No. 25-233

In the Supreme Court of the United States

CATHARINE MILLER, ET AL., *Petitioners*

v.

CIVIL RIGHTS DEPARTMENT

On Petition of Writ of Certiorari to
the Court of Appeal of California,
Fifth Appellate Division

BRIEF OF *AMICUS CURIAE* PROTECT THE FIRST FOUNDATION IN SUPPORT OF PETITIONERS

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*[1]

The First Amendment protects "[a]ll manner of speech," including an artist's "original, customized" creations. *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 587 (2023) (internal citation omitted) (collecting cases). And its protections stand even if—and perhaps especially when—the government does not "find the speaker's message sympathetic." *Id.* at 602. Despite these clear protections, the decision below held that Petitioner Cathy Miller, a baker who created custom wedding cakes in "service to God," App.8a, violated California law when, as compelled by her sincerely held religious beliefs, she declined to bake a custom cake for a same-sex couple's wedding, App.4a-5a. As Miller persuasively demonstrates throughout her petition, that decision cannot be squared with this Court's free-speech or free-exercise precedents and should be reviewed and reversed.

The lower court's failure to recognize the clear First Amendment implications of punishing Miller for refusing to speak contrary to her beliefs is particularly troubling to *amicus* Protect the First Foundation ("PT1"), a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable areas of law. PT1 agrees with Miller that this Court's review is needed to restore conformity

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission. Counsel of record for all parties received timely notice of *amicus*' intent to file this brief.

with controlling free-speech and free-exercise precedent.

PT1 writes separately to expand on two speech-related points that got little attention in the lower court. First, review is necessary because the decision below ignores that the First Amendment protects speech like Miller's, even if unpopular and even when that speech conflicts with a state's public-accommodations laws. And second, PT1 shows that First Amendment protections do not yield just because a person sells her speech for profit. To prevent the harms to expressive businesses that will otherwise flow from the Court of Appeal's flawed application of this Court's precedents, the petition should be granted and the decision below reversed.

STATEMENT

Cathy Miller owns Tastries Bakery, a bakery that makes ready-to-eat and custom-made baked goods for celebrations. App.377a-378a, App.358a, App.387a-390a, App.403a. All wedding cakes are custom made. App.392a. As a devout Christian, Miller only accepts orders that align with her religious belief that marriage must be "between a man and a woman[.]" App.386a, App.394a.

When Mirena and Eileen Rodriguez-Del Rio, a lesbian couple, visited Tastries seeking a wedding cake, App.366a, Miller refused to make a cake for their wedding because of her "deeply held religious convictions." App.401a. But she referred the couple to a nearby bakery that would fulfill their order. App.400a-401a, App.343a. The couple responded by posting negative comments about Tastries on social

media, resulting in hundreds of hateful messages and threats. App.303a-306a, App.381a. Following this targeted abuse campaign, Tastries temporarily closed its doors. App.381a.

Unsatisfied with attacking Tastries in the court of public opinion, the Rodriguez-Del Rios complained about the bakery to the California Civil Rights Department, ultimately leading to a trial after which Tastries prevailed on free speech grounds. App.316a-319a, App.109a-111a, App.140a-148a. The Court of Appeal reversed, rejecting Tastries' defense that forcing Miller to bake a custom wedding cake would require her to further a message with which she disagreed and—in the process—violate her deeply held religious beliefs. App.62a, App.75a, App.78a.

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. Review is necessary to reaffirm that the First Amendment protects unpopular speech.

This case presents the Court with yet another needed opportunity to reaffirm the Nation's "enduring commitment to protecting the speech rights of all comers, no matter how controversial—or even repugnant—many may find the message at hand." *303 Creative*, 600 U.S. at 600-601. For decades, this Court has repeatedly reaffirmed the First Amendment's "bedrock principle * * * that the government may not prohibit the expression of an idea simply because society finds the idea * * * offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989) (collecting cases). Rather, the First Amendment means what it

says: There can be "no law," not even a law designed to prevent what society has deemed unlawful discrimination, "abridging the freedom of speech." U.S. Const. amend. I. The California courts departed from this bedrock principle, and the Court's review is necessary to reaffirm it.

A. First Amendment protections are broad and essential to public debate and include unpopular and hurtful speech.

This court has long held that the essential "freedom of expression upon public questions is secured by the First Amendment." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964). Indeed, the First Amendment reflects the "profound national commitment," etched in constitutional ink, to keep "debate on public issues * * * uninhibited, robust, and wide-open." *Id.* at 270. That protection stands "without regard to the * * * truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP* v. *Button*, 371 U.S. 415, 444-445 (1963). Even "misguided, or even hurtful" speech furthering "unattractive" ideas is constitutionally protected. *303 Creative*, 600 U.S. at 603 (citations omitted).

This means that, occasionally, the First Amendment will successfully be invoked even amid "vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times*, 376 U.S. at 270. Other times, it will protect "speakers whose motives others may find misinformed or offensive." *303 Creative*, 600 U.S. at 595. To the First Amendment, such considerations are of no constitutional moment: The Amendment's "protections belong to all." *Ibid.*

These basic principles mean that Miller's religiously motivated commitment to traditional marriage—however she decides to express that commitment—is protected. As far as the First Amendment goes, her religious viewpoints are just as valuable to the "uninhibited, robust, and wide-open" debate guaranteed by the First Amendment, *New York Times*, 376 U.S. at 270, as the views on the other side of the marriage debate—even though Miller's beliefs are clearly offensive to some.[2] Whatever offense her views bring, there can be no question that they are matters of high importance "as to things that touch the heart of the existing order." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). And the First Amendment ensures that such views can be expressed without government recourse.

B. Even public accommodations laws must give way to the First Amendment's protections of unpopular speech.

Nor does the calculus change when states like California deem certain messages and views unsavory and seek to exclude them from the market.

This Court has held that "public accommodations statutes can sweep too broadly" and that "no public accommodations law is immune from the demands of the Constitution." *303 Creative*, 600 U.S. at 592. Nor,

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[2] Within hours of Miller's declining to make a cake for the Rodriguez-Del Rio family, for example, the family posted a review branding Miller "a bigot." App.304a. And not much later, almost as a fulfillment of prophecy, she began to be "treated as such" by California for the sole crime of "cling[ing] to old beliefs." *Obergefell* v. *Hodges*, 576 U.S. 644, 741 (2015) (Alito, J., dissenting).

under this Court's precedents, can there be any question about "which must prevail" when "public accommodations law and the Constitution collide." *Ibid.* (citing U.S. Const. art. VI, cl. 2). In the face of any conflict, the First Amendment prevails. *Ibid.*

In other words, properly construed, the First Amendment protects Miller's speech even if that speech would otherwise violate a public accommodations mandate. That conclusion reflects the basic truth that any "moral judgments" related to the offensiveness of Miller's speech "are for the individual to make, not for the Government to decree." *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000).

The decision below departed from these clear principles by allowing California law to silence Miller's rejection of same-sex marriage, effectively removing that view from public debate precisely because it deviated from what California considered a "matter[] of profound value and concern to the public." *Janus* v. *American Fed'n of State, Cnty., Mun. Emps.*, 585 U.S. 878, 914 (2018) (cleaned up). Because the First Amendment does not allow that dangerous outcome, this Court should prevent it by reviewing and reversing the Court of Appeal's decision.

II. Review is also necessary to remind courts that the First Amendment applies even when the speaker receives compensation.

Another reason for review is to clarify that the First Amendment does not yield just because a person has decided to enter the economic marketplace. This Court has made clear that the First Amendment

protects even "speech for pay." *303 Creative*, 600 U.S. at 594. This principle is so well established that, even 50 years ago, the Court recognized it as "beyond serious dispute." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). Equally well settled—indeed "rudimentary"—is a state's inability to compel a speaker to forfeit her free speech rights in exchange for the right to do business in the state. *Citizens United* v. *FEC*, 558 U.S. 310, 351 (2010) (citation omitted).

A. A person does not forfeit her First Amendment rights when she offers speech for pay.

For decades, the Court has recognized "that a speaker's rights are not lost merely because compensation is received" for the simple reason that "a speaker is no less a speaker because he or she is paid to speak." *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). And, of course, speech itself remains protected, "even though it is carried in a form that is 'sold' for profit." *Virginia State Bd. of Pharmacy*, 425 U.S. at 761 (citations omitted). No one, for example, could seriously suggest that books, motion pictures, or religious literature lack constitutional protections just because they can be bought. *Ibid.* (collecting cases). So established was this doctrine that, by the time *303 Creative* was decided, this Court could confidently say that its precedents make clear that a person does not "shed their First Amendment protections by employing the corporate form to disseminate their speech." 600 U.S. at 594.

There is no principled reason to conclude that what is good for the book is not also good for the cake. Wedding cakes, including those for sale, can express messages. *Masterpiece Cakeshop* v. *Colorado C.R. Comm'n*, 584 U.S. 617, 625, 633 (2018). Indeed, their entire purpose "is to mark the beginning of a new marriage and to celebrate the couple." *Id.* at 659 (Thomas, J., joined by Gorsuch, J., concurring in part and concurring in the judgment). And they "do, in fact, communicate this message." *Ibid.* That was true in *Masterpiece Cakeshop*, as Justices Thomas and Gorsuch recognized, and it is true here.

This case gives the full Court a needed opportunity to recognize—together with those Justices—that the "creation of custom wedding cakes is expressive." *Id.* at 660. It should take the opportunity. Forcing bakers with religious objections to same-sex weddings to make wedding cakes for those weddings requires them to "acknowledge that same-sex weddings are 'weddings' and suggest they should be celebrated—the precise message" their faith forbids. *Id.* at 660-661. In failing to recognize that reality, the lower court allowed California to unconstitutionally punish Miller for her decision not to accept payment for expressing a message with which she disagrees.

B. States may not deprive a person of her First Amendment rights in exchange for the right to do business.

In the process of clarifying that speech for pay is protected, the Court should also reiterate that, when a state offers "special advantages" to corporations, including the right to take on the corporate form, it

"cannot exact as the price of those special advantages the forfeiture of First Amendment rights." *Citizens United*, 558 U.S. at 351 (citation omitted). Indeed, the Court has said "in a variety of contexts" that "'the government may not deny a benefit to a person because he exercises a constitutional right.'" *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) (quoting *Regan* v. *Taxation With Representation of Wash.,* 461 U.S. 540, 545 (1983)).

Properly applied, that unconstitutional-conditions doctrine forbids California from predicating Miller's ability to conduct business on her willingness to act or speak contrary to her sincerely held religious beliefs. The decision below departs from this principle too by forcing Miller—on pain of ruinous civil liability—to abandon her beliefs and right to speak if she wants to engage in expressive baking in California. Because the lower court condoned that outcome, this Court's review is necessary to clarify that a state's power to regulate businesses does not allow it to predicate the right to operate a business on a person's willingness to forfeit their right to speak out on contested issues—even when the person opts to exercise that right by refusing to speak altogether. *E.g.*, *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

CONCLUSION

The petition should be granted to reiterate the right to decline to speak the government's preferred message by those who, like Miller, engage in expressive—but at times unpopular—activities for money.

Respectfully submitted,

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