NO. 25-233

In the
Supreme Court of the United States

CATHARINE MILLER AND CATHY'S CREATIONS, INC.,

Petitioners,

v.

CIVIL RIGHTS DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT

AMICUS BRIEF OF ADVOCATES FOR FAITH & FREEDOM IN SUPPORT OF PETITIONERS

ERIN ELIZABETH MERSINO
Counsel of Record
ADVOCATES FOR FAITH & FREEDOM
ROBERT H. TYLER
JULIANNE FLEISCHER
25026 Las Brisas Road
Murrieta, CA 92562
(951) 326-4554
emersino@faith-freedom.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. This Court Should Grant Certiorari to Preserve the Pluralism Safeguarded by the First Amendment 5

II. The Petition Should be Granted Because the Lower Court's Decision Conflicts with this Court's First Amendment Free Exercise Rulings 8

III. The Decision Below Conflicts with *Masterpiece Cakeshop* and *303 Creative* 13

IV. The Decision Below Deepens a Circuit Split on "General Applicability" Under the Free Exercise Clause, Misapplying *Fulton* and *Tandon* 15

V. The Petition Should be Granted to Address the Conflict it Creates Between the First Amendment and State Public Accommodation Laws 17

CONCLUSION..19

TABLE OF AUTHORITIES

Page(s)

Cases

303 Creative LLC v. Elenis,
600 U.S. 570 (2023) 3, 13, 14

Abington School District v. Schempp,
374 U.S. 203 (1963) 8

Anderson v. Celebrez,
460 U.S. 780 (1983) 12

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000) 18

Brown v. Entm't Merchs. Ass'n,
564 U.S. 786 (2011) 11

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014) 3, 8

Cantwell v. Connecticut,
310 U.S. 296 (1940) 2, 3, 5, 7

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 3, 7, 8, 9, 11, 15

Employment Div., Dept. of Human Resources of Ore. v. Smith,
494 U. S. 872 (1990) 8, 10

Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Ed.,
82 F.4th 821 (9th Cir. 2023) 16

Fulton v. City of Philadelphia,
141 S. Ct. 1868 (2021) 3, 15, 16

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995) 3, 5, 17, 19

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,
584 U.S. 617 (2018) 3, 13, 14, 15

Murdock v. Pennsylvania,
319 U.S. 105 (1943) 10

North Coast Women's Care Medical Group, Inc. v. Superior Court,
189 Cal. App. 4th 959 (2010) 15

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 10

Sherbert v. Verner,
374 U.S. 398 (1963) 11

Tandon v. Newsom,
141 S. Ct. 1294 (2021) 3, 16

Thomas v. Review Bd. of Ind. Emp't Sec. Div.,
450 U.S. 707 (1981) 8, 11

Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton,
536 U.S. 150 (2002) 7

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 3, 6, 7, 13

Wisconsin v. Yoder,
406 U.S. 205 (1972) 10, 11

Wooley v. Maynard,
430 U.S. 705 (1977) 10

Statutes and Rules

Cal. Civ. Code § 51 16

Supreme Court Rule 37 1

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37, *Amicus curiae* Advocates for Faith & Freedom submits this brief. Pursuant to Supreme Court Rule 37, *Amicus curiae* Advocates for Faith & Freedom submits this brief. Advocates for Faith & Freedom is a religious, nonprofit legal organization dedicated to protecting the fundamental constitutional liberties that have long defined the United States as a beacon of freedom. These include the rights to the free exercise of religion and freedom of speech. See (https://faith- freedom.com, last visited Sept. 25, 2025). Advocates for Faith & Freedom is dedicated to the defense of the constitutional rights of individuals and entities to live and work according to their sincerely held religious beliefs without undue government interference for living out those beliefs. This case directly implicates Advocates for Faith & Freedom's mission because the State of California has punished Petitioners for living out their sincerely held religious beliefs and their right to freedom of expression so vital to a free society. The decision below is an attack on religious freedom and free speech. Advocates for Faith & Freedom believes that Americans should be able to live out their faith without the penalty of

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37(a)(2). *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

protracted litigation and civil fines imposed by the government. Advocates for Faith & Freedom has litigated similar cases in California, and in state and federal courts across the county, including challenges to compelled speech and religious liberty. Advocates for Faith & Freedom urges this Court to grant the petition and correct the state court's decision, which is antithetical to a proper understanding of the First Amendment.

INTRODUCTION

The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and exercise conflicting religious and political beliefs. Under this standard, the government must not interfere with its citizens' freedom of speech, especially when it espouses a disagreeing viewpoint, but embrace the security and liberty only a pluralistic society affords. This Court has long served as the preserver of the pluralism required under the First Amendment in the face of government intolerance and overreach. This case requires that this Court fulfil this difficult role again. The cost of shirking from this duty on this Petition is too great. It will give government the power to compel the dogmatism of whomever is in power.

SUMMARY OF THE ARGUMENT

This Court affirmed this essential constitutional principal in *Cantwell v. Connecticut*, 310 U.S. 296, 300-11 (1940) to invalidate a state law prohibiting a

group of Jehovah's witnesses from proselytizing door-to-door. This Court found that the First Amendment freedoms of religious exercise and free speech outweighed the State's interests in controlling solicitations and public order. *Id.* The Court championed religious and political discourse and the disagreement that naturally follows such discourse as evidencing liberty in an enlightened society. *Id.* at 310; *see also W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943).

The lower court's decision unfortunately ignores and distorts this founding principle. The California Court of Appeal's ruling below—that a custom wedding cake conveys "no particularized message" and is merely "a dessert meant to be eaten"—directly conflicts with this Court's precedents in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018), and *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023). Those decisions affirm that custom wedding-related services, like cakes, are inherently expressive and protected from compelled endorsement of same-sex marriages when rooted in sincere religious beliefs. As it stands now, the lower court's decision forces Petitioners to choose to either: (1) create speech that is directly contrary to their religious beliefs or (2) face prosecution. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

The decision below exacerbates a deepening circuit split on whether the Free Speech Clause prohibits compelled participation in wedding ceremonies, or activities that violate one's sincerely held religious beliefs, only if a third party might

perceive the participation to be an endorsement of it. This view ignores the meaning of the participation to the speaker/religious adherent and that through this participation the State is requiring the speaker's compelled expression. It also perpetuates a flawed interpretation of "general applicability" under the Free Exercise Clause, requiring exemptions only for "identical secular conduct," in direct tension with *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), and the reasoning in *Tandon v. Newsom*, 593 U.S. 61 (2021). The lower court failed to grasp the gravity of the disparate result of imposing public accommodation laws, such as California's, on individuals holding sincere religious beliefs. When a law specifically burdens a particular religious belief, it is not neutral or generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 531-32 (1993). Respondent's application of California's public accommodations law is not justified by a compelling governmental interest and is not narrowly tailored.

Lastly, the lower court's opinion contradicts this Court's precedent regarding the weight accorded to free exercise and free speech concerns when these liberties conflict with a State public accommodations law. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 568-81 (1995). The *Hurley* Court held that a State must not interfere with these important liberties or compel an individual to espouse a belief contrary to his or her religious beliefs "however enlightened [the] purpose may strike the government." *Id.* at 579. The lower court's opinion cannot be squared with *Hurley*, and

this Court should grant the Petition to clarify and reassert the important constitutional principles protected by that holding. Granting review will clarify that states cannot wield public accommodation laws to silence dissenting voices, ensuring that sincerely religious professionals like Petitioners may decline to design custom works that celebrate events contrary to their faith without facing years of prosecution.

ARGUMENT

I. This Court Should Grant Certiorari to Preserve the Pluralism Safeguarded by the First Amendment.

The ideal that the First Amendment protects pluralistic viewpoints is well demonstrated in *Cantwell*, 310 U.S. 296, the first case this Court analyzed upon incorporating the First Amendment's protection of free exercise through the Due Process Clause of the Fourteenth Amendment. In *Cantwell*, this Court invalidated a Connecticut statute requiring individuals to obtain a state license prior to making door-to-door religious solicitations. *Id.* at 303-11. Plaintiffs, Newton Cantwell and his two sons, were Jehovah's Witnesses proselytizing in a predominantly Catholic neighborhood. *Id.* at 300–01. Plaintiffs distributed religious materials and played a phonograph record describing a book called "Enemies," which attacked the Catholic Church. *Id.* at 301. Plaintiffs' speech and actions were not well received and offended men in the neighborhood. *Id.* at 302-03. One man even had to resist the temptation to hit one of the plaintiffs. *Id.* Plaintiffs were charged

and convicted of violating Connecticut's solicitation statute and a breach of the peace ordinance. *Id.* at 305-11.

Despite the offense and animosity plaintiffs' actions aroused, this Court reversed their criminal convictions, holding that their conduct was protected by the Free Exercise Clause. *Id.* This Court avowed,

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310. Three years later, in holding that state action compelling a student to salute the American flag infringed upon a student's religious beliefs, this Court famously declared,

> [W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too

> great. ***But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. 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.***
>
> *Barnette*, 319 U.S. at 641–42 (emphasis added).

The need for liberty and raring appeals for freedom remain just as important and relevant today, as when this Court first penned *Cantwell* and *Barnette*. *See, e.g.*, *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 169 (2002) ("The rhetoric used in the World War II-era opinions that repeatedly saved plaintiffs' coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.").

The Free Exercise Clause of the First Amendment still protects religious individuals from penalties and persecution due to the exercise of their sincerely held religious beliefs. *Lukumi*, 508 U.S. at 523. This protection includes the right to abstain from actions

that violate one's religious faith and expression. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981). This right of abstention includes "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine." *Burwell*, 573 U.S. at 710. Indeed, just a few years ago, this Court found that business practices motivated by one's religious faith "fall comfortably within the understanding of the 'exercise of religion' that this Court set out in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 877." *Burwell*, 573 U.S. at 710. The First Amendment protects Petitioners' right to abstain from certain business practices and from being compelled to espouse messages that directly violate their Christian faith. This Court must reverse the California state court's decision that punishes Petitioners' religious beliefs and right to free expression.

II. The Petition Should be Granted Because the Lower Court's Decision Conflicts with this Court's First Amendment Free Exercise Rulings.

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority." *Abington School District v. Schempp*, 374 U.S. 203, 222-23 (1963). As this Court recognizes, "This principle . . . is so well understood that few violations are recorded in our opinions." *Lukumi*, 508 U.S. at 523. Under the Free Exercise Clause, a State may only pass a law that burdens religious exercise when

the law is facially neutral and of general applicability. *Id.* at 531. *However*, when a law burdens religious exercise because it is *not actually neutral or generally applicable,* it must be "justified by a compelling governmental interest" and be "narrowly tailored to advance that interest." *Id.* at 531-32.

In *Lukumi*, this Court determined that a law is not neutral or generally applicable when it "infringes upon or restricts practices because of their religious motivation," or "in a selective manner imposes burdens only on conduct motivated by religious belief." *Id.* at 533, 543. The Court emphasized that the Free Exercise Clause "forbids subtle departures from neutrality, and covert suppression of particular religious beliefs." *Id.* at 534 (internal quotations and citations omitted). Here, as in *Lukumi*, Respondent's actions are not generally applicable because individuals who proscribe to certain religious beliefs that differ from Petitioners are unaffected by California's enforcement of its public accommodation law. For example, individuals who disavow the Christian faith, such as agnostics or atheists, may freely continue their business practices while individuals who ascribe to traditional Christianity and its biblical teachings are targeted and burdened. Since the Respondents' application of California's public accommodation laws targets individuals who share Petitioners' Christian beliefs, while leaving individuals of other faith persuasions untouched by the law's prohibitions, it is not generally applicable, and this Court should apply strict scrutiny analysis.

If this Court were to find California's public accommodation laws are generally applicable, and

thus potentially subject to the rule in *Employment Division v. Smith*, that case would nonetheless be distinguishable on the very grounds cited by the *Smith* Court. This case involves "hybrid" rights of free speech, free exercise, and religious expression and thus falls within the exception the *Smith* Court carved out based on cases such as *Cantwell*, *supra*, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See Smith*, 494 U.S. at 881-82 (citing *Cantwell,* 310 U.S. at 304-07 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) in conjunction with *Yoder,* 406 U.S. 205 (upholding constitutional right of parents, to direct the education of their children, while invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school); *Wooley v. Maynard,* 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *Barnette,* 319 U.S. 624 (invalidating compulsory flag salute statute challenged by religious objectors)).

Indeed, Respondent requires that Petitioners choose between (1) disavowing the tenets of their religious faith significant to their biblical worldview and create messages and expression to which they disagree, or (2) facing prosecution in California incurring financial penalties and punishment due to their religious beliefs. This Court has repeatedly held

that government regulations imposing such a Hobson's choice on its religious citizens violates the First Amendment. *See Thomas,* 450 U.S. at 717 (holding the State must not require a religious individual to choose "between fidelity to religious belief or cessation of work"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (invalidating the application of a regulation forcing a religious individual "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."); *Yoder*, 406 U.S. at 208, 219 (ruling that the State must not require an individual "to perform acts undeniably at odds with fundamental tenets of their religious belief."). This is the exact type of state action that the Free Exercise Clause forbids and that requires "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546.

In order to pass strict scrutiny, Respondent must show its actions are necessary to fulfill a compelling state interest involving a "high degree of necessity." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 804 (2011). Respondent "must specifically identify an 'actual problem' in need of solving, and the curtailment of [the asserted right] must be actually necessary to the solution." *See id.* at 2738 (citations omitted). Respondent must demonstrate "some substantial threat to public safety, peace, or order," or an equally compelling interest, that would be posed by exempting the Petitioners. *See Yoder*, 406 U.S. at 230.

Requiring a baker to design or speak a message in violation of her sincerely held religious beliefs is not

an interest involving the "highest degree of necessity." On the contrary, other bakers who have no issue speaking the message could be commissioned to complete the requested work. Respondent has not shown that there is a shortage of bakers or cake designers in the State of California who would create the requested message on the cake or that allowing Petitioners' religious exercise and free expression threatens the State's public safety, peace, or order.

Respondent has less drastic options available to achieve its stated goal, options that notably do not involve "stifl[ing] the exercise of [Petitioners'] fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). For example, if Respondent wishes to ensure that individuals in need of cakes bearing a specific message or design can obtain this service, Respondent could publicly post information pertaining to bakeries who hold no faith objections to participating in such creation. Amalgamating such a list and making it accessible to the public would involve no material expense and, most importantly, would not require the violation of the fundamental personal liberties of its citizens. California could also allow bakers, such as Petitioners, who hold religious objections that conflict with California's application of its laws, to refer clients to other bakeries or cake designers. One could reasonably conclude that the ready availability of numerous, simple alternatives and California's refusal to implement them demonstrates the Respondent's irrational animus toward religious people.

III. The Decision Below Conflicts with *Masterpiece Cakeshop* and *303 Creative*.

At the heart of this case is a simple truth: Petitioners' custom wedding cakes are not fungible commodities but expressions that convey messages. Petitioners cannot create expressions signifying certain viewpoints without violating their deeply held Christian beliefs, the relevant view here being that marriage is a sacred union between one man and one woman. Yet the California Court of Appeals dismissed these cakes as non-expressive "desserts," stripping them of First Amendment protection and forcing Petitioners to either violate their conscience or close their bakery. This holding cannot be reconciled with *Masterpiece Cakeshop* and *303 Creative*, where this Court recognized that custom wedding services—cakes included—are protected speech when they affirm a particular vision of marriage.

In *Masterpiece Cakeshop*, the Court held that Colorado's public accommodation law could not be enforced in a way that compelled a baker to create a cake celebrating a same-sex wedding, as doing so would force him to "design and create" an expression "that conveys a celebratory message about [the couple's] marriage." 584 U.S. at 630 (majority opinion); *id.* at 650 (Gorsuch, J., concurring) (describing a wedding cake as "a symbol that serves as 'a short cut from mind to mind,' signifying approval of a specific 'system, idea, [or] institution'") (quoting *Barnette*, 319 U.S. at 632)). The Court emphasized that the baker's objection was not to the customers' identity but to the message of the cake itself, protecting his right to abstain from expressive

participation in the ceremony. The Colorado Supreme Court erred by viewing the cake as mere "commerce," much like the California court below. But this Court rejected that view, noting that the baker's "artistic services . . . expressed his genuine and sincere religious beliefs about marriage." *Id.* at 636. Here, Petitioners' "Design Standards" explicitly prohibit creating cakes for same-sex weddings, just as Jack Phillips' beliefs guided his refusals in *Masterpiece Cakeshop*. And just like Jack Phillips, Petitioners offer all items that do not implicate their sincerely held religious beliefs and right to control their own expression, such as all off-the-shelf items, to everyone without question—underscoring that their objection is to the custom expressive design and not aimed at targeting anyone's protected status.

303 Creative built on the foundation of *Masterpiece Cakeshop* to protect a web designer's refusal to create websites that celebrate same-sex weddings. This Court held that "the wedding websites proposed here . . . are custom speech—speech that the designer herself will create in the course of her custom wedding services," protected under the Free Speech Clause against compelled endorsement. *303 Creative*, 600 U.S. at 593. Even though websites are digital, the Court analogized them to tangible custom works like cakes, rejecting the argument that they are "purely factual and uncontroversial." *Id.* at 597. The decision below flouts these holdings of this Court by deeming Petitioners' cakes non-expressive because they "conveyed no particularized message about the nature of marriage." Pet. App. 45a. This ignores that, like the websites in *303 Creative*, Petitioners' cakes are "pure speech" when customized to celebrate a specific union,

forcing them to "speak" a message they cannot in good conscience endorse.

Permitting States to force individuals to create custom items that carry with them "particularized messages" eviscerates First Amendment safeguards for not just Petitioners, but for all creators, artists, writers, and performers. As Justice Alito warned in *Masterpiece*, such compelled speech risks "eras[ing] the line" between protected expression and regulated commerce. 584 U.S. at 667 (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ., concurring in part and dissenting in part). Review is essential to restore uniformity.

IV. The Decision Below Deepens a Circuit Split on "General Applicability" Under the Free Exercise Clause, Misapplying *Fulton* and *Tandon*.

Even if expressive protections fall short (which they shouldn't), the decision below errs by rejecting Petitioners' Free Exercise claim and deeming California's Unruh Civil Rights Act "generally applicable." *See Lukumi*, 508 U.S. 520. The court below, following *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 189 Cal. App. 4th 959 (2010), held that general applicability requires only the absence of "unfettered discretion" or exemptions for "identical secular conduct." Pet. App. 52a. This narrow test disregards *Fulton*, where this Court invalidated Philadelphia's foster-care policy because it allowed secular exemptions (*e.g.*, for agencies with "singular religious purposes") while denying religious ones, rendering the law not generally applicable. 593

U.S. at 534-35. Similarly, in *Tandon*, the Court struck down California's COVID-19 restrictions because they exempted comparable secular activities (*e.g.*, retail stores) but burdened religious gatherings. 593 U.S. at 66-67.

California's law fails this test: It exempts small businesses with fewer than five employees, allows discrimination based on "customer preference" in certain contexts, and permits dispensations for medical or familial reasons—exemptions that parallel Petitioners' religious objection but are granted to secular actors. *See* Cal. Civ. Code § 51 (Unruh Act). Seven circuits, including the Ninth in *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education*, 82 F.4th 821 (9th Cir. 2023), now assess all forms of discretion and exemptions undermining neutrality, per *Fulton*. Yet four state high courts (California, New York, Illinois, and Oregon) cling to the "identical conduct" rule, creating a split that has left faith-based creators like Petitioners vulnerable to enforcement contradictory to the holdings of this Court and courts nationwide. Pet. 2, 21, 22.

This patchwork cannot stand. As the petition aptly notes, the decision below "deepens" this divide, particularly after *Fulton*'s clarification that even "modest" exemptions trigger strict scrutiny. Pet. 28. Overruling *Employment Division v. Smith*, 494 U.S. 872 (1990), as urged in the third question presented, would resolve the underlying tension, but even under current law, review is warranted to align the circuits with *Lukumi* and its progeny.

V. The Petition Should be Granted to Address the Conflict it Creates Between the First Amendment and State Public Accommodation Laws.

Even The California state appellate decision cannot be reconciled with this Court's holding in *Hurley,* 515 U.S. at 568-81. In *Hurley*, this Court held that the First Amendment gave the organizers of a private St. Patrick's Day parade the right to exclude a homosexual group from the parade when the parade organizers believed that the group's presence would communicate a message about homosexual conduct to which they objected. *Id.* The First Amendment protected the parade organizers' right "not to propound a particular point of view," *id.* at 575, and this Court protected the "principle of speaker's autonomy," *id.* at 580. In doing so, this Court unanimously ruled that a State's public accommodations law must not be applied to compel a speaker to communicate an unwanted message or express a contrary viewpoint. This Court condemned the notion that public accommodation laws should force free individuals to express and convey messages to which they disagree because "*this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.*" *Id.* at 573 (emphasis added).

The *Hurley* Court noted that, "this general rule, that the speaker has the right to tailor the speech, applies not only to expression of value or endorsement, but equally to statements of fact the speaker would rather avoid," *id.* at 573, and the

benefit of this rule is not limited to the press or just some people but is "enjoyed by business corporations generally." *Id.* at 574. The California appellate court, like the lower court in *Hurley*, held that the Petitioners' abstinence from participation in creating expression that violates their religious beliefs was tantamount to discrimination "because of . . . sexual orientation." Pet. App. 171a–72a. Yet, this Court in later applying *Hurley*, noted that "the parade organizers did not wish to exclude the GLIB [*Irish-American Gay, Lesbian, & Bisexual Group of Boston*] members because of their sexual orientations, but because they wanted to march behind a GLIB banner." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–54 (2000). In *Hurley*, the parade organizers did not seek to discriminate against homosexuals but wished to communicate their St. Patrick's Day message as they saw fit, without being compelled to adopt and promote other messages in their parade.

Like the parade organizers whose First Amendment rights this Court protected in *Hurley*, Petitioners do not, and never has, wished to discriminate against anyone based on sexual orientation. Instead, Petitioners simply desire to operate their business in accordance with their Christian faith. Given that Petitioners willingly serves individuals of all sexual orientations, their objections to creating certain expressions is not motivated or based on sexual orientation. Rather, it is based on an honest expression of their sincerely held religious beliefs and that is the only cause for the denial of service when such expression violates their religious conscience. This is a matter of free

expression, not one of promoting unfair discrimination.

Petitioners believe that all men are created equal. They just do not believe that all speech is equal. Petitioners cannot create or promote all messages, without running into conflict with their sincerely held religious beliefs and standards of morality. This is a reality for most, if not all, Americans.

The First Amendment affords Petitioners the liberty to not be forced or compelled by the State of California to create expression that fundamentally conflicts with their religious faith. As this Court previously declared, "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." *Hurley*, 515 U.S. at 579.

CONCLUSION

The petition for certiorari should be granted. The First Amendment does not permit California to prosecute a religious individual for declining to speak a certain message, any more than it allowed Colorado to do the same in *Masterpiece* or in *303 Creative* to create a website. Certiorari will vindicate expressive freedoms for all Americans, ensuring that public accommodation laws serve equality without conscripting dissenters.

Respectfully submitted,

Erin Elizabeth Mersino
Counsel of Record
Robert H. Tyler
Julianne Fleischer
ADVOCATES FOR FAITH & FREEDOM
25026 Las Brisas Road
Murrieta, CA 92562
(951) 326-4554
emersino@faith-freedom.com

Counsel for Amicus Curiae Advocates for Faith & Freedom