No. 16-111

IN THE
Supreme Court of the United States

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

v.

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

On Writ of Certiorari to the
Colorado Court of Appeals

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Brief for Petitioners remains unchanged.

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INTRODUCTION

Expressive freedom is central to human dignity. It requires that artists be free to make their own moral judgments about what to express through their works. And it forbids governments from commandeering the painter's brush, the sculptor's hand, or the soloist's voice to convey what is not in their minds or hearts.

Respondents seek to carve out a new exception to that freedom. They insist that public-accommodation laws override the freedom of for-profit speech creators who serve everyone but object to particular messages that clients ask them to express. No matter the form of speech, the message requested, or the protected classification at issue, Respondents would empower governments to compel expression—even when the speech is custom art celebrating weddings (events inherently sacred for many) and the speaker is a graphic designer, filmmaker, photographer, fine-art painter, or calligrapher.

Respondents take this extreme position because they cannot deny that this case involves compelled speech. The Commission has applied the Colorado Anti-Discrimination Act ("CADA") not to the mere sale of Phillips's products but to his creation of artistic expression. And its order requires that if Phillips continues to create wedding cakes at all, he must design cakes expressing support for same-sex marriage and include on them *any words or designs* that appear on any of his other cakes. The First Amendment forbids such attempts to dictate the content of an artist's work.

After stretching CADA to punish Phillips, the Commission construed that statute to exonerate three cake artists who refused to express religious messages opposing same-sex marriage. Had the Commission applied the same rationale to those artists that it applied to Phillips, it would have punished them too. After all, CADA forbids refusing service because of religious beliefs, and those cake artists admitted that they declined the requests because of the religious beliefs expressed on the cakes. Permitting that while punishing Phillips shows that the Commission discriminates against Phillips's religious viewpoint.

Compelling artists like Phillips to celebrate what their faith proscribes will not foster civility, pluralism, or tolerance. Coercion of conscience and expression never does. But the ruling that Phillips seeks—a narrow decision forbidding the government from coercing artistic expression contrary to conscience—strikes a sound constitutional balance. It ensures that public-accommodation laws will forbid businesses from discriminating against people solely because of who they are, while affirming Phillips's freedom to choose the ideas deserving of expression. The First Amendment promises him this basic liberty.

ARGUMENT

I. The Commission Has Impermissibly Compelled Artistic Expression.

A. *Hurley* Controls this Case, and *FAIR* Does Not.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), establishes that generally applicable public-accommodation laws violate the Free Speech Clause when applied to compel speech. Respondents argue that *Hurley* has no bearing on people who create and sell speech for a living. Commission Br. 29 ("Comm'n"); Craig and Mullins Br. 30 ("C&M"). They are wrong.

Hurley itself rejected that distinction. It recognized that "the fundamental rule … that a speaker has the autonomy to choose the content of his own message" is "enjoyed by business corporations generally," 515 U.S. at 573-74, including for-profit speakers that collaborate with others on the "item[s] featured in the[ir] communication[s]," *id.* at 570. *Hurley* applied the compelled-speech doctrine not because the case arose outside of commerce, but because the state applied the statute "in a peculiar way," "produc[ing] an order essentially requiring [a group] to alter the expressive content" of its speech. *Id.* at 572-73. This reading of *Hurley* reflects free-speech analysis in general, which depends on the presence of speech, not the corporate or for-profit status of the speaker. *See Citizens United v. FEC*, 558 U.S. 310, 342 (2010) (collecting cases).

Furthermore, this Court has protected for-profit speakers from compelled speech at least three times.

See Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795-801 (1988); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 9-21 (1986) (plurality opinion) ("*PG&E*"); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974). And it has affirmed that "the degree of First Amendment protection is not diminished merely because the … speech is sold rather than given away." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988).

Moreover, as explained in Section II.B. below, expressive freedom would be gravely threatened if governments could always apply their ever-expanding public-accommodation laws free of constitutional scrutiny to people who create and sell speech for a living. Thus, Respondents' attempt to confine *Hurley* to the noncommercial context is not only incorrect but also untenable.

In a key respect, the compelled-speech violation here is worse than the violation in *Hurley*. There, the state forced the parade organizers to alter their own speech by *including* another's. Here, however, the Commission requires Phillips to *create* the expression in the first place—to design, craft, and deliver it. That is a greater affront to the "individual freedom of mind." Cato Institute Am. Br. 11. It is so egregious in fact that Phillips has drawn amicus support from groups that oppose—some strenuously so—his beliefs about marriage. *See, e.g.*, First Amendment Lawyers Ass'n Am. Br. 26.

Jettisoning *Hurley*, Respondents rely instead on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"). C&M 32-33.

But they miss the most significant distinction between *FAIR* and this case: the statute there required the law schools to engage in non-expressive conduct—providing access to rooms—whereas this application of CADA requires Phillips to create expression. Thus, while freedom from compelled expression was not threatened there, it is here. *See* Pet. Br. 32 (discussing *FAIR*).

FAIR's discussion of *Hurley*, *PG&E*, and *Tornillo* is instructive. *FAIR* recognized that in each of those cases a speaker was engaged in expression; the government allowed another to co-opt it; and that "affected" the speaker's expression. 547 U.S. at 63-64. The law schools in *FAIR* were different because they do "not speak[] when they host interviews and recruiting receptions." *Id.* at 64. Phillips, however, is like the speakers in *Hurley*, *PG&E*, and *Tornillo*. His custom wedding cakes are his artistic expression, and the Commission's order allows others to hijack that expression and change the messages he conveys.

Respondents nevertheless compare this case to *FAIR* because the statute there forced the law schools to send logistical emails. C&M 33. The Court allowed that because emails telling students when and where military recruiters will be on campus are "plainly incidental" to the non-expressive conduct of providing those recruiters physical access to campus. *FAIR*, 547 U.S. at 62. But that is "a far cry" from requiring Phillips to create custom artistic expression that celebrates ideas about marriage in conflict with his faith. *Id.* The statute in *FAIR* did not force the law schools to speak the military's ideological messages or promote the military's hiring policies, and nothing in

the Court's decision suggests that would have been acceptable. Thus, *FAIR* does not control.[1]

B. Phillips Declined to Express Messages about Marriage That He Considers Objectionable.

Hurley distinguished between objecting to a requested message and turning people away solely because of who they are. 515 U.S. at 572 (distinguishing an "intent to exclude homosexuals" from a "disagreement" with a message). There, the parade organizers allowed LGBT individuals to march. *Id.* They did not "exclude the GLIB members because of their sexual orientations," but because of their messages "march[ing] behind a GLIB banner." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000). Similarly here, Phillips serves LGBT individuals; he simply declines to create art that celebrates same-sex marriage.

Respondents argue that Phillips objects not to any message but only to "*who* the product is for." C&M 27. That is not true. Phillips has always evaluated custom cake requests based on the messages that they convey. JA165-66 (discussing the many messages Phillips will not express through his custom cakes). His wedding cakes are no different. In that context, his decision-making depends on *what* vision of marriage the cake will celebrate and *what* context he will place it in—not *who* will purchase or eat it. *See*

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[1] In further reliance on *FAIR*, Respondents claim that Phillips seeks to protect speech akin to a "White Applicants Only" sign. 547 U.S. at 62; C&M 18. Phillips, however, is not trying to protect words that announce unlawful non-expressive conduct. He objects to creating certain artistic expression.

JA167 ("It has everything to do with the nature of the wedding"); Rev. Patrick Mahoney Am. Br. 2-13.

As Phillips has explained, and Respondents do not dispute, each of his wedding cakes announces the couple's union as a marriage and conveys celebratory messages about the event. Pet. Br. 19-21. Like messages communicated through other speech, the ideas expressed through Phillips's wedding cakes—which are temporary sculptures celebrating the marriage—depend on their context. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 477 (2009) (explaining that "[t]he message" conveyed through "a monument" may "be altered by" location, surroundings, and social milieu); *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (considering "the context in which [speech] occurred"). In particular, a wedding cake at a same-sex marriage celebrates that union as a marriage, which is a message that Phillips cannot in good conscience convey.

Other examples illustrate how artists can quickly decide that a different context would unacceptably alter the meaning of their art:

- African American sculptors who have designed Latin-cross-shaped sculptures for Lutheran churches would know that those same items express different messages if created for an Aryan Nations Church event.
- Catholic artists who have created custom rainbow designs for children's events at Catholic churches would know that the same artwork conveys different messages if made for an LGBT pride festival.

- Democratic cake artists who have crafted elephant-shaped cakes for children's birthday parties would know that the same cakes communicate different messages at a Republican political fundraiser.

Just as these artists have valid message-based reasons for refusing these requests, Phillips has legitimate message-based reasons for declining to create custom wedding cakes celebrating same-sex marriage.

Other facts confirm that Phillips is concerned not about the sexual orientation of his customers but the ideas that his wedding cakes convey. Phillips would decline to create a wedding cake celebrating a same-sex marriage regardless of whether the customer is a same-sex couple or a heterosexual parent purchasing the cake. JA166-67. Similarly, Phillips would celebrate a marriage between a man and a woman even if one or both spouses identified as gay, lesbian, or bisexual.[2] Moreover, Phillips's "decent and honorable" beliefs, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), are grounded solely in a view about the nature and definition of marriage, not in hostility toward LGBT individuals. Ryan T. Anderson Am. Br. 11-15, 22-25; Sherif Girgis Am. Br. 32-33. Those views are even shared by some in the LGBT community. Nat'l Black Religious Broadcasters Am. Br. 11.

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[2] *See* Gary J. Gates, *LGB Families and Relationships: Analyses of the 2013 National Health Interview Survey*, The Williams Institute, at 6 (Oct. 2014), http://bit.ly/2yUZ8qT (noting that 18% of adults who identify as gay or lesbian and are raising children have "a different-sex married spouse").

Attempting to obfuscate the compelled artistic expression at issue here, Respondents argue that this case is about "baked goods" rather than custom wedding cakes. C&M 46. That argument contradicts the undisputed record: Craig and Mullins told Phillips that they wanted to discuss a wedding cake, JA111; they "requested that Phillips design and create a cake," Pet.App.4a; they brought "a folder [with] pictures of different [cake] designs they had decided to discuss," JA39; and Phillips told them that "he does not create wedding cakes for same-sex weddings" while offering to make them other cakes or sell them brownies or cookies, Pet.App.65a; JA111; Pet.App.4a.[3] This case has always been about one thing: compelling Phillips to create custom wedding cakes.[4]

Protecting artists who serve LGBT customers but cannot in good conscience create art celebrating same-sex marriages strikes a sensible balance and promotes tolerance on the divisive issues in this case.

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[3] Respondents claim that Phillips declined to create custom cupcakes celebrating a same-sex union. JA113-14. This is irrelevant. Phillips's custom wedding cupcakes, which he specially crafts and arranges on tiered trays mirroring wedding-cake designs, express the same messages about marriage as those conveyed by his custom wedding cakes. *See* Masterpiece Cakeshop Wedding, http://masterpiececakes.com/wedding-cakes/ (last visited Nov. 20, 2017) (Image 3 of 33). Moreover, that alleged request, which did not result in a CADA complaint or factfinding, was not referenced in the Commission's decision, Pet.App.61a-88a, or the Court of Appeals' ruling, Pet.App.1a-53a.

[4] Craig and Mullins allege that Phillips referenced "a pedophile cake" over 12 years ago. C&M 5; JA119-20. Phillips denies making this comment, and it has no bearing here.

See 34 Legal Scholars Am. Br. 27. It might cause some who resist expanding public-accommodation laws because of cases like this to rethink their position. And others intent on punishing people like Phillips might adopt a more tolerant position. But a contrary decision stripping constitutional protection from members of diverse faith traditions will only bring further social strife.

C. Third-Party Perceptions Do Not Support Respondents' Arguments.

Respondents briefly echo the Court of Appeals' consideration of third-party perceptions in compelled-speech analysis. Comm'n 34 n.6; C&M 34-36. But when the government co-opts someone's expression and forces him to create speech he deems objectionable, this Court need not consider third-party perceptions. *See Hurley*, 515 U.S. at 577 (reserving decision on the significance of "misattribution"). Such an intrusion necessarily alters the speaker's expression, obviating the need for further evaluation. Thus, the perceptions-based analysis in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87-88 (1980)—which, as Craig and Mullins concede, applies when governments mandate "access to … property" (rather than access to speech), C&M 34—is irrelevant. *See* Pet. Br. 29-31.

Regardless, third-party perceptions confirm the compelled-speech violation here. Wedding cakes are distinctly recognizable as "markers for weddings." Simon R. Charsley, *Wedding Cakes and Cultural History* 121 (1992). Thus, they clearly announce that a wedding has occurred and should be celebrated. JA162; *see also* Cake Artists Am. Br. 7-19 (discussing

and depicting wedding cakes). Moreover, this case involves not a "simple commercial transaction," C&M 15, but a request for custom artistic work. Most artists exercise discretion in deciding which messages to convey. Indeed, Craig and Mullins admit that artists generally do not accept "any and all" requested projects. *Id.* at 35 n.4. This is particularly true of Phillips, who is often identified with his work, JA163, and who regularly declines custom requests based on what the cake communicates, JA165-66. Thus, if Phillips were to design wedding cakes celebrating same-sex marriages, that would "be perceived as having resulted from [his] customary determination" that the cake's "message was worthy of presentation and quite possibly of support." *Hurley*, 515 U.S. at 575.

D. Strict Scrutiny Is Not Satisfied.

Cases like *Hurley* and *PG&E* demonstrate that strict scrutiny applies when governments compel speech as the Commission has done here. *See Hurley*, 515 U.S. at 575 (distinguishing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), which "applied only intermediate scrutiny"); *Dale*, 530 U.S. at 659 (acknowledging that *Hurley* "applied traditional First Amendment analysis" rather than the test from *United States v. O'Brien*, 391 U.S. 367 (1968)); Pet. Br. 35. Respondents, however, do not even attempt strict scrutiny's particularized analysis, and Craig and Mullins dismiss it as "absurd." C&M 38. They claim that cases like *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), have already settled the strict-scrutiny question. Comm'n 56; C&M 37-38. But those cases

presented no material burden on First Amendment freedoms and therefore no occasion to apply strict scrutiny. *See Dale*, 530 U.S. at 657-58 (discussing *Duarte* and *Roberts*).

Respondents' primary interest—avoiding dignitary harms—is insufficient here. Girgis Am. Br. 5-16. Never before has this Court allowed such an interest to compel expression. *Id.* at 18-20. In *Hurley*, even though GLIB argued that the law advanced the "compelling interest" of "deter[ring] the deprivation of personal dignity," GLIB Br. 22, the Court concluded that no "legitimate interest [had] been identified" to justify compelling speech, 515 U.S. at 578. Also, allowing dignitary interests to compel speech here is self-defeating because it simply shifts the dignitary harm onto Phillips. Pet. Br. 55-56.

Nor have Respondents shown that CADA is precisely tailored to avoid punishing decisions not to create expression. CADA is astoundingly broad. It covers everyone who sells anything, Pet.App.93a, applies to commissions for custom artistic expression, and punishes artists who, with no "invidiously discriminatory animus," Pet.App.18a, decline to express certain messages through their art. Given this breadth, CADA fails even the *O'Brien* test by "burden[ing] substantially more speech than is necessary to further the government's legitimate interests." *Turner*, 512 U.S. at 662.

The Commission also confirms CADA's underinclusiveness by arguing that cake artists may decline any "pro-gay" message, Comm'n 35, any "offensive" message, *id.* at 52, and even the rainbow-design wedding cake that Craig and Mullins had at

their marriage celebration, *id.* at 25. If this is true, cake artists may decline countless requests (including for wedding cakes) from LGBT customers, and it is difficult to see what punishing Phillips accomplishes.

II. The Court Should Follow its Compelled-Speech Decisions Rather Than Respondents' New Theory.

A. Phillips's Free-Speech Arguments Are Constitutionally Based, Limited, and Workable.

The compelled-speech doctrine forbids governments from applying public-accommodation laws to compel speech when individuals decline requests to create protected expression because they object to the message it communicates.

Respondents complain that this rule would require courts to evaluate the "expressiveness" of "products" that professionals create. C&M 49. That, however, is a feature—not a fault—of the First Amendment, and this Court has frequently distinguished speech from nonspeech. In *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 790 (2011), for instance, the Court affirmed a previously unrecognized form of speech—video games—after finding (1) that it "communicate[s] ideas" and (2) that it is analogous to other protected speech.[5] Those factors are satisfied here, and Respondents do not contend otherwise. Pet. Br. 19-21.

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[5] Lower courts have also distinguished custom products that qualify as expression from those that do not. *See, e.g.*, *Mastrovincenzo v. City of New York*, 435 F.3d 78, 95-97 (2d Cir. 2006) (searching for a "predominantly expressive purpose").

Critically, though, those factors are not satisfied in many of Respondents' farfetched hypotheticals, including examples involving hair stylists and tailors. *See* C&M 48. Craig and Mullins's efforts to take their exaggerated projections from the hypothetical to the real world fare no better, for in many of their cited cases—including the "barber shop," "funeral home," "bed and breakfast," and "medical clinic" cases—compelled-speech claims were not even raised. *Id.* at 48 n.6.

Compelled speakers must also object to the message communicated through the expression they are asked to create. *See Hurley*, 515 U.S. at 580 (noting the absence of compelled-speech protections when allegedly compelled speakers do not "object[] to the content"); *PG&E*, 475 U.S. at 12 (same). It is not enough to object to what mere compliance with the law might communicate. *See FAIR*, 547 U.S. at 65-67. Yet many of Respondents' hypotheticals do just that. One discusses an architect who refuses a remodeling job to avoid "sending a message of equal citizenship for Latino people." C&M 47. A remodeled kitchen communicates no such message.

Neither does constitutional protection apply when expressive professionals exclude people solely because of who they are. *See supra* at 6. Thus, a number of Respondents' other hypotheticals—cake artists who object to "celebrating a black person," Comm'n 36, and photographers who will not "photograph Mexican families" because of "personal animus," *id.*—are beyond what free speech would protect.

Nor does the compelled-speech doctrine shield refusals to sell premade speech that has been offered for sale. In such situations, the speech is already completed, and the public-accommodation law's application does not compel expression. This highlights the difference between regulating the creation of expression, which the Commission has done, and its mere sale.

In addition to these jurisprudential limits, there are practical ones: people like Phillips often face significant opposition, and market forces discourage them from exercising their beliefs. *See* Law and Economics Scholars Am. Br. 16-18 (joined by Professor Richard Epstein); Concerned Women for America Am. Br. 22-24 (recounting hateful emails received by two expressive professionals). Few will have the courage of conviction to endure the harassment—and death threats—that Phillips still experiences today.

Respondents repeatedly invoke hypothetical cake artists who object to designing wedding cakes that celebrate interracial marriages. The record in a case like that would likely reveal that the cake artist engages in broader class-based discrimination against certain races. But assuming such a cake artist objects only to the message of those wedding cakes and otherwise serves people of all races equally, the compelled-speech doctrine would apply. The government, however, could potentially satisfy strict scrutiny because "racial bias implicates unique historical, constitutional, and institutional concerns." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017); *see also* Anderson Am. Br. 15-22.

B. Accepting Respondents' Theory Will Compel Speech.

Respondents argue that the compelled-speech doctrine offers *no* protection when governments apply public-accommodation laws to people who earn a living creating and selling expression. That rule would empower governments to compel speech in far-ranging circumstances. Public-accommodation laws are sweeping in who they cover and the classifications they include (e.g., "political affiliation" and "personal appearance"). *See Arlene's Flowers v. Wash.*, Reply in Support of Cert. 4-5 (No. 17-108). In many jurisdictions, they apply to anyone who sells anything publicly, be it through a storefront, website, or shop on Etsy.com. *See id.* at 4. Even Respondents admit that CADA reaches artists who operate businesses, C&M 20, including those who offer services through a website instead of a storefront, Addendum 2a, and social-media companies like Facebook, Comm'n 36-37.

Respondents disclaim any cause for concern because, they say, governments apply public-accommodation laws to speech *only* when expressive professionals decline the same words or designs that they have created for others. Comm'n 24-25, 48-49; C&M 25-26. This, however, does not reflect the law even in Colorado, much less in other states and municipalities with public-accommodation laws. As the court below held, those laws often apply when expressive professionals decline requests for reasons "closely correlated" to a protected characteristic of "an individual or a group." Pet.App.13a; Pet.App.93a. Under that analysis, governments could compel speech in circumstances far beyond an expressive

professional declining to create the same speech. They could, for example, force Jewish publicists to design ad campaigns for Scientology groups, require Democratic lobbyists to advocate for Republican causes, or demand that conservative Protestant printers create shirts advertising gay pride festivals. *See Lexington-Fayette Urban Cty. Human Rights Comm'n v. Hands On Originals*, No. 2017-SC-000278-D (Ky. Oct. 25, 2017) (granting review in case raising the last issue mentioned).

Even under Respondents' "narrow" view of public-accommodation laws, their theory *admittedly* compels any professional to create expression—including words—requested by a member of a protected class so long as they would communicate it in other contexts. Comm'n 24-25; C&M 36 n.5 (requiring cake artists to write words). That would include the following examples (in addition to those discussed in Section I.B.):

- A Muslim graphic designer who will create an intricately decorated flyer that says "Worshiping the One True God" for a Muslim conference must design it for a Jewish event.
- A Democratic painter-for-hire in the District of Columbia who will paint the American flag for President Obama's presidential library must paint it for President Trump's rally.
- An artist who opposes no-fault divorce and will design hand-painted party favors that say "Let's Celebrate" for a married couple's anniversary party must create those items for a divorcee's party celebrating the end of a marriage.

- A musician-for-hire in Seattle who will sing "This Land Is Your Land" at a peace rally promoting unity must sing it at a Klan rally promoting white nationalism.

No plausible reading of the First Amendment could allow any of this, yet Respondents insist it does.

In the wedding context alone, Respondents admit that many professional speakers—graphic designers, filmmakers, photographers, fine-art painters, calligraphers, and cake artists—will be coerced to speak on marriage, many of them risking jail time or financial ruin if they decline. C&M 47-48 n.6 (citing *Telescope Media Group* and *Brush & Nib Studio*, cases where the public-accommodation laws threaten jail time, and *Arlene's Flowers*, which imposed potentially devastating personal liability); Pet.App.332a-33a (discussing fine-art painters); Pet. Br. 34 (discussing *303 Creative v. Elenis*).

Because no two wedding websites, videos, or photo-albums are the same, Respondents expand their theory to force artists to create expression "similar to" (not just the same as) what they would otherwise make. Comm'n 60. This "similarity" qualifier, which cannot be confined to the wedding context, exponentially increases the speech that governments may coerce. For instance, if Phillips designs a cake celebrating a religious service at a Methodist church, he must create a similar cake for a Satanic group. *Cf.* Kelsey Harkness, *Colo. Baker Asked to Make 'Birthday Cake' for Satan*, The Daily Signal (Oct. 13, 2017), http://bit.ly/2gfTyUl. Or if he includes bride-and-groom figurines on wedding cakes, he must include similar toppers with two grooms.

In short, Respondents' theory is a recipe for the deepest intrusions into freedom of conscience and speaker autonomy. Adopting it will leave all for-profit speech creators' expressive freedom "at the mercy of" public-accommodation laws. *United States v. Stevens*, 559 U.S. 460, 480 (2010). That unprecedented and boundless theory has no basis in the Constitution.

III. Respondents' Attempts to Reduce or Eliminate Constitutional Scrutiny Fail.

A. Laws Applied to Compel Speech Cannot Evade First Amendment Scrutiny Because of Their Facial Scope or Target.

Respondents argue that generally applicable statutes regulating commerce never violate the Free Speech Clause. Comm'n 20; C&M 16-23. That is not the law. "[T]he enforcement of a generally applicable law may … be subject to heightened scrutiny" under the Free Speech Clause. *Turner*, 512 U.S. at 640.

Respondents then claim that "the key question" is whether CADA *generally* "targets" conduct or expression. Comm'n 22; *accord* C&M 15-20. Not true. The decisive factor is whether CADA has been *applied* to penalize speech (including a decision not to speak). As this Court held in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010), strict scrutiny applies to statutes that "*generally* function[] as a regulation of conduct" when "the conduct triggering coverage under the statute consists of communicating a message." *See also, e.g.*, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.3 (1986) ("[W]e have previously struck down '[g]enerally applicable statutes that purport to regulate nonspeech … if they unduly penalize speech'").

Contending otherwise, Respondents repeat the same arguments and cite the same cases that GLIB raised in *Hurley*. *See* GLIB Br. 16 (arguing that the public-accommodation law was "a generally applicable statute aimed at conduct"). That argument fails now as it did then.

Notably, many of the cases that Respondents cite emphasize that the statutes at issue did not compel or silence speech in their application. *See, e.g.*, *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 193 (1946) (law's application did not produce a "restraint upon expression"); *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945) (law's application did "not compel AP or its members" to publish "anything"). And Respondents' argument falters by relying on associational cases where no one was compelled to alter their speech. *See, e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

B. CADA Is Content Based When Applied to Speech.

Although a content-based application of CADA is not a prerequisite to applying strict scrutiny here, *see supra* at 11, that factor confirms that strict scrutiny is the correct test. Respondents' content- and viewpoint-based arguments rely on isolated statements from *Hurley*, 515 U.S. at 572, *Duarte*, 481 U.S. at 549, and *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). Comm'n 46; C&M 23-24. Because those statements reference nondiscrimination laws on their face, they do not foreclose Phillips's as-applied claims.

Free-speech analysis looks beyond the face of statutes and whether they have "a content-based

purpose," *Turner*, 512 U.S. at 642, to consider their "operation" and effect, *id.* at 647. A law used to compel speech is content based in application when (1) as in *Riley*, it "[m]andat[es] speech that a speaker would not otherwise make," 487 U.S. at 795; (2) as in *Tornillo*, the obligation to engage in unwanted speech is "triggered" by the content of the compelled speaker's prior expression, *Turner*, 512 U.S. at 653 (discussing *Tornillo*); or (3) as in *Tornillo*, *PG&E*, and *Hurley*, the state requires a compelled speaker to include another's message because of its content, *see id.* at 653-55 (discussing *Tornillo* and *PG&E*); *Hurley*, 515 U.S. at 570 (explaining that GLIB's message was "to celebrate its members' identity as openly gay, lesbian, and bisexual" individuals).

In all these ways, the Commission has applied CADA based on content here. First, CADA forces Phillips to express messages about marriage that he would not otherwise communicate.

Second, CADA applies because of the content of Phillips's prior art—i.e., because he designed custom wedding cakes that expressed messages about marriage between a man and a woman. Respondents effectively concede this by arguing that CADA permits cake artists to decline messages that they have not expressed and would not express for anyone. *See* Comm'n 48-49; C&M 25-26. This acknowledges that CADA is triggered by the content of artists' other expressive works and that the Commission considers that content when applying the statute. Thus, CADA is admittedly content based in application.

Third, CADA applies here because, according to the court below, cakes celebrating same-sex marriage

implicate the protected classification of sexual orientation. Pet.App.12a-13a. Were Phillips asked to design cakes with messages—such as love for football or chess—that have nothing to do with a protected classification, CADA would not force him to create them.[6]

C. The *O'Brien* Test Does Not Apply.

While Respondents urge the Court to apply *O'Brien*, C&M 21-23, it is not the correct standard for five reasons.

First, *Hurley* already refused to apply *O'Brien*'s "intermediate scrutiny" standard when a state applied a public-accommodation law to alter a speaker's message. 515 U.S. at 575. Second, *O'Brien* does not apply when a statute is content and viewpoint based in application, as CADA is. Pet. Br. 35-37 (discussing *Holder*, 561 U.S. at 27-28).

Third, this application of CADA has more than an incidental effect on expression. It "directly regulate[s] nothing *but* expression," C&M 29, by compelling Phillips either to create custom wedding art that conveys messages in violation of his faith or to stop designing wedding cakes altogether. That "directly and immediately" regulates Phillips's expressive freedom. *Dale*, 530 U.S. at 659.

Fourth, the *O'Brien* test applies to expressive-conduct claims. *FAIR*, 547 U.S. at 65-68. But the speech protected here—Phillips's custom wedding cake—is artistic expression shielded as pure speech. Pet. Br. 18-23. The cases upon which Respondents

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[6] As demonstrated in Section IV. below, the Commission's application of CADA also discriminates based on viewpoint.

base their *O'Brien* argument—*Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), and *O'Brien* itself—demonstrate this distinction. C&M 21-23. In both those cases, the parties claimed that the protected speech was conduct that violated a statute. Phillips does not. His protected expression is the custom wedding cake itself.

Fifth, this application of CADA is related to the suppression of free expression. Comm'n 46; C&M 23. Respondents rely primarily on dignitary interests to justify this specific application of CADA. Comm'n 6. Because those interests are concerned with the "likely communicative impact" of Phillips's choice not to create expression, *O'Brien* does not apply. *Johnson*, 491 U.S. at 411.[7]

IV. The Free Exercise Clause Condemns the Commission's Bias and its Order Compelling Art That Celebrates Weddings.

By exonerating three cake artists who declined religious messages opposing same-sex marriage, the Commission has contravened the Free Exercise Clause's neutrality and general-applicability requirements. *See* Christian Legal Soc'y Am. Br. 18-29 (filed by Professor Douglas Laycock). Respondents' attempts to justify those decisions ignore CADA's language and the Commission's rules interpreting it.

CADA forbids "deny[ing]" "the full and equal enjoyment of … goods" and "services" "because of … creed." Pet.App.93a-94a. "Creed," under the

[7] As explained in Section I.D., CADA cannot survive *O'Brien* because it burdens substantially more speech than necessary to further its purposes.

Commission's rules, includes not just religious status, but "all aspects of religious beliefs." JA307. The three cake artists admitted that they denied the requests—which sought Bible-shaped cakes with images of two grooms and direct quotes from the Bible that expressed a religious belief against same-sex marriage, JA233, 242-43, 252—because they deemed the stated religious belief "hateful" and "discriminatory." JA234, 243, 247. In other words, they denied the requests solely because of a religious belief that CADA protects.

Had the Commission applied the same analysis that it used in Phillips's case, punishment for those cake artists would have been undeniable. Both the Commission and the Court of Appeals held that CADA forbids cake artists from declining requests for reasons "closely correlated" to a protected characteristic. Pet.App.13a; *accord* Pet.App.70a ("inextricably tied"). The three cake artists' reason for refusal was not just closely correlated to something protected under CADA, it was based squarely on a protected religious belief. Craig and Mullins's suggestion that quotations of Bible verses on Bible-shaped cakes are not "closely associated" with religion cannot be taken seriously. C&M 52 n.8. They might as well argue that a "tax on wearing yarmulkes is [not] a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Thus, if Phillips contravened CADA, the other cake artists did so too. And as Professor Laycock's amicus brief explains, when the government "discriminat[es] between squarely opposite sides of a deeply divisive moral issue," it must satisfy strict scrutiny. Christian Legal Soc'y Am. Br. 18.

Respondents' only other justification for the three other rulings is that those cake artists would not create the requested message for anyone. Comm'n 48-49; C&M 25-27. But the same is true of Phillips. As discussed in Section I.B., he will not create a cake that celebrates same-sex marriage for anyone. Moreover, the three cake artists admitted that they declined the requests "because of" a religious belief protected under CADA, so whether they would create the message for others is beside the point. Thus, Respondents have failed to excuse the Commission's bias.

Two remaining factors underscore the free-exercise violation. First, the Commission has defied neutrality by imposing a "special disabilit[y] on the basis of religious views," *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990), through a religious test that excludes from the wedding industry classes of Christian, Jewish, and Muslim artists. Pet. Br. 43-44; Ethics and Religious Liberty Comm'n Am. Br. 14-32. Second, the Commission has "in effect required" Phillips to "participat[e]" through his artistic expression in an event he regards as sacrilegious. *Lee v. Weisman*, 505 U.S. 577, 594 (1992); *see also* Becket Fund Am. Br. 6-12. Yet the Free Exercise Clause stringently forbids coercing people of faith to celebrate events that they consider both religious and contrary to their convictions. If ever that Clause provided a shield, it is in these circumstances.

CONCLUSION

The Commission has devastated Phillips's small family business because his conscience does not allow him to create art that expresses support for same-sex marriage. To justify this punishment of a man who serves all people but declines some messages, Respondents seek to strip all for-profit speech creators of core constitutional protections. That would undermine First Amendment freedoms across the board, compelling speech on topics far beyond marriage, and leaving our society less civil and less free for generations to come. The Court should reject Respondents' invitation, reverse the Court of Appeals' decision, and affirm expressive freedom as a fixed star in our constitutional constellation.

Respectfully submitted,

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November 22, 2017

ADDENDUM

ADDENDUM TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02372-MSK-CBS

303 CREATIVE LLC, a limited liability company; and
LORIE SMITH,

*Plaintiff*s,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official capacity;
ANTHONY ARAGON,
ULYSSES J. CHANEY,
MIGUEL "MICHAEL" RENE ELIAS,
CAROL FABRIZIO,
HEIDI HESS,
RITA LEWIS, and
JESSICA POCOCK, as members of the Colorado Civil Rights Commission, in their official capacities, and CYNTHIA H. COFFMAN, Colorado Attorney General, in her official capacity;

Defendants.

JOINT STATEMENT OF STIPULATED FACTS

*** * * ***

43. 303 Creative is a for-profit limited liability company organized under Colorado law with its principal place of business in Colorado.

44. Ms. Smith is the sole member-owner of Plaintiff 303 Creative LLC.

45. Through 303 Creative, Ms. Smith offers a variety of creative services to the public, including graphic design, and website design, and in concert with those design services, social media management and consultation services, marketing advice, branding strategy, training regarding website management, and innovative approaches for achieving client goals.

* * * *

93. As a Colorado place of business engaged in sales to the public and offering services to the public, 303 Creative is a "place of public accommodation" subject to CADA. Colo. Rev. Stat. § 24-34-601(1), (2)(a).