No. 16-111

In the Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., *et al.*,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeals of Colorado

BRIEF OF FREEDOM X AND RABBI DOVID BRESSMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether applying Colorado's public accommodations law to compel Jack Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

Amicus Freedom X is registered with the IRS as a 501(c)(3) charitable non-profit public interest law firm and advocacy center dedicated to protecting the freedom of religious, political and intellectual expression. Freedom X and its donors and supporters are vitally interested in the outcome of this case inasmuch as its mission is dedicated to the preservation of the Judeo-Christian virtues upon which this nation was founded. Those virtues include respect for the institution and sacrament of marriage and the Judeo-Christian canon observed from time immemorial that marriage is a moral covenant ordained by our creator God intended by God to be limited to one man and one woman.[2] This canon, though decimated by

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[1] Counsel for all parties received at least 10 days notice of the intent to file this brief. Counsel for all parties have consented, through blanket and emailed consent, to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

[2] "The Lord God said, 'It is not good for the man to be alone. I will make a helper suitable for him….'

"But for Adam no suitable helper was found. So the Lord God caused the man to fall into a deep sleep; and while he was sleeping, he took one of the man's ribs and then closed up the place with flesh. Then the Lord God made a woman from the rib he had taken out of the man, and he brought her to the man. The man said,

"'This is now bone of my bones
and flesh of my flesh;
she shall be called 'woman,'
for she was taken out of man.'

moral relativist dogma in the modern era, nevertheless remains a belief protected by the Free Speech and Free Exercise Clauses of the First Amendment to the U.S. Constitution and is non-negotiable to many Americans of sincere religious faith. The sacrament of marriage symbolizes a most basic and timeless form of religious expression that binds a couple to God; and same-sex marriage is blasphemy to these Americans.

It is the mission of Freedom X to preserve and protect the precious and fragile rights enshrined within the greatest charter of freedom known to mankind. Freedom X has an interest in limiting the services it provides to clients seeking to vindicate their rights as political conservatives, Christians, Jews and others who observe traditional moral principles. Freedom X therefore has an interest in how this Court construes the "goods" and "services" described in antidiscrimination statutes like Colorado's section 24-34-601(2)(1), which bars discrimination against customers based on their "creed," and under what circumstances discrimination may enjoy constitutional protection.

Amicus Rabbi Dovid Bressman is recognized within the Jewish community as a *sofer stam* (religious scribe). Rabbi Bressman prepares documents for use in the exercise of Jewish religious practice, including *ketubot* (wedding contracts). Rabbi Bressman also examines and repairs *sifre torah* (torah scrolls) and arranges for their sale. The religious validity of these

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"That is why a man leaves his father and mother and is united to his wife, and they become one flesh." Genesis 2:18-24 (NIV)

goods themselves, and their eventual transfer, may well depend on the religious status of the customer. Rabbi Bressman also practices mediation in family law. He has an interest in limiting his mediation to couples sharing the same religious affiliation. Rabbi Bressman therefore has an interest in how this Court construes the "goods" and "services" described in antidiscrimination statutes like Colorado's section 24-34-601(2)(1), which bars discrimination against customers based on their "creed," and under what circumstances discrimination may enjoy constitutional protection.

SUMMARY OF THE ARGUMENT

Jack Phillips, owner of Masterpiece Cakeshop, Inc., declined a request to design and decorate a cake for the purpose of celebrating a same-sex couple's wedding. The Colorado Court of Appeal perceived a violation of a state law barring the denial of "goods, services, facilities, privileges, advantages, or accommodations." *Craig v. Masterpiece Cakeshop, Inc*., 370 P.3d 272, 280 (Colo. Ct. App. 2015). The petitioners could have obtained the goods (e.g., flour, sugar, etc.) and non-expressive service (e.g., baking such ingredients until they are edible) they desired regardless of their homosexual status. They were not denied the right to have a cake designed by Phillips but the right to have a cake celebrating their homosexuality designed by Phillips. Colorado could not comply with the First Amendment's guarantee of freedom of speech and religious liberty by compelling Phillips to celebrate homosexuality because that conflicts with Phillips' sincerely held religious beliefs.

The Colorado Court of Appeal erroneously concluded the act of decorating a cake to "celebrate" a same-sex marriage would neither convey an expressive message nor be perceived as expressing one. But the expression of an idea regarding same-sex marriage, whether benign or derogatory, enjoys First Amendment protection. *See Matal v. Tam*, 137 S. Ct. 1744, 1766 (Kennedy J. concurring). As Masterpiece was willing to sell or even a bake a cake, just not decorate for a celebratory purpose, any discrimination concerned the nature of the product, not the identity of the customer.

Reasonable observers would have perceived a celebratory message in the decoration Respondents sought. Although the Court of Appeal concluded observers would perceive only that Masterpiece wished to conduct business in accordance with the law, the unwanted expression in *Wooley v. Maynard*, 430 U.S. 705 (1977), violated the First Amendment; it was not reasonable to conclude there that the driver expressed a message only out of a desire to comply with New Hampshire law. Cases like *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006), where the speaker merely permitted others to express a message, might be apposite if Masterpiece ran a kitchen where customers could enter and decorate their own cake, but not here, where Masterpiece needed to express the message itself.

Finally, a decision applying antidiscrimination principles in the context of weddings will inexorably restrict and outlaw religious practices that concern the religious status of the customer. For example, observant Jews who prepare religious documents such as wedding contracts or Torah scrolls may be forced to

sell them in violation of Jewish law. This Court should not impose antidiscrimination principles on internal religious practices.

ARGUMENT

Complainants Craig and Mullins visited the Masterpiece bakery and asked its owner Phillips to "design and create a cake to celebrate their same-sex marriage." Phillips declined, because he does not create cakes for same-sex weddings, but offered to sell them any other baked goods. The couple left the bakery without further discussion of the cake. Craig's mother called the next day, and Phillips repeated to her the same refusal that he provided to Craig and Mullins. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276-77 (Colo. Ct. App. 2015).

I. Cake decoration is expressive conduct.

This Court has long protected expressive conduct as enjoying First Amendment protection. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). This Court there held that Massachusetts could not, consistent with the First Amendment, force St. Patrick's Day parade organizers to permit the expression of a message with which they disagreed. A fortiori, the organizers had no constitutional duty to express it themselves.

A specially designed wedding cake, like a parade, is expressive. People who merely wish to reach a destination may "march" without expressing a message (*Hurley*, 515 U.S. at 568), just as Craig and Mullins could have satiated their hunger by buying baked flour without a personalized design — at a lower cost. They instead requested a personalized cake for an expressive

purpose: "to celebrate their same-sex wedding." *Craig*, 370 P.2d at 376. It was this expressive "celebrat[ion]" that Phillips declined to join. And Colorado could not constitutionally compel him to do so.

The Colorado Court of Appeals held otherwise because it failed to appreciate this expressive element, concluding: (1) Masterpiece's designing and selling a wedding cake to same-sex and opposite-sex couples equally would not convey a celebratory message; and (2) those seeing it would not perceive such a celebratory message. *Craig*, 370 P.3d at 286. Neither conclusion was correct.

A. Decorating a cake expresses a celebratory message.

The First Amendment protects not just speech per se but also the nonverbal expression of ideas. *Hurley*, 515 U.S. at 569, citing inter alia, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) [wearing an armband]; *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) [saluting or not saluting flag]. Creating a cake to "celebrate" a wedding ceremony for two particular people expresses an even more "succinctly articulable" message than that expressed by the *Hurley* marchers.

Clothing enjoys constitutional protection where it conveys a message. A "nondescript school uniform" does not convey a particularized message. *Craig*, 370 P.2d at 285-86, citing *Jacobs v. Clark County Schl. Dist.*, 526 F.3d 419 (9th Cir. 2008). But a uniform's two-word message, "Tomorrow's Leaders," invests the clothing with an expressive message, and generates First Amendment protection. *Frudden v. Pilling*, 742

F.3d 1199, 1203-05 (9th Cir. 2014). Whether expressed through words, such as "Congratulations Charlie and David on your wedding!" or symbols, such as two groom figurines, a specific cake designed to "celebrate" an event conveys a message of enthusiastic support.

In the clothing context, the First Amendment bars the state from compelling a shirtmaker to create a message with which he disagrees. *Lexington Fayette Urban County Human Rights Commission v. Hands on Originals, Inc.,* (Ky. Ct. App. 2017) 2017 WL 2211381, cited in *Craig*, 370 P.3d at 282 n.8. Hands On Originals, like Masterpiece, was willing to sell products (including nondescript T-shirts) to anyone, regardless of the customer's *status* (including sexual preference), about which Hands On did not inquire. *Hands on Originals*, 2017 WL 2211381 at *6. But Hands On was unwilling to print T-shirts designed to promote the "Lexington Pride Festival," an event designed to "celebrate" and exhibit pride in diverse sexual identities. *Id*. at *3. The Kentucky Court of Appeals found Hands On legitimately declined to join the celebration and print the requested *message* on shirts. *Id*. at *8.

This status/message distinction extends to cake decoration. A baker could thus decline to prepare cakes with an unfavorable "message" regarding homosexuality. *Craig*, 370 P.3d at 282 n.8, citing *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 25, 2015), available at http://perma.cc/5K6D-VV8U; *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015), available at http://perma.cc/35BW–9C2N; *Jack v. Gateaux, Ltd.*,

Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015), available at http://perma.cc/JN4U-NE6V [the "*Jack*" cases]. A baker could likewise decline to decorate a cake with a swastika or ISIS logo.

No meaningful principle distinguishes this case from *Hands on Original* or the *Jack* cases. To be sure, the *Jack* message was derogatory toward homosexual relationships, whereas the requested *Craig* message was celebratory, but the First Amendment protects both. *Matal v. Tam*, 137 S. Ct. 1744, 1766 (Kennedy J. concurring) [state may not authorize "positive or benign" speech while suppressing "derogatory" speech]. That is the "essence of viewpoint discrimination." *Id*. Therefore, whether or not the message in the *Jack* cases was "offensive," as the Colorado Court of Appeals described it, was constitutionally irrelevant. *Craig*, 370 P.3d at 282 n.8. Many totalitarian regimes permit citizens to praise the status quo without limitation; a free one permits criticism as well.

Masterpiece's refusal concerned the requested *message*, not the potential customers' *status*. Indeed, when Craig's mother called the next morning, she received the same answer as Craig, that Masterpiece would not prepare a cake to celebrate a same-sex wedding. Her status made no difference to Masterpiece, and, as in *Hands On Originals*, the shop did not inquire about it. The refusal concerned the message, which is why the bakery offered the couple any product lacking a celebratory message.

The instant discrimination thus concerned the *nature of the product* and not the *identity of the customer*. Masterpiece was willing to serve any customer, but not to express any message. The

Colorado court insisted Masterpiece needed to treat same-sex couples "in the same manner" as it treated opposite-sex couples. *Craig*, 370 P.3d at 286. But Craig and Mullins did not want a cake designed for an opposite-sex couple, such as one with a bride figurine and a groom figurine. They emphasized the event was a same-sex wedding from the outset. Although there was not an extended discussion regarding the couple's specific request, there was enough to communicate to Phillips the nature of the requested product and its message.

Both *Craig* and *Hands on Originals* emphasized that discrimination could rest on conduct closely intertwined with status. For example, it would be discriminatory to refuse to serve a Jewish man, not because he is Jewish, but because he wears a *kipa* (yarmulke). *Hands on Originals*, at *6. But while that principle bars discrimination based on the identity of the customer (whether due to status or status-related conduct), it does not compel nondiscrimination regarding the *products served*. A store may sell yarmulkes without selling artifacts meaningful to adherents of other religions. A Muslim-owned restaurant may serve food that is halal but not kosher. A Christian-owned bookstore may sell copies of the Bible without also selling copies of the Koran. Providing products geared to one community but not others is not discrimination based on the customer's status. Masterpiece's decorating cakes with opposite-sex wedding messages (e.g., a bride and groom figurine) but not same-sex wedding messages (e.g., two groom or bride figurines) likewise concerns the product, not the customer served.

Conflating conduct with status reduces freedom of conduct --- for all parties involved. Some European nations now equate criticism of Islamic practices or beliefs with unlawful religious-based discrimination. See e.g. Jacob Mchangama, Something's Rotten: How Denmark is Criminalizing Blasphemy Through Hate Speech Law, Feb. 29, 2016, Columbia University, Global Freedom of Expression, available at https://globalfreedomofexpression.columbia.edu/updates/2016/02/somethings-rotten-denmark-criminalizing-blasphemy-hate-speech-law/. The First Amendment protects individual choice in expression more broadly, regarding both speech and conduct, so Americans are more free than Europeans to criticize Islam — and practice it. Compare James McAuley, *E.U. court says employers can ban Muslim headscarf in workplace*, Wash. Post, Mar. 14, 2017 [employers have no right to wear headscarf in workplace] describing with *EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015) [refusal to hire due to headscarf may establish civil rights violation].

The state may not compel the expressive conduct of cake decoration.

B. Reasonable observers would perceive a celebratory message.

It was also likely that a reasonable observer would connect Masterpiece with the message it expressed on the cake. *Craig* cited inapposite cases where the law required a party to permit others to speak for themselves. *Craig*, 370 P.3d at 286, citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006): "students can appreciate the difference between speech a school sponsors and speech

the school permits because legally required to do so, pursuant to an equal access policy." *Rumsfeld* required law schools to allow military recruiters to interview on campus along with civilian recruiters; it did not require the schools themselves to express any message "celebrating" military service. *Id*. at 65.

The other cases cited in *Craig* relied on the same reasoning. A state's compelling a shopping mall to permit *other parties* to distribute pamphlets or collect signatures would not likely lead observers to conclude the shopping mall owner endorsed those (possibly contradictory) messages. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). And there was no "plausible fear" that the message *expressed by students* in a campus publication, permitted in the context of a viewpoint-neutral program, would be attributed to the university. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995). By contrast, the Colorado law forces Phillips and his employees to themselves express a message, which, unlike the *PruneYard* mall or the *Rosenberger* program, is not part of a larger forum for exchanging views.

This case would be closer to these precedents if the bakery allowed customers to enter and bake their own cakes, as some T-shirts shops allow customers to design and make their own shirts, or photocopy stores allow customers to enter and make their own photocopies. The argument that the speech would be attributable to the customer rather than the business would have greater force under such circumstances, especially if the business had no involvement or awareness of the message. *Craig*, 370 P.3d at 286. But Craig and Mullins did not wish to bake the cake

themselves; they asked Phillips to express the message for them.

The celebratory message could be attributed to Masterpiece even though it was compelled by law. *Craig* opined a reasonable observer would interpret Masterpiece's decorating the cake as merely reflecting "its desire to conduct business in accordance with Colorado's public accommodations law," and not its own view of same-sex marriage. *Craig*, 370 P.3d at 287. But everyone knew New Hampshire law required drivers to display "Live Free or Die" on their license plates, and no one thought George Maynard (or any other driver) developed the motto personally. *Wooley v. Maynard*, 430 U.S. 705, 707 (1977). Nonetheless, compelling Maynard's unwilling acquiescence was enough to infringe his First Amendment right; this Court did not uphold the forced display of an unwanted message and find the display merely reflected his desire to drive in accordance with New Hampshire's license plate law.

Masterpiece's supposed ability to express its view of same-sex marriage and disassociate itself from the cake's message "is not significant." See *Frudden v. Pilling*, 742 F.3d 1199, 1205; *Craig*, 370 P.3d at 288. Mr. Maynard also could express his disagreement with the forced message; he could have done so even in the most visible location — right next to the license plate itself. (Craig and Mullins presumably would not let Masterpiece express a contrary message on the cake itself, right next to the celebratory one.) But no opportunity to disclaim the unwanted message, however effective, eliminates the initial infringement. *Frudden*, 742 F.3d at 1205-06.

Nor does this Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) support compelling Masterpiece's speech. Even if that case reflects a governmental policy that a wedding involving two grooms deserves the same respect as one with a bride and a groom, the state may not conscript individuals into expressing the state's official position. "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." *Barnette*, 319 U.S. 624, 642. That increasing numbers of people support equal treatment for same-sex marriage is all the more reason to protect the First Amendment rights of those who wish to voice a different view. *Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000).

The *Craig* court surmised observers would have no way of knowing Masterpiece's reasons for preparing a wedding cake for an opposite-sex couple, or not preparing one for a same-sex couple. *Craig*, 370 P.3d at 287. But although observers might not know why Masterpiece declined to bake a cake for a same-sex wedding, they would know from Masterpiece's accepting the order that, unlike Maynard, Masterpiece was comfortable with the message it had been asked to express.

Cake decoration may or may not contain expressive content. If a consumer demands the cake contain expressive content, whether benign or derogatory, such messages enjoy constitutional protection.

II. Extending antidiscrimination law to this case will undermine religious liberty.

Some might underestimate the significance of the First Amendment interest, as it concerns "just a cake." But *Wooley v. Maynard*, 435 U.S. 705, concerned just a license plate, and *Pacific Gas and Elec. Co. v. Public Utilities Comm. of California*, 475 U.S. 1 (1986), concerned just a utility bill. The compelled expression of a message against one's conscience imposes a consequence on the speaker, regardless of the medium.

This case raises particular concerns, because the wholesale application of antidiscrimination law into the context of weddings and other religious activity extends these laws well beyond their initial function, and will inexorably serve to constrict religious freedom. Civil rights laws developed to ensure citizens would have equal access to necessities like lodging, transportation, and food, not other citizens' celebratory messages. And these provisions had specific purposes; for example, many states have barred discrimination based on marital status. This ensures unmarried/divorced women would have access to credit, and not be trapped in marriages for economic reasons. See *Smith v. Fair Housing and Employment Comm.*, 913 P.2d 909, 961 (Cal. 1996), (Baxter, J. dissenting). But extending the bar on marital status discrimination to a wedding context makes no sense. It would force a baker to prepare a cake celebrating the wedding of an already-married person taking a second spouse.

Such an extension will necessarily entangle the state in intrareligous doctrinal disputes. Some Catholics, for example, may debate the validity of an annulment to enable remarriage, and some Jews may

oppose a man's remarriage before he grants a religious divorce to his wife. An even deeper debate concerns "discrimination" based on religious affiliation. For example, although most non-Orthodox rabbis perform same-sex weddings, many decline to perform weddings between members of two different religions. See Mark Oppenheimer, Same-sex Interfaith Face Roadblock to Marriage in Judaism, New York Times, Jan. 30, 2015. Some rabbis contend it is consistent with Jewish tradition to accept non-Jewish spouses regardless of whether they convert, while others insist a prior conversion is a precondition for a Jewish religious ceremony, and for fostering a harmonious environment for childrearing. Applying antidiscrimination statutes in these cases would force the state to adjudicate matters beyond its competence.

> [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Thomas v. Review Bd. of Indiana Employment Sec. Division, 450 U.S. 707, 715-16 (1981).

Religious or other symbols on a cake undeniably express a message. Some might see placing a cross and a star of David side-by-side on a cake as expressing a desirable ecumenical inclusivity, while others might perceive it as unwisely derogating both religious traditions. But extending antidiscrimination law to

religious goods and services could also compel conduct more intimately associated with religious practice than cake decoration.

Jewish religious tradition involves a *ketubah*, or wedding contract, a document which some Christians have also adopted to add meaning to their own ceremony. Samuel G. Freedman, *Christians Embrace a Jewish Wedding Tradition*, N.Y. Times, Feb. 11, 2011. Many Jewish calligraphers agree to write one for a Christian couple while altering the wording of the traditional document, but *Craig* concluded any alteration to the offered product amounts to unlawful discrimination. *Craig*, 370 P.3d at 282, citing *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013). And religiously observant calligraphers willing to provide altered contracts for Christian couples would decline to write them for an interfaith ceremony. Similarly, many scribes follow the Jewish law barring the sale of a Torah scroll to those who do not practice the Jewish religion.

Religious instruments like *ketubot* and Torah scrolls are not goods or services like lodging or transportation necessary for full participation in public life. Applying antidiscrimination law to such religious goods and services will essentially outlaw myriad religious customs and practices, which depend on distinctions based on the "creed" of the customer.

This concern also extends beyond the visual realm to aural expression. Some musicians might agree to sing liturgical music for weddings that don't conform to religious law, some might decline to sing, and others might sing only nonliturgical music. These choices

belong with the singer, not the government. *Thomas*, 450 U.S. at 715-16.

If the state can compel musicians to sing liturgical music during a wedding ceremony or calligraphers to write religious documents against their wishes, nothing would prevent the state from compelling a clergymember to recite that same liturgy, or read that same document, during a religious wedding ceremony. Religious freedom is not limited to clergy; it extends to sole proprietorships and for-profit corporations. *Burwell v. Hobby Lobby Stores*, Inc., 134 S. Ct. 2751, 2770 (2014). If it may be taken from the latter, it may be taken from the former.

This Court should not extend antidiscrimination law to this context.

CONCLUSION

Religious individuals have an interest in the protections offered by both antidiscrimination statutes and the First Amendment. They wish to be accepted fully in public life but still have the opportunity to practice their own faith. This case presents a conflict between the Scylla of unequal treatment and the Charybdis of outlawing religious practices. The latter is a legitimate concern, but this Court's holding the First Amendment protects against compelled "celebration" will not return America to the civil rights landscape of the 1940's and 1950's. A decision importing antidiscrimination principles into religious practice instead will effectively dispossess Americans of sincere religious faith of their fundamental right of conscience.

This Court has observed "A tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993), cited in *Craig*, 370 P.3d 272, 282. But a tax on the practice of one's faith is a much milder restriction than a legal prohibition. Applying general antidiscrimination law in the religious context will force religious leaders to violate their principles one way or the other. It could be by commission, *e.g.* selling Torah scrolls to those who do not practice the Jewish religion and *ketubot* for interfaith ceremonies. If they wished to avoid that conduct, it would be through omission, e.g. by failing to prepare scrolls and *ketubot* at all. Either way, the effect would be to exert "a hydraulic insistence on conformity to majoritarian standards" and prevent individuals from defining the values that should govern their life. *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972).

Respectfully submitted,

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