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 INDEPENDENCE LAW CENTER, AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether applying Colorado's public-accommodation law to compel artists to create expression that violates their 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

Secondary Sources

INTEREST OF AMICUS CURIAE

Independence Law Center is a non-profit, civil rights law firm seeking to promote the ability of persons to live freely while following their deeply held convictions. The Law Center observes a diminishing respect for the diversities within our society, with the risk that those with certain disfavored beliefs will be disqualified from enjoying full participation within the economic and professional life of our social order. [1]

[1] Consistent with this Court's Rule 37.6, *amicus curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus and their counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of the amicus' intent to file this brief, and correspondence consenting to the filing of this brief by all parties has been submitted to the Clerk.

INTRODUCTION

Ours is a nation with millions of citizens whose everyday activities are conducted with an eye toward the eternal; citizens who hold to the conviction that their every action matters to the quality of their everlasting existence. Their backgrounds are as varied as their faith traditions, be they Muslim, Christian, Hindu, Jewish, or Buddhists, to name just a few. Our government traditionally has welcomed varied beliefs and has historically avoided forcing citizens to violate their conscience concerning such beliefs. However, our liberal pluralism is in jeopardy if our First Amendment can no longer be relied upon to protect our convictions and expression from official control and coercion.

Affirming the Colorado Court of Appeals' ruling will cause grave and lasting harm to this nation's pluralism. But reversing that decision will help to restore a level of civility and greater tolerance of varied opinions and convictions held by reasonable people of goodwill. This Court should choose—indeed, the First Amendment requires it to choose—the road that respects our pluralistic tradition, affirms the freedom of citizens to live out their beliefs, and preserves the space that we all need to live together civilly, even in the midst of disagreements on deeply important matters.

SUMMARY OF ARGUMENT

The Court should reverse the court of appeals for three reasons in addition to those emphasized in Petitioners' brief.

First, a primary purpose of the First Amendment is to guard against silencing unpopular expression. Second, the Court's quick turnabout from *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), to *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), is testimony to the principle that the First Amendment is designed to protect against government marginalization of minority beliefs, especially when they refuse to affirm majority expression. Finally, the Court's recent precedent recognizes the power of its decisions to shape thinking in a way that can safeguard these principles.

ARGUMENT

I. This Court's precedent and the nation's traditions demonstrate that one of the core functions of the First Amendment is to guard against government marginalization and silencing of unpopular expressions of conscience.

Jean-Jacque Rousseau famously endorsed the principle that "[i]t is impossible to live in peace with people whom one believes are damned." Jean-Jacques Rousseau, *On Social Contract* 131 [1962] (Roger D. Masters ed., Judith R. Masters trans., 1978). Due to legal protections and a tradition valuing dissent, our nation largely has proved an enduring exception to Rousseau's thesis. Conscience

accommodation has been fundamental to the nation's ongoing peace and freedom, allowing the cohesion of *e pluribus unum*, not despite but rather because of a tradition of civil respect and protection of profound differences of individual convictions.

No strangers to Rousseau's maxim, the framers of the Bill of Rights were mindful of the challenge Rousseau's observation posed even as they were dedicated to make the principle of protections for differences in belief a keystone for national cohesion rather than viewing them as harbingers of chaos. Several years prior to Congress's presentation of the Bill of Rights to the several states for ratification, one of the principal authors of the First Amendment, James Madison, observed:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an inalienable right. It is inalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men; It is inalienable also, because what is here a right toward men, is a duty toward the Creator. It is the duty of every man to render to the Creator such homage as he believes acceptable to him.

James Madison, "Memorial and Remonstrance," June 20, 1785 in Jack Rakove ed., *James Madison: Writings* 30 (1999). Three concepts Madison

advances in this passage are important for consideration here.

First is the acceptance of the notion that religious difference must be presumed as even the absence of theological belief is a theological position. Atheism and agnosticism, after all, are religious convictions as well, sometimes equally fervently held.[2]

Second is the imperative conviction that the conscience of every person is a sacrosanct aspect of their being—as Madison characterizes it, "inalienable"—not only in the sense that it is basic to humans but also that it is an inevitable condition of being.

Third is recognition that religious conscience is foundational because many hold the conviction that their actions have consequences for their temporal *and* eternal being—that their character in this world is defined by acting in accordance with such beliefs *and* that their eternal salvation depends upon them so doing. But what is most notable is that Madison saw freedom of conscience as a positive right to be guarded, as it served as a basic social adhesive rather than threatening the cohesiveness of our social order.

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[2] *See*, *e.g.*, Michael Shermer, *The Believing Brain* 175 (2012) (on atheism); Stephen Prothero, *God is Not One: The Eight Rival Religions That Run the World* 326 (2010) (same); William L. Rowe, "Agnosticism" in Edward Craig ed. *Routledge Encyclopedia of Philosophy* (1998) (on agnosticism).

This was so in Madison's time; it is so now. While the "fixed star in our constitutional constellation" will no doubt rightfully be oft-invoked during briefing in this case, Justice Jackson's observation in *Barnette*, 319 U.S. at 642, demonstrates the endurance and centrality of Madison's concern as a bellwether for the health of our body politic.

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. *The test of its substance is the right to differ as to things that touch the heart of the existing order.*

Id. at 641-42 (emphasis added). Always central to this test is whether it is allowable that government action "invades that sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control." *Id.* at 642. That test, and the civility with which this Court ought to teach us through its example, are at stake in this case.

Government marginalization of unpopular expressions of conscience is an evil guarded against from the founding to the present and noted by

thinkers who are as diverse in their ideological beliefs as they are united in their conviction regarding the sanctity of convictions.

Respect for dissent is an American ideal, despite its difficulties:

> If there is no struggle there is no progress. Those who profess to favor freedom and yet deprecate agitation . . . want the ocean without the awful roar of its many waters. This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will.

Frederick Douglass, "West India Emancipation", speech delivered at Canandaigua, New York (August 4, 1857), reported in Philip S. Foner, ed., 2 *The Life and Writings of Frederick Douglass* 437 (1950). The dangers of ending dissent are greater than gaining uniformity. "In the end it is worse to suppress dissent than to run the risk of heresy." Learned Hand, Oliver Wendell Holmes lecture delivered at Harvard (1958), quoted in J. Jeffery Auer, *The Rhetoric of Our Times* 124 (1969).

As an American ideal, dissent should never be viewed as disloyal to our shared goals. "Here in America we are descended in blood and in spirit from revolutionaries and rebels—men and women who dared to dissent from accepted doctrine. As their heirs, may we never confuse honest dissent with

disloyal subversion." Dwight D. Eisenhower, speech at Columbia University's bicentennial, May 31 1954, 524 *Public papers of the Presidents of the United States: Dwight D. Eisenhower* (1961). In the absence of dissent, we are left with only the most dangerous forms of tyranny. "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Barnette*, 319 U.S. at 641.

These testimonies are not mere aphorisms. Their observations stand as a central reason for this Court's First Amendment jurisprudence. As discussed below, this concern for the minority position is fundamental to the First Amendment and is a reason why this Court must reverse the decision of the Colorado Court of Appeals.

II. The contrast between the *Gobitis* and *Barnette* decisions confirm the centrality of dissent to First Amendment protections and the health of our public discourse.

Barnette, rightly understood, is the legacy of two cases, not one. From this, we learn the danger of enforcing uniformity. The story must take account of the Supreme Court's astonishing about-face: The Court rejected a challenge to compelled flag salutes in 1940, in *Gobitis* before affirmatively embracing the identical claim in *Barnette* three years later.[3]

[3] For a more complete history, see Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (2000).

The Minersville school board required all teachers and children to pledge allegiance to the American flag at the beginning of each school day. *Gobitis*, 310 U.S. at 591. The pledge was not a new idea. It started in 1892 as a patriotic way to celebrate the 400th anniversary of Columbus's discovery of America. *See* Richard J. Ellis, *To the Flag: The Unlikely History of the Pledge of Allegiance* 19 (2005). Congress declared the day a national holiday (hence Columbus Day) and eventually codified the pledge, with these familiar words: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, Pub. L. No. 77-623, §7, 56 Stat. 377, 380. Congress would not add the words "under God" until 1954. Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249. The pledge, as initially conceived, was both verbal and physical. As the students recited the words, the exercise required them to extend their right hand from their heart outward and up toward the flag. *See* Sec. 7, 56 Stat. at 380; *see also* Peters, *supra*, at 25 (discussing this "military-style salute" given during the pledge).

By the 1930s, this ceremony posed a problem for Jehovah's Witnesses, a faith originating in Pennsylvania in the 1800s. *See* Peters, *supra*, at 28-29. In 1935, its leader, Joseph Rutherford, gave a speech at their national convention, encouraging adherents not to participate in flag-salute ceremonies. *See id.* at 25. As he saw it, pledging fealty to anything but God—whether the object be a country, a leader, or a secular symbol—violated the Bible. *See id.* at 25-26.

Consistent with Rutherford's teachings, the children in the Gobitis family chose not to participate in the flag-salute ceremony required by the Minersville school board. *See id*. The school board reacted by expelling Lillian Gobitis (age twelve) and her brother, William (ten). *See Gobitis*, 310 U.S. at 591. Their father sued the school board, its members, and the superintendent in federal district court. *See* Peters, *supra*, at 37-39. The district court, *Gobitis v. Minersville Sch. Dist.*, 24 F. Supp. 271, 272 (E.D. Pa. 1938), and the Third Circuit, *Minersville Sch. Dist. v. Gobitis*, 108 F.2d 683 (3d Cir. 1939), granted the Gobitis family relief, invoking the free-exercise guarantee of the First Amendment and permitting the children to return to school. The Supreme Court, however, upheld the compelled flag requirement in an 8-1 vote.

Not only did the decision cause problems for the Gobitis family, it was worse for other Jehovah's Witnesses across the country. Many Minersville residents led a boycott of the Gobitis grocery store. *See* Peters, *supra*, at 70-71. Thanks to the willingness of the state police to stand guard, no violence or destruction of the store resulted. *See id*. at 70. After several months, business for the most part returned to normal. *See id*. at 71.

The same was not true for Jehovah's Witnesses in other communities. As school boards across the country enacted mandatory flag-salute requirements, *see id*. at 164-65, Jehovah's Witnesses were put to the choice of sending their children to the local public schools and compromising their

religious beliefs or sending them to private schools. *See id.*

Making matters more difficult for Jehovah's Witnesses was the first peacetime draft in American history, launched in September 1940 and ramped up after the attack on Pearl Harbor in December 1941. *See* Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885. Male Jehovah's Witnesses sought exemptions from conscription. *See* Peters, *supra*, at 260-61. Jehovah's Witnesses' response to conscription did not sit well with draft boards across the country. Over the course of World War II, the government imprisoned 10,000 men who resisted conscription. *See id.* at 262. Forty percent of them were Jehovah's Witnesses. *See id.*

Jehovah's Witnesses' resistance to the flag salute and to the wartime draft, combined with the Supreme Court's stamp of constitutionality regarding compelled flag salutes in *Gobitis*, unleashed a wave of persecution with few rivals in American history. *Gobitis* was decided on June 3, 1940. In the first three weeks after the decision, there were hundreds of attacks against Jehovah's Witnesses across the country. *See id.* at 72-95 (discussing a series of these attacks). Between May and October 1940, the American Civil Liberties Union reported to the Justice Department, vigilantes attacked 1,488 Jehovah's Witnesses in 335 communities, covering all but four states in the country. *See id.* at 85 (and sources cited). Local law enforcement often did little to deter the attacks. *See id.* at 73. When a reporter asked one sheriff why, he

answered, "They're traitors—the Supreme Court says so. Ain't you heard?" *Id.* at 84.

From the outset, *Gobitis* was not a popular decision in the press or the legal academy. Some 170 newspapers editorialized against it, and few favored it. *See id.* at 67. The New Republic and the ACLU criticized the decision fiercely—a noteworthy development because Justice Frankfurter, the author of *Gobitis*, had helped to found both organizations. *See id.* at 69. How, they thought, could one of their own, one of the great civil libertarians of the day, the defender of Sacco and Vanzetti, write such a decision?

The ACLU's director at the time, Roger Baldwin, wrote a letter to Joseph Rutherford, the Jehovah's Witnesses' leader, promising to help limit or overrule the decision, noting his "shock" that the Court had swept "aside the traditional right of religious conscience in favor of a compulsory conformity to a patriotic ritual." *Id.* "The language" of the decision, he added, "reflects something of the intolerant temper of the moment." *Id.*

The New Republic was tougher. It observed that the "country is now in the grip of war hysteria," creating the risk "of adopting Hitler's philosophy in the effort to oppose Hitler's legions." *Id.* (recounting coverage in *The New Republic*). The magazine even compared the decision to one by a German court punishing Jehovah's Witnesses who refused to honor the Nazi salute, saying it was "sure that the majority members of our Court who concurred in the Frankfurter decision would be embarrassed to know

that their attitude was in substance the same as that of the German tribunal." *Id.* This characterization of the *Gobitis* decision remains and is likely the reason for its quick rejection.

In *Barnette*, the Court restored freedom of conscience. On June 14, 1943—Flag Day, as it happened—the Court held that compelled flag salutes could not be reconciled with the free-speech requirements of the First Amendment. *See Barnette*, 319 U.S. at 624, 642. The 6-3 majority opinion contains one of the most memorable lines in American constitutional history: "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." *Id.* (emphasis added). Of course, proscribing orthodoxy *in other matters* by force of act is precisely what is at issue in this case. This Court should continue to follow the wisdom of *Barnette* rather than retreat to the majoritarian danger of *Gobitis*.

To use government power and the courts to enforce such compulsion, as the State of Colorado has done, is to needlessly penalize people of faith, to wound the country's long tradition of celebrating and protecting religious exercise, and to undermine the pluralism that motivated our country's founding as reflected in its continuing protection of dissenting viewpoints. This Court should rule for petitioner and safeguard the right of all people to exercise their deeply held convictions, in this case ensuring the petitioner the freedom not to provide services that

would constitute forced expression concerning a matter of public debate.

III. This Court should use this opinion to teach the importance of protecting minority views rather than punishing them.

In *Obergefell v. Hodges*, 135 S.Ct. 2584, 2606 (2015), this Court recognized: "Were we to uphold the challenged laws as constitutional, it would teach the Nation that these laws are in accord with our society's most basic compact." Years earlier, the *Barnette* majority similarly recognized this Court's power to influence the American public. And as mentioned above, a sheriff felt justified after *Gobitis* in calling Jehovah's Witnesses "traitors" because "the Supreme Court says so." Peters, *supra,* 84. So too will the Court's disposition in this case intimately matter to American citizens who should feel comforted in the continued exercise of their belief, but as a result of the lower court's ruling, rightfully feel not only hated and marginalized but at great risk of punishment.

What will this Court's decision teach? A leading scholar regarding LGBTQ rights rightfully and eloquently phrases the issue as follows:

> It raises the question whether the millions of Americans with conservative religious views about sexuality have any legitimate place in American society. During the controversy over the Indiana RFRA, the New York Times, one of the world's most trusted newspapers, ran an editorial with the title: 'In Indiana, Using

> Religion as a Cover for Bigotry.' The implicit assumption is that the objection to facilitating same-sex marriage isn't really religion at all, that it is a 'cover' for something else. The label of 'bigotry' is powerful medicine. It can fairly be applied to some sources of opposition to gay rights. Thugs who randomly attack gay people on city streets are not motivated by moral objections to their conduct. But there are also long-standing religious traditions that condemn same-sex relationships, and adherence to those traditions can't fairly be equated with irrational hatred. The notion that religious conservatives are all consumed with a hateful compulsion to hurt gay people has been an effective rhetorical trope, but it unfairly stereotypes those it purports to describe—much like the vicious old notion of gay men as misogynistic, amoral sociopaths.

Andrew Koppelman, "Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law," 88 S. Cal. L. Rev. 619, 653 (2015) (notes omitted). The same scholar concludes: "Conservative Christians have good reason to fear becoming a despised outlier caste, like Jews in medieval Europe." But a reversal of the decision below would ensure that all citizens—including those who hold traditional beliefs about marriage—will remain welcomed members of our body politic.

This Court will continue to teach through its decision in this case. Will it teach that millions of faithful believers are not fit for the public square? Or will it tell the public that the First Amendment protects the freedom of persons to not only teach but also live out the "principles that are so fulfilling and central to their lives and faiths." *Obergefell*, 135 S.Ct. at 2607. If this Court chooses the latter course, it will make clear that freely exercising one's faith means the freedom to do so in the public square. To cabin that right otherwise by affirming the Colorado Court of Appeals, this Court will teach that people of sincere conviction, who seek to live their faith in every act they take, are unworthy of the uniform application of First Amendment protections of the "sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 642.

CONCLUSION

This Court should reverse the decision of the Colorado Court of Appeals.

Respectfully submitted,

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