No. 16-111

IN THE

# Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; 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 FOR THE CATO INSTITUTE, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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September 6, 2017

## QUESTION PRESENTED

Whether the creation and sale of custom wedding cakes is artistic expression and, if so, whether compelling their creation violates the First Amendment's Free Speech Clause.

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## INTEREST OF *AMICUS CURIAE*[1]

The **Cato Institute** is a nonpartisan public policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

**Reason Foundation** is a nonpartisan, nonprofit think tank, founded in 1978. Reason's mission is to promote free markets, individual liberty, equal rights, and the rule of law. Reason advances its mission by publishing *Reason* magazine and commentary on www.reason.com, www.reason.org, and www.reason.tv. To further its commitment to "Free Minds and Free Markets," Reason participates as *amicus* in cases raising significant legal and constitutional issues.

The **Individual Rights Foundation** is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. The IRF opposes attempts to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

*Amici*'s interest here lies in the First Amendment's protection against compelled expression.

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[1] Rule 37 statement: Petitioners and Respondent Colorado Civil Rights Commission lodged blanket consent to the filing of *amicus* briefs, and Respondents Charlie Craig and David Mullins consented separately. No counsel for any party authored any of this brief; *amici* alone funded its preparation and submission.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case is largely controlled by *Wooley v. Maynard*, 430 U.S. 705 (1977). *Wooley*, the New Hampshire "Live Free or Die" license-plate case, makes clear that speech compulsions are as unconstitutional as speech restrictions. *Wooley*'s logic applies to custom wedding cakes and other types of visual art, not just verbal expression. It also applies to compulsions to create cakes and other works (including for money), not just to compulsions to display such works. *Wooley* should not be dismissed as easily as the Colorado Court of Appeals did below.

Indeed, the lower court's reasoning would produce startling results. Consider, for instance, a freelance writer who writes press releases for various groups, including religious ones, but refuses to write copy for a religious organization or event with which he disagrees. While the court below attempted to wave the issue away by saying that Jack Phillips was never asked to include a specific inscription by the respondents, Pet. App. at 34a–35a, such a refusal would also violate the law under the court's reasoning—much as Phillips's refusal to bake a custom cake for an event with which he disagreed did. Yet a writer has the First Amendment right to choose which speech he creates, notwithstanding contrary state law. The same principle applies to bakers. Even the Colorado Civil Rights Commission seems to agree, in other contexts, as it found no illegal discrimination in similar situations where the parties' personal beliefs are essentially a reverse of this case. Pet. App. at 7. At base, photographers, writers, singers, actors, painters, and others

who create First-Amendment-protected speech—including bakers, florists, and other expressive professionals—must have the right to decide which speech to create or commissions to take.

*Wooley* also provides an important—and rather obvious—limiting principle to this constitutional protection: Although wedding (and other) vendors who produce and sell expressive works must be free to accept or reject particular jobs, this right does not apply to those who do not engage in protected speech. This Court can rule in favor of Masterpiece Cakeshop on free-speech grounds without blocking the enforcement of antidiscrimination law against caterers, hotels, limousine service operators, and the like.[2]

*Wooley* secures an important constitutional right to which all speakers are entitled—whether religious or secular, liberal or conservative, pro- or anti-same-sex-marriage. The decision below violates that right.

## ARGUMENT

### I. Under the First Amendment, Speech Compulsions Are Generally Treated the Same as Speech Restrictions

Nearly 75 years ago, this Court stated: "If there is any fixed star in our constitutional constellation, it is that no 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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Since then, the

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[2] The defenses that *non-expressive* businesses may have against the operation of antidiscrimination and public-accommodations laws are beyond the scope of this brief.

Court has numerous times reaffirmed that the First Amendment prohibits compelled speech just like speech restrictions: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *Barnette*, 319 U.S. at 637).

In *Wooley*, the Maynards objected to having to display the state motto on their government-issued license plates and sought the freedom not to display the motto. *Id.* at 707–08, 715. Surely nobody would have understood the motto—printed by the government on government-provided and government-mandated license plates—as the driver's own words or sentiments. *See Walker v. Tex. Div., Sons of Confed. Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015). Yet the Court nonetheless held for the Maynards. *Wooley*, 430 U.S. at 717.

The Court reasoned that a person's "individual freedom of mind" protects her "First Amendment right to avoid becoming the courier" for the communication of speech that she does not wish to communicate. *Id.* at 714, 717. People have the "right to decline to foster . . . concepts" with which they disagree, even when the government is merely requiring them to display a slogan on a state-issued license plate. *Id.* at 714.

Even "the passive act of carrying the state motto on a license plate," *id.* at 715, may not be compelled, because such compulsion "'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.'" *Id.* (quoting *Barnette*, 319 U.S. at 642). Requiring drivers to display the motto made them "an instrument for fostering public adherence to an ideological point of view [they] find[] unacceptable." *Id.* This

reasoning applies regardless of the compelled content. *See, e.g.*, *First Covenant Church v. Seattle*, 840 P.2d 174, 193 (Wash. 1992) (Utter, J., concurring) (landmarks designation violated church's "freedom to express [itself] through the architecture of its church facilities"); *see also Ortiz v. New Mexico*, 749 P.2d 80, 82 (N.M. 1988) (*Wooley* protects drivers from displaying the non-ideological slogan "Land of Enchantment").

This understanding of "individual freedom of mind" makes considerable sense. Democracy and liberty rely on citizens' ability to preserve their integrity as speakers, thinkers, and creators—their sense that their expression, the expression that they "foster," and the expression for which they act as "courier[s]," is consistent with what they actually believe.

Thus in the dark days of Soviet repression, Solzhenitsyn admonished his fellow citizens to "live not by lies": to refuse to endorse speech they believed false. Aleksandr Solzhenitsyn, *Live Not by Lies*, Wash. Post, Feb. 18, 1974, at A26. Each person must never "write, sign or print in any way a single phrase which in his opinion distorts the truth," never "take into hand nor raise into the air a poster or slogan which he does not completely accept," never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting, sculpture, photography, technical science or music." *Id.*

People whose consciences require them to refuse to distribute expression "which [they do] not completely accept," *Id.*, are constitutionally protected. "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and to refrain from speaking at all." *Wooley*, 430 U.S. at 714.

## II. *Wooley*'s Logic Extends to Custom Wedding Cakes, Including When Made for Money

As petitioners argue, custom wedding cakes are artistic expressions. Pet. for Writ of Cert. at 18–22, *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, No. 16-111 (Jul. 22, 2016). Numerous schools throughout the world offer classes focused on mastering the delicate techniques necessary to shape cakes into works of art. Some, such as the French Pastry School and the Institute of Culinary Education, offer extensive cake-decorating programs lasting hundreds of hours and teaching everything from specific techniques for sculpting fondant to academic theories of color and design. In the French Pastry School's 16-week professional certification program, for example, students take classes on baking and pastry theory, cake-baking and construction, and advanced decorating techniques, including "elaborate gumpaste work, detailed piping techniques, French buttercream frosting, making rolled fondant from scratch and rolled fondant cake covering, chocolate decorations specifically tailored for cakes, pastillage and pressed sugar accents, pulled and blown sugar flowers and ribbons, mold making methods, airbrushing skills, figurine modeling and 3-D sculpted cakes." *Course Catalogue*, French Pastry School, http://bit.ly/2wjfBQW.

Those who purchase wedding cakes are also keenly aware of the artistic work and skill that goes into the process—and are willing to pay for it. While cakes vary widely in price, elaborate, professionally designed wedding cakes of the sort sold by Masterpiece Cakeshop can cost hundreds of dollars. In some major cities the price tag can easily turn out to be over a thousand dollars. Sharon Naylor, *Wedding Cake*

*Prices: 20 Ways to Save Big*, Huffington Post, http://bit.ly/2wjy0xg. Customers are not willing to part with hundreds of dollars because the ingredients making up a wedding cake are themselves particularly valuable, but because of the vision, creativity, and artistic skill involved. When hired to make a wedding cake, Jack Phillips sits down with the couple to discuss their particular desires, interests, and tastes, then spends hours designing the cake, baking it, making fillings and decorations, and sculpting the finished product. Pet. App. at 184-85a. The fact that Jack's media are icing and chocolate rather than ink or paint does nothing to diminish the artistic content of his work.

The art of baking and decorating cakes, particularly wedding cakes, exhibits all the characteristics of other expressive formats that this Court has recognized as constitutionally protected. To show that the Constitution protects even abstract expression, the Court identified the "painting of Jackson Pollock, the music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll" as "unquestionably shielded" by the First Amendment. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Although the Court has not yet considered cake-making, it has identified numerous forms of art as speech. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 790–91 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66 (1981) (dance); *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 557–58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502–03 (1952) (movies).

Some of the circuit courts have addressed the First Amendment protections for still other types of artistic expression. The Ninth Circuit has held that all aspects

of tattooing are fully protected. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010). In that court's words: "The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are . . . purely expressive activity fully protected by the First Amendment." *Id.* (emphasis in original). The court went on to hold that the tattooing process is "purely expressive activity" because this Court has never distinguished between pure speech and the process of creating pure speech. *Id.* at 1061–62 (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582 (1983)).

Other circuits that have specifically considered the application of the First Amendment to non-verbal artistic expression agree that it is speech. For example, the Sixth Circuit held that "[t]he protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures." *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003).

In *Piarowski v. Ill. Cmty. College Dist. 515*, 759 F.2d 625, 627–28 (7th Cir. 1985) (Posner, J.), the Seventh Circuit easily found that stained glass windows on display in an art gallery were protected speech. The court stated that the First Amendment "embrace[s] purely artistic as well as political expression (and entertainment that falls far short of anyone's idea of 'art,' such as . . . topless dancing . . . )." *Id.* at 628.

Similarly, in *Bery v. City of New York*, 97 F.3d 689, 691–92 (2d Cir. 1996), the Second Circuit addressed a challenge to a municipal vendors law brought by artists who were arrested for selling their work on city sidewalks without a license—and had their paintings,

photography, and sculptures confiscated or damaged. That court also cited precedents extending the First Amendment beyond words and concluded that the art at issue was "entitled to full First Amendment protection." *Id.* at 694–96. The court also noted that "visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing" and that, in fact, art may be better able to reach people because it is not constricted by the variants of language. *Id.* at 695. "Visual artwork is as much an embodiment of the artist's expression as is a written text." *Id.*

Moreover, people throughout history have debated what makes something art and who decides what is art and how to interpret it. Artists themselves have participated in these debates, often by pushing the envelope of what is accepted as "art." Andy Warhol's pop art took advertisement and made it art. Jackson Pollock's drip painting made art out of paint dripped onto canvas or blown by giant fans. Anish Kapoor's *Cloud Gate*—better known as the Chicago Bean—is art in the form of a giant metallic sculpture that reflects the Chicago skyline. Most people who take selfies in front of the Bean do not know any of Kapoor's themes, which include immateriality, spirituality, and the tension between the masculine and feminine. *The Cloud Gate by Anish Kapoor in 2004–2006*, What Is Art? (May 10, 2011), http://bit.ly/2wiUePH. Pollock's work is even more open to interpretation, and yet the Court said in *Hurley*, 515 U.S. at 569, that it is "unquestionably shielded" by the First Amendment. The message a wedding cake sends likewise may not be as easily identifiable as that of verbal art forms, but "a narrow, succinctly articulable message is not a condition of constitutional protection." *Id.* at 559.

It also does not matter that Mr. Phillips is paid to bake. The First Amendment fully protects both the creation and dissemination of material for profit. The compelled-speech doctrine applies to commercial businesses, both newspapers, *see, e.g.*, *Miami Herald v. Tornillo*, 418 U.S. 241 (1974), and non-media corporations, *see, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1 (1986). This protection is logical: A wide range of speakers, whether writers or bakers—or even lawyers—earn a living from their speech.

That is the nature of our free-market system: The prospect of financial gain gives speech-creators an incentive to create—and the money they make by selling their creations gives them the ability to create more. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 469 (1995) (treating speech for money as fully protected because "compensation [of authors] provides a significant incentive toward more expression"). If making money from one's work meant surrendering one's First Amendment rights to choose what to create, a great many speakers would be stripped of their constitutional rights, including this country's most popular entertainers, authors, and artists.

In sum, wedding cakes are an expressive art form that should be given full First Amendment protection.

## III. *Wooley* Extends to Compelled-Speech Creation and Distribution, and Cannot Be Trumped by State Law

First Amendment protections are not limited to pre-fabricated messages, but extend to the creation and dissemination, including when that creation is done in exchange for money. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*,

502 U.S. 105, 116 (1991) (holding that an author who writes for money is fully protected by the First Amendment); *United States v. Stevens*, 559 U.S. 460, 465–70 (2010) (striking down a restriction on the commercial creation and distribution of material depicting animal cruelty, with no distinction between the ban on creation and the ban on distribution).

This equal treatment of speech creation and dissemination makes sense. Forcing speech interferes with the "individual freedom of mind" at least as much as—truly in all likelihood more than—compelling the dissemination of speech does.

To be sure, creation and dissemination are not identical. This case does not, for instance, involve the concern that Jack Phillips is required to "use [his] private property as a 'mobile billboard'" for a particular message, *Wooley*, 430 U.S. at 715. But compelled creation and compelled dissemination are similar in that they both involve a person's being required "to foster . . . concepts" with which he disagrees, *id.* at 714, and "to be an instrument for fostering public adherence" to a view of which he disapproves. *Id.* at 715. If anything, requiring someone to create speech is even more of an imposition on a person's "intellect and spirit" than is requiring the person simply to engage in "the passive act of carrying the state motto on a license plate." *Id.* (internal quotation marks omitted).

Creating expression involves innumerable intellectual and artistic decisions. It also requires sympathy with the intellectual or emotional message that the expression conveys, or at least absence of disagreement with the message. Requiring people to produce speech is more intrusive than requiring them to be a "conduit." As Solzhenitsyn noted, a person can rightfully

insist that he should never "depict, foster or broadcast a single idea which he can see is false or a distortion of the truth, whether it be in painting, sculpture, [or] photography," Solzhenitsyn, *supra*—just as he can rightfully insist that he should never "take into hand nor raise into the air a poster or slogan which he does not completely accept." *Id.*

Consider the very sort of law at issue here. As interpreted by the court below, this law would apply not just to bakers but to other contractors, such as freelance writers and singers. It would apply not just to weddings, but to political and religious events. And since the court refused to consider the artistic expression that goes into *making* a wedding cake—treating Jack Phillips's profession as if he were merely a seller of interchangeable widgets—the same reasoning can apply to *anyone* who is in the business of selling the products of their intellectual or artistic expression.

Thus a graphic designer who thinks Scientology is a fraud would violate Colorado law—which bans religious discrimination—if he refused to design flyers to be used at Scientologists' meetings. An actor would violate the law if he refused to perform in a commercial for a religious organization he dislikes. And since the same rule would apply to laws that ban discrimination on "political affiliation," *e.g.*, D.C. Code § 2-1411.02 (2001); V.I. Code tit. 10, § 64(3) (2006); Seattle, Wash. Mun. Code §§ 14.06.020(L), .030(B), a Democratic freelance writer in such a jurisdiction would have to accept commissions to write press releases for Republicans.

Yet all such requirements unacceptably force speakers to "becom[e] the courier[s] for . . . message[s]" with which they disagree," *Wooley*, 430 U.S. at 717. All interfere with creators' "right to decline to foster . . .

concepts" of which they disapprove. *Id.* at 714; *see also id.* at 715 (recognizing people's right to "refuse to foster . . . an idea they find morally objectionable"). And all interfere with the "individual freedom of mind" by forcing writers, actors, painters, and singers to express sentiments that they see as wrong. *Id.* at 714.

This logic is just as sound for bakers as for these other kinds of speakers. Baking and decorating a cake for a wedding—like writing a press release or creating a dramatic or musical performance—involves hours of effort and a large range of artistic decisions. Pet. App. At 184a. Clients pay good money for such cakes, precisely because of the bakers' expressive decisions regarding flavors, textures, structure, and decorations.

Nor can *Rumsfeld v. FAIR*, 547 U.S. 47 (2006) justify the decision below. In *Rumsfeld*, the Court wrote that "[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." 547 U.S. at 62. But that situation is distinct from *Barnette* and *Wooley* because requiring an institution to send scheduling e-mails does not interfere with anyone's "individual freedom of mind," *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 637). As argued above, requiring an individual to personally create expressive works interferes with that "freedom of mind"—even more than requiring an individual to display a motto on his car. This case is thus governed by *Wooley*, not *Rumsfeld*.

Moreover, a right guaranteed by the First Amendment cannot be trumped by state laws creating countervailing rights. The court below rejected the petitioners' free-speech defense because "the compelled conduct here is not expressive," and thus the "State need not show that it has an important interest in enforcing CADA." Pet. App. at 36a. By myopically focusing on the point of sale to the exclusion of all other aspects of making a custom wedding cake—to sidestep any difficult free-speech questions—the court effectively elevated Colorado's antidiscrimination law above compelled-speech concerns. But state-law rights cannot trump the First Amendment, as *Hurley* and *Tornillo* show. See also *Boy Scouts of America v. Dale*, 530 U.S. 640, 657 (2000) (distinguishing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 657 (1984), because the law there did not substantially burden First Amendment rights).

*Hurley*, like this case, involved a state-law right to equal treatment in public accommodation, which the state's highest court interpreted as covering parades. *See Irish-American Gay, Lesbian & Bisexual Group of Boston v. Hurley*, 636 N.E.2d 1293, 1298 (Mass. 1994). *Tornillo* likewise involved a law that created an equality right, namely "a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper." 418 U.S. at 243. In both cases, the First Amendment prevailed over the assertions of contrary state rights.

Indeed, the point of First Amendment protection is to trump legislative restrictions—"to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts," *Barnette*, 319 U.S. at 638. That

is just as true for state laws that target discrimination by businesses as for other laws that restrict speech.

## IV. Free-of-Speech Protections Against Compelled Speech Extend Only to Refusals to Create Protected Expression

The First Amendment protection offered by *Wooley* is limited in scope: It extends only to people who are compelled to engage in expression. Under *Wooley*, wedding-cake bakers' First Amendment freedom of expression protects their right to choose which designs to create. But caterers, hotels, and limousine companies do not have a right on that basis to refuse to deliver food, rent out rooms, or provide livery services, respectively, for use in same-sex weddings or otherwise.

This simply reflects the fact that the First Amendment's Speech Clause does not extend to all human endeavors, but only to expression. For instance, the state may create a monopoly on catering, restrict the operation of dance halls, set up a medallion system to limit the number of limousine drivers, or require a license for such businesses that the state had the discretion to grant or deny. *See, e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding a ban on new pushcart vendors that allowed only a few old vendors to operate); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (upholding a ban on businesses that engage in "debt adjusting"); *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (upholding a law that barred dance halls that cater to 14-to-18-year-olds from letting in adult patrons).[3] But it would be an unconstitutional prior restraint for the government to require a license before someone could publish a newspaper or write press releases, or to give

[3] *Amici* may question these, but not on First Amendment grounds.

certain painters a monopoly on that form of expression. *Cf., e.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988) (striking down newspaper-rack licensure); *Mahaney v. City of Englewood*, 226 P.3d 1214, 1220 (Colo. Ct. App. 2009) (striking down wall-mural licensure).

Courts routinely police the line between expression and non-expressive behavior: Restrictions on expression trigger First Amendment scrutiny; restrictions on non-expressive conduct do not. Precisely the same line can be drawn—and with no greater difficulty—when it comes to compulsions. If an activity may be banned, limited to certain classes of people, or subject to licensing without violating the First Amendment, then it may likewise be compelled without violating the First Amendment.[4] But if an activity is protected by the First Amendment, it may not be compelled.

Upholding the right not to be compelled to speak that is implicated here would ultimately inflict little harm on those who are discriminated against. A baker who views same-sex marriage as immoral would be of little use to the people engaging in such a ceremony; there is too much risk that the cake will, even inadvertently, not be as well-suited to the couple's vision as one created by a baker whose heart was in the work.

Those engaging in such a ceremony—or, say, entering into an interfaith marriage, or remarrying after a divorce—would likely benefit from knowing that a prospective baker disapproves of the ceremony, so they could then turn to someone more enthusiastic. According to the Small Business Development Center, as of 2014 there were approximately 6,000 retail bakeries in

[4] Again, other rights may be implicated in such cases.

the country,[5] and according to the American Bakers Association, there are more than 600,000 people directly employed in the industry.[6] A YellowPages.com query for "wedding cakes & pastries" near Lakewood, Colorado, where Masterpiece Cakeshop is located, yielded 26 results. http://bit.ly/2gkJGbk (last visited Aug. 30, 2017). *Amici* are confident that nearly all of these bakers would be happy to take anyone's money.

In this respect, discrimination by narrow categories of expressive commercial actors is much less damaging and restrictive than other forms of discrimination. Employment discrimination can jeopardize a person's livelihood. Discrimination in education can affect a person's future. Discrimination in many places of traditional public accommodation has historically been pervasive (and state-supported or -required), to the point that disfavored minorities or mixed-race groups were unable to find any suitable hotel or restaurant. But protecting the First Amendment rights of writers, singers, florists, and bakers would come at comparatively little cost to those denied such inherently expressive and personal services by specific providers.

Of course, when a baker tells a couple that he does not want to bake the cake for their wedding, the couple may understandably be offended by this rejection. But the First Amendment does not treat avoiding offense as a sufficient interest to justify restricting or compelling speech. *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Texas v. Johnson*, 491 U.S. 397 (1989); *Cohen v. California*, 403 U.S. 15 (1971).

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[5] Bakery Business Industry Summary, Small Bus. Dev. Center, http://bit.ly/2wj4vvp (last visited Aug. 25, 2017).

[6] Baking Industry Economic Impact Study, Am. Bakers Ass'n, http://bit.ly/2wj9fB7 (last visited Aug. 25, 2017).

The First Amendment right to sing, write, and the like also rebuts the notion that people who choose to make custom wedding cakes for some ceremonies may on that basis be required to do them for all others. Creating expressive is constitutionally different than non-expressive activity like delivering food, renting out ballrooms, or driving limousines. States thus cannot impose new burdens on speech-creators as a result of their having exercised First Amendment rights.

*Tornillo* illustrates that point. There, the Court struck down a law that required newspapers to publish candidate replies to the extent that they published criticisms. 418 U.S. at 243. The paper's publication of the initial criticism could not be the basis for compelling it to publish replies. Likewise, a person's choice to create constitutionally protected artistic expression cannot be the basis for compelling him to engage in artistic expression that he does not wish to create.

## CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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September 6, 2017