No. 16-111

IN THE SUPREME COURT OF THE UNITED STATES

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

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO

BRIEF FOR FREEDOM OF SPEECH SCHOLARS AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the application of a statute prohibiting discrimination on the basis of sexual orientation compelling a bakery with ideological objections to produce a wedding cake for a same-sex wedding reception implicates speech within the meaning of the First Amendment and, if so, whether it violates freedom of speech.

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Interest of Amici[1]

Amici are legal scholars with special expertise and interest in freedom of speech. They are divided on many free speech issues, but they are united in concluding that custom wedding cakes are not speech within the meaning of the First Amendment, that even if such cakes were considered speech, the compelled speech line of cases would not support Petitioners' claim, and that extending the compelled speech doctrine to such a novel claim would severely undermine anti-discrimination law and the integrity of the First Amendment.

Amici include Michael C. Dorf, Robert Stevens Professor of Law, Cornell Law School, Seana Valentine Shiffrin, Professor of Philosophy and Pete Kameron Professor of Law and Social Justice, University of California, Los Angeles, and Steven H. Shiffrin, Charles Frank Reavis, Sr., Professor of Law Emeritus, Cornell Law School.

Brief Statement of Facts

In July, 2012, David Mullins, Charlie Craig, and Craig's mother Deborah Munn visited Masterpiece Cakeshop, Ltd., a bakery in Lakewood, Colorado for the purpose of ordering a cake for a wedding reception in Colorado after their upcoming marriage in Massachusetts. Craig told Jack Phillips (who creates the majority of cakes for Masterpiece)[2] that he and Craig

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[1] This brief was prepared entirely by amici and their counsel. No other person made any financial contribution to its preparation or submission. The consents of petitioners and the Colorado Civil Rights Commission are on file with the Clerk; the consent of the individual respondents, Craig and Mullins, is submitted with the brief.

[2] Joint App., at 160 (J.A.). There are no findings regarding the views of those other than Phillips who create cakes there.

would like to order a cake for their wedding. On behalf of the cakeshop, Phillips refused, explaining that he opposed same sex weddings on religious grounds, but that he did not object to providing baked goods to gay individuals or couples in other contexts. There was no discussion of the character of the wedding cake that Masterpiece was being asked to supply.

In response to a complaint from Craig and Mullins, an Administrative Law Judge (ALJ) ruled that Masterpiece had violated the Colorado Anti-Discrimination law[3] prohibiting discrimination on the basis of sexual orientation in places of public accommodations. In response to the freedom of speech argument, the ALJ recognized that decorating a wedding cake required considerable skill and artistry, but he made no finding that Phillips' cakes were works of art and concluded that speech within the meaning of the First Amendment was not present: "The undisputed evidence is that Phillips categorically refused to prepare a cake for Complainants' same sex wedding before there was any discussion about what that cake would look like. Phillips was not asked to apply any message or symbol to the cake or to construct the cake in any fashion that could be reasonably understood as advocating same sex marriage. For all Phillips knew at the time, Complainants might have wanted a nondescript cake that would have been suitable for consumption at any wedding." Pet. App. 75a.

The Colorado Civil Rights Commission upheld the decision of the ALJ, and ordered Masterpiece to cease and desist from continued discrimination on the basis of sexual orientation (which included the making of custom cakes if it made custom cakes for traditional weddings), to take remedial measures and to file quarterly reports for two years detailing aspects of its compliance. Pet. App.

[3] Colo.Rev. Stat. §§ 24-34-301 to 24-34-804 (2016).

57a-58a. No ruling was entered against Jack Phillips.[4] The Commission's ruling was upheld by Division I of the Colorado Court of Appeals in *Craig v. Masterpiece Cakeshop,* 370 P.3d 272 (2015).

Summary of Argument

Phillips believes that God does not sanction same sex weddings and, accordingly, that they are not worthy of celebration. Amici take no position on his freedom of religion argument, but Amici maintain that his religious argument cannot be repackaged as a free speech argument without serious distortion of First Amendment law. Phillips maintains that a wedding cake in this context would carry messages in conflict with his ideology, namely that a wedding has occurred, a marriage has begun, and the couple should be celebrated. Pet. App. 280a. But Phillips would not deny that a legal marriage took place or that it had begun. He would deny that such a marriage was valid in the eyes of God. Wedding cakes carry no messages about God. Similarly, one might glean from a wedding cake that a wedding reception would celebrate the wedding. But a wedding cake does not communicate that a wedding should be celebrated, and, here too, a wedding cake has no theology. It does not carry a message of divine approval.

Alternatively, Phillips maintains that his cakes are works of art. Although the Commission observed that the decorating of cakes involves skill and artistry, there is no

[4] Before this Court, Masterpiece has disclosed that the bakery is co-owned by Phillips and his wife. The record is silent as to her views about same sex weddings, about her religious views, and whether the order applying to Masterpiece affects her speech activities in any way. Despite the co-ownership and the fact that no judgment has been entered against Phillips, we will refer to Masterpiece and Phillips interchangeably.

finding that Phillips or the other bakers in the cakeshop create works of art and no attempt to engage in particularized judgments separating one baker's work from another. It would be the rare baker who did not decorate a wedding cake. But it cannot be that the existence of craft or artistic choices is enough to ground a First Amendment interest. Wedding cakes are not per se protected under the First Amendment, and it is not the business of courts to make *ad hoc* judgments as to what is or is not art in a particular genre.

The Colorado Anti-Discrimination Act is directed at discriminatory conduct whether or not it takes the form of speech. It applies to the hair dresser, the dress designer, the florist, the jeweler, the interior decorator, the chef, the bartender, the candlestick maker, and the baker. All make artistic choices that make a wedding attractive. To stretch the First Amendment to cover this wide range of goods and services would threaten civil rights law not only with respect to sexual orientation, but also with respect to race, religion, and gender.

Even if Phillips has a cognizable speech interest, the Colorado law, as applied, does not violate the First Amendment. Two branches of the compelled speech doctrine are relevant here: (1) the compelled speech doctrine does not permit government to require persons to affirm, carry, or produce messages that contradict their ideologies or to participate in a prescribed ritual affirming a government mandated orthodoxy; and (2) it does not permit government to engage in content discrimination that forces speakers engaged in communicating a message to include unwanted materials that unduly burden their messages. The prohibition on discrimination does not impermissibly compel speech in this case because the baking company is not compelled to affirm, carry, or produce a message that contradicts its religious views. Nor does the non-discrimination obligation in this case involve content discrimination in the sense of forcing the baking company to include unwanted materials in a

message it communicates. The Colorado Anti-Discrimination Act is content-neutral on its face and as applied. The law does not approve or disapprove any message. The law does not tell the company what design to use in its baking. Indeed, the law is not directed at speech.[5] The law simply insists that if baking services are made available to the public, they must be made available on a non-discriminatory basis.

The compelled speech doctrine does not dictate that persons will invariably be free from engaging in unwanted speech. For example, persons may be compelled to be witnesses and to swear or affirm that their testimony is true; mandatory political disclosures are common, including requiring candidates to affirm that they approve of a message from their campaign; persons can be forced to identify themselves to police officers in certain circumstances; doctors in some circumstances can be compelled to communicate messages to abortion patients.

Case law strongly supports the qualified nature of the compelled speech doctrine. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,* 547 U.S. 47, 61-65 (2006)("*FAIR*"), this Court held that a content-neutral law compelling law schools to send out e-mails advertising interviews with military recruiters did not violate the compelled speech doctrine even though the law schools did not want to engage in that speech and thought the military was involved in immoral employment practices. *FAIR* strongly indicates that compelled speech is permissible in this case because content discrimination is likewise not present here. As is developed in Section II, A, *infra*, *FAIR* is the most relevant precedent for this case. Masterpiece does not adequately deal with the decision. It

[5] Some content-neutral laws can raise serious First Amendment questions when they are directed at speech. A law prohibiting the sending of emails would be content-neutral, but plainly unconstitutional. Nothing of the kind is presented here.

does not discuss the forced messages instead focusing on the fact that the law schools had to make rooms equally available. The United States primarily argues that compulsory inclusion of e-mails was incidental to the government's regulation of conduct (United States Brief 62),[6] but does not persuasively come to grips with the fact that the compulsory production of cakes (if speech at all) is also incidental to the enforcement of Colorado's anti-discrimination statute. Speech is routinely outlawed when it is an integral part of illegal conduct. Here the discriminatory refusal to engage in conduct whether expressive or non-expressive is the gravamen of the illegal conduct.

The United States contends that *Hurley v. Irish-American, Gay, Lesbian, and Bisexual Group of Boston,* 515 U.S. 557 (1995) held that a content-neutral public accommodation law that has the effect of altering speech and interferes with an expressive event is unconstitutional. U.S. Brief 7-8. As is developed in Section III B, *infra,* this misreads *Hurley.* In *Hurley,* Massachusetts declared a parade (the expressive event) to be a public accommodation and altered its message for the content-based purpose of promoting a message of its own. 515 U.S. at 579. The Court did not regard the law as content-neutral, attached significance to the communicative event only because it was defined to be a public accommodation, and did not hold that alteration of a message resulting from the application of a content-neutral law was unconstitutional.

By contrast, the Colorado law here does not make an expressive event a public accommodation. The public accommodation here is not a wedding reception or a wedding cake. The public accommodation is a bakery, and the purpose here is unrelated to any message of the

[6] The endorsement argument of the United States is primarily considered in Section I ¶ 2; and Section 2, A *infra.*

bakery. The purpose is to prevent discrimination. Finally, Colorado does not alter a message of the bakery as occurs in the second line of compelled speech cases. The application of the law at most obligates the bakery to engage in unwanted speech within the first line of such cases, but that speech, if any, does not carry a message contradicting the views of the baker.

Apart from precedent, extending the compelled speech doctrine beyond its current framework to permit those who offer commercial speech services to violate anti-discrimination law would be undesirable. Such an extension would multiply the complaints of florists and the like, would extend beyond religious ideologies, and would interfere with the objectives of combatting sexual orientation, race discrimination, religious discrimination, and gender discrimination.

Finally, Appellant wrongly suggests that the strict scrutiny standard applies to the content-neutral law in this case. Yet, by contrast with *Holder v. Humanitarian Law Project,* 536 U.S. 1 (2010) where the content of the speech made the governing law applicable, here the state regulatory interest has nothing to do with any regulated message. Even assuming that baking a custom cake is speech within the meaning of the First Amendment, cases like *FAIR* conclude that the proper standard for a content-neutral law such as this is the *O'Brien* test, and that standard is easily satisfied here.

Argument

I. Masterpiece Has No Cognizable Free Speech Interest in this Case

"It is possible to find some kernel of expression in almost every activity a person undertakes." *Dallas v.*

Stanglin, 490 U.S. 19, 25 (1989). Accordingly, the Court does not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien,* 391 U.S. 367, 376 (1978). It is not surprising that in the absence of a message or a symbol, no court has held that the making and sale of a cake for any event is free speech activity. To be sure, serious constitutional questions would be raised if Colorado's statute compelled a baker to affix an offensive message to a cake he or she was asked to bake.[7] But then it would be the message affixed to the cake, rather than the cake itself, that was expressive. In any event, the dialogue between the baker, Craig, and Mullins did not refer to any message to be displayed on a cake. In fact, Phillips on behalf of Masterpiece was not willing to provide a baked good of any kind for their reception – regardless of design.

Phillips suggests that the provision of a wedding cake by him would necessarily project a message with which he disagrees. But that contention is off the mark. Anyone who attends a wedding reception knows that a wedding has taken place, that a marriage has begun, and that the reception will celebrate the marriage. If they did not know that the event was a wedding reception, the design of the cake might or might not signal the nature of the event. For example, a rainbow cake might be understood to be a birthday cake, not a wedding cake. In

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[7] The United States maintains that if Masterpiece affixed a "God Blesses this Marriage" for a traditional wedding, Colorado would require Masterpiece to use those words for a same-sex wedding. United States Brief 24 n. 4. Of course, the message would contradict the religious views of Phillips in the same-sex context. There is no reason to believe that Colorado in the end would accept the United States' literal reading of the remedial order. The Colorado Court of Appeals has made clear that it is prepared to consider the constitutional issues if such a case were to arise. Craig v. Masterpiece Cakeshop, 370 P.3d at 288.

no way, however, would a wedding cake without a specific message communicate that God blessed same-sex weddings. An observer might reasonably infer from the presence of a wedding cake that a wedding will be celebrated, but not that the wedding was religious in nature or that the wedding is worthy of celebration, let alone that God believes such weddings are worthy of celebration. Wedding cakes do not celebrate weddings; people do. And the provision of a wedding cake does not constitute an endorsement of the marriage. Bakers, florists, and even ministers have offered their services to couples they may have thought were not right for each other. Amici understand the baker's religious position. But the baker is not uttering a message contrary to his views through his cake, and the cake he bakes is not speaking.

To be sure, a person might subjectively *feel* as though baking a cake, or for that matter, making a salad for a wedding reception implicates him in the morality of that wedding, and that feeling could be relevant to a religion claim. As noted above, Amici take no position on the free exercise issue in this case. But whatever might be true about religion, feeling a certain way about one's actions does not make these actions speech. Communication is an inter-subjective process that must be measured from an external perspective. And by any reasonable measure, a baker is not uttering a message offensive to him through his cake, and the cake he bakes is not speaking.

Alternatively, Phillips maintains that his cakes are works of art. He contends that his bakery is an "art gallery of cakes" (Petitioners' Brief, at 1) and portrays himself as an "artist using cake as his canvas and Masterpiece as his studio." *Id.* He cites writers who portray wedding cakes as works of art. *Id.* at 7. It is not clear from his brief whether Phillips maintains that all wedding cakes are works of art, or that his cakes and those of some other bakers are works

of art.[8] It would be the rare baker who did not decorate a wedding cake. Many would maintain that decoration involves artistic ability, so, in a loose sense, they are artists. But that does not mean they produce art within the meaning of the First Amendment.

It would be perilous for the courts to attempt to discern, cake by cake, which is worthy or the label "art." Judges are not art critics. They do not make *ad hoc* judgments whether some music is art and some is not. Instead, courts have made the categorical judgment that music is speech within the meaning of the First Amendment. Lower courts should not be sent down a road in which they determine what is or is not art among bakers, florists, or jewelers. Although some long-recognized art forms count as expression within the meaning of the First Amendment even absent an articulate message, unless boundless forms of human activity are to count as art, a line must be drawn narrowly. Music falls within the scope of the First Amendment; the products of jewelers, florists, chefs, and bakeries do not, even though they involve skill and aesthetic judgment. In the absence of a specific message affixed to a cake, baked products are not now and never have been expression within the meaning of the First Amendment.

II. The Holding and Principles of the FAIR Case Contradict Appellant's Claim and Extending the Compelled Speech Doctrine Beyond Its Current Framework to Permit Commercial Enterprises That Offer Speech Services to Routinely Violate Civil Rights Laws is Undesirable.

[8] It is not even clear whether Phillips regards the work of other bakers in Cakeshop as art.

A. Even if Petitioners' Speech Were Expression, Government Can Compel Speech in a Wide Variety of Circumstances, and the *FAIR* Case Shows That This Is One of Them.

The brief for the United States maintains that requiring an individual to engage in unwanted speech is forbidden by the First Amendment. U.S. Brief 7. To be sure, as *West Virginia v. Barnette,* 319 U.S. 624, 642 (1943)(compulsory flag salute), and *Hurley* (compulsory inclusion of marchers on the basis of their message) demonstrate, some forms of compelled speech are categorically forbidden. However, there is no "generalized right not to speak." *State v. Dawson,* 1999 NMCA 72 ¶ 20, 127 N.M. 472, 983 P.2d 421. Persons are often compelled to engage in unwanted speech even though much of that speech would be protected if government had tried to censor it. Despite grand dicta to the contrary, the right to say something does not invariably correspond with the right not to say something. Persons are compelled to be witnesses in judicial and legislative proceedings, *Barenblatt v. United States,* 360 U.S. 109 (1959)(denying a First Amendment objection to giving testimony even when the testimony would threaten freedom of association). They are routinely compelled to swear or affirm that their testimony is true. Persons can be forced to identify themselves to police officers in certain circumstances. *State v. Dawson, supra.* Although there are First Amendment limitations, mandatory political disclosures are common (see *Buckley v. Valeo,* 424 U.S. 424 U.S. 1, 60-74 (1976)) including requiring candidates to affirm that they approve of a message from their campaign, 2 U.S.C.A. § 441d. Physicians can be required to provide truthful information to patients about the risks of abortion. *Planned Parenthood of Southeastern Pennsylvania v, Casey,* 505 U.S. 833, 884 (1992); advertisers can be forced to disclose information about their products or services. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985).

Especially pertinent to this case, *Rumsfeld v. FAIR* approved a law that compelled law schools to engage in speech they did not want to produce. 547 U.S. at 51-62, 70. In *FAIR,* the Solomon Amendment required the Department of Defense to deny federal funding to institutions of higher education that did not afford military recruiters the same access and assistance that they afforded to other recruiters. *Id.* at 51. Although the Amendment enforced its mandate through a funding condition, the Court analyzed the case as if the government had directly ordered law schools to afford equal treatment to the military. *Id.* at 59-60. In order to provide equal assistance, law schools not only were forced to make rooms equally available (as Petitioners recognize), but also were forced to *advertise* the military interviews by sending e-mails to students and to post notices on bulletin boards. *Id.* at 61.

FAIR, an association of law schools and law faculties, brought suit contending, among other things, that the Amendment violated their rights under the compelled speech doctrine. *Id.* at 53. Chief Justice Roberts, writing for every member of the Court except Justice Alito who did not participate, flatly rejected FAIR's claim. Being forced to send e-mails to students and to post factual notices on bulletin boards on behalf of the military was characterized by the Court as "plainly incidental to the Solomon Amendment's regulation of conduct" (*id.* at 62) and a "far cry from the compelled speech in *Barnette* and *Wooley.* …"[9] There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse." *Id.*

Contrary to Petitioners' position, *FAIR* shows that entities can be compelled to convey a message they would prefer not to convey, so long as the government does not

[9] *Wooley v.* Maynard, 430 U.S. 705, 717 (1977)(requiring a motorist to be a forced courier of a government motto violates First Amendment).

force them to affirm or be a courier for a governmentally approved ideological message with which they disagree and so long as the government does not impose a content-based requirement that unduly burdens a message the speaker intends to communicate.

The content-neutral Solomon Amendment is directed at conduct, expressive or non-expressive, and happened to hit both. The Amendment as applied did not force the law schools to endorse military recruiting. It forced them to give non-discriminatory access and left them free to condemn discrimination by the military. At the same time, it forced the law schools to create unwanted factual and articulate speech that would have the effect of fostering through advertising the discriminatory recruitment policies of the military that it opposed. Yet, this unwanted speech was deemed to be outside the compelled speech doctrine altogether. The compelled speech in *FAIR* was understood to be a far cry from being forced to salute a government symbol against a person's will or being the forced courier of an ideological message selected by government. Rather the law schools were compelled to provide services to the military on a non-discriminatory basis whether those services took the form of conduct or speech.

The comparison of *FAIR* to this case is obvious. Indeed, if anything, there was a stronger argument that the Solomon Amendment was directed at speech because as applied it specifically required e-mail advertising and posting messages on their own premises. Even so, this Court rightly saw that the advertising obligation was simply an incidental application to expression of the broader mandate prohibiting discrimination against military recruiters. Here the content-neutral Colorado Anti-Discrimination Act, as applied, does not require the production of any traditionally protected expression.

The Colorado Act does not force the baker to endorse same-sex marriage ceremonies or to otherwise

express a message to which he is religiously opposed. As with *FAIR,* nothing in the Act prohibits the baker from making clear his personal opposition to same sex-marriage, so long as he does not post a message that a member of a protected class is unwelcome. As applied, the Act does have the effect of forcing him to bake cakes for same-sex wedding receptions, at least so long as the cakes do not contain messages or symbols contradicting his ideological views. But that is simply to restate that it is a public accommodations law like any other one – one that requires bakers to bake cakes, as it requires hoteliers to rent rooms and restaurants to serve meals on a non-discriminatory basis. In the end, the Colorado Anti-Discrimination Act compels commercial enterprises to provide professional services without discrimination, whether those services take the form of conduct or speech. Commercial enterprises like Masterpiece are entitled to no greater rights than law schools.

The United States claims, however, that unlike the law schools in FAIR, a reasonable observer would conclude that the baker endorsed or was neutral about the marriage. U.S. Brief 29. The Colorado Court of Appeals found no support in the record for an endorsement theory. 370 P.2d at 287. In fact, it is doubtful that any guest would pause to speculate about the attitudes a baker held regarding the wedding. It is not clear the guests would know who baked the cake. Nothing requires Phillips to identify himself at the reception. Unlike *FAIR,* Masterpiece would not be required to post public notices of the cake on its own premises. Anyone who happened to know who baked the cake and did so speculate would be hard pressed to draw an inference about the ideology of a commercial actor from the fact that he sold a wedding cake. In the end, the argument boils down to the claim that the baker has a right for the wedding guests to know his views, but this argument could be made by those who are forced to provide chairs to same-sex weddings. The

concern does not properly arise from any message contained in the cake.

B. The Approach Taken in FAIR Is Correct and Extending the Compelled Speech Doctrine to the Speech of the Appellant Would Be Undesirable.

Important to the analysis in *FAIR* was this Court's understanding that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62, *quoting Gibboney & Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949). In *FAIR,* the discriminatory conduct against the military lay in the refusal to advertise on its behalf when the schools were advertising for other employers. Given that the law schools were not required to affirm a belief they did not share and given that the Amendment was directed at conduct, expressive or not expressive, the fact that the conduct took the form of expression was beside the constitutional point.

In other words, in this context, there is nothing strongly privileged about conduct that happens to be artistic. If Jack Phillips were a hair dresser, a dress designer, a florist, a jeweler, an interior decorator, or a chef, he would have the same objection and he could enlist lengthy *Amicus* briefs detailing how the artistic choices of these commercial actors enhanced the attractiveness of the ceremony itself. These artistic expressions are not ordinarily conceived of as speech within the meaning of the First Amendment, but that is the point. In this context, it is hard to see why speech deserves the kind of exalted privileged treatment for which Petitioners are calling.

In addition, if Phillips were privileged to violate the public accommodations law in this case, the same First Amendment analysis would permit speech enterprises to

discriminate on the basis of race, sex, and religion in addition to sexual orientation. The United States resists this conclusion by arguing that preventing race discrimination is a compelling state interest. It is not yet clear that preventing private racial discrimination is a compelling state interest, but assuming that it is, both the United States and the Petitioners contend that the compelled speech claim in this case gives rise to strict scrutiny (which we dispute in section IV), and the Petitioners maintain that law as applied here cannot survive the narrow tailoring test. If preventing discrimination against a same-sex couple cannot meet the narrow tailoring test,[10] neither can preventing discrimination against an interracial couple.

C. A Disposition for Craig and Mullins Would Not Lead to Untenable Results in Other Cases.

Some of the briefs before the Court suggest that a disposition for Respondents would endanger the free speech rights of creative professionals. The briefs ask about poets, singers, musicians, photographers, and painters.

The Court could deal with such examples in a number of different ways. It could hold that poets, singers, musicians, photographers, and painters for hire must comply with anti-discrimination statutes. From this perspective, if you hold yourself out as an actor in the commercial marketplace, you do not have a constitutional right to discriminate. Alternatively, the Court could hold that such persons must offer their services on a non-discriminatory basis, but they cannot be compelled to produce messages to which they are ideologically opposed. Accordingly, a poet for hire could not be compelled to write

[10] In fact, their contention is based on a misunderstanding of how the strict scrutiny test works. See note 14 *infra.*

a poem glorifying same-sex marriage. Finally, even in the absence of being compelled to produce a message to which one is ideologically opposed, the Court could endorse a more fine-tuned analysis in which it took into account the extent to which the actor appeared to endorse the wedding or the extent to which the actor was compelled to physically and overtly participate in the wedding ceremony. On this theory, one might distinguish between the singer in the ritual of the wedding from the musicians who play music for the secular reception.

Whatever approach one might take with these examples involving traditionally recognized speech within the First Amendment, they are a far cry from this case in which traditionally recognized speech is not involved, the baker is not compelled to produce a message that contradicts his ideology, in a context where wedding cake sales are understood to be commercial transactions, not endorsements, and in which the bakers himself need not be present for or identified at either the wedding or the reception.

III. Enforcement of the Colorado Anti-Discrimination Act In This Case Does Not Fall Within the Compelled Speech Doctrine.

A. Because Government is not Requiring the Baker to Affirm, Carry, or Produce a Message that Contradicts His Ideology or Participate in a Prescribed Ritual Affirming a Government Mandated Orthodoxy, *Barnette, Wooley, and FAIR* do Not Support Petitioners' Position.

Petitioners maintain that *West Virginia v. Barnette,* 319 U.S. 624, 642 (1943), *Wooley v.* Maynard, 430 U.S. 705, 717 (1977), and *Rumsfeld v. FAIR*, 547 U.S. 47, 61-65 (2006) support their position. This reads more into *Barnette, Wooley*, and *FAIR* than is plausibly

present. *Barnette* struck down a requirement of the West Virginia State Board of Education that children salute and pledge allegiance to the flag as applied to Jehovah's Witnesses. The Witnesses objected to this requirement because saluting a flag or pledging allegiance to a flag would force them to declare a belief in a graven idol, a belief they did not hold. The heart of *Barnette* was the view that, "If there is any fixed star in our constitutional constellation, it is that no official high or petty can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. So *Barnette* spoke not merely against compelled "affirmation of a belief" (*id.*at 633) or compelling a schoolchild "to utter what is not in his mind." *Id.* at 634. *Barnette* set its face against the promotion of national unity through a mandatory ritual. *Id.* at 640-41. It insisted that a forced flag salute is ineffectual and smacks of the kind of totalitarian state the Bill of Rights was designed to avoid. *Id.*

Unlike *Barnette,* as we have previously discussed, the baker is not being forced to profess a belief he does not hold. Still less is he being forced to participate in (or attend) a ceremony that affirms a governmentally prescribed orthodoxy. Rather, the law as applied would require him to produce a wedding cake. He is not required to be present at the reception, much less to applaud the couple, and he is not required to identify the cake as his.

Wooley v. Maynard also does not support Petitioners' claim. Maynard had been prosecuted for covering up the motto "Live Free or Die" on his New Hampshire license plate. In finding for Maynard, the central concern of the *Wooley* Court was that Maynard was being forced to advertise a slogan that Maynard found "morally, ethically, religiously, and politically abhorrent." 430 U.S. at 713. The Court found the situation to be akin to *Barnette*: "As in *Barnette,* we are faced with a state measure which forces an individual, as part of his daily

life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715. The Court ruled that the "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable." *Id. Wooley* stands for the proposition that persons cannot be compelled to be couriers for messages they ideologically oppose.[11] It does not support a generalized right to be immunized from engaging in unwanted speech.

Petitioners suggest that the logic of *Wooley* should extend to creation of messages as well as dissemination of messages. Unlike *Wooley,* however, the baker is not being compelled to produce a message with which he disagrees, or to foster public adherence to Biblical views he opposes. He is simply being required to provide his commercial services on a non-discriminatory basis.

As is discussed in Section II,B, *supra,* far from supporting Appellant's contention that the compelled speech cases protect individuals or entities from having to engage in unwanted speech, *Rumsfeld v. FAIR* approved compelling law schools to engage in speech they did not want to produce as an incidental effect of regulating conduct.

B. Because Colorado is Not Engaged in Content Discrimination, Let Alone Content Discrimination That Forces the Baker to Include Unwanted Material in any Message He Is Engaged in Communicating, *Hurley,*

[11] *Pacific Gas and Electric Co. v. Public Utilities Commission,* 475 U.S. 1 (1986) stands for the same proposition, but the First Amendment violation there was compounded with additional features. See Section III, B *infra.*

Tornillo, and Pacific Gas, Do Not Support Masterpiece's Position.

Petitioners maintain that the statute as applied to Appellant violates the compelled speech doctrine because it runs afoul of *Hurley v. Irish-American, Gay, Lesbian, and Bisexual Group of Boston,* 515 U.S. 557 (1995), *Miami Herald Publishing Co v. Tornillo.,* 418 U.S. 241 (1974), and *Pacific Gas and Electric Co. v. Public Utilities Commission,* 475 U.S. 1 (1986). This argument fails because those cases involved content discrimination, but this case does not.

The Petitioners and the United States place particular emphasis on *Hurley*. There, Massachusetts declared that a parade was a public accommodation. The Court observed that this was a "peculiar" use of the concept of public accommodations (515 U.S. at 572) because it thereby made the parade "sponsors' speech itself a public accommodation." *Id.* at 573. So understood, if the sponsor's speech is a public accommodation, any application of the statute would likely alter the message of the parade. *Id.* at 572-73.

The parade organizers had excluded a clearly identified Gay, Lesbian, and Bi-Sexual group from marching not because of its sexual orientation, but because of its message. *Hurley* condemned Massachusetts' application of its public accommodation law as a form of content discrimination, concluding that government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one . . . ." 515 U.S. at 579.

The United States claims that *Hurley* applies strict scrutiny because it involves the application of a "public accommodations law that fundamentally alters expression and interferes with an expressive event, . . . notwithstanding the law's content-neutrality." U.S. Brief at 7-8.

The first problem with this characterization is that it improperly describes *Hurley* as involving content-neutrality when, in fact, Massachusetts had given an authoritative content-discriminatory interpretation of its statute in the context of a parade. So, as this Court ruled, the alteration of expression referred to by the United States (U.S. Brief at 7-8, 14) occurred because Massachusetts had the purpose of promoting a message when it interfered with the organizer's attempted exclusion. In contrast, Colorado's purpose here is to ensure commercial services are offered on a non-discriminatory basis. Its purpose is not to disrupt or corrupt a communicative message. Indeed, this case does not involve the alteration of a message made by Masterpiece. In that respect, the relevant line of cases is Barnette, *Wooley,* and *FAIR,* not the cases we consider in this sub-section.

Second, the emphasis of the United States on interference with an expressive event is off the mark. A parade is an inherently communicative event whose message may be disrupted by the inclusion of unwanted groups. On the other hand, a forced inclusion of a cake at a wedding reception when the cake is desired by the married couple does not disrupt any message at the reception. Moreover, the emphasis on a communicative event is puzzling. Given the incidental impact of the anti-discrimination statute, an impact on a communicative event would not trigger strict scrutiny. But it is worth pointing out that a wedding reception is quite unlike a parade. A wedding reception is a party, often secular, and parties are not easily classified as communicative events. To be sure, the cake is present in the wedding reception (though not the wedding), and most couples feed each other cake at the reception. But that no more transforms the reception into a communicative event than does the fact that league bowlers sometimes buy beer for each other transforms a night of bowling into a communicative event. Indeed, it is less than clear how communicative

events are to be defined and whether they should occupy a special category in compelled speech law. Presumably, regulations of schools, attorneys, and psychiatrists cover communicative events, but it is not clear that unique protections against compelled speech should be triggered in these contexts.

Unlike *Hurley,* the Colorado Anti-Discrimination Act is not applied to an inherently expressive activity. Even assuming a custom cake is speech, Colorado does not claim that a custom cake is a place of public accommodation; to the contrary, the public accommodation is a commercial bakery. Impact on any speech does not flow from government support for an approved message. Any impact on speech is entirely incidental. [12]

Tornillo invalidated a content-based Florida statute that compelled newspapers to afford any political candidates criticized in its pages to provide a free right of reply in as conspicuous a space and in the same kind of type as the charges that triggered the reply. The Court concluded that the statute imposed a penalty upon a newspaper for criticizing a candidate (418 U.S. at 256-57), and that the newspaper had a right to be free from governmental dictation of the material that belonged in the press. *Id.* at 258.

Unlike *Tornillo*, the Colorado Anti-Discrimination Act does not engage in content discrimination, let alone impose a penalty.

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[12] *Hurley* also expressed concern that reasonable observers might believe the parade organizers had deemed the message forcibly included to be worthy of support. By contrast, as previously discussed, it would be a vanishingly rare guest who would know who baked the cake and who would pause to speculate about the baker's views. A reasonable observer would not infer that a commercial baker endorsed a wedding couple merely because he or she had sold them a cake.

In *Pacific Gas,* the Public Utilities Commission ordered the company to place a newsletter of an antagonistic third party in its billing envelope. 475 U.S. at 4. In other words, in disregard of *Wooley,* the Commission tried to turn PG&E into a forced courier of a government-selected speaker with which the utility disagreed. In disregard of *Tornillo,* the Commission's content-based order had the effect of impermissibly burdening PG&E's planned expression. Objecting to, among other things, forcing the utility to carry speech with which it disagreed (*id.* at 7-8), to content-based imposition of a government selected speaker into PG&E's discourse (*id.* at 12, 20-21), and to the burden the order would place upon the speaker (*id.* at 13, 20-21), the plurality concluded that the Commission's order was unconstitutional. *Id.* at 20-21. More narrowly, concurring Justice Marshall objected that the government had redefined a property right in the utility's billing envelope "to burden the speech of one party in order to enhance the speech of another." *Id.* at 25.

Unlike *Pacific Gas*, the Colorado Anti-Discrimination Act is content-neutral is not directed at speech, and does not force the Petitioners to be the courier of a government selected message.[13]

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[13] Two other cases offer no assistance to the Petitioners because they adhere to the principles developed in this sub-section: McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) and *Riley v. National Federation of the Blind,* 487 U.S. 781 (1988). Both involved demands by the state for the inclusion of particular factual statements in messages, but the Court held in both cases among other things that the inclusion would unduly burden the speakers' messages. In *McIntyre,* the Court ruled that the prohibition on anonymous leafleting in candidate elections burdened speech at the core of the First Amendment (514 U.S. at 347) and would undermine an important shield from the tyranny of the majority. *Id.* at 347. In *Riley,* disclosure requirements placed on solicitations for charities were found to be imprecise, unduly burdensome, and not narrowly tailored. 487 U.S. at 801. Unlike this case, both cases struck down provisions designed to interfere with a

IV. If a First Amendment Standard of Review Applies, the Appropriate Standard of Review is Found in *O'Brien*, not in Strict Scrutiny, and Appellant's Conduct is Not Protected Under *O'Brien.*

Amici have argued that in the absence of a specific message, wedding cakes are not expressive conduct within the meaning of the First Amendment. Multiple factors support this conclusion. Such cakes are distant from the core of the First Amendment (*Snyder v. Phelps,* 131 S.Ct. 1207 (2011) (speech on matters of public concern is at the heart of the First Amendment); *New York Times v. Sullivan,* 376 U.S. 254 (1964)(speech on public issues is at the core of the First Amendment). They are prepared for transitory use and are not a part of public discourse (*Snyder v. Phelps,* 131 U.S. at 1217 (fact that speech is on public land near public street is a positive factor supporting a First Amendment claim); *Dun and Bradstreet Inc., v. Greenmoss Builders, Inc.,* 472 U.S. 749 (1985)(plurality opinion of Powell, J.,)(limited distribution of speech is relevant to conclusion that it is not worthy of the same protection as more publicly distributed speech). And they are the product of a commercial enterprise that advertises its services to the public at large, which can usefully be compared with the services of others (such as jewelers, florists, and interior decorators) whose work involves some artistry and creativity but is not within the scope of the speech clause of the First Amendment.

Even if this Court were to determine that wedding cakes were expressive conduct within the meaning of the First Amendment, application of the appropriate

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speaker's message; and neither *Riley* nor *McIntyre* involved the application of a content-neutral statute.

standard of review would support the judgment of the lower court.

It would, of course, require a substantial leap from the proposition that wedding cakes are expression within the meaning of the First Amendment to the conclusion that the application of Colorado's anti-discrimination Act should trigger the highest level of scrutiny. It is well established First Amendment law that intermediate scrutiny is the appropriate standard of review for a content-neutral restriction with an incidental impact on speech. *See, e.g., Turner Broadcasting v. FCC,* 520 U.S. 80, 89 (1997)(*Turner II*); *Turner Broadcasting v. FCC,* 512 U.S. 622, 662-63 (1994) (*Turner I*); *Ward v. Rock Against Racism,* 491 U.S. 781 (1989); *United States v. O'Brien,* 391 U.S. 367 (1968); *Emergency Coalition to Defend Educational Travel v. U.S. Department of the Treasury,* 545 F.3d 4, 12 (D.C. Cir. 2008).

The Colorado Anti-Discrimination Act is, of course content-neutral and not directed at speech. It applies to those who sell custom perfume and jewelry, to those who rent ballrooms and tuxedos, to those who dress hair and arrange flowers. It mandates who shall be served and that they should be treated in a non-discriminatory way. It does not tell anyone what they must say. It does not compel Petitioners to bake cakes because the government agrees or disagrees with a particular message. It simply compels non-discrimination without regard to message.

Petitioners argue that strict scrutiny is appropriate and rely on *Pacific Gas and Electric Co. v. Public Utilities Commission,* 475 U.S. 1 (1986) as authority. As previously discussed, in *Pacific Gas,* the Public Utilities Commission ordered a utility to place a newsletter of a third party in its billing envelope. The Commission granted access to the entity authoring the newsletter because it had views different from those expressed by the utility company in its own political newsletter that was distributed in its billing envelope. There was nothing content-neutral about

the Commission's order. It was manifestly content-based. In criticizing the order the Court noted that "it discriminates on the basis of the viewpoints of the selected speakers" and that access to the billing envelopes was limited to those who disagreed with the views of *Pacific Gas.* 475 U.S. at 12-13.

Petitioners also cite *Hurley* and *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000). It is true that *Hurley* did not apply *O'Brien,* but, as previously discussed, the Court there found that the law as applied was content-based because the Massachusetts courts determined that a parade – an inherently expressive activity - was a public accommodation. 515 U.S. at 573. *Hurley* condemned this form of content discrimination, concluding that government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one . . . ." 515 U.S. at 579.

In *Dale,* this Court also did not apply *O'Brien*, but that is because, as applied to the Boy Scouts, the scope of the New Jersey anti-discrimination statute went beyond traditional commercial entities to include a membership organization. 530 U.S. at 657. This extension of public accommodations law "directly and immediately" affected associational rights. *Id.* at 659. Accordingly, *O'Brien* was ruled to be inapplicable. Indeed, the *Dale* Court cited *Hurley* for the view that forced inclusion of marchers in the parade was akin to violating freedom of association. *Id.* at 580, *citing* 515 U.S. at 580-81. Neither *Hurley* nor *Dale* support Petitioners' position.[14]

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[14] Petitioners' understanding of how the strict scrutiny standard works is defective. Citing *Hurley* (Petitioners' Brief 49), Petitioners claim that the purpose for enacting the law is not the relevant purpose, but the particular interest in applying the law under the circumstances of the case. They would require Colorado to prove that it had a compelling interest in forcing "cake artists" to create custom wedding cakes for same sex weddings. But their reading of *Hurley* ignores its context. *Hurley* recognized the general anti-discrimination purpose of the law,

Nor is *Holder v. Humanitarian Law Project,* 561 U.S. 1 (2010) of any assistance to Petitioners. There the defendant's speech aided terrorist organizations. *Humanitarian Law Project* applied strict scrutiny because the statute as applied regulated "speech on the basis of its content." *Id.* at 27. The government's interest in combatting terrorist organizations was undercut by the respondent's speech in that case precisely because of the content of its speech. Here Colorado's interest is unrelated to the content of the speech; the state objects to status discrimination, not to interests flowing from the speech of the baker. And, in any event, *Humanitarian Law Project* raised no issue of compelled speech; it concerned punishing organizations based on the content of their speech.

In the compelled speech context, the doctrine is more complicated. The FAIR case fairly captures the essence of the doctrine. *FAIR* suggests that if the Solomon Amendment had violated either branch of the compelled speech doctrine (as in *Wooley* or Tornillo) by singling out speech for special treatment, a *per se* violation would exist or an exacting standard of review would be in order. In the absence of a violation of either prong of the compelled speech doctrine, however, the Court applied *O'Brien.* There is no warrant for breaking new ground here. *O'Brien* clearly applies.

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but found that when a public accommodation law is stretched to include providing access in a parade to marchers promoting a gay and lesbian theme (the parade organizers did not exclude gays or lesbians *per se*), the "apparent object is simply to require speakers to modify the content of their expression . . . ." 515 U.S. at 578. *Hurley* provides no warrant for the general proposition that the state interest in preventing discrimination is not the appropriate interest to consider in evaluating a First Amendment claim. Indeed, a paragraph later, Appellant cites *Boy Scouts of America v. Dale* where even in applying strict scrutiny, the Court balanced the interest in preventing discrimination against the freedom of association. 530 U.S. at 658-59.

Even though O'Brien intended to express an idea in burning a draft card, because the government interest was unrelated to expression, *O'Brien* simply required that the government action in question further a substantial interest by means no greater than is essential to the furtherance of that interest. 391 U.S. at 377. The Court has stated that the "no greater than is essential language" does not import the "least restrictive alternative test." See *Ward, supra,* 491 U.S. at 798 (rejecting the least restrictive alternative test for time, place, and manner cases and stating that the time, place, and manner test is little different from the *O'Brien* test); *Clark v. Community for Creative Non-Violence,* 468 U.S. 298, 299 (1984)(rejecting the least restrictive alternative test for *O'Brien* cases and time, place, and manner cases). The *O'Brien* test is clearly satisfied here. The interests in anti-discrimination and equal citizenship are substantial. Applying the statute to all commercial enterprises including the Appellant's enterprise furthers that interest and the means chosen – preventing the discrimination – is perfectly tailored to the government objectives.

Conclusion

The foregoing analysis explains why the Petitioners' claims should fail under a straightforward analysis of First Amendment law. But there is a further problem with Petitioners' arguments. If the compelled speech argument were to prevail here, the door would be open to many other claimants including florists, jewelers, and hairdressers. Equally serious, the holding could not be confined to those with religious claims, but would be available for those with non-religious ideologies, including hate-filled ideologies. In addition, the holding would give rise to free speech claimants who find objectionable messages involved in conduct that would be otherwise be required under statutes prohibiting anti-discrimination

on the basis of religion, sex, disability, and veteran status, not just by objectors to anti-discrimination provisions involving sexual orientation.

Fortunately, the Colorado statute as applied to Masterpiece Cakeshop does not violate free speech principles. Petitioners' claims to the contrary are based on a faulty factual analysis, a deficient understanding of the nature of speech under the First Amendment, and a misreading of the Court's compelled speech precedents.

Accordingly, the free speech judgment of the Colorado Court of Appeals should be affirmed.

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