No. 21-476

In the Supreme Court of the United States

303 CREATIVE LLC, *et al.*,

***Petitioners*,**

v.

AUBREY ELENIS, *et al.*,

***Respondents*.**

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS, ANGLICAN CHURCH IN NORTH AMERICA, CONGRESSIONAL PRAYER CAUCUS FOUNDATION, THE FAMILY FOUNDATION, ILLINOIS FAMILY INSTITUTE, NATIONAL LEGAL FOUNDATION, PACIFIC JUSTICE INSTITUTE, AND INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS *in Support of Petitioners*

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Table of Authorities

Cases

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, social service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

The **Angelican Church in North America** ("ACNA") unites some 100,000 Angelicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Angelican Future Conference (GAFCon) and formally recognized by the GAFCon Primates—leaders of Anglican Churches representing 70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given human right to free exercise of religion.

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[1] All parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The **Congressional Prayer Caucus Foundation** ("CPCF") is an organization established to protect religious freedoms (including those related to America's Judeo-Christian heritage) and to promote prayer (including as it has traditionally been exercised in Congress and other public places). It is independent of, but traces its roots to, the Congressional Prayer Caucus that currently has over 100 representatives and senators associated with it. CPCF has a deep interest in the right of people of faith to speak, freely exercise their religion, and assemble as they see fit, without government censorship or coercion. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from forty-one states.

The Family Foundation ("TFF") is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia, and its interest in this case is derived directly from its members throughout Virginia who seek to advance a culture in which children are valued, religious liberty thrives, and marriage and families flourish.

The **Illinois Family Institute** ("IFI") is a nonprofit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and

conscience rights for all individuals and organizations.

The **National Legal Foundation** ("NLF") is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Colorado, seek to ensure that those with a religiously based view of marriage continue to be free to express those views without being compelled to express the opposite view by state-enforced association with those holding that opposite view.

The **Pacific Justice Institute** ("PJI") is a nonprofit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. Such includes those who, as a matter of conscience, hold traditional views of marriage and family. As such, PJI has a strong interest in the development of the law in this area.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel.

SUMMARY OF THE ARGUMENT

A marriage ceremony is a communal, expressive event with a public exchange of vows. Those who support a same-sex wedding, including the State that gives it legal validity, communicate a message of approval and acceptance of such unions. By applying its civil rights law to require the web-site designer to service a same-sex ceremony despite her sincere objection to same-sex marriage, Colorado is compelling her to associate with, and facilitate, a message she finds objectionable, in violation of the Free Speech Clause.

Colorado does not properly apply its law in this situation, as even its own precedents demonstrate. To use an analogy: does a public accomodations law prohibiting religious discrimination require a Jewish restauranteur to cater a Muslim gala with the announced purpose of fundraising for a jihad against the State of Israel? It does not, because the restauranteur objects, not to Muslims per se, but to the *message* of the gala, a message he does not want to facilitate. So it is here. When a vendor normally serves gay persons but objects to supporting a same-sex wedding, it is clear that the vendor objects only to the *message* sent by the customers' *event*; she does not discriminate on the basis of the customers' *status*, and so does not violate civil rights or public accommodations laws.

But even if it were considered to be a technical violation of such laws, compelling the vendor to facilitate the customer's objectionable message, as

Colorado attempts here, violates the Free Speech Clause. The message proclaimed at and by the wedding is that a same-sex marriage should be approved and celebrated. Marriage vendors who object to that message may be engaged in something artistic like cake decoration or web-site design, like the petitioner here. Other vendors may perform more menial tasks, such as providing rental tables and chairs for the ceremony and reception. While those engaged in more artistic endeavors have a second layer of free speech protection, *all* vendors, artistic and non-artistic, will have their speech rights violated whenever they are forced to associate with and facilitate the message being communicated by their *customers* to which they have sincere objection. No vendor may properly be compelled to facilitate and associate with objectionable speech or face being punished for refusing to do so.

ARGUMENT

Web-site designer Smith does not object to serving members of the gay and lesbian community, including those already in a same-sex relationship. Rather, she objects to facilitating a same-sex wedding due to her sincerely held religious convictions that it would be ethically wrong for her to associate with the message of such a ceremony.

As presaged by this Court in *Masterpiece*,[2] the issue at the heart of this controversy is how vendors objecting to facilitating same-sex marriages can be distinguished from those who objected to Black

[2] *Masterpiece Cakeshop v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

customers eating in their restaurants in *Piggie Park*.[3] The difference, of course, is that Black patrons were being discriminated against based on their race, i.e., their status. Here, however, Smith is not discriminating against gays and lesbians at all; rather, she is refusing to associate with a message conveyed by same-sex couples, by Colorado, and by all those associated with the ceremony. Colorado recognizes this controlling distinction in decisions already examined by this Court in *Masterpiece*.

As a web-site designer, Smith is an artist exercising her own speech when she creates wedding websites. Her own speech, however, is not the only speech of high relevance in cases such as these. Focusing *only* on whether a particular vendor's *own* speech is artistic leads to close questions concerning whether icing a cake,[4] arranging flowers,[5] or doing a bride's hair or makeup[6] is artistic enough to be "speech." And it excludes from protection vendors who have *exactly the same objection* to facilitating same-sex marriages simply because their services are not "artistic enough" to be characterized as their own speech. Giving relief to a baker who is solicited to provide the wedding cake but not to the chef who would prepare the rest of the meal for the reception[7]

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[3] *Newman v. Piggie Park Enters., Inc.,* 390 U.S. 400 (1968).

[4] *See Masterpiece*, 138 S. Ct. at 1723.

[5] *See Klein v. Ore. Bur. of Labor and Indus.*, 410 Pac. 3d 1051 (Ore. Ct. App. 2017), *vacated and remanded for recon.*, 139 S. Ct. 2713 (2019).

[6] *See Masterpiece*, Oral Arg. Tr. at 12-14 (No. 16-111, Dec. 5, 2017) (Kagan, J., questioning about various wedding vendors, including hair stylists, makeup artists, and chefs).

[7] *See id.* at 14.

demonstrates that focusing simply on how artistic the vendor is does not suffice.

Smith documents that "19 states have already relied on the decision below to argue that officials may use public-accommodation laws to compel citizens to speak in violation of their conscience."[8] These nineteen states, echoing Colorado's arguments in this case, generally treat all vendors—artistic and non-artistic—the same. To them, neither artistic nor non-artistic wedding vendors have any speech rights protected by the First Amendment. In their view, "[e]xempting businesses from public accommodations laws on the basis of the First Amendment would undermine the vital benefits these laws provide to residents and visitors."[9]

And when these States do specifically address whether vendors are sufficiently artistic, they make clear that, if they must, they will contest such designations across the board. Why? Because, unlike this Court, which explored some of the close cases during the *Masterpiece* oral argument, these States do not believe *any* vendor, no matter how artistic, presents a close case. In a passage clearly aimed at addressing this Court's questions at that argument, these States assert that "architects, signmakers, hairdressers, make-up artists, chefs, and more" should not be exempted from public accommodations laws even when they have moral objections to same-

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[8] Cert. Pet. Reply Br. at 1 (citing Mass. *Amicus* Br. at 19, 21, *Updegrove v. Herring*, No. 21-1506 (4th Cir. Aug. 27, 2021) ("Mass *Amicus* Br.")).

[9] Mass. *Amicus* Br. at 2.

sex marriage.[10] The obvious implication is that these States will doggedly fight these cases category by category, vendor by vendor.

Adopting the approach your *Amici* urge will allow the courts to avoid this threat of endless hairsplitting and the already demonstrated likelihood of conflicting results. It will protect all those vendors, irrespective of their perceived degrees of artistry, who have sincere objections to the message conveyed by a same-sex wedding.[11]

I. Smith Has a Sincere Objection to the Message of the Wedding Ceremony, and Forcing Her to Facilitate That Message Is Compelled Speech

That Smith's objections here are sincere cannot come as a surprise to anyone. This Court in *Obergefell*[12] recognized that many in our country disagree that same-sex marriage is morally permissible and good social policy. The *Obergefell* Court noted, "Marriage, in [objectors'] view, is by its nature a gender differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere

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[10] *Id.* at 22.

[11] The question presented has been limited to the free speech issue. Thus, this brief does not address the appropriate contours of protection for the free exercise of, or from discrimination due to, religion, which is a bundle of beliefs and practices rather than a pure status category like sexual orientation.

[12] *Obergefell v. Hodges,* 576 U.S. 644 (2015).

people here and throughout the world."[13] And, again, the *Obergefell* majority observed, "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[14]

It is not disputed that Smith is among those who sincerely believe that same-sex marriage is wrong and that, by facilitating such a ceremony, she would associate herself with its message and be fostering it, contrary to her convictions.[15] She comes to that belief, as the *Obergefell* majority put it, "based on decent and honorable religious or philosophical premises."[16] But, unlike this Court, which took pains in *Obergefell* not to disparage such beliefs and in *Masterpiece* to assure that decision makers did not do so either,[17] the lower tribunals here have both disparaged and punished Smith for holding to her beliefs.

In this, Colorado runs directly counter to this Court's decisions recognizing that it violates the Free Speech Clause for a government to force someone to facilitate a message with which she disagrees. *Janus* teaches that doing so inflicts a "demeaning" injury that violates a "cardinal constitutional command";[18]

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[13] *Id.* at 657.
[14] *Id.* at 672.
[15] *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) (holding that a court may not judge the reasonableness of a sincere religious belief).
[16] 576 U.S. at 672.
[17] 138 S. Ct. at 1729.
[18] *Janus v. Am. Fed. of State, Cnty., and Mun. Employees*, 138 S. Ct. 2448, 2463-64 (2018).

Hurley instructs that it runs roughshod over "the fundamental rule of protection under the First Amendment";[19] and *Turner Broadcasting* observes that it undercuts the principle that lies "[a]t the heart of the First Amendment" that grounds our very "political system and cultural life."[20] Indeed, in *Tornillo*,[21] decided under the cognate Free Press Clause (and interpreted in *Pacific Gas* as a free speech decision as well[22]), this Court struck down "right of reply" legislation that required newspapers to publish responsive messages whenever they spoke about candidates, noting that the practical effect of such rules is "inescapably" to dampen "the vigor and limit[] the variety of public debate."[23] Most recently in *NIFLA*,[24] this Court found intolerable under the Free Speech Clause a governmental requirement that a pregnancy center post in its waiting room a pro-abortion message with which it disagreed. Justice Kennedy wrote in concurrence, "Governments must not be allowed to force persons to express a message contrary to their deepest convictions."[25]

Janus is particularly on point. There, the objecting employee did not join the union designated

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[19] *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc.,* 515 U.S. 557, 573 (1995).
[20] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).
[21] *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).
[22] *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 9-12 (1986) (striking down requirement to send in billing statements messages to which the utility objected).
[23] *Id.* at 257 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (punctuation conformed)).
[24] *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*").
[25] *Id.* at 2379 (Kennedy, J., concurring).

to negotiate exclusively with his employer and did not agree with many of the union's public policy positions, but was forced by law to associate with the union by paying prorated dues.[26] The employee did not express any speech of his own. Despite that fact, this Court held that his free speech rights were violated by his being forced to subsidize messages of others of which he disapproved. The *Janus* Court equated such a requirement with compelled speech in violation of the Free Speech Clause and noted that the "right to eschew association for expressive purposes is likewise protected."[27] It summarized that "[c]ompelling individuals to mouth support for views they find objectionable" on "controversial public issues," even indirectly by forced association, should be "universally condemned."[28] These teachings of *Janus* apply with full force here.[29]

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[26] 138 S. Ct. at 2460-61.

[27] *Id.* at 2463 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)).

[28] *Id.* at 2463-64; *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 742 (2011) (invalidating campaign-funding regulation as restriction on free speech when a voluntary contribution to one candidate triggered matching government support for rival).

[29] *See also Harper & Row Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) ("'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" (quoting *Estate of Hemingway* v. *Random House,* 23 N. Y. 2d 341, 348, 244 N.E.2d 250, 255 (1968) (emphasis in original)).

II. The Civil Rights Laws Do Not Force Vendors to Service Same-Sex Weddings When Vendors Sincerely Object to the Message of Those Weddings

This Court in *Masterpiece* did not need to decide whether the Colorado Civil Rights Commission, in punishing the baker for refusing to supply a wedding cake celebrating a same-sex marriage, violated the Free Speech Clause. In dicta, the majority expressed concern that upholding the baker's right not to foster a message to which he was religiously opposed would run counter to the purpose of public accommodations laws. It noted that, while a person's "religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law,"[30] citing *Piggie Park*[31] and *Hurley*.[32] While acknowledging that an objecting member of the clergy (presumably one who held himself out as available to perform weddings for a fee) could undoubtedly refuse to officiate a same-sex marriage service, in dicta this Court continued that, unless such exceptions were "confined" and "sufficiently constrained," vendors who put up notices similar to the one the web-site designer desires to post here would impose a "community-wide" and "serious stigma on gay persons" inconsistent with a purpose of those laws.[33]

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[30] 138 S. Ct. at 1727.
[31] 390 U.S. at 402 n.5.
[32] 515 U.S. at 572.
[33] *Masterpiece*, 138 S. Ct. at 1727-29.

Smith addresses this concern of the *Masterpiece* Court by pointing out that, when artistic vendors utilize their *own* speech, their work is protected by the First Amendment and is excepted from the reach of civil rights and public accommodations laws. It is certainly true that such artists have an extra layer of protection under the Free Speech Clause. But the larger point is that *all* vendors, like Smith, who sincerely object to supporting same-sex weddings are protected. The appropriate and fully sufficient responses to the concerns expressed in *dicta* in *Masterpiece* are these: (a) it is the speech of the wedding participants that is of controlling importance, not that of the vendor; (b) a vendor by refusing to facilitate a message to which she objects is not discriminating on the basis of *status*, but *message*, and, therefore, does not violate the civil rights or public accommodations laws; and (c) even if a vendor's refusal were construed to be a violation, the government would not have sufficient countervailing reasons to force her to associate with and facilitate the message of a same-sex marriage. "Stigma," by itself, has never been sufficient to overcome free speech rights.

A. The Wedding Participants, and the State, Are Communicating a Profound Message in the Same-Sex Marriage Ceremony

By engaging in a marriage ceremony, both the couple and everyone else involved, including the State, are broadcasting a message loud and clear. That message is not just that marriage, in the abstract, is a good and valued institution. It is a more particularized endorsement: that same-sex couples

are entitled to engage in such unions with the State's full blessing.

As this Court recounted in the various opinions in *Obergefell*, whether same-sex marriage is a legitimate form of marriage is an issue that deeply divides the citizens of this country. [34] A same-sex marriage ceremony is divisive *precisely because* it "makes a statement," just as the denial of the right to marry to same-sex couples communicated disapproval. As the majority noted in *Obergefell*, without being able to marry with the sanction of the State, "[a] truthful declaration by same-sex couples of what was in their hearts had to remain unspoken."[35] Moreover, same-sex couples were "burdened in their rights to associate"[36] in this way. Conversely, permitting same-sex couples to marry allows them to proclaim that their relationship is "sacred," at least by their own values.[37]

This Court in *Obergefell*, as well as in *United States v. Windsor*,[38] emphasized that the State is also communicating its own message when it prohibits or endorses same-sex marriage. Expressed negatively, this Court held that, when the Federal Government only recognized heterosexual marriages, it "impermissibly disparaged those same-sex couples 'who

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[34] 576 U.S. at 657-58, 671-72; *id.* at 686-88 (Roberts, C.J., dissenting); *id.* at 713-14 (Scalia, J., dissenting); *id.* at 732-33 (Thomas, J., dissenting); *id.* at 739-40 (Alito, J., dissenting).
[35] *Id.* at 660.
[36] *Id.* at 661.
[37] *Id.* at 667.
[38] 570 U.S. 744 (2013).

wanted to affirm their commitment to one another before their children, their family, their friends, and their community.'"[39] Expressed positively, this Court recognized that, during a marriage ceremony, "just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."[40] "The right to marry [with legal sanction] thus dignifies couples who 'wish to define themselves by their commitment to each other.'"[41] Simply put, this Court recognized that the wedding ceremony is fundamental statement by both the individuals making the commitment and society at large. It is vows that are spoken and symbolic speech, both communicating a profound message.

B. Smith Is Not Discriminating on the Basis of the Personal Status of Her Customers, but on the Basis of the Customers' Message That She Would Be Compelled to Associate with and Facilitate

The record is clear that Smith, like the baker in *Masterpiece*, does not discriminate against the wedding participants because of their sexual orientation. She has no objection to serving gays and lesbians, even those already in a same-sex relationship. Rather, she just objects to facilitating a same-sex wedding. Her assisting the ceremony with her services, just like the State's licensing of the event, would send a message to others of acceptance and

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[39] *Obergefell*, 576 U.S. at 662 (quoting *Windsor*, 570 U.S. at 764).
[40] *Id.* at 669.
[41] *Id.* at 667 (quoting *Windsor*, 570 U.S. at 763).

approval, "offering symbolic recognition and material benefits to protect and nourish the union."[42]

And her assistance would do that in a way that is not present in a mere exchange of goods and services dissociated from the wedding. Using another analogy, this would be similar to an African American restauranteur serving whites in his restaurant, but refusing to cater their Ku Klux Klan banquet.[43] In that situation, the restauranteur's refusal is tied not to the race of the customers—their *status*—but to the *message* that they would communicate at the event. It is not a rejection of whites, but a refusal to become associated with what some whites say and do and to facilitate a racist ideology.

This Court pointed out in *Masterpiece* that the Colorado Civil Rights Commission had recognized exactly this important distinction between status and message when it found no violation of its laws when other bakers refused to prepare cakes with anti-same-sex-marriage messages. While the majority opinion used those decisions to demonstrate Colorado's disparate treatment prejudicial to the *Masterpiece* baker's religious beliefs,[44] the key point for present purposes is that the commission, when the other bakers refused to facilitate anti-same-sex-marriage *messages* with which they disagreed, interpreted its civil rights laws *not* to cover those situations because

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[42] *Id.* at 669.

[43] The Solicitor General during the *Masterpiece* argument used the similar example of an African American sculptor being requested to sculpt a cross for a Klan service. Oral Arg. Tr. at 27 (No. 16-111, Dec. 5, 2017).

[44] 138 S. Ct. at 1728-31.

they involved discrimination against a message, rather than a protected class.[45] While the Colorado Court of Appeals in *Masterpiece* compounded the State's constitutional problems by saying the commission properly justified the refusal to sell because the requested message was offensive *to the government*,[46] the key point was really that the message was offensive *to the vendors*, implicating their rights not to be compelled to communicate a message of others with which they disagreed. Justice Gorsuch in his concurrence stated it pithily: "In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers."[47] Continuing, he noted, "Like 'an emblem or flag,' a cake for a same-sex wedding is a symbol that serves as 'a short cut from mind to mind,' signifying approval of a specific 'system, idea, [or] institution.'"[48] And Justice Thomas, focusing on the Free Speech Clause, appropriately observed that, "by forcing him to provide the cake, Colorado is requiring [the baker] to be 'intimately connected' with the couple's speech, which is enough to implicate his First Amendment rights."[49]

The proper reading of the Colorado civil rights act, supported by its own agencies and courts, is that a vendor refusing to associate with and foster a *message* with which he disagrees is *not* in violation of

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[45] *Id.* at 1730.
[46] *Id.* at 1730-31.
[47] *Id.* at 1736 (Gorsuch, J., concurring).
[48] *Id.* at 1738 (quoting *W. Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 632 (1943)).
[49] *Id.* at 1743 n.4 (Thomas, J., concurring) (quoting *Hurley*, 515 U.S. at 576) (punctuation conformed).

the act.[50] Indeed, the United Kingdom Supreme Court, presented with an analogous case involving a baker's refusing to prepare a cake celebrating a same-sex marriage, recognized that this refusal was not based on sexual orientation discrimination, but on being unwilling to advance the message the ceremony conveyed.[51]

This Court in *Hurley* came to exactly the same conclusion. There, it held that, when parade organizers refused to let LGBT individuals march with them, it was not because they wished "to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner" expressing a message the organizers did not want as part of the event.[52]

That same holding applies here. Smith refuses to participate because of the message communicated by the same-sex marriage. She does not refuse service on the basis of sexual orientation, but on the basis of the desire (indeed, the ethical imperative in her case) not to become associated with, or to assist in communicating, a message with which she sincerely

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[50] This Court in *Fulton v. Philadephia*, 141 S. Ct. 1868 (2021), interpreted a city's public accommodations ordinance to exclude foster care facilities without the benefit of the city's own interpretation of its ordinance on the issue. *Id.* at 1879-81. Here, the Court has the benefit of Colorado's own interpretation of its civil rights law in similar cases, as well as logic and its own precedent in *Hurley*, to inform a proper interpretation.

[51] *Lee v. Ashers Baking Co.*, [2018] UKSC 49 (appeal taken from N. Ir.).

[52] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653-54 (2000) (summarizing and quoting *Hurley*, 515 U.S. at 574-75).

disagrees.

This fully distinguishes *Piggie Park*, which the *Masterpiece* majority cited,[53] and *Heart of Atlanta Motel*,[54] which the Tenth Circuit majority referenced.[55] Both these decisions dealt with the Civil Rights Act of 1964.[56] *Piggie Park* found unavailing a restauranteur's objection that it would violate his religion to serve Black customers.[57] He had no objection to the *message* of the Black patrons who requested service at his restaurants: they just wanted to eat. He objected to serving them because of their race, a protected *status*. Similarly, in *Heart of Atlanta Motel* the proprietor had no objection to Black individuals sleeping at some other motel; he just didn't want to service them at his motel because of their racial *status*.[58] This precedent is in no way threatened by recognizing that civil rights and public accomodations laws simply do not reach a refusal of service based on sincere objection to facilitating the *message* of the customers.

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[53] 138 S. Ct. at 1727.
[54] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).
[55] *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1179-80 (10th Cir. 2021).
[56] 42 U.S.C. § 2000a-3.
[57] 390 U.S. at 402 n.5.
[58] 379 U.S. at 243-44.

C. Non-discrimination Laws When Used in This Way Unconstitutionally Compel Speech by Forcing the Vendor to Facilitate the Ceremony's Message or Punishing the Refusal to Do So

Consider again the Black restauranteur who refuses to cater a Ku Klux Klan banquet. Even assuming that it violated the non-discrimination laws of his jurisdiction for him to do so, the restauranteur would have a valid defense to being punished for his refusal. He would be exercising his own free speech right not to associate with or to facilitate racist messages. If the State required such association and facilitation on pain of monetary damages, it would unconstitutionally compel speech with no sufficiently compensating purpose.[59]

The same holds true for Smith. This Court in *Obergefell* took pains to explain that it understood the very situation in which she finds herself and that, by ruling that States could not deny same-sex couples a marriage license, it did not intend to infringe on the First Amendment rights of those who would object for religious or other sincere reasons:

> Finally, it must be emphasized that religions, and 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. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so

[59] *See Janus*, 138 S. Ct. at 2463-64.

> fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.[60]

This passage references the Religion Clauses, but the Free Speech Clause similarly protects the right of those who oppose same-sex marriage. As this Court held in *Wooley*,[61] "The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[62] Smith could service a same-sex wedding "only at the price of evident hypocrisy."[63] This Court summarized in *Knox*, "The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves . . . . The First Amendment protects 'the decision of both what to say and what not to say.'"[64]

The State, through its non-discrimination laws, is trying to force an individual with sincere objections to facilitate and support a public exchange of vows with great symbolic significance. Just as the parade organizers objected to associating with those wishing

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[60] 576 U.S. at 679-80.
[61] *Wooley v. Maynard*, 430 U.S. 705 (1977).
[62] *Id.* at 715.
[63] *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 219 (2013) (holding that conditioning a grant on compelled speech is unconstitutional).
[64] *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 309 (2012) (quoting *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988)).

to espouse an unwanted message in *Hurley*,[65] the website designer here objects to being associated with a marriage she considers immoral. The situation here is even more egregious: in *Hurley*, the group complaining was trying to force its way *into* an event;[66] here, Smith only wants to stay *out* of it. The First Amendment freedoms of speech and assembly "den[y] those in power any legal opportunity to coerce that consent."[67] No officials may "force citizens to confess by word or act" the "orthodox" position in "religion[ ]

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[65] 515 U.S. at 568-81.

[66] *Id.*

[67] *Barnette*, 319 U.S. at 641. The freedom of assembly, although a freestanding right, is a close cousin of the freedom of speech. Quite commonly, individuals exercise their freedom of speech by gathering in groups. Conversely, by restricting the access of individuals to each other, their rights to free speech can be restricted or eliminated altogether. The two rights, then, often do their essential work in tandem. *See NAACP v. Ala.*, 357 U.S. 449, 460 (1958) ("this Court has more than once recognized . . . the close nexus between the freedoms of speech and assembly"); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (noting that rights of the speaker and audience are "necessarily correlative"); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"); *Whitney v. Cal.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring in the result) ("without free speech and assembly discussion would be futile"), *majority opinion overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The right of association is also implicated in the outworking of these rights: "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

or other matters of opinion."[68] Paraphrasing *Wooley*, the Free Speech Clause "protects the right" of Smith and other marriage vendors "to refuse to foster . . . an idea they find morally objectionable."[69]

Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("*FAIR*"), also provides a helpful comparison to this case.[70] The law schools in *FAIR* claimed that the Solomon Amendment unconstitutionally compelled them to associate with speech with which they disagreed by conditioning federal grants on allowing the military to recruit along with multiple other organizations on campus. In that circumstance, their compelled speech and association claim failed because the forum was open to a multitude of recruiters, and no one could reasonably claim that a law school was approving of all the different viewpoints represented simultaneously. Rather, the law schools were simply providing a forum for the speech of others, leaving the schools themselves free, and without penalty, to articulate their views on the same subject.[71]

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[68] *Barnette,* 319 U.S at 642.

[69] *See Wooley*, 430 U.S. at 715.

[70] 547 U.S. 47 (2006).

[71] *Id.* at 65 ("Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."). Similarly, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court upheld a state law requiring a shopping center owner to allow certain expressive activities by others on its property, which state law regarded as a public forum, but only because there was little likelihood that the views of those engaging in the expressive activities would be identified with the owner, who remained free to dissociate

By contrast, a wedding is not an open forum where different views can be expressed. All who participate do so to communicate their approval of the wedding's overriding message. Moreover, unlike in *FAIR*, Smith is trying to *avoid* affirming the event's overriding message and having that message attributed to her. She is not attempting to force her attendance at the event where it is being resisted, as the Government was doing via the Solomon Amendment. Making Smith facilitate a message of approval and of State sanction of a wedding concerning which she has religious scruples is personal, focused, compelled speech.

At a minimum, then, Colorado has to justify its infringement of Smith's rights under heightened scrutiny: laws "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those "that suppress, disadvantage, or impose differential burdens upon speech because of its content."[72] The majority opinion in *Masterpiece* suggests a countervailing consideration of the "serious stigma" celebrants would experience if multiple vendors

himself from those views and who was "not . . . being compelled to affirm [a] belief in any governmentally prescribed position or view." *Id.* at 88.

[72] *Turner Broad.*, 512 U.S. at 642; *accord Dale*, 530 U.S. at 657-59; *Hurley*, 515 U.S. at 573; *Tex. v. Johnson*, 491 U.S. 397, 412 (1989); *see also Masterpiece*, 138 S. Ct. at 1741-44 (Thomas, J., concurring in part and concurring in judgment) (stating that strict scrutiny is applicable); *see generally Janus*, 138 S. Ct. at 2464-65 (describing strict and exacting scrutiny applied in compelled speech cases).

refused to service their same-sex-weddings.[73] While this conclusion is anything but apparent—after all, the fact that many persons, for religious and other reasons, disapprove of same-sex marriage is broadcast in *Obergefell* itself—that someone feels "oppressed" or "insulted" by someone else's speech has never been a justification for its suppression or compulsion by the government.

This point has been made repeatedly by this Court. In *Matal*,[74] Justice Kennedy in concurrence observed, "[A] speech burden based on audience reactions is simply government hostility . . . in a different guise."[75] In *Texas v. Johnson*, this Court described as a "bedrock principle" of the First Amendment that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[76] In *Hustler*, this Court noted that, "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[77] And in *Hurley*, this Court concluded that trying to justify a public accommodations law's restriction on free speech because it will help "to produce a society free of . . . biases" against the protected group does not aid in its enforcement. To the contrary, such an interest is "decidedly fatal" to the challenged restriction:

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[73] *Masterpiece,* 138 S. Ct.. at 1727, 1728-29.
[74] *Matal v. Tam*, 137 S. Ct. 1744 (2017).
[75] *Id.* at 1767 (Kennedy, J., concurring in part and concurring in judgment).
[76] 491 U.S. at 414.
[77] *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (quoting *FCC v. Pacifica Found.,* 438 U.S. 726, 745 (1978).

> 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 disfavored one, however enlightened either purpose may strike the government.[78]

D. The Proper Scope of Exceptions to Attempted Applications of the Civil Rights or Public Accommodations Laws Is Simply That Which the First Amendment Requires

Returning to the concern of the majority in *Masterpiece* that individualized "exceptions" to the civil rights and public accommodations laws with regard to fostering same-sex weddings not be crafted so broadly as to stigmatize those denied service, that stated concern starts from the false premise that vendors who refuse such service are discriminating against persons because they are in a protected class. To the contrary, the fact that a vendor, like here, willingly services members of the protected class on other occasions demonstrates that the vendor's decision is not rooted in the *status* of the customers, but in the *message* of the customers and those with whom they associate. The civil rights laws only cover the former. But if they are construed by state authorities to reach a vendor's objections to facilitating the message, then the Free Speech Clause prohibits enforcement.

The *Masterpiece* majority in dicta articulated a

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[78] 515 U.S. at 579.

need to "confine" and "constrain" any incursion into the scope of the civil rights laws for same-sex weddings because such exceptions would be "inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[79] But it quickly admitted the exception of a minister who objected to same-sex marriages, finding it obvious that he could not be compelled to officiate one.[80] While the majority identified the source of this exception as the Free Exercise Clause,[81] the minister obviously would have an independent and sufficient ground in the overlapping Free Speech Clause. So what distinguishes the hypothesized pastor or priest from the actual web-site designer here? Certainly not that the web-site designer writes on a computer and the minister reads from a liturgical script. If anything, the web-site designer's work is the more original and more tailored. And certainly not that the web-site designer works to facilitate the same-sex marriage *before* the ceremony and the minister does so *during* the ceremony. Both are asked to consecrate the same

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[79] 138 S. Ct. at 1727.

[80] *Id.* at 1727. Justice Kagan joined the majority opinion, but in her concurrence suggested that the Colorado statute could properly have been applied against the baker because he provided wedding cakes for others, just not gay persons desiring a same-sex marriage. *Id.* at 1733 (Kagan, J., concurring). Justice Gorsuch in his concurrence appropriately criticized this suggestion. *Id.* at 1735-39 (Gorsuch, J., concurring). The minister exception to which the majority acceded also shows that Justice Kagan's approach is unavailing, for it would disqualify the minister from being excepted from the operation of the civil rights laws if he presided over the marriages of others.

[81] *Id.* at 1727.

marriage, and it is that purpose and association—i.e., the actual and symbolic speech of the wedding couple and their ceremony—to which both the minister and the web-site designer object.

The *Masterpiece* majority suggests that the exception for the pastor or priest would be generally understood and accepted and so gay persons would not be as hurt by ministers refusing to serve them as they would by others doing exactly the same thing.[82] Just stating that as a rationale for declining to extend an exception further than ministers (and perhaps organists and vocalists who participate in the service?) rebuts it. The protections of the Free Speech Clause (and the Free Exercise and Assembly Clauses) are available to *all*, not just to ministers, and those protections are most clearly needed when the community is most hostile to the exercise of the right.[83]

The *Masterpiece* majority's concern about the breadth of exceptions when the civil rights laws are (improperly) interpreted by state authorities to require vendors to provide goods and services for same-sex marriages despite their moral objections is, in reality, simply a concern about the operation of the First Amendment. It breaks no new ground, but only states the obvious, to reaffirm that civil rights and public accommodations laws of both the Federal and State Governments may not violate the Free Speech Clause (or any other, applicable constitutional pro-

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[82] *Id.*

[83] *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011); *Tex. v. Johnson*, 491 U.S. at 414; *Hustler*, 485 U.S. at 55; *Barnette*, 319 U.S. at 641.

vision). Normally, that concern will not come into play, because most violations will involve a vendor's denial of goods and services due to the protected *status* or *class* of the potential customer. But when the vendor's objection to service is because she does not want to contribute to, sponsor, foster, facilitate, or associate with the *message* of her customer, it violates the Free Speech Clause (and often the Free Exercise and the Assembly Clauses as well) to compel her to do so.

CONCLUSION

A Jewish Community Center cannot constitutionally be punished for racial or national origin discrimination for its refusal to rent its hall for a PLO fundraiser. Nor can a vendor, whether or not an "artist" utilizing her *own* speech, lawfully be compelled to foster a wedding ceremony she finds morally objectionable. The web-site designer here, by refusing to service same-sex marriages that she finds morally objectionable, is not violating Colorado's civil rights laws; she is not discriminating against the celebrants because of their *status*, but because of their *message*. And if Colorado's civil rights laws are so broadly interpreted as to force her to facilitate and foster a message with which she sincerely disagrees, then they are unconstitutional, as it compels her speech without a suitably weighty, countervailing governmental interest justifying it. As a matter of law, neither "embarrassment" nor "stigma" nor "shame" experienced by those denied her service provides sufficient justification for the State to compel Smith (or any other wedding vendor) to associate with and facilitate a message to which she objects.

This Court should reverse.

Respectfully submitted
this 31st day of May, 2022,

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