No. 16-111

In The Supreme Court of the United States

MASTERPIECE CAKESHOP, INC. AND JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, CHARLIE CRAIG, AND DAVID MULLINS,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG IN SUPPORT OF MASTERPIECE CAKESHOP, INC. AND JACK C. PHILLIPS

Scott W. Gaylord
Counsel of Record
ELON UNIVERSITY SCHOOL OF LAW
201 North Greene Street
Greensboro, NC 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel of Record for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF AMICUS[1]

CatholicVote.org ("CatholicVote") is a nonpartisan voter education program devoted to building a Culture of Life. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. CatholicVote believes that Catholic teaching often serves to illuminate the first principles set forth in the Declaration of Independence and the Constitution by situating those principles in the broader context of our Judeo-Christian tradition. When public accommodations laws, like the Colorado Anti-Discrimination Act ("CADA"), are applied to the expressive activity of businesses, religious liberty and freedom of speech are threatened. CatholicVote, therefore, comes forward to support the right of all citizens to be left alone so they can practice their art (and earn their living) in a manner that is consistent with their religious faith.

Given its educational mission and focus on the dignity of the person, CatholicVote is deeply concerned about the First Amendment issues implicated by *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n* as well as the effect of public accommodations laws on those who seek to incorporate their religious principles in their expressive activity. CatholicVote believes that its amicus brief provides this Court with an important

---

[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

perspective on the compelled speech problem that attends the application of broad public accommodations laws to expressive activity.

SUMMARY OF ARGUMENT

The central question in this case is whether CADA "abridges expression that the First Amendment was meant to protect." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Under *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* and this Court's other compelled speech cases, the answer is "yes." The "fundamental rule" under the First Amendment is that "a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. 557, 573 (1995). This rule safeguards individuals as well as for-profit businesses. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341 (2010) ("The Court has recognized that First Amendment protection extends to corporations."). As a result, Masterpiece Cakeshop, Inc. ("Masterpiece") has the right to determine "both what to say and what *not* to say." *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988). But public accommodations laws, when applied to the expressive activity of for-profit businesses, may deprive them of their First Amendment right. Such is the case here. CADA forces Masterpiece either to convey a message with which it disagrees (by designing and creating a wedding cake for a same-sex wedding) or to remain silent and forego sending its desired message (in support of opposite-sex marriage). This CADA cannot do. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that

the government cannot compel speakers "to foster … an idea they find morally objectionable").

The Court's expressive association cases confirm that public accommodations laws must yield to protected speech activity when those laws "interfere with the [speaker's] choice not to propound a point of view contrary to its beliefs." *Boy Scouts of America v. Dale*, 530 U.S. 640, 654 (2000). When applying antidiscrimination laws to expressive associations or to businesses that engage in expressive activity, the government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579 (quoted in *Dale*, 530 U.S. at 661).

Moreover, the lower court's reliance on *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47 (2006) is misplaced. Drawing on *Rumsfeld*, the Colorado court contends that CADA does not violate Masterpiece's First Amendment rights because "a reasonable observer would understand that [its] compliance with the law is not a reflection of its own beliefs." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 286 (2015). There are two problems with this interpretation. First, unlike the bakery here, "the schools [we]re not speaking." 547 U.S. 47, 64 (2006). As a result, *Rumsfeld* is inapposite because there was no compelled speech violation. Second, the lower court's proposed rule—that compliance with a general law mandating speech does not trench on a speaker's First Amendment rights because an observer would not attribute the speech

to the speaker—is inconsistent with *Barnette*, *Wooley*, *Pacific Gas*, *Riley*, and *Tornillo*, and, therefore, should be rejected.

ARGUMENT

Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n requires this Court to consider the intersection of public accommodations laws and the broad protection afforded speakers under the First Amendment. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964) (stating that the First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). As the scope of public accommodations laws has grown—in terms of both the types of entities classified as public accommodations and the number of groups protected from discrimination—the possibility for conflict with First Amendment speech rights has increased. This case is a prime example. The Colorado Court of Appeals denied that the First Amendment protects the creative and expressive works of for-profit businesses from public accommodations laws, like CADA, that interfere with the businesses' desired message. *See Masterpiece Cakeshop*, 370 P.3d at 285-6 (holding that CADA "prohibits all places of public accommodation from discriminating against customers because of their sexual orientation," even those, like Masterpiece, that "involve[] skill and artistry"); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 74 (2013) ("The reality is that because [Elane Photography] is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work.").

Despite acknowledging that expressive professions "undoubtedly engage in speech, and sometimes even create speech for others as part of their services," the lower courts contend that "there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws." *Id*. at 71.

The lower courts are wrong. *Hurley* and this Court's other compelled speech cases establish that the First Amendment shelters expressive activity—whether engaged in by individuals or for-profit businesses—when antidiscrimination laws violate a speaker's "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.[2] While

---

[2] Recognizing that the First Amendment prevents the government from applying antidiscrimination laws to speech activity is not novel. Consistent with *Hurley*, several lower courts have refused to apply such laws when they interfered with a speaker's expression. *See*, *e.g.*, *Lexington Fayette Urban County Human Rights Comm'n v. Hands on Originals, Inc.*, 2017 WL 2211381 at *7 (Ky. Ct. App. 2017) (refusing to apply Kentucky's public accommodations law to a t-shirt printing business because the First Amendment protected its right "not to promote" a message with which it disagreed); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 57 (N.D. Ohio 1995) (barring application of Ohio's public accommodations law, where Nation of Islam ministers sought to give a "separate speech to men and women," because forcing the ministers to talk to a mixed gender audience would alter "the content and charter of the speech"); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596 (5th Cir. 1995) (recognizing that Title VII "steers into the territory of the First Amendment" when "pure expression is involved"); *McDermott v. Ampersand Publ'g, Inc.*, 593 F.3d 950, 962 (9th Cir. 2010) (voiding a preliminary injunction under the NLRA against a newspaper that had fired certain writers

Hurley acknowledges that public accommodations laws generally are constitutional when applied to a business's conduct, it also holds that antidiscrimination laws must yield to the First Amendment when "the sponsors' speech itself [is taken] to be the public accommodation." *Id.* When a State seeks to apply its public accommodations laws to a business's expression, the speaker retains the right "to shape its expression by speaking on one subject while remaining silent on another." *Id.* at 574. This is not surprising given that the Supremacy Clause ensures that constitutional norms prevail when in conflict with state laws, including state antidiscrimination laws. U.S. CONST., Art. VI ("This Constitution … shall be the supreme Law of the Land….").

Unfortunately, the lower court gets this backwards, holding that CADA requires Masterpiece either to (1) engage in expression with which it disagrees or (2) remain silent and not send its desired message. *See Masterpiece Cakeshop*, 370 P.3d at 286; *Elane Photography*, 309 P.3d at 66 (holding that because Elane Photography "sells its expressive service to the public," it must "perform the same services for a same-sex couple as it would for an opposite-sex couple"). Yet putting businesses that engage in expressive activity to this choice violates the freedom of thought and mind that the First Amendment was meant to safeguard. *See Wooley*, 430 U.S. at 714 (quoting *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)) ("The

---

for union activity because, under *Hurley*, "[t]o the extent the publisher's choice of writers affects the expressive content of its newspaper, the First Amendment protects that choice").

right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"). As a result, *Masterpiece Cakeshop* contravenes "the usual rule that governmental bodies may not prescribe the form or content of individual expression," *Cohen v. California*, 403 U.S. 15, 24 (1971), even when others might view "those choices of content" as "misguided, or even hurtful." *Hurley*, 515 U.S. at 574.

I. This Court's compelled speech and expressive association cases prohibit States from applying their public accommodations laws in a way that interferes with a business's expressive activity.

Although the First Amendment states only that "Congress shall make no law … abridging the freedom of speech," U.S. CONST., Amend. 1, this Court has long held that it also prevents the government from compelling speech: "the right of freedom of thought protected by the First Amendment against state action, includes both the right to speak freely and the right to refrain from speaking." *Wooley*, 430 U.S. at 714; *Riley*, 487 U.S. at 796-97 ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.") Compelled expression "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 642. Consequently, "as a general matter, ... government has no power to restrict expression because of its

message, its ideas, its subject matter, or its content." *Ashcroft v. Am. Civil Liberties Union,* 535 U.S. 564, 573 (2002) (internal quotation marks omitted); *Barnette*, 319 U.S. at 642 ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

The fact that Masterpiece is a for-profit business does not alter the First Amendment analysis. *Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."). Visual expression—whether wedding cakes, photography, video games, paintings, or other forms of symbolic speech—is protected even when created as part of a commercial enterprise. *United States v. Stevens*, 559 U.S. 460, 464, 481 (2010) (striking down a federal statute that "criminalize[d] the commercial creation, sale, or possession of certain depictions of animal cruelty," which depictions included videos and photographs in magazines); *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 790 (2011) (confirming "that video games qualify for First Amendment protection"). Thus, a business that "sells its expressive services to the public" does not lose its right to object to compelled speech. *Elane* Photography, 309 P.3d at 66.

Moreover, nonverbal expression, like the flag salute in *Barnette*, receives the same protection under the First Amendment. The Court struck down the compulsory flag salute because to hold otherwise would have required the Court "to say that a Bill of Rights which guards the individual's

right to speak his own mind, left open to public authorities to compel him to utter what is not in his mind." 319 U.S. at 364; *Hurley*, 515 U.S. at 569 ("The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression."). Wedding cakes are an important symbol of marriage and for many a central part of a marriage celebration. *Barnette*, 319 U.S. at 632 ("Symbolism is a primitive but effective way of communicating ideas."); Merriam-Webster Dictionary (defining "wedding cake" as "a usually elaborately decorated and tiered cake made for the celebration of a wedding") (last visited on September 4, 2017) (available at https://www.merriam-webster.com/dictionary/wedding cake). A wedding cake, like other emblems, is used "to symbolize some system, idea, institution, or personality" and serve as "a short cut from mind to mind." *Barnette*, 319 U.S. at 632. As a symbol of marriage, a wedding cake promotes the sanctity of the institution and celebrates a new union between two people.

Yet even if one assumes that the message "is not wholly articulate," a wedding cake for a same-sex wedding suggests at a minimum that a same-sex union should be celebrated and possibly (in the wake of *Obergefell*) the "view that people of their sexual orientation[] have as much claim to unqualified social acceptance as heterosexuals" who are married. *Hurley*, 515 U.S. at 574. Masterpiece may not believe that same-sex weddings should be celebrated because such unions are contrary to its owner's religious beliefs or, like the parade organizers in *Hurley*, it "may object to unqualified

social acceptance of gays and lesbians or have some other reason for wishing" not to create a wedding cake for a same-sex couple's marriage ceremony. *Id.* at 574-75. "[W]hatever the reason," though, under the First Amendment "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575.

Recognizing that the First Amendment protects the expressive activity of for-profit businesses safeguards the right of all speakers—whether individuals or businesses—"to hold a point of view different from the majority and to refuse to foster … an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. Public accommodations laws that are applied to force Masterpiece or any other business to express its support for same-sex marriage (or anything else)—through a banner stating that same-sex marriage should be accepted or through an elaborate wedding cake celebrating a same-sex union—are unconstitutional because they violate the "individual freedom of mind" that the First Amendment was meant to guard. *Barnette*, 319 U.S. at 637.

A. *Hurley* precludes States from using public accommodations laws to force for-profit businesses to engage in speech with which they disagree or to remain silent, thereby giving up their right to communicate their desired message.

In determining whether public accommodations laws violate the First Amendment rights of

corporations, *Bellotti* instructs that the proper question "must be whether [CADA] abridges expression that the First Amendment was meant to protect." 435 U.S. at 776; *Pacific Gas and Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986) (plurality opinion) (confirming that a "critical consideration[]" in *Bellotti* was "that the State sought to abridge speech that the First Amendment is designed to protect"). When dealing with businesses that design, create, or disseminate expressive works (such as cake artists, photographers, newspapers, speechwriters, painters, and musicians), the answer is unequivocally "yes" because the underlying expressive activity would be protected if done by a natural person. *See Bellotti*, 435 U.S. at 777 ("If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech."). As the New Mexico court admits, if Elane Photography did not offer their services to the public, the State could not apply its antidiscrimination law to force the studio to photograph a same-sex wedding ceremony: "If Elane Photography took photographs on its own time … or if it was hired by certain clients but did not offer its services to the general public, the law would not apply to Elane Photography's choice of whom to photograph or not." 309 P.3d at 66. Thus, given that a State cannot require individuals or businesses that are not public accommodations to create wedding cakes or wedding albums, CADA violates Masterpiece's free speech rights.

To avoid this conclusion, the lower courts unsuccessfully try to distinguish this Court's compelled speech cases. Toward this end,

Masterpiece Cakeshop and *Elane Photography* make much of *Hurley*'s statement that public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments." 515 U.S. at 572. The reason for this is straightforward. On their face, public accommodations laws typically focus "on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Id.* at 572. In the wedding context, for example, public accommodations laws apply to hotels that rent rooms to family members and guests, banquet halls that host wedding receptions, a restaurant that serves the wedding party at the rehearsal dinner, limousines that drive the wedding party to and from the scheduled events, a caterer that provides the food at the reception, and the airline that flies the couple to their honeymoon destination.

But *Hurley* makes clear that antidiscrimination laws may be "applied in a peculiar way"—*i.e.*, applied to the expressive content of a group or business—and that First Amendment protections are triggered under such circumstances. *Id.* at 572. If application of a public accommodations law "target[s] speech" or "discriminate[s] on the basis of its content," then "the statute ha[s] the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573. Using public accommodations laws in this way, however, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.*

The facts in *Hurley* and *Masterpiece Cakeshop* highlight the different ways public accommodations laws can be applied: to an organization's conduct and to its expressive activity. The disagreement between GLIB and the parade organizers did not involve "the participation of openly gay, lesbian, or bisexual individuals in various units in the parade." *Id*. at 572. No members of GLIB alleged that the parade organizers excluded homosexual individuals from marching as part of an approved parade group, and the organizers disclaimed any such intent to exclude. Similarly, Masterpiece denied any "intent to exclude homosexuals as such," *id*., declining to make a wedding cake for a same-sex marriage but stating that the bakery "would be happy to make and sell [the couple] any other baked goods." *Masterpiece Cakeshop*, 370 P.3d at 276; *Elane Photography*, 309 P.3d at 61 (noting that the photography studio stated that "it would have taken portrait photographs and performed other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings"); *State of Washington v. Arlene's Flowers, Inc.*, 389 P.3d 543, 550 (2017) (stating that the flower shop "has served gay and lesbian customers in the past for other, non-wedding-related flower orders").

The problem in *Hurley* arose only when GLIB sought to participate in the parade organizers' speech activity by marching in the parade under its own banner. 515 U.S. at 572. Applying the Massachusetts law to the selection of participants forced the parade organizers "to alter the expressive content of their parade" and transferred authority over the message conveyed to "all those

protected by the law who wished to join in with some expressive demonstration of their own." *Id.* at 573. Because the parade was expressive, the parade organizers had the right "to choose the content of [their] own message" and to "decide 'what not to say.'" *Id.* (quoting *Pacific Gas*, 475 U.S. at 16).

Given that "*all* speech inherently involves choices of what to say and what to leave unsaid," the Court's holding is not restricted to parades. *Pacific Gas*, 475 U.S. at 11 (plurality opinion). Rather, the First Amendment shelters all forms of expression, including wedding cakes, photographs, speeches, paintings, and music. *Hurley*, 515 U.S. at 569 (explaining that "the Constitution looks beyond written or spoken words as mediums of expression" to include "symbolism"); *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952) (confirming that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the medium of communication used). When public accommodations laws are applied to "the sponsors' speech itself," they violate the "fundamental rule" that the government cannot control "the choice of a speaker not to propound a particular point of view." 515 U.S. at 573. And this is true even if the speaker expresses views that private citizens (or even the courts) might think "are misguided, or even hurtful." *Id.* at 574.

Masterpiece Cakeshop did the same thing that the lower court did in *Hurley*—treated the bakery's expression as the public accommodation. Specifically, the court targeted Masterpiece's speech activity, taking its decision not to create a

cake for a same-sex wedding to be a violation of CADA. Masterpiece and its owner believed "baking a wedding cake would convey" a "celebratory message about same-sex marriage," a message that was inconsistent with their religious beliefs. *Masterpiece Cakeshop*, 370 P.3d at 276, 280. In ordering Masterpiece to either create wedding cakes for same-sex couples or stop making wedding cakes altogether, the lower court infringed the bakery's right "to choose the content of [its] own message" as well as its right to "decide 'what not to say.'" *Hurley*, 515 U.S. at 573 (citation omitted). The court impermissibly required Masterpiece to "becom[e] the courier for … [a] message with which [it] disagree[s]" and undermined its right to "refuse to foster … an idea [it] find[s] morally objectionable." 430 U.S. at 717, 715.

In *Obergefell*, this Court surveyed the "ongoing dialogue" surrounding same-sex marriage and "emphasized that … those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597, 2607 (2015). Masterpiece and Elane Photography sought to do just that—witness to their religious convictions by not condoning same-sex marriage in and through their expressive activity. *See Elane Photography*, 309 P.3d at 61 ("Elane Photography explains that it 'did not want to convey through [Huguenin]'s pictures the story of an event celebrating an understanding of marriage that conflicts with [the owners' religious] beliefs.'") (internal punctuation omitted). The parade organizers in *Hurley* did the same—"clearly decid[ing] to exclude a message it

did not like from the communication it chose to make," which was "enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." 515 U.S. at 574.

If upheld, the lower court's order will empower States to "compel affirmance of a belief with which the speaker disagrees," whenever the speaker is a public accommodation. *Id*. at 573. A Christian baker will be required to design and produce a wedding cake for a same-sex ceremony, a Jewish choreographer will have to stage a dramatic Easter performance, a Catholic singer will be required to perform at a marriage of two divorcees, and a Muslim who operates an advertising agency will be unable to refuse to create a campaign for a liquor company. States also will be able to dictate the content of expressive works by writers, painters, musicians, and photographers. Yet requiring any of these businesses to convey messages with which they disagree "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette* 319 U.S. at 642.

The lower courts attempt to avoid this outcome by distinguishing *Hurley*. These efforts are unavailing. *Masterpiece Cakeshop* and *Elane Photography* focus primarily on two features of *Hurley*: (1) the "inherent expressiveness" of parades (as compared to the lack of expressiveness in operating a for-profit business), *see Masterpiece Cakeshop*, 370 P.3d at 287 ("Central to the Court's conclusion was the 'inherent expressiveness of marching to make a point.'") and *Elane Photography*, 309 P.3d at 68 ("While photography

may be expressive, the operation of a photography business is not."), and (2) *Hurley*'s conclusion "that spectators would likely attribute each marcher's message to the parade organizers as a whole," whereas observers would not attribute the wedding cake's message to the bakery. *Masterpiece Cakeshop*, 370 P.3d at 287.

With respect to the first distinction, the "inherent expressiveness" of a parade was not dispositive in *Hurley*. *Hurley* and the other compelled speech cases focus on the rights of the speaker, not on creating a taxonomy of types of expression. *Hurley* mandates First Amendment protection whenever "[t]he principle of speaker's autonomy … [is] threatened in [a] case," *Hurley*, 515 U.S. at 580, *i.e.*, whenever the State attempts to "restrict [a speaker's] speech to certain topics or views or to force [a speaker] to respond to views that others may hold." *Pacific Gas*, 475 U.S. at 11 (plurality opinion). Baking may not be inherently expressive. Doughnuts, bagels, cookies, and breads usually are made for people to eat, just as people may march for no other reason than "to reach a destination." *Hurley*, 515 U.S. at 568. But when someone asks a cake artist to design and decorate a cake for a specific occasion (such as a wedding), the cake is meant to do more than give attendees something to eat; it celebrates and promotes the importance of the event. Accordingly, some baking *is* expressive, and the government cannot use public accommodations laws to force businesses to create such expressive works for government-preferred customers.

In the photography context, who the client is determines the content of the work, namely, which

events will be captured or whose portrait will be taken. *See Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (striking down part of a statute that prohibited photographic reproductions of currency and recognizing that "the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers"). Even if a picture is not worth 1,000 words, it says a lot—about a person, a location, or an event. Clients rely on the photographer to use her creativity and judgment with respect to, among other things, the framing of the scene or portrait, lighting, background, positioning, color, exposure, saturation, editing, and cropping to properly capture the personality and beauty of a person or the dignity and celebratory nature of an event. Applying antidiscrimination laws to require a photographer to create such expressive works (like a photo album commemorating and celebrating a wedding) impermissibly infringes on a photographer's "right … to hold a point of view different from the majority and to refuse to foster … an idea [she] find[s] morally objectionable." *Wooley*, 430 U.S. at 715. Thus, the First Amendment shields all forms of expression, not just those that are "inherently expressive."

The lower court's second attempt to distinguish *Hurley*—based on a reasonable observer's sense of who is speaking—fares no better, conflicting with the Court's compelled speech precedents in three distinct ways. First, the Colorado court never mentions, let alone tries to reconcile its interpretation with, *Hurley*'s "fundamental rule" that "a speaker has the autonomy to choose the

content of his own message." 515 U.S. at 573; *id.* (emphasizing that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"). This autonomy is inconsistent with predicating First Amendment protection on a reasonable observer. The court below concluded that creating a wedding cake was not expressive conduct, in part, because "[t]he public has no way of knowing the reasons supporting Masterpiece's decision to serve or decline to serve a same-sex couple." 370 P.3d at 287; *Arlene's Flowers*, 389 P.3d at 557 ("[A]n outside observer may be left to wonder whether a wedding was declined for one of at least three reasons: a religious objection, insufficient staff, or insufficient stock.").

As *Hurley* explains, though, a speaker is entitled to First Amendment protection "whatever the reason" may be why the speaker does not want to "propound a particular point of view, and that choice"—to speak or to remain silent on an issue—"is presumed to lied beyond the government's power to control." 515 U.S. at 575. The First Amendment shields the speaker's decision, not a third party's interpretation of that decision. In fact, *Hurley* confirms that the First Amendment safeguards expression from governmental control even when an observer *may not* be able to discern a specific meaning of or reason for the speech activity: "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson

Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Id*. at 569.

Second, having a reasonable observer determine whether a business can claim the protection of the First Amendment is inconsistent with *Pacific Gas*. Under *Pacific Gas*, a speaker retains the right not to carry someone else's speech even when a reasonable observer knows that the message is not that of the speaker. TURN, the organization that was granted access to the unused space in Pacific Gas's envelopes, was required to provide a disclaimer stating that it was expressing only its own views. The plurality still found a First Amendment violation because "[t]he disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant." *Id*. The disclaimer did "nothing to reduce the risk that [Pacific Gas] will be forced to respond when there is strong disagreement with the substance of TURN's message." *Pacific Gas*, 475 U.S. at 15 n.11 (plurality opinion).

Pacific Gas, therefore, establishes an important corollary to the general rule that a speaker has the right to speak or to refrain from speaking: if compelled speech might force a speaker to respond to the unwanted message, the First Amendment is violated regardless of to whom an observer would attribute the message. *See id*. at 16 ("The danger that [Pacific Gas] will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude, because the message itself is protected under our decisions in *Bellotti* and *Consolidated Edison*."). The threat of misattribution by an observer greatly increases the

chance that a business may need to respond to the compelled speech to ensure that its message is not misunderstood or distorted. *Hurley*, 515 U.S. at 577 (recognizing the threat of misattribution "[w]ithout deciding on the precise significance of the likelihood of misattribution"). For example, if CADA requires Masterpiece to (1) design and create wedding cakes for same-sex couples and, as the Colorado court states, (2) observers will not be able to determine the bakery's views, 370 P.3d at 287, Masterpiece "may be forced to respond" to ensure that its sincerely held religious beliefs regarding marriage are not confused with its customers' views. And "[t]his pressure to respond 'is particularly apparent when the owner has taken a position opposed to the view being expressed on his property.'" *Pacific Gas*, 475 U.S. at 14 (plurality opinion) (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 100 (1980) (Powell, J., concurring)). Because Masterpiece announced its religious objections to celebrating same-sex weddings through its cakes, the First Amendment shields it from having to respond to an unwanted or inconsistent message. *See Pacific Gas*, 475 U.S. at 11 (plurality opinion) ("[T]he State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold."); *id.* at 18 (stating that [s]uch forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent").

If a for-profit business does not want to speak or respond, the court below offers the business an alternative: stop offering its creative works to

anyone who wants to get married. *Masterpiece Cakeshop*, 370 P.3d at 286 (stating that, under CADA, Masterpiece must "sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner"). On this view, silence cures the CADA violation. Masterpiece can avoid discriminating based on sexual orientation by ceasing to make all wedding cakes.

The problem is that compelled silence is unconstitutional: "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley*, 487 U.S. at 796-97. Speech prohibitions, like speech compulsions, constitute content-based regulations of speech and are unconstitutional for the same reason—they prevent a speaker from determining the content of its desired message. *Hurley*, 515 U.S. at 557 (""Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." (citations and internal quotation marks omitted)); *Wooley*, 430 U.S. at 714 ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."). In the present case, CADA tramples on Masterpiece's "right to speak freely."

Third, recognizing that for-profit businesses receive the protection of the First Amendment does not "undermine all of the protections provided by antidiscrimination laws." *Elane Photography*, 309 P.3d at 72. To qualify for First Amendment protection, a public accommodation must (1) offer goods or services involving expression or expressive activity, (2) engage in expressive activity that an antidiscrimination law interferes with (or wish to refrain from sending a message mandated by the law), and (3) be willing to lose business from the specific customers who are refused service as well as from others who no longer wish to support the business given its views relating to members of a protected class. Each of these considerations limits the number of businesses that could—or would—object to public accommodations laws on First Amendment grounds. Although some businesses are involved in expressive activities, many more are not. And for every business that decides not to engage in expression related to members of a protected class, many more will. *See*, *e.g.*, *Arlene's Flowers*, 389 P.3d at 816-17 (noting that the florist gave the respondent "the name of other florists who might be willing to serve him" and that "a handful of florists offered to provide their wedding flowers free of charge").

The relatively few First Amendment challenges to public accommodations laws that have been working their way through the courts bear this out. Although some bakers, photographers, and florists may challenge public accommodations laws, thousands more of these businesses have not. In this way, the marketplace of ideas is self-regulating. The free speech exception to

antidiscrimination laws is limited only to those who engage in expression and object to promulgating a particular government-mandated message, which ensures that members of protected classes have ready access to the type of expressive goods and services protected by the First Amendment. In the rare situation where there is no such access, the government may be able to satisfy strict scrutiny. Absent that showing, however, the fact that some—or even many—individuals find the refusal to create expression for members of a protected class wrong or misguided does not obviate the protection of the First Amendment. Rather, as this Court concluded in *Hurley* such objections confirm the need for such protection: "[T]he law … is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." 515 U.S. at 579.

B. This Court's expressive association cases confirm that the First Amendment shields organizations and businesses from public accommodations laws that interfere with their expressive activity.

The unanimous Court in *Hurley* concluded its First Amendment analysis by contrasting the application of Massachusetts's public accommodations law in the parade context with the application of a New York antidiscrimination statute to an expressive association. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988). The difference in outcome between the two cases had nothing to do with the "inherent expressiveness" of a parade or to whom an observer

would attribute a message. Instead, *Hurley* instructed that, while "the expressive associational character of a dining club ... was sufficiently attenuated to permit application of the law," the club retained the First Amendment right to exclude "those whose views were at odds with positions espoused by the general club membership." *Hurley*, 515 U.S. at 580. The First Amendment protected the club's right to engage in expressive association; it just so happened that in *New York State Club Ass'n* "compelled access to the benefit … did not trespass on the organization's message itself." *Id*.

In contrast, the forced inclusion of GLIB did interfere with the parade organizers' chosen message. In fact, this Court held that even assuming the parade was a public accommodation, "GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id*. at 580-81. Thus, rather than establishing a rule "peculiar" to its facts, *Hurley* established the general rule that "[d]isapproval of a private speaker's statement does not legitimize use of the [State's] power to compel the speaker to alter the message by including one more acceptable to others." *Id*. at 581.

Connecting this Court's compelled speech and expressive association cases is appropriate, therefore, because both are predicated on the First Amendment principle articulated in *Hurley* and quoted in *Dale*: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better

reason than promoting an approved message or discouraging a different one, however enlightened either purpose may strike the government." 515 U.S. at 579 (quoted in *Dale*, 530 U.S. 640, 661 (2000)). Under both lines of cases, a speaker (whether an expressive association or a public accommodation engaged in expression) retains "the right to speak freely and the right to refrain from speaking at all," *Wooley*, 430 U.S. at 714, without governmental "interference with a speaker's desired message." *Rumsfeld*, 547 U.S. at 64.

That this principle governs in both contexts also is apparent from this Court's more recent expressive association cases, *Roberts v. U.S. Jaycees* and *Dale*. These cases make clear that, just as speakers have the right to speak and the complementary right not to speak, the "[f]reedom of association … plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Requiring an expressive association to accept members that it does not want "may impair the ability of the original members to express only those views that brought them together." *Id.* But consistent with *New York State Club Ass'n*, *Roberts* instructs that an expressive association can invoke the protection of the First Amendment when the compelled inclusion of a member "will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.* at 627. Applying the Minnesota public accommodations law to require the Jaycees to accept women members did not implicate the First Amendment because the Jaycees "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of

expressive association." *Id.* at 626. Because allowing women as members did not interfere with the Jaycees' advocating and promulgating its desired message, *Roberts* upheld application of Minnesota's public accommodations law. *See also Dale*, 530 U.S. at 657 ("But in [*Roberts*] we went on to conclude that the enforcement of [public accommodations] statutes would not materially interfere with the ideas that the organization sought to express.").

Dale reinforces that public accommodations laws violate the First Amendment when they interfere with a speaker's autonomy over the content of its own message. Unlike the antidiscrimination law in *Roberts*, New Jersey's public accommodations law did violate the Boy Scouts right of expressive association. In reaching this conclusion, the Court relied heavily on *Hurley*:

> As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.

530 U.S. at 654. Furthermore, *Dale* recognizes that an association does not have to associate "for the 'purpose' of disseminating a certain message" to qualify for First Amendment protection; it "must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655. Thus, First Amendment protection is triggered whenever a public accommodations law

"interfere[s] with" or "impair[s]" the chosen message of an expressive association or business.

If a business provides non-expressive goods or services to the public (such as stock photographs of nature or doughnuts, cakes, and cookies that are for sale to all customers), the First Amendment may not shelter the sale of such goods or services because compelled access would not interfere with any message the business sought to communicate. However, when a public accommodations law requires a business "to propound a particular point of view," the First Amendment "shield[s]" the speaker's "choices of content." *Hurley*, 515 U.S. at 574. If a customer sought to express a view that "trespass[ed] on the [for-profit business's] message," that customer "could nonetheless be refused" service "just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id*. at 580-81.

As this Court acknowledged in *Cohen*, the "constitutional right of free expression is powerful medicine" in our diverse and populous society. 403 U.S. at 24. The First Amendment provides broad speech protection for all—individuals, associations, and businesses—to:

> remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of

> individual dignity and choice upon which our political system rests.

Id. That choice of content, "be it of the popular variety or not," is directly undermined when public accommodations laws are applied to require for-profit businesses either to speak the government's desired message or to remain silent. *Dale*, 530 U.S. at 660.

II. *Rumsfeld* does not insulate public accommodations laws from First Amendment challenge.

In *Masterpiece Cakeshop*, the Colorado court invokes *Rumsfeld* to support its claim that the bakery "does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally." 370 P.3d at 286. The law schools in *Rumsfeld* challenged the Solomon Amendment's requirement that the schools treat military and non-military recruiters alike, arguing that this requirement "compelled them to send 'the message that they see nothing wrong with the military's policies [regarding gays in the military], when they do.'" *Id.* (quoting *Rumsfeld*, 547 U.S. at 65). The court below correctly noted that *Rumsfeld* rejected this argument but, instead of analyzing this Court's reasoning, relied on *Rumsfeld*'s observation "that students 'can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so.'" *Id.* Based on this quote, the court concluded that "because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, … a

reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs." 370 P.3d at 286; *Arlene's Flowers*, 389 P.3d at 557.

Elane Photography invokes *Rumsfeld* for a similar proposition—that the New Mexico public accommodations law does not require the regulated businesses to affirm any belief but only to "provide [its] services without regard for race, sex, sexual orientation, or other protected classifications." 309 P.3d at 65. On this view, New Mexico's law regulates conduct (to whom a business must offer its services) and any impact on expression is incidental. Drawing on *Rumsfeld*, the court concludes that "Elane Photography is compelled to take photographs of same-sex weddings only to the extent that it would provide the same services to a heterosexual couple." *Id.*; *Rumsfeld*, 547 U.S. at 62 (stating that the law schools' speech related to military recruiters was "only 'compelled' if, and to the extent, the school provide[d] such speech for other recruiters"). If Masterpiece does not want to make wedding cakes for same-sex couples, it simply can stop making all wedding cakes.

Contrary to the lower courts' suggestion, *Rumsfeld* does not support the holdings in *Masterpiece Cakeshop* and *Elane Photography*. Indeed, *Rumsfeld* adopts the same First Amendment rule as *Hurley*—that the First Amendment is violated when "the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate." *Rumsfeld*, 547 U.S. at 63. Accordingly, given that the legal rule is the same, the difference in outcome is a consequence of the factual differences between the two cases.

The critical difference is that in *Rumsfeld* the law schools "are not speaking when they host interviews and recruiting receptions." *Rumsfeld*, 547 U.S. at 64. The Solomon Amendment "neither limits what law schools may say nor requires them to say anything"; rather, "[i]t affects what law schools must *do*—afford equal access to military recruiters." *Id.* at 60. As a result, because the schools were not engaged in speech activity, accommodating recruiters (including military recruiters) could not affect or interfere with the law schools' own message. To the extent the law schools were required to engage in any expression—sending out emails or posting notices on bulletin boards—such speech "is plainly incidental to the Solomon Amendment's regulation of conduct." *Id.* at 62; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

In contrast, the speech compelled in *Masterpiece Cakeshop* just is the expressive work of the business. There are not two separate things—the conduct (allowing recruiters on campus) and the incidental speech (making students aware of the recruiters' presence on campus)—there is only the wedding cake, which is an expressive creation. As a result, the public accommodations laws mandate specific speech—a particular wedding cake for a specific couple—not simply expression that is incidental to some independent conduct requirement.

Although the States' ability to regulate conduct is well-established, *Hurley* and *Rumsfeld*

emphasize that the First Amendment restricts the government's ability to regulate speech activity. Consequently, *Rumsfeld*'s claim that the law schools' speech "is only 'compelled' if, and to the extent, the school provides such speech for other recruiters" cannot be taken as a general First Amendment pronouncement that speakers confronted with public accommodations laws must either acquiesce and convey the government's desired message or stop providing their expressive goods or services to non-protected classes of individuals.

Instead, *Rumsfeld* confirms the uncontroversial view that law schools do not have a constitutional right to engage in the underlying conduct giving rise to the incidental speech requirement. *Gibboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I[t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed"). If the law schools decide to no longer engage in certain conduct (namely, allowing recruiters access to their buildings), then they will not have to "grant equal access to military recruiters" and, consequently, will not have to send out emails or post notices on their behalf.

The contrast with for-profit businesses that engage in expressive activity is stark because they do have a constitutional right—the right to "choose the content of [their] own message." *Hurley*, 515 U.S. at 573. *Masterpiece Cakeshop* and *Elane Photography* violate this right by requiring for-profit businesses to either create expression with

which they disagree or remain silent and forego creating speech that fosters views with which they agree. But this just is an unconstitutional Hobson's choice—either acquiesce in a speech compulsion (by carrying the government-mandated message) or submit to a speech restriction (by refraining from speaking about an important public issue like same-sex marriage). At the same time, businesses that agree with the protection afforded groups listed in the public accommodations laws remain free to express their views without governmental interference. As a result, when applied to speech activity, antidiscrimination laws favor "certain preferred speakers … taking the right to speak from some and giving it to others." *Citizens United*, 558 U.S. at 340. In so doing, "the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Id*. at 340-41. Under CADA, Masterpiece loses its right to speak in favor of traditional marriage through its creative works and, instead, is required to promote same-sex marriage (through the creation of a wedding cake) or to get out of the wedding cake business altogether.

Moreover, the breadth of the rule championed by the Colorado court is alarming. If a reasonable observer understands that compliance with a generally applicable law does not reflect the speaker's own views, then *Wooley*, *Barnette*, *Riley*, *Pacific Gas*, and *Tornillo* were all decided wrongly. Observers would have known that New Hampshire forced the Maynards to be a "mobile billboard" and would have understood that displaying "Live Free or Die" was not a reflection of the Maynards'

beliefs. *Wooley*, 430 U.S. at 715. The same holds true for the school children in *Barnette*, the fundraisers in *Riley*, the utility company in *Pacific Gas*, and even the newspaper in *Tornillo*. Under the lower court's proposed rule, none of these cases would have involved a compelled speech violation because observers would not have viewed compliance with the law as a reflection of the speakers' own views.

The problem, of course, is that this Court struck down the government regulations in each of these cases because the laws *did* compel speech. The First Amendment violation "resulted from interference with a speaker's desired message," *Rumsfeld*, 547 U.S. at 64, not an observer's failing to know that a general law required the expressive activity. "[T]he fundamental rule of protection" under the First Amendment—"that a speaker has the autonomy to choose the content of his own message"—would be eviscerated if a reasonable observer's knowledge that a public accommodations law mandated the expression permitted the government to wrest control over the content of a message from the speaker. *Hurley*, 515 U.S. at 573 (quoted in *Rumsfeld*, 547 U.S. at 64). The government could force businesses to speak the government's desired message or to stop conveying a disfavored message simply by passing a public accommodations law.

CADA, therefore, is inconsistent with the First Amendment because it requires for-profit businesses engaged in expression to change their desired message. To comply with the lower court's ruling, Masterpiece must either speak when they want to remain silent (by making a wedding cake

for a same-sex couple) or remain silent when they would prefer to speak (by no longer designing wedding cakes for heterosexual couples). None of the compelled speech cases justify this result. Rather, these cases compel the opposite conclusion because, as *Dale* reminds us, the First Amendment protects the "freedom to think as you will and to speak as you think" and "eschew[s] silence coerced by law—the argument of force in worst form." *Dale*, 530 U.S. at 660-61 (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

CONCLUSION

For the reasons set forth above, this Court should hold that the First Amendment protects the expressive activity of for-profit businesses from public accommodations laws that interfere with the businesses' ability to choose the content of their own messages.

Respectfully submitted,

Scott W. Gaylord
Counsel of Record
ELON UNIVERSITY LAW SCHOOL
201 North Greene Street
Greensboro, North Carolina 27401
Phone: (336) 279-9331
Email: sgaylord@elon.edu

Counsel for Amicus Curiae CatholicVote.org

September 7, 2017