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 THE THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

BRIEF OF THE THOMAS MORE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Thomas More Society ("TMS") is a nonprofit organization devoted to the defense and advocacy of First Amendment rights, including freedom of speech and the free exercise of religion. Incorporated as a 501(c)(3) not-for-profit corporation in Illinois and based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is undisputed that "decorating a wedding cake involves considerable skill and artistry." (Pet. App. 28a, 57a, 75a). Consistent with the precedent of this Court and of the Second, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits, such nonverbal forms of artistic expression are protected by the First Amendment as

[1] Blanket letters of consent from petitioners and respondent, Colorado Civil Rights Commission, to the filing of *amicus* briefs have been lodged with the Clerk. Respondents, Charlie Craig ("Craig") and David Mullins ("Mullins"), have also consented to the filing of an *amicus* brief on behalf of petitioners by the Thomas More Society. Pursuant to S. Ct. Rule 37.6, *amicus* further states that no counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae* or its counsel, has made a monetary contribution to this brief's preparation or submission.

pure "speech" or expression (as opposed to expressive conduct). Instead of considering, in the first instance, whether the First Amendment protection afforded artistic expression as pure "speech" extends to the creation of custom wedding cakes, the Colorado Court of Appeals considered only whether the creation of wedding cakes is protected as expressive conduct. This flawed analysis constitutes a dangerous, unprecedented contraction of the First Amendment's critical protection of such nonverbal art forms to only "inherently expressive" forms of artistic expression that convey a particularized message likely to be understood by those who view it. (Pet. App. 26a). This Court, however, has held that the First Amendment protects artistic expression irrespective of whether it conveys "a narrow, succinctly articulable" or "particularized" message. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

Moreover, even under the "expressive conduct" test applied by the Colorado Court of Appeals (a test that has not been previously applied to visual art forms), petitioners' conduct is entitled to First Amendment protection. Requiring petitioner, Jack Phillips ("Phillips"), to create a custom wedding cake for a wedding to which he objects on the basis of his religious beliefs, impermissibly compels him to convey an unmistakable message that a marriage has occurred and of approval of the wedding as an event to be celebrated. In finding that the creation of a wedding cake for Craig and Mullins would not constitute expressive conduct,

the Colorado Court of Appeals ignored not only the purpose and central role of the wedding cake in the wedding ritual, but also the evidence that the rainbow cake that Craig and Mullins wanted, and ultimately obtained from a different cake artist, clearly conveyed a particularized message of celebration and approval of same sex marriage. (JA175-176).

Based on a misinterpretation of this Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("*FAIR*"), the Colorado Court of Appeals erroneously concluded the public would not view the creation of a Masterpiece cake as an endorsement of a same sex wedding, but would instead understand it as necessary compliance with the law. (Pet. App. 31a-32a). According to the Colorado court, there is no expressive conduct and no First Amendment violation arising out of compelling the creation of custom cakes for same sex weddings pursuant to Colo. Rev. Stat. § 24-34-601, Discrimination in Places of Public Accommodation ("CADA"), because such wedding cakes will be understood to be the result of compelled compliance and not the expression of the cake artist. This fallacious circular reasoning impermissibly seeks to justify a violation of the First Amendment based on a violation of the First Amendment.

This case is but an example of a trend in the use of expanded public accommodation laws to compel speech in contravention of the First Amendment. Public accommodation laws have been unduly broadened with respect to both what constitutes a "public accommodation" as well as the categories of groups for which

service may not be refused. As a consequence of that expansion, far beyond what is necessary to effect the original laudable purposes of public accommodation laws, the owners of businesses who provide expressive artistic services are being routinely forced to surrender their First Amendment rights as the cost of doing business, even though the services they provide are not vital and alternatives are readily available elsewhere. This Court should make clear that it will not countenance that ongoing assault on the protections afforded by the First Amendment.

ARGUMENT

I. The Colorado Court Of Appeals Erred In Failing To Analyze Whether Petitioners' Custom Wedding Cakes Are Nonverbal Artistic Expression Protected By The First Amendment As Pure "Speech" Or Expression.

The Colorado Court of Appeals erred in failing, in the first instance, to analyze whether creating custom wedding cakes is a form of pure "speech" within the meaning of the First Amendment. Among other reasons, the distinction between pure "speech" and expressive conduct is significant because the First Amendment protection afforded to expressive conduct is limited to conduct that is "inherently expressive" (*FAIR*, 547 U.S. at 66), or "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . ." *Spence v.*

State of Wash., 418 U.S. 405, 409 (1974). Decisions of this Court and of the federal Courts of Appeals, however, establish that nonverbal forms of artistic expression are protected irrespective of whether they communicate a particularized message.

This Court has consistently held that nonverbal forms of artistic expression, including painting, music and dance, are protected by the First Amendment. For example, in *Hurley*, *supra*, this Court observed that some forms of expression are "unquestionably shielded" by the First Amendment, such as the painting of Jackson Pollock, and the music of Arnold Schöenberg (as well as the Jabberwocky verse of Lewis Carroll), even though they fail to fail to convey "a narrow, succinctly articulable" or "particularized" message which, in *Spence*, this Court found was necessary to a determination that "expressive conduct" is entitled to First Amendment protection.

Prior to *Hurley*, this Court similarly declined to apply *Spence* and its expressive conduct analysis to nonverbal artistic forms of expression. For example, in *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989), the Court acknowledged that music is "a form of expression and communication" that is protected under the First Amendment. In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981), this Court recognized that live entertainment, including musical works and dance, are included in "a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." Similarly, in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975),

this Court concluded that the ordinance at issue impermissibly prohibited First Amendment protected speech or expression, including a ballet and "other works of unquestionable artistic and socially redeeming significance."

In other cases, the Court has simply taken as established law that artistic expression is protected by the First Amendment. *See, e.g.*, *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) ("*Finley*") (Court assumed that the First Amendment protected the work of the performance artists who challenged a statute directing the Chairperson of the NEA to establish procedures that would take into consideration "general standards of decency and respect for the diverse beliefs and values of the American public" in making funding decisions). *See also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246-248 (2002) (statute prohibiting any depiction of sexually explicit activity involving minors violates First Amendment because it "prohibits speech despite its serious literary, artistic, political, or scientific value," including films depicting teenagers involved in sexual activity). In his *Finley* dissent, Justice Souter expressly recognized what the majority implicitly acknowledged – that artistic expression is encompassed within the protection of the First Amendment. Citing this Court's decisions in *Hurley*, *Ward*, *Schad* and *Kaplan v. California*, 413 U.S. 115, 119-120 (1973),[2] Justice Souter observed: "It goes

[2] In *Kaplan*, the Court stated: "As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide

without saying that artistic expression lies within this First Amendment protection." *Finley*, 524 U.S. at 602-603 (citations omitted) (Souter, J., dissenting). Justice Souter explained:

> The constitutional protection of artistic works turns not on the political significance that may be attributable to such productions, though they may indeed comment on the political, but simply on their expressive character, which falls within a spectrum of protected "speech" extending outward from the core of overtly political declarations. Put differently, art is entitled to full protection because our "cultural life," just like our native politics, "rest[s] upon [the] ideal" of governmental viewpoint neutrality. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641, 114 S.Ct. 2445, 2458-2459, 129 L.Ed.2d 497 (1994).

The Second, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits have also repeatedly held that nonverbal artistic expression is protected by the First Amendment as pure "speech" or expression. The Second Circuit recognized: "Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection." *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996).

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with the long-settled position of this Court that obscenity is not protected by the Constitution." *Kaplan*, 413 U.S. at 119-120 (citations omitted).

The court went on to conclude that paintings, photographs, prints and sculptures "always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection." *Id.* at 696. *See also Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006) (graffiti painted clothing protected First Amendment expression).

In *White v. City of Sparks*, 500 F.3d 953 (9th Cir. 2007), the Ninth Circuit held that the original paintings of an "itinerant artist" qualify as forms of expression protected by the First Amendment. The court held that original paintings reflect the artist's "sense of form, topic, and perspective" and that an artist's self-expression is protected irrespective of whether his or her paintings "express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica,*" or simply "the artist's vision of movement and color, as with 'the unquestionably shielded painting of Jackson Pollock.'" *White*, 500 F.3d at 956, citing *Hurley*, 515 U.S. at 569. The court concluded: "So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective." *Id. See also Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) ("We have little difficulty recognizing that a tattoo is a form of pure expression entitled to full constitutional protection." The court made clear: "The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment.")

In concluding that stained glass windows were protected by the First Amendment, the Seventh Circuit similarly acknowledged, "the freedom of speech and of the press protected by the First Amendment has been interpreted to embrace purely artistic as well as political expression." *Piarowski v. Illinois Comm. College Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985). The Sixth, Tenth and Eleventh Circuits have also held that the First Amendment protects all forms of artistic expression. *See ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) ("The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures." (citations omitted)). *See also Cressman v. Thompson*, 798 F.3d 938, 952-953 (10th Cir. 2015) (recognizing that "[t]he concept of pure speech is fairly capacious" and extends to nonverbal media that genuinely and primarily reflect the self-expression of the artist, including the artist's sale of his or her own original artwork); *Buehrle v. City of Key West*, 813 F.3d 973, 976-977 (11th Cir. 2015) (First Amendment prohibition against any law abridging speech extends beyond the spoken or written word and includes various forms of artistic expression including the display of a tattoo).

Petitioners' custom wedding cakes are a visual medium of expression with the same characteristics as those forms of skilled, artistic nonverbal expression that this Court and the Courts of Appeals have found are protected by the First Amendment as pure "speech"

or expression. The record establishes that original wedding cake design and decoration is a form of art and creative expression. That fact is reflected by Masterpiece Cake's logo – an artist's palette with a paintbrush and a whisk. Phillips begins his designs by sketching them on paper and then crafts the designs he creates out of cake, fondant, edible paint and other media. Some of his designs are sculpted out of sheet cake. His wedding cakes are created for the specific couple after a consultation in which Phillips learns about the couple's wedding ceremony and celebration and gets to know their personalities and preferences. His cakes are a central component of the wedding celebration and, in creating them, he is an active participant associated with the event. (Pet. App., 277a-280a, ¶¶28-45).

There is no principled distinction between an artist who conveys his or her perspective through a painting of a cake, including, for example, Wayne Theibaud's painting, *Cakes*, which hangs in the National Gallery of Art, https://www.nga.gov/content/ngaweb/Collection/art-object-page.72040.html (last visited Sept. 5, 2017), and an artist who conveys his or her perspective through the creation of an actual, uniquely designed wedding cake. The record in this case establishes that custom wedding cakes, are, like paintings, music and dance, the product of their creator's artistry, skill, creativity and distinctive style. They are the artist's expression about the couple, their relationship and their wedding ceremony. The Colorado Court of Appeals erred in failing to consider, as the necessary first step

in its analysis, whether a custom designed wedding cake constitutes a visual art form that constitutes pure "speech" or expression.

II. The Colorado Court Of Appeals' Erred In Concluding That Petitioners' Custom Designed Wedding Cakes Do Not Constitute Expressive Conduct Protected By The First Amendment.

Even if categorized and subject to evaluation as expressive conduct (an analysis at odds with that which this Court and the Courts of Appeals have previously applied to visual art forms), petitioners' creation of custom wedding cakes is protected by the First Amendment. In order to determine whether conduct is sufficiently communicative to warrant protection, the courts evaluate a number of factors. Those considerations include the nature of the activity, the factual context and environment in which it was undertaken in order to determine the presence of "[a]n intent to convey a particularized message . . . and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *See Spence*, 418 U.S. at 410-411.

In this case, Phillips was asked to use his skill and artistry to create a central component of Craig and Mullins' wedding celebration – a component that is inextricably bound to the message that a marriage has occurred and that it should be celebrated. The rainbow cake that Craig and Mullins wanted for their wedding

celebration, and that they ultimately obtained from a different cake artist, conveys a particularized message of celebration and approval of their same sex marriage.

Petitioners' conduct is analogous to the conduct which, in *Hurley*, this Court found was protected by the First Amendment. In *Hurley*, the Court held that the panel that organized the parade (the "Council") could not be compelled to include the Irish-American Gay, Lesbian and Bisexual Group because to do so would constitute compelled speech in violation of the First Amendment. The Court explained: "Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Hurley*, 515 U.S. at 574. As in *Hurley*, even if characterized as expressive conduct, compelling Phillips to create a custom rainbow wedding cake for a same sex wedding to which he objects based on his sincerely held religious beliefs, impermissibly requires him to create a cake that inherently conveys, "to the public at-large," a belief that a marriage has occurred and approval of the wedding as an event to be celebrated.

In finding that Phillips' cakes do not constitute expressive conduct, the Colorado Court of Appeals concluded, "the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same sex weddings likely to be understood by those who view it."

(Pet. App. 30a). Relying principally on this Court's decision in *FAIR*, the court held that, instead, the message to be discerned from a Masterpiece cake by "a reasonable observer" would be "Masterpiece's compliance with the law" and "not a reflection of its own beliefs." (Pet. App. 31a).

In *FAIR*, this Court held there was no First Amendment violation arising out of a statute that required law schools, as a condition of receiving federal funding, to treat military and nonmilitary recruiters alike. The Court concluded that the law schools would not be viewed as agreeing to the military's policies because, "[n]othing about recruiting suggests that law schools agree with any speech by recruiters." This Court noted that it previously held that even high school 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." *FAIR*, 547 U.S. at 65 (citations omitted). In this case, however, there is no distinction or separation between the message reflected by the creation of a wedding cake and its creator. The fact that Phillips is commonly asked to create cakes and other goods as a result of people having seen his wedding cakes at another wedding establishes that he, and not the State of Colorado, is specifically identified and associated with the wedding cakes he creates. (Pet. App., 280a, ¶¶46, 48). Phillips is not the "sponsor" of the speech, but the speaker. Contrary to the Colorado Court of Appeals' conclusion, *FAIR* does not stand for the

proposition that the message inherent in compelled expressive conduct is negated on the basis that it is compelled.

III. The Unwarranted Expansion Of Public Accommodation Law Is Incompatible With The Expressive Protections Of The First Amendment.

This case illustrates how modern public accommodation laws have been expanded well beyond their salutary purposes to the point that they are in profound conflict with the ideal of free expression enshrined in the First Amendment. Indeed, they have become a widespread justification for the very antithesis of First Amendment ideals: compelled speech. Public accommodation laws were originally created to ensure that certain types of businesses with a monopoly granted by the government did not abuse that monopoly to prevent access to the critical services they provided. The expansion of both the types of businesses encompassed within the definition of "public accommodation" and the types of protected classes (as to which any refusal of service is presumptively "unreasonable") have created an untenable conflict with the First Amendment, causing all who use their artistry in the commercial sphere to choose between their fundamental right to freedom of expression (and free exercise of religion) and their ability to earn a livelihood using their expressive talents.

A. Original Public Accommodation Laws Balanced Consumer Protection With Entrepreneurial Liberty.

As this Court has noted, public accommodation laws originated under English common law and required certain businesses that functioned as a "sort of public servant[]" to serve all customers unless they had a "good reason" to refuse such service. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 571 (1995) (quoting *Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N. P. 1835)). The rationale for such a requirement came from "the special privilege of a monopoly franchise given to a common carrier to perform a service for the public," rendering "the carrier[] like other public utilities" which could not refuse "its service without permission of the authorized governmental commission." Alfred Avins, *What is a Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1, 3 (1968), *available at* http://scholarship.law.marquette.edu/mulr/vol52/iss1/2. Similarly viewed as "affected with a public interest" were monopolies resulting from the nature of the enterprise – such as the erection of a wharf or a crane – which as a practical matter were usually the only alternative in town. Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STANFORD L. REV. 1241, 1250 (2014) (citing Matthew Hale, *De Portibus Maris*, *in* A TREATISE, IN THREE PARTS (c. 1670), *reprinted in* 1

A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND FROM MANUSCRIPTS 1, 78 (Francis Hargrave ed., London, T. Wright 1787)).

Unlike most businesses, these monopolies, or public "utilities," were designed to perform a service for the public at large in providing necessities of food, shelter, or transportation – necessities which, if denied, would put the consumer's very life (or, perhaps, in the case of cranes and wharves, livelihood) at risk. American jurisprudence naturally followed the English common law, requiring common carriers and innkeepers to not unreasonably exclude anybody. Avins, *supra*, at 2. Even so, however, these places of public accommodation "had the power to make reasonable regulations and discriminations, and exclude passengers on reasonable grounds," *id.*, such as unruly behavior or repeated offenses. Epstein, *supra*, at 1252.

In contrast to the monopolies that served the public interest in general, businesses in more competitive industries that refused service caused the consumer much more minor consequences – the consumer's life was not at risk as a result of the denial and he could also easily go to another provider to obtain the needed goods or services; "the market supplies . . . all the protection that any person needs." *Id.* at 1251.

This public accommodation framework adequately balanced the protection of consumers in situations where the market could not do so with the freedom of entrepreneurs to serve selected clientele

without an overall denial of service to any particular individual or class of persons.

B. The Scope Of Public Accommodation Under Title II Of The Civil Rights Act Of 1964 Necessarily Expanded To Combat Entrenched Legal And Societal Racial Barriers That Forestalled The Power Of Market Forces.

Title II of the Civil Rights Act of 1964 expanded the scope of public accommodations to include many more businesses regardless of monopolistic character. This was necessary, however, because the "weight of history ma[de] it impossible to leap from state-imposed segregation to a perfectly voluntary market." *Id.* at 1260.

In the aftermath of the Civil War, much of society in the southern states sought to maintain a culture mirroring the balance of power that had existed with slavery. It did so in part through law, with many states adopting "Black Codes." Helen J. Moore, *Patterson v. McLean Credit Union: Racial Discrimination by Private Actors and Racial Harassment Under Section 1981*, 20 GOLDEN GATE U. L. REV. 617, 620-21 (1990) ("The newly reconstructed state legislatures immediately adopted Black Codes, which sought to confine blacks to a condition as close to slavery as possible, maintaining the South's pre-war social and economic order."). Equally pernicious, southern society engaged in cartel-like behavior where white people agreed

amongst themselves not to sell or lease land to blacks, or pay them decent wages, or in any way treat them as equals – "In other words, the right[s were] not technically withheld as a legal matter, but [were] worthless as a practical matter." Barry Sullivan, *Review Essay and Comment: Reconstructing Reconstruction: Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 556 (1989).

By the time the Civil Rights Act of 1964 was passed, both law and custom rendered it "difficult, if not impossible, for African American citizens to secure food, transportation, and lodging when traveling from place to place in large sections of the country," either because they were outright refused access to facilities, or granted only "on limited and unequal terms." Epstein, *supra*, at 1242.

Even those that opposed racial discrimination – whether native Southerners or Northerners seeking to enter those markets – were limited in their ability to act in opposition because "the dominant white segregationists who controlled the polls, the police, and all key government positions exercised in combination a level of state monopoly power that no simple public utility could hope to match." *Id.* at 1243 (also noting, at 1258, that new businesses who did not wish to "toe the segregationist line" faced the risk of "local government intrigue cut[ting] their key services at the most inopportune time"). Similarly, "the use and threat of private violence against those who tried to stand up to the

dominant political forces" also prevented individuals from pushing back against the status quo. *Id.* at 1258.

This environment was one where the competitive market had no power, because the monopolistic force of the government itself prevented individual choice by providers in determining which clientele to select or how to treat differing groups of clientele. It was only in "forcing" such businesses to treat all races equally that they were protected from the governmental and societal consequences of choosing to do so. *Id.* at 1260 (noting that "many of the strongest supporters of Title II were the large firms that would be regulated by it" because their "basic commercial interests were undermined by segregation and [they] wanted government protection at the federal level against the depredations by public and private forces at the local level").

Such expansion of public accommodation law, while broadening the entities covered by the law, remained limited in the classifications of the groups toward whom refusal of service was deemed "unreasonable" and thus illegal.

C. Unwarranted Expansion Of Public Accommodation Laws Directly Threatens Fundamental Rights Of Expression In Numerous Commercial Activities.

Modern public accommodation laws, by contrast, have greatly expanded the scope of what is a "public accommodation" as well as the categories of groups that may not be refused. The result is a widespread

sacrifice of fundamental rights to control expression as the entry price to join the market. Such a price offends every principle of individual freedom cherished throughout this country's history.

As an example of the expanded definition of what is considered a public accommodation, New Jersey's law articulates *fifty* separate types of places that are deemed to be public accommodations, with broad enough language that, in essence, "business of any type, carrying on any activity, likely falls within the state's definition of a public accommodation." James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 967 (2011) (citing N.J. Stat. Ann. § 10:5-5(l)); *see also* N.M. Stat. Ann. § 28-1-2(H) (defining public accommodation as *any* establishment that offers *any* "services, facilities, accommodations, or goods to the public"). In terms of protected classes, Washington D.C.'s law includes, in addition to race, "religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business." Gottry, *supra*, at 967 (citing D.C. Code § 2-1402.31(a)); *see also* 775 Ill. Comp. Stat. 5/1-102(A) (including as protected classes "race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental

disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service").

In 2000, this Court noted that such expansions have increased "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657 (2000). When it comes to the expressive behavior of an organization or business, however, even more conflict arises when states conflate the refusal to create or provide *expression* with the refusal to provide any service to a *class*.

This is nowhere more evident than in the current public debate on compelled expression in connection with same sex marriages, where as in this case, providers of artistic wedding services (*see supra* Argument I) are punished for their desire not to use their expressive talents to express a message that goes against their deeply held religious beliefs. *See also State v. Arlene's Flowers, Inc.*, 289 P.3d 543 (Wash. 2017), *petition for cert. filed*, No. 17-108; *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (2014). *But see Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals, Inc.*, 2017 Ky. App. Unpub. LEXIS 371 (May 12, 2017) (affirming Circuit Court reversal of Human Rights Commission finding of discrimination for refusal to print t-shirts saying "Lexington Pride Festival 2012" with the number 5 surrounded by rainbow circles, finding that the printer's denial was of the message itself, rather than service to any particular individual). In these

cases, the denial of a particular service stands in stark contrast to the proprietors' willingness to provide other services to members of the protected class,[3] yet courts continually categorize the denial of a particularized service – or, in other words, the refusal to express approval of a wedding when such approval violates the proprietor's sincerely held religious beliefs – as class-based discrimination.

The original justifications for public accommodation laws, and even their expansion under the Civil Rights Act of 1964, fail to support the expanded coverage of public accommodation laws to such businesses. These businesses are not monopolies providing essential services for life. They operate in an economy of thriving competition, where consumers can find another provider with little to no trouble at all. In the instant case, for example, a search on Yelp for "bakeries" in Lakewood, Colorado, the home of Masterpiece Cakeshop, brings up *628 locations*. Yelp Search Results for "Bakery" near "Lakewood, CO," *available at* https://www.yelp.com/search?find_desc=bakery&find_loc=Lakewood%2C+CO&ns=1 (last visited Sept. 4, 2017).

Unlike the services originally provided by innkeepers, who simply supplied a roof over one's head in protection against the elements, services provided by

[3] *See*, *e.g., State v. Arlene's Flowers, Inc.*, 289 P.3d 543, 549 (Wash. 2017) (proprietor served customer for over nine years prior to request for same sex wedding floral arrangements).

businesses which incorporate expressive or artistic elements, including such services provided by bakeries, florists, photographers, speechwriters, printers, painters, sculptors, ghostwriters, bloggers, and countless others in today's incredibly diverse economy, must be protected by the First Amendment. While the consumer may prefer the particular creative style of the artist sought to be hired over other offerings in the market, such a preference actually *supports* the need to protect the creator's right to refuse by proving that, even in the consumer's understanding, the creator is engaged in unique and protected expression. The consumer has the freedom to choose among the varied offerings on the market, but has no right to use public accommodation law to force a particular artist into expressing the consumer's desired message against the provider's will.

This Court's jurisprudence has clearly held that the First Amendment's protection "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (internal citations omitted). "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Id.* (citing *Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). The expansion of public accommodation laws to encompass numerous

expressive services has made surrender of this fundamental right the entrance price to the commercial sphere. In an arena full of competition to provide consumers with goods and services beyond those vital to life and safety, this Court should clarify emphatically that such a price cannot stand.

CONCLUSION

For the foregoing reasons, including, most importantly, upholding and protecting the fundamental freedom of expression guaranteed by the First Amendment, this Court should reverse the decision of the Colorado Court of Appeals.

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