No. 16-111

IN THE

Supreme Court of the United States

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

v.

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

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF FLOYD ABRAMS, VINCENT A. BLASI, WALTER DELLINGER, SETH F. KREIMER, BURT NEUBORNE, ROBERT POST, GEOFFREY R. STONE, AND KATHLEEN M. SULLIVAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DIMITRI D. PORTNOI
JAMIE CROOKS
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

WALTER DELLINGER
(*Counsel of Record*)
wdellinger@omm.com
MEAGHAN VERGOW
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTEREST OF THE *AMICI CURIAE*[1]

Amici are scholars of the First Amendment. They have an interest in promoting the sound interpretation of the First Amendment in a way that does not dilute the rigorous protection of free expression afforded by the Court's precedents.

Amici's names are set forth in the Appendix.

SUMMARY OF ARGUMENT

This is not a case about the expressive properties of baking. The Court does not need to decide here whether bakers are artists or food scientists. Artists who sell their creations to the public are, like other commercial actors, bound by a variety of generally applicable laws, including laws that forbid businesses to refuse service on certain grounds. If Rembrandt van Rijn puts "The Descent from the Cross" in his shop window—or publicly offers the service of copying the masterwork for a fee—the First Amendment would not condemn a law that says he may not refuse on grounds of ethnicity or religion the business of a Flemish man who wished to hang the painting in a Roman Catholic church. If a vendor sells "Black Lives Matter" signs from her stall, she may not refuse on the basis of race to sell her creations to a white customer who she fears will alter that message.

Petitioners sell wedding cakes from a storefront in the community of Lakewood, Colorado. Whatever

---

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

expressive message may inhere in a "wedding cake," it is a message that petitioners are willing to sell to the general public. Colorado's public accommodations law does not require petitioners to make anything they are otherwise unwilling to make, or say anything they are otherwise unwilling to say.

Colorado does not regulate the creation of messages. An artisan may refuse to create a message if he would refuse to create such a message for any customer. Thus a Colorado artisan may decline to create for any and all customers messages saying "God Bless This Gay Marriage" or "The South Will Rise Again," for the simple reason that the Colorado law does not seek to regulate messages but to prohibit discrimination against customers. But if a cakemaker willingly creates and sells cakes saying "God Bless This Marriage," he cannot decline to complete such a sale upon finding out that the purchaser or user is gay.

The Colorado statute thus regulates the conduct of selecting customers, and does so well within the parameters of First Amendment protections. The Court's precedents on this point are clear. Public accommodations statutes that preclude discrimination among buyers do not intrude on the expressive prerogatives of commercial actors. They regulate the conduct of commerce. When an artist sells a message, he must take all comers. When a Colorado baker sells wedding cakes, he cannot turn away LGBT customers who will use the cake to celebrate their marriage.

Petitioners and their *amici* argue that in regulating sales the Colorado law conscripts artisans like

petitioners in service of a message they reject. But selling goods to all customers on equal footing no more inculpates the baker in the promotion of marriage equality than it allies the pro-segregation proprietor of a Dixie-themed barbecue restaurant with a message of racial mixing. Indeed, it is petitioner's proposed conscience-based exception to conduct-regulating laws of general application that would permit an establishment's philosophical persuasion to be discerned through the groups it elects to serve, or not to serve. It is irrelevant in any case what inference might be drawn from a business's compliance with public accommodations laws: the First Amendment sanctions the general regulation of commercial conduct even if the business considers its work expressive.

Colorado provides that its citizens may purchase goods and services even if they do not look, or love, or worship like the vendor. Petitioners have a First Amendment right to pick their message, but not to choose their customers based on sexual orientation.

BACKGROUND

Two background points bear emphasis.

First, Colorado's Anti-Discrimination Act (the "Act") regulates conduct, not speech. Originally enacted over 100 years ago, the Act currently provides:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal

> enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation….

COL. REV. STAT. § 24-34-601(2)(a) (2016). The law does not regulate what messages a business owner must create. It also does not prevent businesses from publicly announcing that their compliance with the Act "does not constitute an endorsement or approval of conduct." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. App. 2015).

Second, the Act was not applied in this case to require petitioners to create a new type of baked good. Petitioners sell wedding cakes. Petitioners refused to sell respondents a wedding cake, because respondents are gay. The stipulated record, as it comes to this Court, reflects that petitioners "categorically refused" to accept the cake order without any discussion of "what the cake would look like," and that they were "not asked to apply any message or symbol to the cake." Pet. App. 75a. This is thus not a case in which the artisan has been asked to create a message he does not otherwise produce for commercial purposes. The message intrinsic to a wedding cake is one that petitioners are generally willing to create and sell. The interest asserted here is in choosing who gets to buy the product bearing that message.

ARGUMENT

THE FIRST AMENDMENT DOES NOT PROTECT A RIGHT TO CHOOSE YOUR CUSTOMERS BASED ON THEIR SEXUAL ORIENTATION

A public accommodations law, applied to restrict a commercial business's refusal of customers but not the messages put to market, does not implicate the First Amendment.

a. This brief assumes that the creation of a wedding cake is expressive in some way—that petitioners are artisans, not automatons. The Act still does not regulate the expressive content of petitioners' cakes. It simply forbids petitioners to refuse to sell to customers based on their sexual orientation. The Act is a content-neutral, *speech*-neutral law. *See, e.g.*, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 572 (1995) (provisions that ensure access to public accommodations "do not, as a general matter, violate the First or Fourteenth Amendments").

What is essential here is that petitioners have agreed to sell to customers whatever expression may be inherent in a wedding cake. They are willing to sell that message, such as it is, in their public establishment. *See* JA 157. Colorado law merely forbids them to discriminate in their sales against African Americans, women, gays, interracial couples, persons of Irish descent, and so on.

This is not a case about infringing the speaker's "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. A product may contain expressive elements that are entitled to First

Amendment protection. As the court below recognized, the Act does not compel a baker to inscribe a cake with a unique message he has not produced and would not produce for any other customer—say, "God Bless This Gay Wedding." 370 P.3d at 282 n.8. It does not compel a jeweler to create a swastika pendant if she is unwilling to make that pendant for any other buyer.

The Court's First Amendment precedents forbid the "peculiar" application of anti-discrimination law in such a way as to interfere with an individual's own speech. *Hurley*, 515 U.S. at 572, 578. Thus, the organizers of a parade cannot be compelled to include a banner they do not endorse. *Id.* at 574. A private membership organization cannot be required to include leaders who espouse values antithetical to the organization's own. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655, 659 & n.4 (2000).

But the decision below does not require petitioners to bake a cake any different *in message* from the countless other wedding cakes they have created for customers over the years. Even if petitioners customize their wedding cakes by incorporating the customers' preferences as to flavor, shape, tiers, and ornamentation, petitioners have already embraced the content of the message inherent in a "wedding cake," which they sell in a "retail shop[]" with an "open invitation[] to the public." *Dale*, 530 U.S. at 657. Petitioners are no differently situated from a wedding dress designer asked to sew the gown for a Russian bride, or a caterer asked to provide the luncheon for a mixed-race couple's wedding reception, or a florist asked to supply the garlands that will adorn the chuppah at a Jewish wedding. The expressive work

of these artisans consists of creating products they wish to make. It does not extend to otherwise unlawful discrimination against customers simply because customers intend to incorporate the product into their own expressive events.

The First Amendment does not include the right to violate content-neutral laws regulating commercial conduct. *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 65-66 (2006) ("*FAIR*") ("[W]e [have] rejected the view that conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." (citation and internal quotation marks omitted)). Commercial activities are subject to generally applicable tax laws, safety rules, and labor regulations that have only an incidental effect on speech, even if the daily business of the regulated entity or person is expression. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983); *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

The Constitution "does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part and concurring in the judgment). Commercial transactions are open to "rational regulation." *Id.* A law firm produces speech by authoring briefs and memoranda, but the First Amendment does not pro-

tect its hiring decisions based on race. An orchestra engages in speech at every symphonic performance, but likewise has no constitutionally protected right to refuse to hire female percussionists. The neutral regulation of these businesses' employment activity is not subject to heightened scrutiny simply because their daily work is expressive.

"Employees Wanted" and "For Lease" signs undoubtedly convey a message. But the First Amendment does not protect the employer's or landlord's right to "express" that message only to African Americans or only to Christians. *FAIR*, 547 U.S. at 62 ("Congress . . . can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct.").

b. The essence of petitioners' argument is that they will appear complicit in *respondents'* expressive conduct by supplying merchandise for it—that they will be understood to endorse same-sex marriage by serving same-sex customers. That is precisely what might have been said by proprietors of segregated lunch counters who refused to serve potential customers based upon their race. It is hardly a basis for holding the application of an antidiscrimination law unconstitutional.

In any event, a lunch counter is not understood to be anti-segregation when it serves African Americans. A bookstore is not understood to be feminist because it accommodates female readers. The external attribution on which petitioners' argument hing-

es is not only legally irrelevant: it does not exist. (Even if it did, petitioners could lawfully disclaim the attribution, as the courts below recognized. *Supra* at 4.)

It does not help to draw a line between products that are custom-made and those that are sold off the shelf. The purveyor of a tailored dress, a unique ring, a seasonal bouquet of flowers, or a menu tailored to the diets of the happy couple's family is no more an "active participant" in a wedding than the limousine driver, the wait staff, or the provider of the chairs in which the wedding guests sit. Reasonable people do not construe messages to be endorsed, in their use, by the vendors who produce the instruments for them. A churchgoer does not understand the printer of her church bulletin to be welcoming her to the 10:00 Mass. A child does not believe that Carvel wishes him a happy birthday. A spouse does not infer that Hallmark remembered her anniversary. Only if the court were to recognize petitioners' claim would there be any reasonable basis for concluding that artisans or businesses serving customers protected by public accommodations laws agree with those customers' lifestyles.

Petitioners wish not to associate with a particular user of their goods through a commercial transaction. But there is no defensible boundary to petitioners' argument that commercially selling artistic products implicates specially protected expressive interests. Nearly every human activity can be cast as expressive in some way; nearly every conduct-regulating law will have some incidental effect on human activity that is not purely mechanical. The individual who beats up another in order to express

his hostility to the other's race is not protected by the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993).

Analysis of the sort envisioned by the petitioners and their *amici* is inconsistent with this Court's seminal public accommodation decisions. Even if Ollie McClung in *Katzenbach v. McClung*, 379 U.S. 294 (1964), or Maurice Bessinger in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), firmly believed in the inequality of the races and accordingly wished not to comply with antidiscrimination laws, the First Amendment provides no basis for doing so.

Accepting petitioners' arguments will force courts to make an uncomfortable choice in which either our democratic values or our constitutional values will suffer. Either the right of "conscientious violation" will culminate in the unwinding of antidiscrimination protections because expressive objections to providing goods and services to women or Catholics or African Americans will proliferate. Or courts, uncomfortable with a rule permitting Ollie's Barbecue to resume its practice of refusing service to African Americans, will stretch First Amendment doctrine to its breaking point. Upholding reasonable discrimination laws against these many challenges will require courts to severely dilute First Amendment principles—perhaps to the point that those principles cease to provide adequate protection against the many true threats to precious First Amendment freedoms that will undoubtedly materialize in the future.

The Court can escape this dilemma if it faithfully applies its own precedents to hold that a commercial artisan cannot cite First Amendment concerns to resist the application of an otherwise valid antidiscrimination law.

CONCLUSION

For all of these reasons, as well as those presented in respondents' briefs, the judgment below should be affirmed.

Respectfully submitted,

DIMITRI D. PORTNOI
JAMIE CROOKS
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

WALTER DELLINGER
(*Counsel of Record*)
wdellinger@omm.com
MEAGHAN VERGOW
O'MELVENY & MYERS
1625 Eye St., N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amici Curiae

Dated: October 30, 2017

APPENDIX

List of Amici Curiae

Floyd Abrams
Adjunct Professor
New York University School of Law
Author, *The Soul of the First Amendment* (Yale U. Press 2017)

Vincent A. Blasi
Corliss Lamont Professor of Civil Liberties
Columbia Law School

Walter Dellinger
Douglas B. Maggs Professor Emeritus of Law
Duke University School of Law

Seth F. Kreimer
Kenneth W. Gemmill Professor of Law
University of Pennsylvania Law School

Burt Neuborne
Norman Dorsen Professor in Civil Liberties
New York University School of Law

Robert Post
Sterling Professor of Law
Yale Law School

Geoffrey R. Stone
Edward H. Levi Distinguished Service
Professor of Law
The University of Chicago

Kathleen M. Sullivan
Partner, Quinn Emanuel Urquhart & Sullivan, LLP