from that tradition. And there is particularly no reason to depart from that tradition here. Introducing a distinction

between paid and unpaid speech in the context of compelled-speech claims under antidiscrimination laws would both create an impossible line-drawing problem for lower courts and unnecessarily complicate the operation of antidiscrimination laws.

A. Creating a distinction between compensated and uncompensated speech creates an impossible line-drawing problem for courts.

The lower court's assumption that the public is less likely to attribute a paid speaker's message to the speaker himself is just that: an assumption. It will be true in some circumstances and false in others, and it will be all but in possible to tell which is which with any degree of certainty. To be sure, some people speak for pay and will say whatever best helps them earn a living. Others, though, speak for pay and hope to earn a living while advancing important ideas they believe in. The public will understandably sometimes confuse the one with the other, and a test requiring a judge to discern what lies within a paid speaker's secret heart gives that judge an impossible task. Such a test should form no part of this Court's analysis of the First Amendment issues in this case.

Not once has this Court adopted the idea that the guarantees of the First Amendment for otherwise-protected speech can be diminished by a speaker's motivation; to the contrary, it has frequently rejected such a test. *See, e.g., FEC v. Wis. Right to Life, Inc.*, 551 U.S.

449, 467-68 (2007) (rejecting a proposal to "distinguish between constitutionally protected speech and speech that [the Bipartisan Campaign Reform Act] may proscribe" based on "a test turning on the intent of the speaker"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983) ("[T]he fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech."); *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (noting that analyzing speech in terms of its "intent and effect" would "offer[ ] no security for free discussion"); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) ("If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales.").

The Court has been right to reject such tests, which (in addition to wrongly depriving many speakers of their constitutional rights) would be uncertain and unworkable. *See, e.g., Wisconsin Right to Life*, 551 U.S. at 468 (noting that even the FEC had conceded that an intent-based test that " 'turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum it would invite costly, fact-dependent litigation.' ").

The difficulties posed by the lower court's commerce-based analysis in this case only confirm that this Court has been right to historically reject such tests. The crux of the lower court's analysis is that

compelled-speech protections are less necessary in the context of paid speech because members of the public are less likely to believe that a paid speaker is saying something he truly believes (instead of something he is paid to say or compelled to say by law). 370 P.3d at 287. But this analysis belies the complex reality of paid speakers. Take, simply for example, attorneys. Some attorneys, to be sure, represent any would-be clients, happy to make any arguments consistent with their ethical duties. But many others are more selective in choosing their clients or cases specifically because they have ideological commitments that drive the legal claims they are willing to make. *Cf.* Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers As Cause Lawyers*, 95 J. Crim. L. & Criminology 1195 (2005) ("Criminal defense attorneys are often motivated by an intricate set of moral and ideological principles that belie their reputations as amoral (if not immoral) 'hired guns' who, for the right price, would do anything to get their guilty clients off."). But both sorts of lawyers get paid for their lawyering, and undoubtedly many of the latter sort would bristle at the suggestion that they are willing to embrace causes or arguments they do not believe simply because they are paid to do so.[2]

[2] Indeed, some of the parties in this very case are represented by attorneys from the American Civil Liberties Union or the Alliance Defending Freedom. One suspects that these attorneys would vociferously object to a suggestion that they should switch sides.

Lawyers, of course, are not alone in blending ideological commitments with paid work in ways that are sometimes difficult to cleanly separate. Even a cursory tour through this Court's free-speech caselaw reveals innumerable examples where a paid (or potentially paid) speaker's sincerity in speaking a message could have been—but was not—questioned. Were the members of the "coalition of professional fundraisers" who brought suit in *Riley v. National Federation of the Blind* pure mercenaries, or did they selectively work only for charities whose message they believed in? 487 U.S. 781, 787 (1988). What of the paid petition circulators in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999)? If any of the door-to-door solicitors in *Watchtower Bible & Tract Society v. Village of Stratton* had received a stipend from their church, would that call into question the sincerity of their religious devotion? 536 U.S. 150 (2002). The difficulty of answering questions like this in a predictable, reliable way is obvious—which is why this Court does not ask questions like this in the first place. It should not start now.

B. Creating a distinction between compensated and uncompensated speech inserts an unnecessary complication into antidiscrimination laws.

There is nothing inherent in the nature of antidiscrimination laws that makes a distinction between paid and unpaid speech more compelling here than it has been in any of the other contexts in which the

Court has addressed the distinction. Quite the contrary. The opinion below seems to operate from the premise that someone who chooses to engage in commerce necessarily sacrifices some things, including certain protections against compelled speech. That is, as discussed above, incorrect as a matter of law. But it also maps poorly onto how state public-accommodation laws actually work in practice. They do not neatly divide up public accommodations that engage in "commerce" and those that act purely voluntarily. Instead, states have applied these laws to nonprofits charging only nominal fees and even to totally voluntary transactions. *See, e.g., Isbister v. Boys' Club of Santa Cruz*, 707 P.2d 212, 218 (Cal. 1985) (holding that California's Unruh Act's limitation to "business establishments" encompasses nonprofits that operate public recreational facilities, even if they "collect[] no substantial fees from [their] users and [have] no economic function"); *Shepherdstown Volunteer Fire Dep't v. State ex rel. West Va. Human Rights Comm'n*, 309 S.E.2d 342, 351 (W.Va. 1983) (holding that a volunteer fire department was a "place of subject accommodations" subject to West Virginia's antidiscrimination requirements); *cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 646-48 (2000) (evaluating the application of New Jersey's public-accommodation law to Boy Scout's refusal to accept respondent's services as volunteer assistant scoutmaster).

This reality of how public-accommodation law works is in serious tension with how the lower court treated the free-speech question. If Petitioners were an

explicitly religious organization that designed religious-themed cakes for a nominal payment of $10, that would certainly undermine the lower court's assumption that the public would attribute any message in those cakes solely to Petitioners' commercial motives. But in many (if not most) states, such an enterprise would almost certainly be regulated as a "public accommodation" subject to the requirements of the state's antidiscrimination statutes.[3] The lower court's confident assumptions about how the public will attribute the messages of paid speakers thus sound even more suspect in light of the fact that this dispositive "payment" can be a minimal amount in the context of an otherwise voluntary transaction.

In short, introducing a distinction between paid and unpaid speech in any case would be a sharp and unjustified departure from this Court's longstanding practice. Introducing such a distinction in this case would be at odds with how antidiscrimination requirements like those at issue in this case are actually enforced in other states across the country. This Court should therefore reject the invitation to reject its longstanding protection for paid speech.

[3] Whether such statutory requirements will pass constitutional muster in every instance is, of course, another question. *Cf. Dale*, 530 U.S. at 656-57.

CONCLUSION

This Court has never drawn a line between paid and unpaid speech in the First Amendment context. To the extent the lower court's holding rests on drawing just such a line, it should be expressly rejected.

Respectfully submitted,

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