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
Colorado Court of Appeals

Brief of Amici Curiae Indiana Family Institute, Inc., Indiana Family Action, Inc., and The American Family Association of Indiana, Inc. Supporting Petitioners

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August 2017

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Interests of Amici Curiae[1]

Amici are pro-traditional-family, issue-advocacy, expressive-association nonprofits. Indiana Family Institute, Inc. ("IFI") and American Family Association of Indiana, Inc. ("AFA") are nonprofit under 26 U.S.C. 501(c)(3). *See* www.hoosierfamily.org; www.afain.net. Indiana Family Action, Inc. ("IFA") is a 501(c)(4) nonprofit. *See* www.facebook.com/IndianaFamilyAction.

Amici's interests here are to: (i) note Amici's similar case so the Court may consider the present case in a broader context and provide guidance for similar cases; (ii) seek further recognition of First Amendment protection for issue-advocacy groups against compelled speech undercutting their message; (iii) highlight the traditional biblical view of true marriage[2]; and (iv) provide the Peaceful Coexistence Model,[3] a visual analysis demonstrating that providers of expressive services in cases like this are protected against compelled speech, though such "expressive-providers" don't object to providing services absent objectionable messages.

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[1] **Rule 37:6:** No counsel for a party authored this brief in whole or part; no such counsel or party made any monetary contribution to fund the preparation or submission of this brief; and no person, other than amici or their counsel, made such a monetary contribution. **Rule 37.3(a):** Petitioners and respondents consented to filing this brief in documents provided to the Clerk.

[2] *See infra* note 10 (statement by ecumenical group Evangelicals and Catholics Together that true "*marriage is a unique and privileged sign of the union of Christ with his people and of God with his Creation—and it can only serve as that sign when a man and a woman are solemnly joined together in a permanent union*." (emphasis in original)).

[3] *See infra* at 30 (wedding-related activities graphed).

Summary of the Argument

Peaceful coexistence is a vital goal in expressive-provider cases. The First Amendment is America's means to peaceful coexistence. It protects core liberties, including speech and expressive-association, vital to our governmental system and deepest values.

The wisdom displayed in the First Amendment arose from millennia of wars and oppression by ascendant powers to crush and silence religious, ideological, and political foes. It grew from two primary roots: (i) advocacy by Enlightenment thinkers, horrified by Europe's religious wars and oppression, who saw a better way of tolerance under legal protections for individual liberties, thereby promoting individual dignity and self-identity, and (ii) advocacy for liberty of conscience, speech, association, dignity, and self-identity by nonconformist groups willing to lose life, liberty, property, and physical well-being for the sake of conscience.

The lessons of history are easily forgotten. Once again government is using its coercive force to crush and silence persons who disagree with its pressing agenda of the day. But applying the protections of the First Amendment—the balance already struck by America—is the means to peaceful coexistence.

Because this and similar expressive-provider cases involve pure speech, they are readily resolved under the First Amendment's protection against compelled speech, association, and expressive-association. The zone of clear protection can be visualized—as done in the Peaceful-Coexistence Model, *see infra* at 30—by graphing activities on two axes. One shows the degree of *involvement* in an activity to which an expressive-provider objects because of a message involved. The

other axis shows the degree of *expression* involved in both the activities and the messages at issue. High-involvement, high-expression activities cluster in the upper-right quadrant where they are clearly protected from government's coercive force. Plotting the activities at issue here, in similar cases, and in Amici's case shows that they fall in the clearly protected quadrant—as do activities of *all* in that zone, including the refusal by Colorado bakers to create cakes with messages on the *other* side of same-sex issues.

Argument

I.

Peaceful Coexistence Is a Vital Goal in Expressive-Provider Cases.

Peaceful coexistence is a vital goal in this and similar expressive-provider cases. The First Amendment is America's means to peaceful coexistence—by protecting cherished liberties of expression, association, expressive-association, etc. for all.

Coercive force has long been used by ascendant powers to deny those liberties to persons with whom controlling forces disagree. Most people have learned of "heretics" ablaze, the Inquisition, European religious wars, witch hunts, Pilgrims seeking religious liberty in America, and religious disqualifications for employment, education, and benefits. Some have learned that devastated European countries finally agreed to tolerate each other's religions (1648, Peace of Westphalia), that Enlightenment thinkers dismayed by religious wars and oppression promoted individual liberties, and that Enlightenment ideals are reflected in the Declaration of Independence and the Bill of Rights.

The First Amendment's individual-liberty protections arose from two primary roots: (i) the recognition by Enlightenment thinkers that protecting individual human rights is essential to prevent religious wars, to promote good government, and to safeguard liberty, personal dignity, and self-definition for all and (ii) advocacy for such protection by nonconformist individuals and groups willing to lose life, liberty, property, and physical well-being for the sake of conscience. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understandings of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

Given the (easily forgotten) lessons of history, the goal in cases like this must be peaceful coexistence by accommodating competing interests. But in a constitutional Republic, that accommodation and peaceful coexistence must be sought within the framework of the expressly guaranteed liberties in the First Amendment—America's means to peaceful coexistence. The whole purpose of a Bill of Rights "is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

This case is one of many expressive-provider cases where government uses coercive force to (i) compel providers of expressive services to engage in expression and expressive-association[4] to which they object based

[4] The expression here—an artist consulting with persons planning a same-sex-wedding then sculpting and painting a custom artistic creation to symbolize and celebrate that a marriage has occurred—is pure speech. *See Hurley v. Irish-*

(continued...)

on the message(s) involved, (ii) impose severe penalties on nonconformists, and (iii) impose employment disqualifications on nonconformists. Many of these expressive-provider cases involve wedding-service providers and the same-sex-marriage context. *See* www.adflegal.org/issues/religious-freedom/conscience (some cases described).

But the context is broader. For example, Amici have brought a preenforcement challenge to nondiscrimination provisions that apply to them because Amici offer educational programs to the public and exemptions don't protect them. While some educational programs involve marriage-enrichment classes, others involve grassroots activism, leadership training, and how churches and Christians should respond to sexual issues. The case, *Indiana Family Institute v. City of Carmel* (No. 29D01-1512-MI-10207) ("*IFI*"), is in the Hamilton [Indiana] Superior Court.[5] Amici seek to protect their right to promote their message without dilution by compelled inclusion of ideological opponents. Amici advocate for the traditional biblical message on marriage and human sexuality: marriage must be between one man and one woman, and human sexual activity should be confined to that context. To protect their message, Amici exclude persons engaged in, or advocating for, things contrary thereto. This would include

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[4] (...continued)
American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 568-69 (1995) (even abstract painting is speech).

[5] *See* https://public.courts. in.gov/mycase#/vw/CaseSummary/eyJ2Ijp7IkNhc2VUb2tlbiI6Ik56UTRNVE15TnpFNE1UY3dPak0xTWpBek16SXlPR1k9In19. Dismissal motions (standing and ripeness) were denied, discovery progresses, and summary judgment briefing begins October 30.

a range of activities, including polygamy,[6] same-sex sexual activity, and same-sex marriage. So for example, AFA placed the following on a flyer for a Grassroots Training Conference open to the public: "*AFA of Indiana reserves the right to limit admission to this event to those who share the ideals and values of our organization and its mission.*"[7] Amici's own ability to

[6] The next hot-button issue of the day may well be polygamy. In an opinion later vacated due to mootness, a federal district court decided a case brought by Kody Brown, his legal wife (Meri Brown), and the other three women in a plural-partner arrangement depicted in TLC Network's "Sister Wives," holding that the cohabitation provision at issue (which would prohibit such arrangements) violated the Free Exercise Clause and lacked a rational basis under the Due Process Clause. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1176, 1190 (D. Utah 2013), *vacated* 822 F.3d 1151 (10th Cir. 2016), *cert. denied* 137 S.Ct. 828 (2017). The Browns and "sister wives" were represented by Professor Jonathon Turley, of George Washington University School of Law, and supported by a Cato Institute amicus brief authored by Eugene Volokh and Ilya Shapiro (on free-speech grounds and the expressive nature of the actual activity at issue). 822 F.3d at 1153 (amicus brief *available at* https://object.cato.org/sites/cato.org/files/pubs/ pdf/brown-v-buhman.pdf). The present case should be considered in this broader context because expressive-providers should not be subject to compelled expression, association, and expressive-association regarding wedding-related services and plural-member wedding or commitment ceremonies.

[7] In *IFI*, *see supra* at 5, defendants argued that such exclusion makes *public* programs *non*-public and not subject to challenged provisions that ban discrimination in accommodations, programs, etc. offered to the public. But where persons are excluded on *banned bases* that is nonsen-

(continued...)

protect their issue-advocacy, teaching, and message is safeguarded by the First Amendment, as expressly recognized in *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015) (emphasis added):

> [T]hose who adhere to religious doctrines[] may continue to *advocate* with utmost, sincere conviction that, by divine *precepts*, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to *teach* the *principles* that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.

But a broader analysis is needed to protect both pro-traditional-family advocates and other expressive-providers. The First Amendment protection against compelled expression, association, and expressive-association readily resolves expressive-provider cases. And a broader analysis is required to protect those on *both* sides of same-sex-marriage and other issues:

> It is undisputed that the Colorado Civil Rights Commission (the "Commission") does not apply [Colorado's Anti-Discrimination Act ("CADA")] to ban (1) an African-American cake artist from refusing to create a cake promoting white-

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[7] (...continued)
sical because then Jim Crow-era restaurants could have evaded public-accommodation laws by becoming non-public through race-based service denial. Such law would be fatally underinclusive as to an anti-discrimination interest.

> supremacism for the Aryan Nation, (2) an Islamic cake artist from refusing to create a cake denigrating the Quran for the Westboro Baptist Church, and (3) three secular cake artists from refusing to create cakes opposing same-sex marriage for a Christian patron.

(Cert. Pet.1 (citing Cert.Pet. Appendix ("App.") 78a, 297-331a).) The third item was the subject of a complaint to the Commission, with the patron arguing that the refusal violated discrimination on the CADA-forbidden basis of "creed," but the Commission rejected the complaint on a basis equally applicable to Phillips:

> The Commission reasoned that—like Phillips—(1) the bakeries declined the request because they objected to the particular message of the cake and (2) the bakeries were willing to create other items for Christians [as was Phillips]. App.297-331a. Unlike Phillips, the Commission exempted these secular bakeries from CADA's scope.

(Cert. Pet.7.) How is the disparate treatment justified?

The Colorado Court of Appeals held that only *conduct* is involved in the activities at issue here, so there is no First Amendment protection. (App.22a; 30a.) This holding errs in at least the six ways set out next (and it fails to provide the broader, generally applicable analysis that leads to peaceful coexistence in this and similar cases).

First, though the lower court "recognize[d] that a wedding cake, in some circumstances, may convey a particularized message celebrating a same-sex marriage," it erroneously thought that such a message would require a "discussion regarding the wedding

cake's design or any possible written inscriptions." (App.34-35a.) That errs because (as shown in detail below) the facts that (i) the requested cake will be a *wedding* cake is itself a message and (ii) numerous messages inhere in the activities at issue, *see infra* at 19-21, so the cake and related activities are "inherently expressive" and within First Amendment protection, contrary to the lower court's holding. (App.26.)

Second, because even abstract, impressionist art with no discernible message is protected speech, *Hurley*, 515 U.S. at 568-69, a work of *art* in the form of a wedding cake and the sculpting and painting that created it are inherently expressive and protected by the First Amendment without any need for words on the cake, a same-sex topper, etc. Artists may use many media, from sculpting in marble, sand, or cake to painting in oil, acrylics, or icing, so the media doesn't matter. That cake artistry is an actual art form is widely recognized in our culture. *See, e.g.*, http://www.foodnetwork.com/shows/last-cake-standing ("Last Cake Standing pits eight stars ... as they vie for the title of 'Best Cake Artist in America' ...."). And wedding cakes are expressly commissioned because of their artistry, with better artists able to charge higher fees.

Third, the court below held that "the compelled conduct" here is not speech but "comport[ing] with CADA." (App.29a.) That issue-substitution errs because compliance with the law is *always* at issue where speech is compelled, but that doesn't replace the compelled-speech claim. A compelled flag-salute and pledge were at issue in *Barnette*, 319 U.S. 624, but the compelled-speech issue did not disappear under a reframing of the issue as just comporting with the requirement. The analysis of the court below would eliminate First

Amendment compelled-speech challenges.

Fourth, the court extends this mere-compliance-issue analysis by saying that any messages would "be attributed to the customer" by reason of such "comporting." (App.30a.) But that argument doesn't comport with compelled-speech cases, which don't excuse compelled speech on such grounds. For example, *Barnette* didn't decide instead that the compelled speech was attributable to the government, not the student. *Wooley v. Maynard*, 430 U.S. 705 (1977), invalidated compelled display of a license-plate slogan based on a compelled-speech analysis and didn't instead hold that viewers would deem it the state's message. The lower court cites *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47 (2006) ("*FAIR*"), for the proposition that an audience would know "'the difference between speech a school sponsors and speech the school permits because legally required to do so.'" (App.30a (quoting *FAIR*, 547 U.S. at 65).) That doesn't apply here because (inter alia) Jack Phillips's art is his *own* speech, not that of others that he "permits."[8]

Fifth, the court below apparently thinks that posting a disclaimer about one's views on traditional and same-sex marriage fixes the unconstitutional compelling of speech. (App.35a.) But in *Barnette* and *Wooley* this Court didn't say that compelled speech could be fixed by some disclaimer. In *Barnette*, the First Amendment harm of compelling Jehovah's Witness children

[8] Similarly, the court's recognition that "'photography may be expressive'" but "'the operation of a photography business is not,'" (App.33a (quoting *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (2014)), swallows compelled-speech doctrine in a "comporting" analysis and creates an employment restriction.

to salute and pledge would not have been fixed by pinning a disclaimer to their shirts as they saluted and pledged. In *Wooley*, compelling persons to display "Live Free or Die" would not have been fixed by attaching a license-tag frame proclaiming "I don't agree with this."

Sixth, the "correlated" analysis employed below is erroneous. (App.18-19a.) What is at issue in same-sex marriage is *conduct*, yet the lower court decided that same-sex marriage is "closely correlated with sexual orientation" so that refusing expressive services for a same-sex wedding is discrimination based on sexual-orientation *status*. (*Id.*)

But the case it cites, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), said refusing to participate in elective abortion did not discriminate against women—which is comparable to the present situation—but that "[s]ome activities may be such an *irrational* object of disfavor that, if they are targeted, and if they *also* happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Id.* at 270 (emphasis added). The example is a yarmulke tax. *Id.* Note *Bray*'s three-part analysis: (i) irrationality *and* (ii) an identifiable targeted class *raise* (iii) a mere presumption of an attempt to disfavor those so targeted.

Bray's analysis doesn't apply here because (i) there is nothing "irrational" about subscribing to the millennia-old, world-wide view (with only some modern exceptions) that marriage should be between a man and a woman and wanting to comport one's activities to one's beliefs. One may disagree with the traditional-marriage view, but it cannot properly be called irrational. This is so (inter alia) because of the biology of human reproduction and the birthing and rearing of off-

spring that have long been considered a central focus of what government sought to protect with marriage laws. And the traditional view of marriage also cannot be deemed irrational because it has been the view of most societies and humans for millennia, around the world, even in societies where same-sex sexual activity was widely accepted. And the traditional view, that marriage is properly between a man and a woman, remains widely supported today. For example, while some Protestant denominations have changed their views on the religious permissibility of same-sex marriage, many religious groups have not and are unlikely to do so—ranging from large Protestant denominations,[9] Evangelicals, Roman Catholics,[10] and Eastern

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[9] *See, e.g.*, http://www.sbc.net/resolutions/1224 (Southern Baptist Convention statement); http://www.umc.org/what-we-believe/what-is-the-denominations-position-on-homosexuality (United Methodist statement). These are America's largest Protestant denominations. *See* http://www.pewforum.org/2015/05/12/chapter-1-the-changing-religious-composition-of-the-u-s/pr_15-05-12_rls_chapter1-03/.

[10] An insightful statement on the biblical view of marriage is by the ecumenical group Evangelicals and Catholics Together, *The Two Shall Become One Flesh: Reclaiming Marriage*, First Things (March 2015), www.firstthings.com/article/2015/03/ the-two-shall-become-one-flesh-reclaiming-marriage-2. The statement clarifies that *religious* marriage differs from *civil* marriage regulated by the state and the biblical view of human sexuality differs from that of much of current culture. For example, it says: "Maleness and femaleness are essential components of our unique dignity as human beings created in the image of God, for through these realities we participate in the divine creativity and its fruitfulness. Thus, from a Christian point of view, sexual

(continued...)

Orthodox to Orthodox Judaism and Islam. So the traditional view of marriage cannot be deemed "irrational" as *Bray* requires. And there is nothing irrational about wanting to act in ways consistent with one's beliefs. But while the lower court recites the "irrational" requirement (App.19a), it never applies it.

Regarding (ii), *Brays*'s targeted "class" requirement, nothing is "targeted" here, let alone a "class." Rather, expressive-providers do not want to facilitate, participate in, or otherwise be involved in a same-sex marriage—an activity. Expressive-providers in this and similar cases are perfectly willing to provide services in non-same-sex-marriage contexts to the same persons. *See infra* at 21-24. This fact alone overrides any "correlation" analysis because that analysis tries to make something true that factually is not.

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[10] (...continued)
union must be approached with reverence and in recognition of its intrinsic potential for new life." *Id.* Consequently, "[o]ur sexual acts have spiritual and moral dimensions; they are not merely physical or biological." And so, though, "[a]s Evangelicals and Catholics, we do not agree on the status of marriage as a sacrament of the Church ...[,] [w]e affirm strongly and without qualification, following the clear testimony of Holy Scripture, that *marriage is a unique and privileged sign of the union of Christ with his people and of God with his Creation—and it can only serve as that sign when a man and a woman are solemnly joined together in a permanent union*." *Id.* (emphasis in original). So from the religious perspective, "same-sex unions, even when sanctioned by the state, are not *marriages*. Christians who wish to remain faithful to the Scriptures and Christian tradition cannot embrace this falsification of reality, irrespective of its status in law." *Id.* (emphasis in original).

Regarding (iii), *Bray*'s "presumption," the willingness of expressive-providers to serve LGBT persons in *other* contexts while declining to engage in expression, association, and expressive-association with a same-sex wedding (and all the messages involved therewith), *id.*, readily rebuts any presumption of discrimination. The present situation is not at all like the discrimination against Jews by a targeted tax.

So there is no "correlation" under *Bray*'s test. Rather, *Bray*'s applicable analysis here is that, though only women get abortion, refusing to participate in abortion isn't sex discrimination. Thus, though this Court has found a right to engage in same-sex marriage, refusal to participate is not discrimination based on sexual orientation.

Moreover, the lower court's use of a non-*Bray*-compliant "correlation" analysis to convert refusal based on *activity involving objectionable messages* to refusal based on *sexual-orientation status* is also problematic for at least three other reasons.

First, there is a double standard at work regarding status and activity. Religious persons are told in these contexts that their *status* is protected (i.e., they may believe what they wish) but their *activity* is not (despite the Free *Speech* Clause and the Free *Exercise* Clause) at the same time that they are told they must participate in and facilitate activity (with messages to which they object) because it "correlates" to status. The "correlation" slight-of-hand should not be allowed to convert activity to status to allow some persons to compel others to expression, association, and expressive-association to which they object, while others whose activity (speech and free-exercise) are expressly protected by the First Amendment are stripped of that

constitutional protection by the lower court's flawed analyses.

Second, the record recounts that a Christian patron asked bakers to bake cakes with messages including Bible verses about sin and homosexuality (App.297-331a), but his messages were not found to correlate to his Christian creed (a basis on which discrimination is barred) which would have made those bakers in violation of CADA. Rather, the bakers were found to have rejected the commissions based on the messages (just as Jack Phillips also did). The ease with which "correlation" and "message" can be employed or not shows that correlation, as the lower court used it, is a too-malleable tool for First Amendment analysis. Rather the Peaceful Coexistence Model, based on the First Amendment, should consistently be used to protect all four cake artists.

Third, there is a serious flaw in the "correlation" formulation, i.e., that same-sex marriage is something done only by same-sex-oriented persons. That is mere description, not analysis. It is not the sort of analysis employed in *Bray* when it held that, though only women have abortions, refusing involvement isn't discrimination. 506 U.S. at 270. The idea that just because only certain individuals do something creates a participation duty per se cannot be cabined and must be rejected.

For the foregoing reasons (and others), the lower court's analysis was flawed. In place of it, a broad, fully constitutional analysis is needed that encompasses (i) Phillips, (ii) the other cake artists who also rejected cake-art commissions based on the message, and (iii) other expressive-provider cases. That is shown next.

II.

Compelled-Speech Protection Resolves Expressive-Provider Cases Given Degrees of Involvement and Expression.

Though many expressive-provider cases involve religious beliefs, they can readily be resolved under First Amendment protection against compelled expression, association, and expressive-association as explained in *Employment Division v. Smith*, 494 U.S. 872, 882 (1990):

> Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, ... also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors).

Wooley puts it succinctly: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637). *Wooley* involved a challenge to the license-plate slogan "Live Free or Die." Drivers cannot be compelled "to foster ... concepts" to which they object, even as to such a "passive act." *Id.* at 714-15. Government may not so "'invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" *Id.* at 715 (quoting *Barnette*, 319 U.S. at 642).

The quoted *Barnette* decision is instructive here. In it, this Court considered a mandate by West Virginia

school authorities that children participate in a flag salute accompanied by the Pledge of Allegiance or be expelled, with the child then treated as a delinquent and the parents subject to fine and jail. *Id.* at 628-29. Jehovah's Witness children were religiously forbidden to participate (they considered the flag-salute a form of idolatry), so some were expelled and parents were prosecuted. *Id.* at 629-30. The Court found it unnecessary to consider whether a free-exercise conscience-exemption was required, *id.* at 634-35, because "the flag salute is a form of utterance," *id.* at 632, and the Bill of Rights "guards the individual's right to speak his own mind" and forbids the "public authorities to compel him to utter what is not in his mind," *id.* at 634. The Court forcefully rejected coercion as a means of promoting national unity with ringing words applicable here:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.... Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic

> unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> It seems trite but necessary to say that *the First Amendment ... was designed to avoid these ends by avoiding these beginnings.*

Id. at 640-41 (emphasis added). The "freedom to differ" includes "the right to differ as to things that touch the heart of the existing order." *Id.* at 642. "If there is any fixed star in our constitutional constellation, it is that no official ... can prescribe what shall be orthodox ... or force citizens to confess by word or act their faith therein." *Id.* at 642. *See also Agency for International Development v. Alliance for Open Society International*, 133 S.Ct. 2321, 2327 (2013) ("'At the heart of the First Amendment lies the principle that each person should decide ... the ideas and beliefs deserving of expression, consideration, and adherence.'" (quoting *Turner Broadcasting System v. FCC*, 512 U.S. 622, 641 (1994)[11]));

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[11] *Turner Broadcasting* develops this idea further:

> *Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right*. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persua-

(continued...)

Knox v. Service Employees, 132 S.Ct. 2277, 2288 (2012) ("The government may not ... compel the endorsement of ideas that it approves."); *Wooley*, 430 U.S. at 714 (free-speech right "includes ... right to refrain from speaking").

And the same government coercion to government orthodoxy at issue in *Barnette* is at issue here. The government seeks to compel cake artist Jack Phillips to engage in expression and expressive-association affirming a state-imposed orthodoxy of what constitutes marriage, which differs from his own orthodox religious beliefs. In the activities at issue here, at *least* six expressive messages are involved: (i) the message of the wedding *ceremony*, i.e., that a true marriage and something sacred are occurring[12]; (ii) the message of the wedding *reception*, i.e., that a true marriage has

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[11] (...continued)
sion. These restrictions "raise the specter that the Government may *effectively drive certain ideas or viewpoints from the marketplace*." *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

Id. (emphasis added).

[12] Though a wedding ceremony is pure speech, even under *FAIR*'s expressive-conduct standard, 547 U.S. 47, a wedding ceremony is "inherently expressive" given its "particularized message" and "the likelihood ... that the message would be understood by [viewers]." *Id.* at 404. In addition to the message that a true marriage is being created is the additional message that something sacred is occurring—communicated (inter alia) by the solemnity of marital vows, the exchange of long-recognized marital symbols, and an officiant representing social and (perhaps) religious endorsement.

occurred and is to be celebrated; (iii) the message of the *wedding cake*, i.e., that this is no mere cake, but by design, style, intent, and purpose it is a *wedding* cake to be used at the reception to indicate that a wedding has occurred and is to be celebrated through cutting, mutual feeding, sharing, and consumption of the cake[13]; (iv) the *artist*'s message in creating a custom cake designed, sculptured, painted, and intended for use as the wedding cake at a same-sex wedding, i.e., that the speaker believes, supports, and wants to expressively associate with the other messages; (v) the message of the rainbow theme of the cake desired, which was not communicated to Jack Phillips (because the conversation did not proceed that far) but as a mat-

[13] Many see covenant symbolism in the cutting of the cake, feeding one another with it, and sharing it with guests. *See, e.g.*, https://www.thoughtco.com/christian-wedding-traditions-701948; https://www.answers.com/Q/What_is_the_bible_says_about_the_cutting_of_wedding_cake. For example, such sources point to the concept of "cutting" a covenant, as Genesis 15:18 says God "cut" a covenant ("ברית ... כרת") with Abram, so that ceremonial cutting of the cake (with the couple holding a special knife and ceremonially cutting together with the special attention of witnesses) connotes the cutting (making) of a solemn covenant. And a covenant meal has long been a common way of symbolizing that a covenant has occurred between parties, *see, e.g.*, Genesis 31:51-54; Exodus 24:9-11, including a wedding covenant, so that the feeding and sharing of the cake also symbolizes that a covenant has occurred. In Christian theology, marriage is seen as symbol of the bond between Christ and his Church (his Bride), *see supra* note 10, and a covenant meal is clearly associated with that in Revelation 19:9 ("marriage supper of the Lamb"), so the reception featuring the cake and activities surrounding it is no mere party.

ter of fact was what the couple wanted as evidenced by a photograph in the record (Cert. Pet.6 (App.289-91a)), which theme overlaid the messages above with the messages that this is both a *same-sex* wedding and *gay-pride* event (by using the cake to display a prominent, widely recognized gay-pride symbol); and (vi) the message of the court-ordered teaching of staff by Phillips that they must make same-sex-wedding cakes, i.e., that the government has taken a side in this deeply expressive issue and held that Phillips and his business acted wrongfully and discriminatorily in declining compelled expression, association, and expressive-association, which in turn conveys the message that the First Amendment no longer protects against compelled expression, association, and expressive-association. (Cert. Pet.6 (App.56-58a).) In sum, the activities at issue are inherently infused with expression and expressive-association involving many messages—this is no mere matter of batter or simply slicing icing.

Phillips has a First Amendment right against the compelled speech of recognizing a given orthodoxy concerning what constitutes marriage and what is sacred[14] and against the compelled speech of consulting with the couple as to a wedding cake then sculpting and painting a custom wedding cake that is intended to recognize that a marriage has occurred and that will be used by the couple and guests in celebrating that a marriage has occurred.

It is vital to note that the objection is to communicating these messages, not to the persons involved or their status. In the present case, Jack Phillips makes

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[14] *Cf. supra* note 10 (Evangelical and Catholics Together statement regarding what is a true marriage).

this clear by carefully detailing what he can and cannot do in good conscience. For example, he will gladly serve people of all races, all faiths, all sexual orientations," (Cert. Pet. Appendix ("App.") 282 (¶ 56)), including selling all sorts of ready-made baked goods to a same-sex couple, (App.287-288a (¶¶ 79, 87)), but he won't "design and create wedding cakes for same-sex weddings," (App.284a (¶ 66)), regardless of requester's sexual orientation, (App.284-286a (¶¶ 67-68)), and he won't do baked goods containing alcohol, related to Halloween, or expressing indecent and hateful messages, (App.282 (¶¶ 59, 60, 63)). As shall be graphed in considering the Peaceful Coexistence Model, Phillips only refuses service where there are high degrees of both (i) involvement in activities and messages to which he objects and (ii) expression in the messages and activities at issue. Everywhere else he gladly serves all. So this is about objectionable messages, not persons or their status.

That is also true in *Arlene's Flowers v. Washington*, currently on petition for a writ of certiorari in this Court (No. 17-108). In that case, the floral artist, Barronelle Stutzman, has long sold her artistic floral arrangements to two LGBT men, but declined to do custom floral arrangements for their same-sex wedding, with which service she provides "full wedding support" by attending, facilitating, monitoring the floral art, and cleanup at the wedding and reception. (*Arlene's Flowers* Cert. Pet.1, 4, 9-11.) She has LBGT employees. (*Id.* at 9.) Her refusal to speak through her art for the same-sex wedding is due to messages involved, not persons or their status.

That was also true in *Elane Photography*, 309 P.3d 53 (N.M. 2013), *cert. denied* 134 S.Ct. 1787 (2014) As

explained in the petition for certiorari in that case (No. 13-585), the two photographers involved "gladly serve gays and lesbians—by, for example, providing them with portrait photography—whenever doing so would not require them to create expression conveying messages that conflict with their religious beliefs." (*Elane Photography* Cert. Pet.7.) But, as petitioner and photojournalist[15] Elaine Huguenin explained, her "style of wedding and event photography is photojournalistic, meaning that she conveys stories and messages through her images and books" (*id.* at 4), and her "artistic expression pervades her work"—from selecting subject(s), moment, point of view, depth of field, focal length, and framing for a photograph to choreographing the subjects to extensive selection and editing to "creat[ing] a picture-book for each customer by arranging the images to tell her story about the event" (*id.* at 5). She "automatically obtains federal copyright protection over all [her] photographs and picture-books" (*id.)*, making her the legal "'author'" of the "'pictorial' works" under federal copyright law (*id.* (statutory citations omitted)). But the two photographers "will not create images that tell stories or convey messages contrary to their religious beliefs" (*id.* at 6), and they have consequently "declined requests for nude maternity pictures

[15] In *Elane Photography*, the Brief of Wedding Photographers as *Amicus Curiae* in Support of Petitioners (No. 13-585), https://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/ElaneAmicusPhotographers.pdf, developed in detail the facts that wedding photographers are photojournalists, that telling a wedding story is the photographer's own speech, that the speech is protected even where paid for, that photographers' speech shouldn't be compelled, and that compelling such speech poses broad dangers to others.

and photographs portraying violence" (*id.)*. Thus, when Elaine Huguenin declined to be the photojournalist for a same-sex commitment ceremony, her refusal was because of the messages, not the persons.

So these expressive-providers have been faithful to their position that they object based on the message(s) involved, not the status of those involved. As will be seen, messages that these expressive-providers can and cannot communicate in good conscience may be plotted on a graph that parallels a compelled-speech analysis.

But preliminarily, to demonstrate that the compelled-speech issue may not be evaded, six analytical points are next briefly addressed. Some were raised by the lower court's analysis and discussed above, while others have been raised elsewhere.

First, the activity at issue involves both expression of, and expressive-association with, messages to which Phillips objects, so pure speech is involved. *See supra* at 19-21. *See also, e.g.*, *Hurley*, 515 U.S. at 568-69 (even abstract-impressionist painting by Jackson Pollock is protected speech, though there is no "clear social position").

Second, as the cake artist, Phillips's speech is his own, not that of persons proposing to pay for his services, for the same reason that a painter on canvas is the speaker. *Id.*

Third, that Phillips would have been paid is immaterial to whether his sculpting and painting of a wedding cake is speech because artists have long received commissions to produce art, artists sell art, and paid speech is protected by the First Amendment. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460 (2010) (commercial animal-cruelty depictions are speech).

Fourth, state-created statutory interests or rights, e.g., against discrimination, cannot overcome explicit federal constitutional rights. U.S. Const. art. VI, cl. 2 (Supremacy Clause).

Fifth, First Amendment cases have long established that another's displeasure, discomfort, or perceived dignity-harm resulting from one's speech cannot be used to silence speech. *See, e.g.*, *Matal v. Tam*, 137 S.Ct. 1744, 1751 (2017) ("bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend"). So another's displeasure, discomfort, etc. with one's refusal of expression, association, or expressive-association can't be used to compel these.

Sixth, to the extent state-created interests or rights might be considered here, "dignity" and "self-definition" interests underpin *both* same-sex marriage and religious free-exercise. *Compare Obergefell*, 135 S.Ct. at 2593, 2604 (2015) (Kennedy, J., for Court) *with Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2785 (2014) (Kennedy, J., concurring) (religious free-exercise protects "self-definition," "dignity," and "more than ... belief"). Government can't deprive one of dignity to protect another's or allow one to self-define but not another because that would violate equal protection. So such interests cancel each other out. In other words, the substantive due process that underpins constitutional protection for same-sex marriage is a "two-way street" that also protects traditional beliefs about marriage. Mark L. Rienzi, *Substantive Due Process as a Two-Way Street: How the Court Can Reconcile Same-Sex Marriage and Religious Liberty*, 68 Stan. L. Rev. Online 18 (2015). "[O]ur society remains capable of adopting a live-and-let-live approach in which same-

sex marriage is recognized as a constitutional right, but religious dissenters are neither punished for their beliefs nor forced to violate them." *Id.* at 19.

> Indeed, this live-and-let-live approach is our constitutional norm. It is constitutional to procure an abortion, a gun, a Bible, or pornography; to engage in all manner of religious and secular ceremonies; and for the government to engage in capital punishment and wage war. Yet we generally do not force unwilling parties to participate in these legal and constitutionally protected or constitutionally permitted activities when it runs contrary to their deeply held moral or religious beliefs.

Id. at 19 n.5 (citing Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 130-52 (2012)).

With these objections rejected, the issue of compelled expression and expressive-association must be considered. We turn to the Peaceful Coexistence Model as an analytical tool for doing so in multiple contexts.

The context here is the desire of providers of expressive services related to weddings and marriage to not be compelled to engage in expression of, and expressive-association with, messages with which they disagree. Such expressive services range from marriage counseling, marriage-enrichment classes, officiating, and singing to coordination, photography, floral art, cake art, and calligraphy for a wedding and reception. As established above, expressive-providers who have appeared before this Court have no problem with providing services and products entailing low-involvement, low-expression activities communicating no message about same-sex marriage. So they care about the

degree to which they must be involved with activities to which they object based on the messages involved, and they care about the degree that their activity is expressive, including the degree that messages about same-sex-marriage are involved. In short, degrees of *expression* and *involvement* matter to expressive-providers in this context.

This parallels compelled-speech analysis, which turns on whether First-Amendment-protected speech is involved (expression) and whether there is a substantial burden thereon (involvement). Of course, degrees of expression in the activity involved are analytically unimportant once it is established that the activity at issue actually involves protected speech. That is, the fact that a wedding officiant uses actual words and a wedding photojournalist tells a story through photographs makes no constitutional difference for compelled-expression purposes because both are protected speech that may not be compelled. Still, degrees of expressive activity are useful factually and analytically, with the understanding that once activity is cognizable as speech it is protected regardless of any other degree of expression involved.

Consider degrees of involvement and expression in the present context of a cake artist and a same-sex wedding. We first consider *involvement*. The greater the required involvement with the activity and message to which one objects, the greater the burden on the objecting person and any constitutional rights involved (here, against compelled speech, association, and expressive-association). Consider three scenarios.

First, an ordinary bakery shop offers baked goods to the public and someone simply walks in and buys a ready-made cake. The baker has no idea whether it

will be used for any special occasion, but unbeknownst to him it will be used at a same-sex wedding reception. The expressive-providers described above would not hesitate to sell the cake and likely none would consider themselves involved in a same-sex wedding in any way, let alone an objectionable way. Courts would find no substantial burden on any right against compelled expressive or expressive-association.

Second, in the same bakery setting, before buying the ready-made cake the buyer says he wants to use it for his wedding and will himself put a wedding-related text atop it, along with two male figurines. Though the involvement with a same-sex-wedding is perhaps a bit higher, the baker is not required to turn the cake into a wedding cake (with the inherent message that a wedding has occurred and is to be celebrated). He has not been asked to apply the message to the cake, nor to do the reception-hall setup. What happens to the cake after it leaves the shop is up to the purchaser. Based on the evidence of the expressive-providers described above, they would sell the ready-made cake and not consider themselves much involved (or not all) with what would happen to the cake after it left the shop. Courts would likely find no substantial burden on rights against compelled expression, association, or expressive-association.

Third, is the present situation. A cake artist creates works of art with materials and tools including cake, frosting, icing, fondant, gum paste, piping, coloring, painting, airbrush, structural supports, and textual and symbolic messages. He first consults with the couple to be wed then draws the cake on paper before sculpting and painting it to be used as a *wedding* cake (with the message inherent in that very fact), here spe-

cifically for a same-sex wedding. Then he delivers and sets up that cake at the reception location. Here the involvement with the message that a wedding is occurring and is to be celebrated is high, as is the involvement with the wedding and reception events themselves. At this level of involvement, the expressive-providers discussed above refuse due to the degree of involvement with messages they do not wish to be compelled to express. And to the extent that expressive rights are involved (discussed next), courts should find a substantial burden on those rights given the degree of compelled involvement.

Likewise, the more the activity involved is *expressive*, the greater the burden on rights against compelled speech, association, and expressive-association. Selling ready-made cakes over the counter involves less expression than does a cake artist's customer consultation, custom design, and artistic execution of a commissioned cake that is designed and intended to serve as a wedding cake. A wedding cake is inherently expressive because it is a central focus of the wedding reception and symbolizes that a wedding has occurred and is being celebrated. The cutting of the cake, feeding each other with it by the couple, and sharing it with guests is a also central part of wedding expressive and associational activity.

In the graph on the following page, the Peaceful Coexistence Model is used to plot activities related to weddings on involvement and expression axes.[16]

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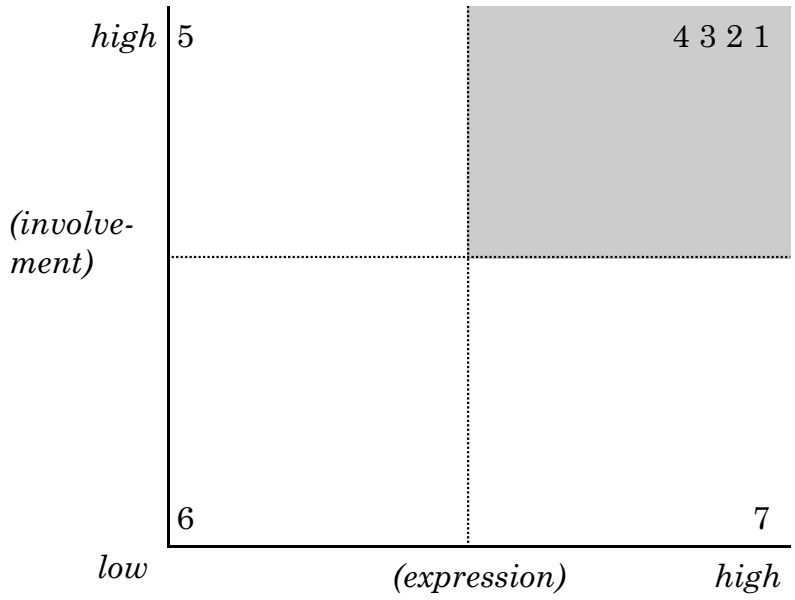
[16] Note again that photojournalists' and artists' speech is as protected as officiants' spoken words because the key to First Amendment protection is whether *speech* is involved, not degrees within protected speech. So ranking (continued...)

Peaceful Coexistence Model



Activity: **1.** counseling, officiating & classes; **2.** photojournalism at ceremony & reception; **3.** custom cake artistry & setup; **4.** custom floral artistry & setup; **5.** renting & setup of chairs, tables, etc.; **6.** selling over-the-counter, ready-made cakes and flowers or materials and supplies for baking or floral arranging; **7.** commenting on a wedding on one's blog

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[16] (...continued)
perceived degrees (which may be debated) *within* protected speech doesn't alter that. But the Model also considers expressive degrees *beyond* protected speech and shows the interplay with degrees of involvement. So the Model helps describe and evaluate the larger context.

The Model's upper-left quadrant shows high involvement with a wedding and reception but little expression, e.g., a rental company setting up chairs, tables, etc. for an outdoor wedding and reception (No.5).[17] Reported conflicts typically don't fall here, and any can be dealt with another day.

The lower-right quadrant shows high-expression activity related to a wedding and reception with little or no involvement in them, e.g., a blogger commenting on a wedding on her own blog (No. 7).[18] Reported conflicts typically don't fall here, and any can be dealt with another day.

In the lower-left quadrant (No. 6), conflicts are unlikely to arise because expressive-providers in cases before this Court (a florist, photographers, and a baker) have expressed a willingness to provide things in that quadrant regardless of who is involved, their status, intended use, etc. And because of the low degrees of involvement and expression, the clear protection lies elsewhere—in the upper-right quadrant.

In the upper-right quadrant lie the expressive-provider cases that have been brought before this Court, as well as Amici's own case, *IFI* (*see supra* at 5). That is where the conflicts arise as government compels

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[17] The vendor might object to expressive-association with the message of a same-sex wedding itself. But that case can be decided if it arises. The present analysis focuses on providers whose services are clearly expressive, where the conflict cases have largely arisen and where protections against compelled speech readily resolve them.

[18] If a wedding photojournalist tells a wedding story on her online site, that falls in the upper-right quadrant of the Model due to high degrees of involvement and expression.

expressive-providers to adopt its orthodoxy[19] regarding marriage and participate in expression, association, and expressive-association against conscience and belief. Absent compliance, government imposes severe consequences. Yet the upper-right quadrant is also where expressive-providers are fully protected by the First Amendment's rights against compelled expression, association, and expressive-association. That makes expressive-provider cases readily resolvable under compelled-speech doctrine without more.

Note that the Peaceful Coexistence Model (along with the First Amendment) also protects others:

> (1) an African-American cake artist from refusing to create a cake promoting white-supremacism for the Aryan Nation, (2) an Islamic cake artist from refusing to create a cake denigrating the Quran for the Westboro Baptist Church, and (3) three secular cake artists from refusing to create cakes opposing same-sex marriage for a Christian patron.

(Cert. Pet.1 (citing App.78a, 297-331a).) Each of these situations falls in the upper-right quadrant, given high degrees of expression and involvement with messages to which they object. So each is protected by the First Amendment. Moreover, the Model shows that there is little or no conflict arising in *three* of the four quadrants showing that those seeking services and those

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[19] Forbidden viewpoint discrimination is also involved here with government punishing one view and promoting another. *See Matal*, 137 S.Ct. at 1757 (""First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."" (citations omitted)).

providing them can generally peacefully coexist, so those seeking to compel expression, association, and the expressive-association in the upper-right quadrant are the ones seeking to upset the peaceful coexistence already established by the First Amendment and society's actual practice.

The use of government's coercive force in expressive-provider cases to compel orthodoxy, viewpoint, and compliance is the same sort of deprivation of liberty, dignity, and self-identity that led to the First Amendment in the first place. Government's refusal to adopt the usual live-and-let-live approach taken in other contexts is a rejection of America's means to peaceful coexistence—the First Amendment. Government coercion in these expressive-provider cases is a type of the long-rejected disqualifications for employment, effectively saying that no person who does not adopt the government's orthodoxy may engage in employment related to weddings.

America's solution is to apply the First Amendment. Given high degrees of involvement and expression, as in expressive-provider cases, government's coercive force may not be used to compel expression, association, and expressive-association. In the other three quadrants of the Peaceful Coexistence Model, wedding-related services typically flow and the government may have a stronger case, though those cases are for another day. But cases involving wedding-related services and expressive-providers are readily resolved because protection is clear in the upper-right quadrant.

One judge said that compelling expression, association, and expressive-association on unwilling expressive-providers is "the price of citizenship." *Elane Photography*, 309 P.3d at 80 (Bosson, J., concurring). But

the price of citizenship was already paid by patriots who fought to free America from the British system of speech licensing, prior restraints, censorship, employment disqualifications, and the like. And the Founders gave us a better system with the First Amendment, a system of liberty where government cannot compel orthodoxy or speech. The First Amendment maps the way to peaceful coexistence in this conflicted context, as shown in the Peaceful Coexistence Model.

Conclusion

This Court should hold for Petitioners by reaffirming First Amendment protection against compelled expression, association, and expressive-association in the expressive-provider context, thus bringing peaceful coexistence to this troubled context.

Respectfully submitted,

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