No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., et al.,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the Court of Appeals of Colorado

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

INTEREST OF *AMICUS CURIAE*

Amicus curiae[1] Service Employees International Union ("SEIU") is a labor union representing 2 million men and women in healthcare, property services, and public service employment in the United States, Canada, and Puerto Rico. SEIU is dedicated to improving the lives of workers and their families and creating a more just and humane society. As such, SEIU has an interest in defending the states' and political branches' historic power to regulate commercial conduct. Petitioners' expansive interpretation of the First Amendment threatens that traditional regulatory prerogative and would upset the balance of power between legislatures and the courts.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* SEIU made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Masterpiece Cakeshop, Ltd., and its proprietor, Jack Phillips, (collectively, "Masterpiece") urge this Court to hold that application of Colorado's Anti-Discrimination Act ("CADA") to them violates the First Amendment. In doing so, Masterpiece departs from settled doctrine and advances several arguments that will, if accepted, impose unprecedented restrictions on states' authority to regulate conduct. This Court should reject Masterpiece's invitation to re-write First Amendment law in a manner that will undermine legislatures' traditional prerogative to regulate commercial conduct, including discriminatory conduct.

Masterpiece's initial departure from settled law is its effort to weaken the traditional test for determining whether conduct is expressive and, therefore, protected by the First Amendment. This Court has consistently explained that conduct is protected by the First Amendment only when it is "inherently expressive," which in most cases requires proof that the conduct in question is intended to make a "point" *and* that its point will be "'overwhelmingly apparent'" to outside observers. *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 66 (2006) (quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989)). In rare cases, a less particularized inquiry is needed because the conduct at issue is "unquestionably" expressive in the sense that it has no purpose other than human expression. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995). Masterpiece would radically expand the latter category of "unquestionably" expressive

conduct to contexts never before thought to involve "inherent expression," essentially eliminating the requirement that conduct must be likely to be perceived by reasonable observers as "convey[ing] a symbolic meaning" in order to merit First Amendment protection. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011).

Masterpiece further errs when it contends that strict scrutiny applies to laws that have only an incidental effect on conduct with expressive elements. In fact, the First Amendment is not even implicated unless a law, as applied, "significant[ly]" interferes with conduct's expressive elements. *Bd. of Directors v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987). And even if a statute does so interfere, it is subject at most to a form of intermediate scrutiny if aimed principally at conduct rather than speech. *See, e.g.*, *FAIR*, 547 U.S. at 66–67. Abandoning this framework and instead applying strict scrutiny whenever a law has an incidental effect on expressive conduct is neither supported by precedent nor consistent with states' traditional prerogative to regulate conduct deemed harmful.

Masterpiece's unworkable proposal to require strict scrutiny whenever regulation is applied to a business that claims its work to be "art" should be rejected as well. It is well established that the states may validly apply neutral, generally applicable laws even to a business engaged in pure speech (unlike Masterpiece, *see infra* Part III), as long as regulation of the non-speech elements of the business's work does not unduly interfere with the expressive elements. *See Minneapolis Star & Tribune Co. v. Minn. Com'r of Revenue*, 460 U.S. 575, 581 (1983). Thus, "a ban on race-based hiring may [still] require

employers to remove 'White Applicants Only' signs," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (quoting *FAIR*, 547 U.S. at 62), even if the signs are carefully designed or hand-painted; artists and other creative businesses are not entitled to a special exemption from generally applicable laws aimed at conduct. To hold otherwise would enmesh the courts in insoluble debates about what is and is not art—a result as unworkable as it is without constitutional foundation.

In sum, because so much conduct could be perceived as potentially expressive or creative in some way, accepting Masterpiece's invitation to apply strict First Amendment scrutiny whenever an artistic method or expressive purpose is asserted would open myriad loopholes in generally applicable laws. Such an approach would place courts in the untenable position of having to evaluate not only the sincerity of such assertions but also the relative artistic value of the conduct in question, and enmesh courts in inherently political disputes about ordinary economic legislation. Adopting Masterpiece's novel First Amendment tests would thus "involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the states to care for the lives, health, and wellbeing of their citizens." *Lochner v. New York*, 198 U.S. 45, 73 (1905) (Harlan, J., dissenting).

ARGUMENT

I. This Court has long held that laws regulating conduct do not violate the First Amendment even if they impose incidental burdens on speech or expressive conduct.

Notwithstanding Masterpiece's attempts to sow confusion, the applicable First Amendment principles are clear and settled. Laws aimed at commerce or conduct do not implicate the First Amendment if they have merely insubstantial, incidental effects on speech. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017); *Sorrell*, 564 U.S. at 567 ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." (quoting *FAIR*, 547 U.S. at 62)). Were it otherwise, effective regulation would be impossible, as "every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986).

A generally applicable law is subject to First Amendment scrutiny, however, when two conditions are met: first, the law is applied to "inherently expressive" conduct *and* second, the law's application imposes substantial (rather than merely insignificant and incidental) burdens on the expressive elements of such conduct. The first condition requires conduct that is either intended to make a "point" that will be "'overwhelmingly apparent'" to objective observers, *FAIR*, 547 U.S. at 66 (quoting *Johnson*, 491 U.S. at 406), or conduct that "unquestionably" has no purpose other than expression, *Hurley*, 515 U.S. at 569; *see also infra*

Part II.A. The second condition requires proof that application of the law in question "will affect in a[] significant way [the plaintiff's] ability to" express himself or herself. *Rotary Club*, 481 U.S. at 548. And even if both those conditions are met, the law's application will be held "sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

These principles apply fully to public accommodation and other civil rights laws, as demonstrated by this Court's repeated explanation that legislatures may "prohibit employers from discriminating in hiring on the basis of race . . . [even if] this will require an employer to take down a sign reading 'White Applicants Only.'" *FAIR*, 547 U.S. at 62 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992)); *see also Sorrell*, 564 U.S. at 567 (same); *cf. Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (law firm's First Amendment right of association not violated by application of anti-discrimination law); *Rotary Club*, 481 U.S. at 548 (Rotary Club's First Amendment right of association not violated by application of anti-discrimination law). Because the purpose of civil rights laws is to ensure that all persons are "entitled to the full and equal enjoyment of . . . goods and services"—*not* to interfere with protected expression—such laws are generally subject to rational basis review. *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964). They receive at most a form of intermediate scrutiny if, and only if, their application is shown to

substantially interfere with the expressive elements of inherently expressive conduct. *See FAIR*, 547 U.S. at 62.

Thus, when a person or business entity contends that application of a civil rights law will infringe its constitutional right of expression, the putative speaker must "show[] how its ability to [express itself]" will be "inhibited by a requirement that it" comply with the civil rights law at issue. *Hishon*, 467 U.S. at 78; *see also Rotary Club*, 481 U.S. at 548. Although "[i]nvidious private discrimination" might "be characterized as a form of exercising freedom of association," a commercial entity's decision to discriminate "has never been accorded affirmative constitutional protections." *Hishon*, 467 U.S. at 78 (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)). For the same reasons, discrimination even by an inherently expressive commercial entity is not usually thought to be protected under the First Amendment, unless the entity can show that requiring it not to discriminate will significantly interfere with its expressive functions. *Cf. Hishon*, 467 U.S. at 78 (citing *Norwood*, 413 U.S. at 470); *see also Minneapolis Star & Tribune Co.*, 460 U.S. at 581 (even inherently expressive businesses like newspapers can be subject to the civil rights laws).

These principles strike a careful balance between guarding against unwarranted intrusions on protected expression on the one hand and respecting the states' traditional prerogative to regulate "commercial activity deemed harmful to the public" on the other. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The Court should not undermine these longstanding precepts at Masterpiece's invitation.

II. The Court should not weaken its test for inherently expressive conduct nor expand the category of cases for which strict scrutiny is required.

A. Conduct is "inherently expressive" only if it is intended to convey a message that will be "overwhelmingly apparent" to objective observers.

Masterpiece asks this Court to hold their conduct inherently expressive simply because selling a custom wedding cake *could* be viewed as "expressing some message." Pet. Br. at 23. Any such holding would be contrary to decades of consistent precedent.

This Court has repeatedly "rejected 'the view that a[] . . . limitless variety of conduct can be labeled "speech" [merely because] the person engaging in the conduct intends . . . to express an idea.'" *Johnson*, 491 U.S. at 404 (quoting *O'Brien*, 391 U.S. at 376). Such a view would be doctrinally unworkable, as it would subject the application of almost any law to First Amendment challenge. *See id.* For example, if expressive intent alone were sufficient to trigger First Amendment protection, a person's declared intent "to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes" would require application of *O'Brien* "to determine whether the Tax Code violates the First Amendment." *FAIR*, 547 U.S. at 66. Because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes . . . such a kernel" cannot be "sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

What *does* suffice to bring conduct within the potential protection of the First Amendment is a showing that the conduct is "inherently expressive"—which requires both that it seeks to convey a "point," and that the point will be "overwhelmingly apparent" to objective observers. *FAIR*, 547 U.S. at 66 (citing *Johnson*, 491 U.S. at 406). If additional "explanatory speech" is needed to make the point comprehensible, the conduct at issue is unlikely to be "inherently expressive" and thus does not "warrant[] protection under *O'Brien*." *Id.*

Applying these principles, *FAIR* held that a law school's refusal to host a military recruiter was not inherently expressive, both because "a law school's decision to *allow* recruiters on campus is not inherently expressive," *id.* at 64 (emphasis added), and because a law school's refusal to do so would not likely be understood as expressing disapproval of that recruiter without an accompanying explanatory statement. *See id.* at 66.

Likewise, *Carrigan* held that a state legislator's act of voting was not "inherently expressive" because a reasonable observer could not discern the reasons for the legislator's vote without an accompanying explanation, such that the act was not sufficiently symbolic. 564 U.S. at 125-28. *Carrigan* reasoned that a legislator's vote may be motivated by a number of different considerations. Without explanation, an observer would not be able to tell whether a legislator voting "aye" strongly favored the law at issue, was ambivalent about it, or voted yes for a purely political purpose. *Id.* at 126. And when conduct cannot reasonably be perceived as a form of symbolic expression unless accompanied by "explanatory speech," the need for additional speech

"is strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection." *FAIR*, 547 U.S. at 66.

By contrast, *Johnson* held that the act of burning an American flag outside a city hall during a political protest coinciding with a Republican National Convention *was* inherently expressive and therefore subject to *O'Brien* scrutiny. *See Johnson*, 491 U.S. at 400, 406. Given the factual context, the flag burning in *Johnson* was inherently expressive because it likely was understood by objective contemporary observers as expressing "disagreement with [the] country's policies" under the Reagan administration. *Carrigan*, 564 U.S. at 126 (citing *Johnson*, 491 U.S. at 406); *see also Johnson*, 491 U.S. at 400.

Likewise, *Spence* determined that "[a] flag bearing a peace symbol and displayed upside down by a student" in the immediate aftermath of Kent State and the invasion of Cambodia qualified as inherently expressive conduct because "it would have been difficult for the great majority of citizens to miss the drift of [the student's] point at the time that he made it." 418 U.S. 405, 410 (1974). Context was key: without it, the student's actions would most likely "be interpreted as nothing more than bizarre behavior." *Id.* at 410. The mere fact that the petitioner *intended* to convey a particularized message also was not enough. *Id.* at 410–11. He succeeded only because "in the surrounding circumstances the likelihood was great that the message *would be understood by those who viewed it*." *Id.* at 411 (emphasis added).

Masterpiece purports to rely on *Hurley* for a different standard, but *Hurley* did not apply a less

rigorous test for determining when conduct is inherently expressive. *Hurley* involved the "peculiar" application of a public accommodations law in the specific "context of an expressive parade." 515 U.S. at 572, 577. The Court emphasized that a parade, in which marchers come together for no reason other than to make a "collective point," is by its very nature designed to express an idea and is therefore characterized by "inherent expressiveness." *Id.* at 568.

In this way, *Hurley* merely recognized that certain conduct (like marching in a parade, or like certain forms of abstract art, *see infra* Section III) is so obviously engaged in for the sole purpose of expression itself that the conduct is properly deemed inherently expressive. *Id.* In those rare cases, people engaged in such conduct need not also show that they have "a narrow, succinctly articulable message." *Id.* at 569.

In sharp contrast, ordinary commercial activity is not similarly engaged in for the purpose of expression itself. While selling "barbecued meats and homemade pies" to a black person at a lunch counter in the newly integrated South might have been viewed as expressing support for integration, the same conduct might instead have indicated nothing more than the seller's desire to maximize revenue. *Katzenbach*, 379 U.S. at 296. Similarly, the hiring of a divorced person might indicate approval of divorce—or it might have nothing to do with divorce at all. *Cf. e.g.*, *Smith v. Fair Employment & Hous. Com.*, 913 P.2d 909, 919 (Cal. 1996) (although landlord's "religion may not permit her to rent to unmarried cohabitants," refusing rentals to unmarried persons in violation of California's fair

housing law is not protected under First Amendment's free exercise clause). In none of these cases is the conduct so obviously engaged in for the purpose of expression itself as in the case of a parade or a poem.

It would upend First Amendment doctrine for all of these actions to trigger constitutional protection, which is why this Court has admonished that merely "saying conduct is undertaken for expressive purposes cannot make it symbolic speech." *FAIR*, 547 U.S. at 69; *see also Carrigan*, 564 U.S. at 127 ("the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech"). Masterpiece's effort to undermine these principles should be rejected.

B. *O'Brien* intermediate scrutiny applies only when a content-neutral, generally applicable law significantly burdens expressive elements of the conduct at issue.

Determining that conduct is inherently expressive does not end the First Amendment inquiry. A law's application to such conduct violates the Constitution only if the application imposes a "significant" restriction on the conduct's expressive (as opposed to non-speech) elements. *Rotary Club*, 481 U.S. at 548.

Thus, in a related context, this Court concluded there was no First Amendment violation when a private elementary school that wished "to promote the belief that racial segregation is desirable" was required by state anti-discrimination law to admit

racial minorities, for there was "no showing that discontinuance of the discriminatory admissions practices would inhibit in any way the teaching in these schools of any ideas or dogma." *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

Likewise, although lawyers unquestionably engage in constitutionally protected expression, *O'Brien* scrutiny was not required in *Hishon* because the law firm in that case could not "show[] how its ability to [engage in protected speech] would be inhibited by a requirement that it consider [women] for partnership." *Hishon*, 467 U.S. at 78.

Conversely, this Court applied intermediate scrutiny in *O'Brien* because the act of burning a draft card was the expressive element of the defendant's conduct, and application of a law forbidding destruction of draft cards directly interfered with that element. *See* 391 U.S. at 369–70, 376–77. The same was true of application of the state-flag desecration statute to flag burning in *Johnson,* 491 U.S. at 400, 406, and with the state's requirement in *Hurley* that parade organizers include marchers expressing a message with which the organizers disagreed. The state law in *Hurley* significantly burdened—and, indeed, required alteration of—the expressive element of the parade. 515 U.S. at 572–73.

Masterpiece ignores these precedents, skipping over the question whether application of Colorado's law significantly interferes with expressive elements of its conduct. *See Rotary Club*, 481 U.S. at 548. The Court should not make the same mistake. If Colorado's law imposes no burden at all on expressive elements, or if the law imposes at most an insignificant burden that is wholly "incidental to its

primary effect" on non-speech conduct, the First Amendment is not implicated. *Expressions Hair Design*, 137 S. Ct. at 1151.

C. Even when application of a content-neutral regulation burdens expressive elements of conduct, a form of intermediate scrutiny applies.

Contrary to Masterpiece's position, *O'Brien* intermediate scrutiny, rather than strict scrutiny, applies when a First Amendment plaintiff demonstrates that his or her conduct is inherently expressive and expressive elements of that conduct are "significant[ly]" burdened. *Rotary Club*, 481 U.S. at 548. Under *O'Brien*, application of an otherwise neutral conduct regulation to inherently expressive conduct "is sufficiently justified . . . if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377. An incidental burden on speech is permissible "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *FAIR*, 547 U.S. at 67 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Thus, the First Amendment is not automatically violated whenever a generally applicable law burdens "a significant expressive element" of inherently expressive conduct. *Arcara*, 478 U.S. at 706. Instead, "when 'speech' and 'nonspeech' elements are combined in the same course of

conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 702–03 (quoting *O'Brien*, 391 U.S. at 376). Only if the government has no important interest, or is shown to be targeting expression itself, will application of the relevant law be prohibited.

Although Masterpiece relies heavily on *Hurley*, that case articulates no contrary rule. Rather, *Hurley* applied strict scrutiny because the "peculiar" application of an anti-discrimination law in the specific context at issue not only interfered with the organizer's expression but actually compelled the parade's organizers to express a contrary view, thereby implicating this Court's compelled-speech doctrine. 515 U.S. at 572, 577. In *Hurley*, the private organizers of a St. Patrick's Day Parade sought to exclude a contingent of marchers who wished to engage in an inherently "expressive demonstration" communicating that "gay, lesbian, or bisexual" persons of Irish descent "have as much claim to unqualified social acceptance as heterosexuals." *Id.* at 574. The Court emphasized the uniquely expressive nature of a parade and that both the parade organizers' and the GLIB contingent's conflicting messages were not "difficult to identify" as expressing "a particular point of view" or a "collective point." *Id.* at 574, 568. Ordering the organizers to include that perceivable message would have "essentially requir[ed] them to alter the expressive content of their parade" and violated the

principle that "a speaker has the autonomy to choose the content of his own message." *Id.* at 572–73.[2]

It would drastically rework First Amendment doctrine to construe *Hurley* and this Court's other compelled speech cases as Masterpiece does: namely, as holding that a law impermissibly compels a person to speak even when, as in this case, the only conceivable message conveyed by compliance is mere obedience to the law. Indeed, this Court implicitly rejected a similar compelled-speech argument in *FAIR*, determining that the Solomon Amendment (which required schools to allow military recruiters on campus as a condition of federal funding) could be enforced against objecting law schools because their compliance would reasonably be understood as conveying adherence to the law, nothing more. *See* 547 U.S. at 64, 66. In *Hurley*, by contrast, the parade organizers were compelled not merely to comply with the law but actually to convey a discernible message with which they disagreed. 515 U.S. at 574–75.

Reading these compelled speech precedents as Masterpiece suggests would also have significant, undesirable consequences. An employer could evade

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[2] The other compelled speech cases upon which Masterpiece relies to argue that strict scrutiny applies all also involved the forced communication of either the government's or another private entity's discernible message. *See PG&E v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 9 (1986) (private corporation could not be compelled to provide forum for views other than its own in its inherently expressive newsletters); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (individual could not be compelled to display "Live Free or Die" on license plates); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244–45 (1974) (newspaper could not be required to print messages of speakers with which it disagreed).

Title VII by asserting a sincere belief that women should work only in the home and that compliance would force expression of a contrary view. *Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) ("A shopkeeper has no constitutional right to deal only with persons of one sex."). Likewise, citizens could refuse to pay taxes on the ground that payment is a compelled endorsement of the tax laws. *Cf. FAIR*, 547 U.S. at 66 (rejecting idea that intent "to express . . . disapproval of the Internal Revenue Service by refusing to pay . . . income taxes" would require "determin[ing] whether the Tax Code violates the First Amendment"). A secular, for-profit mortuary service could refuse to honor its contractual obligation to care for the remains of a gay person and avoid liability for breach of contract by arguing that performance would amount to compelled endorsement of homosexuality. *Cf.* Complaint, *Zadawski v. Brewer Funeral Home Servs.*, No. 55CI1:17-cv-00019-CM, Doc. 12 at 1-2 (Miss. Cir. Ct. Mar. 7, 2017) (alleging mortuary breached "agreement to provide . . . cremation and funeral services for a grieving family's departed loved one, knowingly leaving the decedent's body without proper storage for hours while the family scrambled to find alternative arrangements," when funeral home discovered decedent was gay and asserted it would not "deal with" LGBT persons).

Applying strict scrutiny in such contexts on the theory that legal compliance alone is communicative would not only be absurd but would also dangerously undermine state and federal legislatures' ability to regulate harmful conduct.

D. Masterpiece's case fails at every step of the "inherently expressive" conduct analysis.

Applying the principles just described to the facts of this case, Masterpiece cannot show a First Amendment violation.

As an initial matter, Masterpiece's conduct is not "inherently expressive." It is unlikely that observers would conclude that the act of creating and selling a wedding cake expresses the baker's endorsement of the particular wedding at which the cake is consumed, just as no one thinks that a hotel's provision of a reception hall conveys the hotel owner's endorsement of any of the bride's or groom's particular views. Though weddings may have religious significance, marriage is a civil institution, and the businesses that provide goods and services for wedding receptions are primarily engaged in commercial conduct. Vendors' provision of goods or services is not likely to be received as endorsing the marriage or the religious or other beliefs of the couple in question, even if the vendors have that specific expressive intent in mind. *Cf. Carrigan*, 564 U.S. at 127 (it is not enough that "the actor would like [his conduct] to *convey* his deeply held personal belief").

Even in the case of a customized cake, the baker's expression, if any, is likely to be understood as aesthetic—as conveying the baker's artistic vision. The cake is not likely to be understood as "symbolic" of any additional meaning unless the cake is accompanied by "explanatory speech" that conveys a message and is understood to reflect the baker's (rather than the couple's) point of view. *FAIR*, 547 U.S. at 66; *see also id.* (if conduct requires

explanatory speech, that "is strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection"). One can imagine facts that might present a more difficult question—perhaps a cake covered with rainbow flags and displayed with a card that says "proudly presented by Masterpiece Cakeshop." But nothing like that transpired here. And while Masterpiece might *intend* to convey endorsement whenever it sells a cake (because of Phillips's particular belief that his cakes constitute approval of the wedding where they are consumed), there is no great likelihood that Masterpiece's intended message will actually be understood as such by objective outsiders absent additional, explanatory speech. *Cf. id.* (citing *Johnson*, 491 U.S. at 406); *Carrigan*, 564 U.S. at 127.

Nor is it easy to see how Masterpiece's discontinuance of its discriminatory conduct "would inhibit in any way the" *expressive* element of its conduct, to the extent such an expressive element even exists. *Runyon*, 427 U.S. at 176; *see also Rotary Club*, 481 U.S. at 548; *Hishon*, 467 U.S. at 78. CADA does not require Masterpiece to make any particular aesthetic choice with which Phillips disagrees. Phillips could refuse to make a cake he deems ugly or a cake with an offensive message, as long as he would refuse to make such cakes for anyone. *See* Pet. Br. at 10 (citing JA39, 43, 48, 89, 168) (Phillips declined to make a cake without discussing its design and determining whether the design would be consistent with his artistic vision). All CADA requires is that if Masterpiece offers a certain kind of good to members of one group, it may not refuse to sell that same good to members of another.

Accordingly, as applied in this case, CADA "neither limits what [Masterpiece] may say nor requires them to say anything." *FAIR*, 547 U.S. at 60. Masterpiece "remain[s] free under the statute to express whatever views [it] may have on the [state's legislatively] mandated [anti-discrimination] policy," or about same-sex marriage itself. *Id.* Because CADA does not interfere with the purportedly expressive elements of Masterpiece's conduct, its application to Masterpiece does not violate the First Amendment.

Finally, Masterpiece's argument for strict scrutiny fails because this case is not similar to the compelled-speech scenarios in *Hurley* and the other cases on which Masterpiece relies. *Hurley*, for example, turned on two crucial facts not present here: both the parade organizers and the excluded marchers sought to convey messages, and neither of their intended messages was "difficult to identify" as inherently symbolic. 515 U.S. at 574, 568. In this case, by contrast, a guest viewing Masterpiece's cake at a same-sex wedding would be able to discern that Masterpiece has complied with CADA but not *why* Masterpiece complied—that is, whether Masterpiece did so because, like most bakers, it is indifferent about the weddings where its cakes are served; because it wished only to avoid legal penalty; because it enthusiastically supports anti-discrimination legislation; or perhaps because it approves of same-sex marriage. Because all Masterpiece's compliance with CADA would "disclose" is that Masterpiece "wishes (for whatever reason)" to obey the law, *Carrigan*, 564 U.S. at 126, a reasonable observer would not perceive any "particular point of view" in Masterpiece's conduct. *Hurley*, 515 U.S. at 575. Requiring Masterpiece to

sell a cake does not compel it to subscribe to any particular message.

Moreover, CADA does not require commercial actors who offer goods or services to alter the content of their own expression by carrying customers' discernible messages or "point[s] of view." *Hurley*, 515 U.S. at 575. CADA permits commercial actors to refuse requests to convey discernible messages with which they disagree, such as messages "glorifying divorce," "disparaging gays and lesbians," or "promot[ing] atheism, racism, or indecency," as long as they would refuse to make cakes carrying those messages for anyone. Pet. Br. at 9 (citing JA165). CADA thus steers well clear of the kind of compelled-speech problem posed in *Hurley*. 515 U.S. at 574.

"There is nothing in this case approaching a Government-mandated pledge or motto that the [business] must endorse," *FAIR*, 547 U.S. at 62, nor a government-required conveyance of another person's perceivable message. *See Hurley*, 515 U.S. at 574–76. Accordingly, the Court should hold there is no First Amendment violation in this case.

III. The Court also should reject Masterpiece's invitation to apply strict scrutiny whenever a commercial product is asserted to be "art."

Masterpiece and its amici further argue that the application of CADA requires heightened First Amendment scrutiny because Masterpiece's custom cakes are a form of artistic expression, and artistic expression is entitled to heightened First Amendment protection as "pure speech." Pet. Br. at 18; First Amend. Law. Ass'n. Br. at 13; States of Tex.

et al. Br. at 3–5. The Court should reject this argument because it has no basis in this Court's jurisprudence and would work significant damage to First Amendment doctrine.

It is of course true that the First Amendment may extend to works of art that do not convey a particular message because such art is objectively perceivable as created for the sole purpose of expression itself. For that reason, the First Amendment "unquestionably" would cover the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569.

But saying that abstract art qualifies as protected expression does not mean the state can never regulate artists. "It is beyond dispute that the States and the Federal Government can subject newspapers [and other businesses engaged in pure speech] to generally applicable economic regulations without creating constitutional problems." *Minneapolis Star & Tribune Co.*, 460 U.S. at 581. Indeed, countless neutral and generally applicable laws are routinely applied to all manner of persons and institutions engaged in what is indisputably "pure speech," and those applications have never been thought to implicate the First Amendment at all, much less to require strict scrutiny. *See id.*

For example, generally applicable taxes are routinely applied to makers of films, operators of commercial art galleries, and writers of novels without triggering First Amendment protection. Generally applicable health and safety regulations are likewise applied to concert halls and theaters without any need for First Amendment analysis. And this Court has firmly rejected the contention

that First Amendment scrutiny is triggered when general labor laws are applied to newspaper employees. *Id.* (citing *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 192–93 (1946)). Masterpiece's assertion that heightened scrutiny is required whenever a neutral and generally applicable conduct regulation is applied to artists, artisans, and other purportedly creative professionals engaged in the creation of "pure speech" is thus contrary to this Court's longstanding precedent.

"The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State." *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring); *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259 (1964) (a business "has no 'right' to select its guests as it sees fit, free from governmental regulation"). Rather, state and federal governments have inherent authority to enact civil rights laws that mandate "[w]hen the doors of a business are open to the public, they must be open to all . . . ." *Lombard v. Louisiana*, 373 U.S. 267, 281 (1963). These principles apply with equal force whether the public accommodations law is challenged by the artist's studio or the lunch counter, the symphony or the common innkeeper.

Thus, though "[i]t may well be that a considerable amount" of artistic expression or human creativity "occurs" not only in the concert hall or the theater but also in a bakery whose sole proprietor creates custom wedding cakes, "as is also true in many restaurants and other places of public accommodation, . . . that fact alone does not afford the entity as a whole any constitutional immunity to

practice discrimination when the government has barred it from doing so." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 12 (1988) (citing *Hishon*, 467 U.S. at 78). Rather, because public accommodations laws are not aimed at speech itself but instead are designed only to require specific conduct (the equal provision of goods and services), they do not violate the First Amendment even when applied to artists and other creative businesses. *See Minneapolis Star & Tribune Co.*, 460 U.S. at 581.

Masterpiece acknowledges that it could not validly refuse to sell other baked goods to LGBT customers. Pet. Br. at 10. But if the Court were to accept Masterpiece's novel "pure speech" argument, that premise would not hold: At some point Mr. Phillips might produce other items that he feels require similar artistry and refuse to sell any of them to LBGT people. Any state attempt to intervene would (under Masterpiece's test) be subject to strict scrutiny. Masterpiece's argument would thus "lead to the absurd result that any government action that had some conceivable [art]-inhibiting consequences, such as the arrest of a[n artist] for a traffic violation, would require analysis under the First Amendment." *Arcara*, 478 U.S. at 708 (O'Connor, J., concurring).

Masterpiece's "pure speech" test would also be unworkable in practice. It would force courts to determine, as a matter of constitutional importance, what is and is not "art." That insoluble question is not one amenable to judicial decision.

IV. Adopting Masterpiece's novel First Amendment tests would also put courts in the untenable position of passing on the wisdom of economic regulation.

This Court has declined to apply constitutional scrutiny to the political branches' justification for ordinary economic legislation since the time of the New Deal. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 488 (1955). Instead, this Court has recognized that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." *Nebbia v. New York*, 291 U.S. 502, 537 (1934). "Even if the wisdom of the policy be regarded as debatable . . . , still the Legislature is entitled to its judgment." *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

These same principles have also weighed against an overbroad expansion of First Amendment doctrines. If it were true that the First Amendment required searching judicial review of every law that potentially affects expressive or artistic conduct in the commercial realm, then the First Amendment would inevitably become the same scourge of regulation that the Fourteenth once was. Rather than a nebulous "freedom of contract," an unduly expansive concept of free speech would authorize courts to strike down all manner of commercial legislation. The Court would thus "return[] to the

bygone era of *Lochner v. New York*, 198 U.S. 45 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

Some of Masterpiece's amici even urge this result, arguing that the Court should rule for Masterpiece because public accommodations laws like CADA allegedly "diminish social welfare" by creating a smaller, "less diverse and less competitive" market for goods and services. Law & Econ. Sch. Br. at 5. Such arguments have no place in First Amendment analysis. Whether public accommodations laws are sound as a matter of *policy* is classically "a judgment for [the legislative branch], not the courts." *FAIR*, 547 U.S. at 67.

To avoid twisting the First Amendment beyond recognition into a powerful deregulatory cudgel that would radically undermine the states' traditional legislative prerogative, the Court must reject improper entreaties like those made by Masterpiece's amici. It is also essential that the Court ensure the First Amendment is reserved for those instances where the actual expression of ideas is seriously threatened, and not expand it unnecessarily to realms where the state is not substantially interfering with the expression of a message.

CONCLUSION

For the foregoing reasons, the Colorado Court of Appeals' decision should be affirmed.

Respectfully submitted,

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