No. 25-233

IN THE

Supreme Court of the United States

CATHARINE MILLER, ET AL.,
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

BRIEF OF *AMICUS CURIAE* MANHATTAN INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation dedicated to developing and advancing ideas that foster greater economic opportunity, individual responsibility, and adherence to the rule of law. To that end, it has sponsored scholarship and filed briefs on the need to prevent compelled speech and forced ideological conformity. MI has a strong interest in the outcome of this case because it lies at the intersection of core First Amendment values and economic liberty.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment's protection "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). It also protects conduct or expressive acts that are "sufficiently imbued with elements of communication." *Spence v. State of Wash*, 418 U.S. 405, 409 (1974). And its protection applies with full force when the state commands an artist to unwillingly participate in a wedding ceremony.

That's what happened here. Cathy Miller is a cake artist and the owner of Tastries Bakery. She serves everyone but declines custom requests when her services would express a message that conflicts with her

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in any part by counsel for any party and that no person or entity other than *amicus* or its counsel made a monetary contribution to fund its preparation or submission. Parties received timely notice of this filing.

beliefs. After she refused to provide a custom cake for a same-sex wedding, California brought an action under state law to force her compliance.

Given this Court's recent decision in *303 Creative*, the state court's judgment should have been straightforward. That case holds that a state may not "use its law to compel an individual to create speech she does not believe." *303 Creative LLC v. Elenis*, 600 U.S. 570, 578-79, 596 (2023). Rather than applying that straightforward principle, the decision below attempted to sidestep *303 Creative* by relabeling the cake as generic and thus not expressive in any way.

That decision is wrong. A wedding cake inherently "conveys a message" in context. *Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 650 (2018) (Gorsuch, J., concurring). The very presence of a wedding cake at a ceremony signals celebration: "it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding." *Id.* Just as "an emblem or flag" can "signif[y] approval of a specific system, idea, [or] institution," a wedding cake serves as a symbol of celebration and endorsement of the marital union. *Id.* (cleaned up). Compelling its creation thus coopts the artist's voice.

This Court is familiar with state efforts to compel expression involving same-sex weddings. Yet despite its most recent decision in *303 Creative*, courts around the country have narrowed, reframed, or delayed its command—prolonging already lengthy, costly, and burdensome disputes for small businesses and individuals with objections to same-sex marriage. The Court's intervention is badly needed to finally resolve

this category of cases and ensure nationwide adherence to important First Amendment principles.

ARGUMENT

I. Forcing Tastries Bakery to create a cake celebrating a same-sex wedding would compel speech.

A. The First Amendment forbids compelled participation in a ceremony.

Just two years ago, this Court analyzed a Colorado public accommodations law that required a website designer to create custom websites celebrating same-sex marriages. *303 Creative*, 600 U.S. at 577-79. Colorado stipulated that the designer's work was "expressive," and the Tenth Circuit likewise found that the law would compel "pure speech" from the designer. *Id.* at 582-83. Given those facts, this Court easily concluded that forcing the designer to "create speech" she does not believe violated the Free Speech Clause. *Id.* at 599, 603.

This Court's decision in *303 Creative* is decisive: a state may not "use its law to compel an individual to create speech she does not believe." 600 U.S. at 578-79. The Court reiterated the timeless rule that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943)). Thus, no person can be compelled to "speak [the State's] preferred message" or "utter what is not in [her] mind." *303 Creative*, 600 U.S. at 586,

596 (alteration in original) (quoting *Barnette*, 319 U.S. at 634).

Like Lorie Smith (the website designer in *303 Creative*), Cathy Miller is an artist-entrepreneur who serves customers from all backgrounds but wishes to "choose the content of [her] own messag[e]" when creating custom wedding cakes used to celebrate marriage. *Id.* at 592 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995)). Miller gladly serves gay customers in general and offers many products to all. But she cannot in good faith design a wedding cake celebrating a same-sex marriage, because that specific message conflicts with her deeply held beliefs. Miller's practice, like Smith's, is driven by the content of the request, not the status of the customers. *Id.* at 594-95. She simply does not "create expressions that defy any of her beliefs for any customer." *Id.* at 595.

The California appellate court should have started and stopped with *303 Creative*. There, this Court explained that Smith's websites were protected because they "promise to contain 'images, words, symbols, and other modes of expression,'" and that "every website will be her 'original, customized' creation" intended "to communicate ideas—namely, to 'celebrate and promote the couple's wedding and unique love story' and to 'celebrat[e] and promot[e]' what Ms. Smith understands to be a true marriage." 600 U.S. at 587. Instead, the California court side-stepped that decision, concluding that the chosen cake was not expressive due to its plain, white design. But forcing Miller to bake a custom wedding cake for a ceremony she disagrees with is no different than forcing Smith to

design a website celebrating a same-sex marriage. In each case, the state seeks to "coopt an individual's voice for its own purposes" to advance an officially favored viewpoint. *Id.* at 592. The First Amendment forbids that result.

B. Expressive character does not depend on form or style.

The California appellate court described Miller's cake as a purely commercial product, devoid of expressive quality because it was "a plain, white, three-tiered cake" with no text or ornate design. Pet. App. 75a. That reasoning fundamentally misunderstands expressive conduct.

Neither elaborate artistry nor written words are necessary for conduct to be protected as speech. The First Amendment protects expression in many forms. *Masterpiece Cakeshop*, 584 U.S. at 657 (Thomas, J., concurring) (recognizing the protection of "nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag").

A wedding cake inherently "conveys a message" in context. *Id.* at 650 (Gorsuch, J., concurring). Although a wedding cake is "eventually eaten," that is not its "primary purpose." *Id.* at 659 (Thomas, J., concurring). Its purpose is to express celebration of the wedding. *Id.* "Words or not," the very presence of a wedding cake at a ceremony signals celebration: "it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding."

Id. at 650 (Gorsuch, J., concurring). Just as "an emblem or flag" can "signif[y] approval of a specific system, idea, [or] institution," a wedding cake serves as a symbol of celebration and endorsement of the marital union. *Id.* (quoting *Barnett*, 319 U.S. at 632). The cake is often the centerpiece of the wedding reception; the ceremonial act of cutting it is a time-honored tradition that represents the couple's new union. In fact, Miller explains to all her wedding customers that "[j]ust as you will offer hospitality to friends and family in your new home together, cutting and serving your cake as husband and wife is the first act of hospitality you will perform together. It is a ceremonial representation of the hospitality you will show to others, together as a new family unit." Pet. App. 279a. *See also* Pet. App. 335a-36a, 340a (describing the wedding cake "as a centerpiece of th[e] wedding celebration" and noting that some of the couple's friends "will want to know who designed it"). One could not "reasonably doubt" the communicative significance of this ritual item. *Masterpiece Cakeshop*, 584 U.S. at 650 (Gorsuch, J., concurring). Thus, the lack of artistic flourishes on the cake does not erase its expressive character. The message comes from what the cake is *for*, not merely what is visually depicted or inscribed upon it.

Importantly, artistic merit or complexity is not the touchstone for First Amendment protection. *303 Creative*, 600 U.S. at 592. "Were the rule otherwise, the better the artist, the finer the writer, the more unique his talent, the more easily his voice could be conscripted to disseminate the government's preferred messages." *Id.* If the California court's reasoning is followed, the opposite would be equally true. The

worse the artist, the poorer the writer, the less unique his talent, the more easily the government can force him to speak its own messages.

Weddings are expressive acts for the same reason parades are. In every wedding the spouses are communicating a message to one another, to their families and friends, and to the wider community. If this were not so, one would expect a marriage certificate to simply be unceremoniously filed with the county clerk, like applications for government benefits or parking ticket appeals. Instead, the ministerial act usually takes place within a ceremony, often at steep financial cost, to communicate and celebrate the codification of a union. All parties take part in expressing the "collective point" of the ceremony.

Here, creating a custom wedding cake for a specific couple's wedding is a form of artistic expression and "serves as 'a short cut'" for the communication of an idea: marriage. *Masterpiece Cakeshop*, 584 U.S. at 650 (Gorsuch, J., concurring) (quoting *Barnette*, 319 U.S. at 632). It entails artistic choices about the cake's symbolism, and it undoubtedly communicates celebration of the couple's union. Just as filmmakers have a First Amendment right to choose which marriages to portray in videos, and parade organizers have the right to choose which banners to carry, a cake artist has the right to choose which marriages to celebrate through her creations. The expressive element is present regardless of the cake's outward simplicity. For purposes of the First Amendment, a simple product can still be the vehicle for expression when used in a ceremony imbued with deep social and religious significance. Indeed, "[i]f an average person walked into

a room and saw a white, multitiered cake, he would immediately know that he had stumbled upon a wedding." *Id.* at 659 (Thomas, J., concurring).

Moreover, "[t]o some, all wedding cakes may appear indistinguishable." *Id.* at 653 (Gorsuch, J., concurring). But to Miller "that is not the case—h[er] faith teaches h[er] otherwise." *Id.* It is thus "no more appropriate" for the Court to tell Miller "that a wedding cake is just like any other—without regard to the religious significance h[er] faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is *just* bread or a kippah is *just* a cap." *Id.* Her religious beliefs are "entitled" to "respectful treatment." *Id.*

Nor does the commercial nature of a baker's relationship with a couple change the calculus. Pet. App. 67a. Free speech rights are "enjoyed by business corporations" no less than by individuals. *Hurley*, 515 U.S. at 574; *see also Citizens United v. FEC*, 558 U.S. 310, 342 (2010). Local businesses frequently participate in parades, expressing the overall "collective point" while simultaneously taking part in an advertising opportunity. *See Hurley*, 515 U.S. at 568, 562 (reiterating the trial court's finding that the Boston parade "contain[ed] a wide variety of 'patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes"). The presence of a commercial purpose does not undermine the expressive character of wedding participation any more than parade participation.

C. The state court's workarounds are unpersuasive.

The California appellate court's attempt to reframe Miller's cake as insufficiently unique or expressive—even as she was holding a consultation for a custom cake with the complainants—is semantic wordplay. The court reasoned that since the couple selected a pre-designed, "generic" cake that Tastries Bakery would have sold to any other customer for a different occasion, Miller was not creating new expression but merely providing an off-the-shelf product. Pet. App. 67a. According to the court, requiring her to create a "plain white cake" did not compel her to express support for same-sex marriage. *Id.* at 79a.

That framing is misguided. "Suggesting that this case is only about 'wedding cakes'—and not a wedding cake celebrating a same-sex wedding" is "the problem." *Masterpiece Cakeshop*, 584 U.S. at 651 (Gorsuch, J., concurring). If courts slide up or down a level of generality to recast expressive activity as something else, then "wide swaths of protected speech would be subject to regulation." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). A parade could be called merely walking, painting could be reduced to mixing pigments, and a wedding cake could be dismissed as "just a mixture of flour and eggs." *Id.*; *Masterpiece Cakeshop*, 584 U.S. at 651 (Gorsuch, J., concurring). But this Court's jurisprudence looks to substance over form. *See Hurley,* 515 U.S. at 579. In the end, "there is no question that the government cannot compel an artist to paint." *Lucero*, 936 F.3d at 752. Likewise, the government cannot force a cake artist to

design, create, and deliver a cake for a ceremony she does not want to celebrate.

The lower court's focus on the cake's lack of specific artwork is a red herring. The reason Miller objected was not that the cake's design was too elaborate or too simple, but that the very act of designing and creating it for a same-sex wedding would involve her in expressing support for that event. No one can "reasonably doubt" that a wedding cake "conveys a message." *Masterpiece Cakeshop*, 584 U.S. at 650 (Gorsuch, J., concurring). "Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding." *Id.* The lower court's refusal to recognize this message is simply an attempt to "reimagine[] the facts" so that "speech more or less vanishes from the picture." *303 Creative*, 600 U.S. at 597, 593.

Nor does the absence of stipulations limit *303 Creative*'s rule. Respondents may argue that *303 Creative* is distinguishable because the parties there stipulated that the plaintiff's custom web design was expressive, while California has not conceded that here. But First Amendment protection against compelled speech does not depend on government stipulations; it is grounded in whether protected expression is at stake.

Courts must determine whether a law affects a speaker's message or "alter[s] the expressive content" of the speaker's activity. *Hurley*, 515 U.S. at 572-73. *Hurley* is instructive. There, the Massachusetts courts treated a St. Patrick's Day parade like a public accommodation. 515 U.S. at 564. But this Court held the parade was an expressive event and the state could not

compel the parade organizers to include a gay pride contingent because "every participating unit affects the message conveyed" by the parade as a whole. *Id.* at 572. The Court rejected the state's attempt to downplay the speech interests, explaining that such 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.

Here, Miller's creation of a wedding cake for a specific ceremony conveys a message of celebration and approval of the marriage. That is exactly the kind of compelled message that the First Amendment forbids.

D. Public accommodation laws cannot override compelled speech protections.

Finally, no state interest can override a person's freedom of speech by compelling him or her to speak the state's "own preferred message." *303 Creative*, 600 U.S. at 586. The First Amendment's "protections belong to all," not just to "speakers whose motives the government finds worthy." *Id.* at 595. When a public accommodations law "sweep[s] too broadly" such that it compels speech, it must yield to the Constitution. *Id.* at 592; *Hurley,* 515 U.S. at 579 ("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."); *Boy Scouts of America v. Dale*, 530 U.S. 640, 661 (2000) ("[P]ublic or judicial disapproval of a tenet of an organization's expression does not justify the State's

effort to compel … the organization's expressive message."); *Moody v. NetChoice, LLC*, 603 U.S. 707, 732 (2024) ("[T]he government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas.").

In "case after case," this Court "has barred the government from forcing a private speaker to present" the government's favored views to "rejigger the expressive realm." *Moody*, 603 U.S. at 733. The First Amendment prohibits the government from manipulating speech by compelling disfavored speakers to disseminate preferred messages.

California seeks to prevent discrimination based on certain characteristics. That's a laudable goal. But however compelling the interest in preventing discrimination may be, a state may not compel speech to serve as a public accommodation for others. *303 Creative*, 600 U.S. at 592. The line is drawn at the Constitution: "When [antidiscrimination laws] and the Constitution collide," the Constitution prevails. *Id.*

Public accommodations laws do not operate as a First Amendment override. When such a law compels people to engage in expression or celebration of an idea, it "fails to clear the barriers of the First Amendment." *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). That does not leave a state powerless to combat invidious discrimination in commerce; it simply means the state must pursue its aims without conscripting individuals to voice messages they reject. Forcing a handful of dissenters to eliminate ideas that differ from the state's preferred message is a cure

worse than the disease. The answer to offensive or unorthodox ideas in the marketplace is "tolerance, not coercion." *303 Creative*, 600 U.S. at 603.

II. This Court should grant the petition to definitively resolve this category of cases.

With this case, yet another court perpetuates a culture war that should have ended long ago. When the Court decided *Obergefell v. Hodges*, it promised religious Americans their beliefs about marriage were "decent and honorable" and that the First Amendment "ensures" that those beliefs that are "so central to their lives and faiths" would be "given proper protection." 576 U.S. 644, 672, 679-80 (2015).

Yet over the past decade, courts across the country have undermined that promise. State officials and activists alike have targeted individuals trying to run their small businesses consistent with their religious beliefs. *See, e.g.*, *303 Creative*, 600 U.S. 570; *Masterpiece Cakeshop*, 584 U.S. 617; *Masterpiece Cakeshop, Inc. v. Scardina*, 556 P.3d 1238 (Colo. 2024); *Klein v. Oregon Bureau of Lab. & Indus.*, 143 S. Ct. 2686 (2023); *Klein v. Oregon Bureau of Lab. & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017); *Klein v. Oregon Bureau of Lab. & Indus.*, 506 P.3d 1108 (Or. Ct. App. 2022); *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Odgaard v. Iowa Civ. Rts. Comm'n*, CVCV-046451 (Iowa Dist. Ct. April 3, 2014), And those campaigns have largely prevailed in state and lower federal courts.

These cases are often incredibly costly and can drag on for years. For example, Oregon bakers Aaron

and Melissa Klein were fined $135,000 and forced to close their bakery after declining to create a cake for a same-sex wedding. *See* Press Release, First Liberty Inst., Oregon Bakers Forced Out of Business Make Their Case Before Oregon Court of Appeals for Third Time (Jan. 30, 2024), perma.cc/3BMU-K53B. That decades-long litigation is still ongoing. *Id.* Seventy-seven-year-old Washington florist Barronelle Stutzman risked "ruinous" attorney's fees before settling after eight years of litigation for declining to create custom floral arrangements for a same-sex wedding. Kristin M. Kraemer, *Tri-Cities Florist Settles With Gay Couple. Turns 'legal struggle for freedom over to others,'* Tri-City Herald (Nov. 18, 2021), perma.cc/GF8P-5584. When she turned to crowdfunding to help cover her litigation costs, the platform shut down her campaign due to pressure from activists. Samuel Smith, *GoFundMe Removes Christian Grandma-Florist Barronelle Stutzman's Fundraising Page; 2nd Christian Business Facing 'Ruin' Removed From Site This Week*, The Christian Post (Apr. 29, 2015), perma.cc/DGU2-XPEU.

Those cases are only the start. Colorado baker Jack Phillips lost 40% of his business after the state civil rights commission launched a "disparag[ing]" and "hosti[le]" public investigation against him for declining to design custom cakes for same-sex weddings. *Masterpiece Cakeshop*, 584 U.S. at 634-35; *see Jack Phillips*, Heritage Found. (Dec. 1, 2018), perma.cc/8JZ8-2TJV. Even after this Court vindicated his rights in 2018, Phillips was dragged back to court soon after for declining to design a cake celebrating a gender transition. *See Masterpiece Cakeshop*, 556 P.3d

1238. In total, Phillips has spent over 12 years litigating these cases. And just two years ago, this Court ended Lori Smith's seven-year attempt to prevent Colorado from punishing her for creating wedding websites consistent with her beliefs. *See 303 Creative,* 600 U.S. 570.

But these numbers don't tell the full story. These cases inflict immense mental and emotional strain on their targets. Stutzman described the experience as a concerted campaign to "force [her] to change [her] religious beliefs or pay a devastating price for believing them." Josh Blackman, *After A Decade of Litigation, 77-Year-Old Barronelle Stutzman Retires And Settles* Arlene's Flowers *Case for $5,000*, Reason: The Volokh Conspiracy (Nov. 18, 2021), perma.cc/NWW7-A3BM. Because of death threats, she had to install a security system at her flower shop and even "change her route to work." *For opposing gay marriage, she's facing death threats and million-dollar lawsuits*, Cath. News Agency (Apr. 18, 2018), perma.cc/9T2Q-3UD8. Phillips also faced numerous death threats and constant harassment. Valerie Richardson, *Colorado baker hit with hostile reviews, protesters after Supreme Court win*, Wash. Times (June 9, 2018), perma.cc/A983-NCB2. And "[f]rom the day her case was filed," Smith was "deluged with hate mail, cruel telephone calls, death threats, constant hacking attempts, false Facebook accounts designed to look like her business's page, and fervent wishes for her to contract cancer." *Lori Smith's Story*, ADF (July 3, 2024), perma.cc/W9GK-T4J2. Miller has faced all this and more. *See* Pet. 14-15; Pet. App. 345a-48a.

In these cases, the process is often the punishment. As Petitioners explain, "[p]olitical realities mean that officials in some states find it impossible to live-and-let-live when it comes to disfavored religious beliefs." Pet. 38. Even after *303 Creative* reaffirmed that states may not conscript a speaker's voice, courts continue to narrow, reframe, or delay its command. Pet. App. 57-60; *see also St. Mary Cath. Par. in Littleton v. Roy*, 736 F. Supp. 3d 956, 1013-15 (D. Colo. 2024); *McMahon v. World Vision, Inc.*, 704 F. Supp. 3d 1121, 1145-46 (W.D. Wash. 2023). This Court's intervention is badly needed to finally resolve this category of cases and ensure faithful, nationwide adherence to important First Amendment principles.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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