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**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

**CIVIL RIGHTS DEPARTMENT, FORMERLY THE
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING,
AN AGENCY OF THE STATE OF CALIFORNIA,**
Plaintiff and Appellant,

v.

**CATHY'S CREATIONS, INC., D/B/A TASTRIES,
A CALIFORNIA CORPORATION, AND
CATHARINE MILLER,**
Defendants and Respondents; and

**EILEEN RODRIGUEZ-DEL RIO AND
MIREYA RODRIGUEZ-DEL RIO,**
Real Parties in Interest.

APPEAL FROM KERN COUNTY SUPERIOR COURT
J. ERIC BRADSHAW, JUDGE – CASE No. BCV-18-102633

RESPONDENTS' APPENDIX
File 5 of 8, Volume 5, pp. RA.0961-RA.1242

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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **COUNTY OF KERN**

18 DEPARTMENT OF FAIR EMPLOYMENT
19 AND HOUSING, an agency of the State of
California,

20 Plaintiff,

21 v.

22 CATHY'S CREATIONS, INC. d/b/a
TASTRIES, a California Corporation; and
23 CATHARINE MILLER, an individual,

24 Defendants.

25 EILEEN RODRIGUEZ-DEL RIO and MIREYA
RODRIGUEZ-DEL RIO,

26 Real Parties in Interest.

CASE NO.: BCV-18-102633

IMAGED FILE

**APPENDIX OF AUTHORITIES
PURSUANT TO CAL. RULES OF
COURT, RULE 3.1113(i)1 IN
SUPPORT OF DEFENDANTS
CATHARINE MILLER AND
TASTRIES BAKERY'S MOTION
FOR SUMMARY JUDGMENT**

Date: Nov. 4, 2021
Time: 8:30 a.m.
Dept: 11
Judge: Hon. David R. Lampe
Action Filed: Oct. 17, 2018

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Respectfully submitted,

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Dated: September 8, 2021

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EXHIBIT 1

Judicial Council Of California Civil Jury Instruction 3060

Judicial Council Of California Civil Jury Instructions | July 2021 Update
By the Judicial Council of California Advisory Committee on Civil Jury Instructions

Civil Rights

3060 Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff*] claims that [*name of defendant*] denied [him/her/nonbinary pronoun] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her/nonbinary pronoun] [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[*insert other actionable characteristic*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [*name of plaintiff*];
2. [That a substantial motivating reason for [*name of defendant*]'s conduct was [its perception of] [*name of plaintiff*]'s [sex/race/color/religion/ancestry/national origin/ medical condition/genetic information/marital status/sexual orientation/ citizenship/ primary language/immigration status/[*insert other actionable characteristic*]];
[That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[*insert other actionable characteristic*]] of a person whom [*name of plaintiff*] was associated with was a substantial motivating reason for [*name of defendant*]'s conduct;]
3. That [*name of plaintiff*] was harmed; and
4. That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.

New September 2003; Revised December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013, June 2016

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Note that element 2 uses the term “substantial motivating reason” to express both intent and causation between the protected classification and the defendant's conduct. “Substantial motivating reason” has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, “Substantial Motivating Reason” Explained.) Whether the FEHA standard applies under the Unruh Act has not been addressed by the courts.

With the exception of claims that are also violations of the Americans With Disabilities Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional discrimination is required for violations of the Unruh Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under the Unruh Act, see [CACI No. 3067, Unruh Civil Rights Act—Damages](#). Note that the jury may award a successful plaintiff up to three times actual damages but not less than \$4,000 regardless of any actual damages. ([Civ. Code, § 52\(a\)](#).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See [Koire v. Metro Car Wash \(1985\) 40 Cal.3d 24, 33 \[219 Cal.Rptr. 133, 707 P.2d 195\]](#) [Unruh Act violations are per se injurious]; [Civ. Code, § 52\(a\)](#) [provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also [Civ. Code, § 52\(h\)](#) [“actual damages” means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. ([Rotary Club of Duarte v. Bd. of Directors \(1986\) 178 Cal.App.3d 1035, 1050 \[224 Cal.Rptr. 213\]](#).) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. ([Marina Point, Ltd. v. Wolfson \(1982\) 30 Cal.3d 721, 736 \[180 Cal.Rptr. 496, 640 P.2d 115\]](#).) Therefore, this instruction allows the user to “*insert other actionable characteristic*” throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. ([Semler v. General Electric Capital Corp. \(2011\) 196 Cal.App.4th 1380, 1392–1393 \[127 Cal.Rptr.3d 794\]](#); see [Harris, supra](#), 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See [Harris, supra](#), 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an “other actionable characteristic.” If there are contested factual issues, additional instructions or special interrogatories may be necessary.

Sources and Authority

- Unruh Civil Rights Act. [Civil Code section 51](#).
- Remedies Under Unruh Act. [Civil Code section 52](#).
- “The Unruh Act was enacted to ‘create and preserve a nondiscriminatory environment in California business establishments by “banishing” or “eradicating” arbitrary, invidious discrimination by such establishments.’ ” ([Flowers v. Prasad \(2015\) 238 Cal.App.4th 930, 937 \[190 Cal.Rptr.3d 33\]](#).)
- “Invidious discrimination is the treatment of individuals in a manner that is malicious, hostile, or damaging.” ([Javorsky v. Western Athletic Clubs, Inc. \(2015\) 242 Cal.App.4th 1386, 1404 \[195 Cal.Rptr.3d 706\]](#).)
- “ ‘The Legislature used the words “all” and “of every kind whatsoever” in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term “business establishments” was used in the broadest sense reasonably possible. The word “business” embraces everything about which one can be employed, and it is often synonymous with “calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.” The word “establishment,” as broadly defined, includes not only a fixed location, such as the “place where one is permanently fixed for residence or business,” but also a permanent “commercial force or organization” or “a permanent settled position, (as in life or business).” ’ ” ([O'Connor v. Village Green Owners Assn. \(1983\) 33 Cal.3d 790, 795 \[191 Cal.Rptr. 320, 662 P.2d 427\]](#), internal citations omitted.)
- Whether a defendant is a “business establishment” is decided as an issue of law. ([Rotary Club of Duarte, supra](#), 178 Cal.App.3d at p. 1050.)
- “When a plaintiff has visited a business’s website with intent to use its services and alleges that the business’s terms and conditions exclude him or her from full and equal access to its services, the plaintiff need not enter into an agreement with the business to establish standing under the Unruh Civil Rights Act. In general, a person suffers discrimination under the Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services. We conclude that this rule applies to online businesses and that visiting a website with intent to use its services is, for purposes of standing, equivalent to

presenting oneself for services at a brick-and-mortar store. Although mere awareness of a business's discriminatory policy or practice is not enough for standing under the Act, entering into an agreement with the business is not required." (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1023 [250 Cal.Rptr.3d 770, 446 P.3d 276].)

- "We hold that including websites connected to a physical place of public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress's mandate that the ADA keep pace with changing technology to effectuate the intent of the statute." (*Thurston v. Midvale Corp.* (2019) 39 Cal.App.5th 634, 644 [252 Cal.Rptr.3d 292].)
- "Here, the City was not acting as a business establishment. It was amending an already existing municipal code section to increase the minimum age of a responsible person from the age of 21 years to 30. The City was not directly discriminating against anyone and nothing in the plain language of the Unruh Civil Rights Act makes its provisions applicable to the actions taken by the City." (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [196 Cal.Rptr.3d 267].)
- "[T]he protection against discrimination afforded by the Unruh Act applies to 'all persons,' and is not reserved for restricted categories of prohibited discrimination." (*Marina Point, Ltd., supra*, 30 Cal.3d at p. 736.)
- "Nevertheless, the enumerated categories, bearing the 'common element' of being 'personal' characteristics of an individual, necessarily confine the Act's reach to forms of discrimination based on characteristics similar to the statutory classifications—such as 'a person's geographical origin, physical attributes, and personal beliefs.' The 'personal characteristics' protected by the Act are not defined by 'immutability, since some are, while others are not [immutable], but that they represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition.'" (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1145 [228 Cal.Rptr.3d 336].)
- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)
- "The Act applies not merely in situations where businesses exclude individuals altogether, but also 'where unequal treatment is the result of a business practice.' 'Unequal treatment includes offering price discounts on an arbitrary basis to certain classes of individuals.'" *Candelore, supra*, 19 Cal.App.5th at pp. 1145–1146, internal citations omitted.)
- "Race discrimination claims under ... the Unruh Civil Rights Act follow the analytical framework established under federal employment law. Although coaches are different from 'ordinary employers,' the *McDonnell Douglas* framework strikes the appropriate balance in evaluating race discrimination claims brought by college athletes:..." (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 661 [242 Cal.Rptr.3d 757], internal citations omitted.)
- "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act." (*Harris, supra*, 52 Cal.3d at p. 1149.)
- "On examining the language, statutory context, and history of [section 51, subdivision \(f\)](#), we conclude ... [t]he Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by [section 52](#). A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under [section 52](#)." (*Munson, supra*, 46 Cal.4th at p. 665.)
- "Civil Code [section 51, subdivision \(f\)](#) states: 'A violation of the right of any individual under the federal [ADA] shall also constitute a violation of this section.' The ADA provides in pertinent part: 'No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who ... operates a place of public accommodation.' The ADA defines discrimination as 'a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.'" (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825], internal citations omitted.)

- “ ‘Although the Unruh Act proscribes “any form of arbitrary discrimination”, certain types of discrimination have been denominated “reasonable” and, therefore, not arbitrary.’ Thus, for example, ‘legitimate business interests may justify limitations on consumer access to public accommodations.’ ” (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)
- “Discrimination may be reasonable, and not arbitrary, in light of the nature of the enterprise or its facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment.” (*Javorsky, supra*, 242 Cal.App.4th at p. 1395.)
- “[T]he Act’s objective of prohibiting ‘unreasonable, arbitrary or invidious discrimination’ is fulfilled by examining whether a price differential reflects an ‘arbitrary, class-based generalization.’ ... [A] policy treating age groups differently in this respect may be upheld, at least if the pricing policy (1) ostensibly provides a social benefit to the recipient group; (2) the recipient group is disadvantaged economically when compared to other groups paying full price; and (3) there is no invidious discrimination.” (*Javorsky, supra*, 242 Cal.App.4th at p. 1399.)
- “Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public.” (*Harris, supra*, 52 Cal.3d at p. 1165, internal citations omitted.)
- “It is thus manifested by [section 51](#) that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And [section 52](#), liberally interpreted, makes clear that discrimination by such a business establishment against one’s right of association on account of the associates’ color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act.” (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)
- “Appellant is disabled as a matter of law not only because she is HIV positive, but also because it is undisputed that respondent ‘regarded or treated’ her as a person with a disability. The protection of the Unruh Civil Rights Act extends both to people who are currently living with a physical disability that limits a life activity and to those who are regarded by others as living with such a disability. ... ‘Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute’s plain language leads to the conclusion that the “regarded as” definition casts a broader net and protects *any* individual “regarded” or “treated” by an employer “as having, or having had, any physical condition that makes achievement of a major life activity difficult” or may do so in the future.’ Thus, even an HIV-positive person who is outwardly asymptomatic is protected by the Unruh Civil Rights Act.” (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 529–530 [155 Cal.Rptr.3d 620], original italics, internal citations omitted.)
- “[T]he Unruh Civil Rights Act prohibits arbitrary discrimination in public accommodations with respect to trained service dogs, but not to service-animals-in-training.” (*Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 224 [223 Cal.Rptr.3d 133].)

Secondary Sources

8 Witkin, *Summary of California Law* (11th ed. 2017) Constitutional Law, §§ 994–1015

Chin et al., *California Practice Guide: Employment Litigation*, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, § 35.20 et seq. (Matthew Bender)

WEST'S EDITORIAL REFERENCES

Direct References:

- See [BAJI 7.92](#)

Related References:

- [BAJI 7.94](#), [12.01.1](#), [12.13](#), [12.88](#), [13.00](#), [14.10](#) to [14.13](#)

Statutory References:

- [Civ. Code](#), §§ 51, 52

Library References:

- [Cal. Jur. 3d](#), [Civil Rights](#) § 7

Research References:

- West's Key Number Digest, [Civil Rights](#)  1001, 1752

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EXHIBIT 2

621 F.3d 1051

United States Court of Appeals,
Ninth Circuit.

Johnny ANDERSON, Plaintiff–Appellant,

v.

CITY OF HERMOSA BEACH, a California
Municipal Corporation, Defendant–Appellee.

No. 08–56914.

Argued and Submitted May 7, 2010.

Filed Sept. 9, 2010.

Synopsis

Background: Tattooist seeking to establish tattoo parlor in city filed § 1983 action, alleging that municipal ordinance effectively totally banning tattoo parlors was facially unconstitutional under First and Fourteenth Amendments, and seeking declaratory and injunctive relief. The United States District Court for the Central District of California, Christina A. Snyder, J., granted city summary judgment. Tattooist appealed.

Holdings: The Court of Appeals, Bybee, Circuit Judge, held that:

in matter of first impression, tattoo itself, process of tattooing, and business of tattooing are First Amendment protected forms of pure expression, and

municipal ban on tattooing was not reasonable time, place, or manner restriction on free expression.

Reversed.

Noonan, Circuit Judge, filed concurring opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

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Appeal from the United States District Court for the Central District of California, Christina A. Snyder, District Judge, Presiding. D.C. No. 2:07–cv–05923–CAS–E.

Before: JOHN T. NOONAN, RICHARD B. CLIFTON and JAY S. BYBEE, Circuit Judges.

Opinion

Opinion by Judge BYBEE; Concurrence by Judge NOONAN.

BYBEE, Circuit Judge:

We address a question of first impression in our circuit: whether a municipal ban on tattoo parlors violates the First Amendment. Although courts in several jurisdictions have upheld such bans against First Amendment challenges, *see, e.g., Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F.Supp.2d 656, 659–61 (N.D.Ill.2008); *Yurkew v. Sinclair*, 495 F.Supp. 1248, 1253–55 (D.Minn.1980); *State v. Brady*, 492 N.E.2d 34, 39 (Ind.Ct.App.1986); *People v. O'Sullivan*, 96 Misc.2d 52, 409 N.Y.S.2d 332, 333 (1978); *State v. White*, 348 S.C. 532, 560 S.E.2d 420, 423–24 (2002); *Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, 72 Va. Cir. 388, 390 (Cir.Ct.2007), we respectfully disagree. We hold that tattooing is purely expressive activity fully protected by the First Amendment, and that a total ban on such activity is not a reasonable “time, place, or manner” restriction.

I. BACKGROUND

Petitioner–Appellant Johnny Anderson seeks to establish a tattoo parlor in Defendant–Appellee City of Hermosa Beach (the “City”), but Hermosa Beach Municipal Code (“Code”) § 17.06.070 effectively bans tattoo parlors. Anderson sued the City under 42 U.S.C. § 1983, alleging that § 17.06.070 is facially unconstitutional under the First and Fourteenth Amendments. The parties filed cross-motions for summary judgment, and the district court denied Anderson's motion and granted the City's motion. Anderson now appeals this decision.

We begin with the relevant background information, starting with a brief explanation of the process and health implications

of tattooing,¹ followed by a summary of the laws regulating tattooing in the State of California and its subdivisions, and ending with a more detailed description of the facts and procedural history in Anderson's particular case.

A. Tattooing

A declaration provided by the City sums up well the process of tattooing:

A tattoo is created by injecting ink into a person's skin. To do this, an electrically powered tattoo machine, often called a gun, moves a solid needle up and down to puncture the skin between 50 and 3,000 times per minute. The needle penetrates the skin by about a millimeter and deposits a drop of insoluble ink into the skin with each puncture. *1056 The ink is deposited in the dermis, which is the second layer of skin.... Because the skin has been punctured many times, the end result is essentially an open wound.

Tattooing carries the risk of infection and transmission of disease “if unsanitary conditions are present or unsterile equipment is used.” *Yurkew*, 495 F.Supp. at 1252. The City's declarations establish that tattooing can result in the transmission of such diseases as *hepatitis*, *syphilis*, *tuberculosis*, *leprosy*, and HIV. Reports from the Centers for Disease Control and Prevention and the Food and Drug Administration confirm the significant health risks of tattooing. *See* Centers for Disease Control and Prevention, *Body Art: Tattoos and Piercings* (Jan. 21, 2008), available at <http://www.cdc.gov/features/bodyart> (last visited May 25, 2010) (noting risks of infection, *tuberculosis*, Hepatitis B and C, and HIV); United States Food and Drug Administration, *Tattoos & Permanent Makeup* (Nov. 29, 2000), available at http://www.fda.gov/cosmetics/productingredientsafety/product_information/ucm108530.htm (last visited May 25, 2010) (discussing risks of infection, removal problems, potential *allergic reactions*, and MRI complications).

In general, however, “tattooing is a safe procedure if performed under appropriate sterilized conditions.” *Yurkew*, 495 F.Supp. at 1252. “[T]attoo artists protect themselves and their clients when following safe and healthy practices,” including “using sterile needles and razors, washing hands, wearing gloves, and keeping surfaces clean.” Centers for Disease Control and Prevention, *supra*; *see also* Mayo Clinic, *Tattoos: Understand Risks and Precautions* (Feb. 16, 2010), available at <http://www.mayoclinic.com/health/tattoos-and-piercings/mc00020> (last visited May 25, 2010) (providing a list of questions a person should ask “[t]o make sure[his] tattoo will be applied safely”).

B. Tattooing Regulations

Because of the potential health concerns implicated by tattooing, the State of California requires “[e]very person engaged in the business of tattooing ... [to] register ... with the county health department of the county in which that business is conducted,” CAL. HEALTH & SAFETY CODE § 119303(a), and requires these county health departments to inspect the registered tattoo parlors, *id.* § 119304. A person engaged in a tattooing business “who fails to register as provided by Section 119303 ... [is] subject to a civil penalty of five hundred dollars (\$500) per violation.” *Id.* § 119306. Moreover, California makes it illegal to “tattoo[] or offer[] to tattoo a person under the age of 18 years.” CAL. PENAL CODE § 653.

The City of Hermosa Beach lies within the County of Los Angeles (“the County”). According to a declaration by Claro Cartagena, an inspector of tattoo establishments for the County, there are nearly 300 tattoo establishments in the County and over 850 tattooists. However, Cartagena is the only inspector in the County monitoring the parlors. Many tattoo parlors have never been inspected and are subject to no regulations other than the requirement to register with the County. Thus, it is largely up to the owner of the tattoo establishment to sterilize his equipment and follow sterilization procedures. According to Cartagena, “While most tattoo establishments are clean and sanitary, others are not.... As in any field, there are those practitioners that are unscrupulous or incompetent and do not follow the proper sterilization processes strictly. This poses a risk for infection.” Cartagena has also received complaints about illegal underage tattooing.

*1057 Although Los Angeles County generally permits tattooing businesses, the City of Hermosa Beach does not. Hermosa Beach Municipal Code § 17.06.070 provides:

Document received by the CA 5th District Court of Appeal.

“Except as provided in this title, no building shall be erected, reconstructed or structurally altered, nor shall any building or land be used for any purpose except as hereinafter specifically provided and allowed in the same zone in which such building and land is located.” The Code provides zoning for a wide variety of commercial uses, including movie theaters, restaurants, adult businesses, bars, fortune tellers, gun shops, and youth hostels. HERMOSA BEACH MUN. CODE § 17.26.030. No provision of the zoning code, however, permits tattoo parlors, and as a result, these facilities are banned from Hermosa Beach under section 17.060.070. Indeed, on November 20, 2007, the City's Planning Commission adopted a resolution against amending the Code to permit tattoo parlors.

C. Facts and Procedural History

Plaintiff–Appellant Johnny Anderson presently co-owns a tattoo parlor in the City of Los Angeles, and seeks to establish a tattoo parlor in the City of Hermosa Beach. Anderson describes his own approach to tattooing in a declaration he submitted to the district court:

The tattoo designs that are applied by me are individual and unique creative works of visual art, designed by me in collaboration with the person who is to receive the tattoo. The precise design to be used is decided upon after discussion with the client and review of a draft of the design. The choices made by both me and by the recipient involve consideration of color, light, shape, size, placement on the body, literal meaning, symbolic meaning, historical allusion, religious import, and emotional content. I believe my designs are enormously varied and complex, and include realistic depictions of people, animals and objects, stylized depictions of the same things, religious images, fictional images, and geometric shapes and patterns.... Sometimes, several kinds of images are combined into a single tattoo or series of tattoos.... I have studied the history of tattooing, and I draw significantly on traditional

Americana tattoo designs and on Japanese tattoo motifs in creating my images, while all the while trying to add my own creative input to make the designs my own.

On August 14, 2006, Anderson brought a [42 U.S.C. § 1983](#) action against the City in the Central District of California, alleging that Hermosa Beach Municipal Code § 17.06.070 is facially unconstitutional under the First and Fourteenth Amendments, and seeking declaratory relief, injunctive relief, attorney's fees, costs, and any other relief the court deemed appropriate. The district court initially dismissed Anderson's claim for lack of ripeness because Anderson had not sought permission to operate a tattoo parlor under the administrative procedures provided in the Code, which allow the community development director to permit a commercial use not listed in the zoning code if this use “is similar to and not more objection[able] than other uses listed.” HERMOSA BEACH MUN. CODE § 17.26.040. In May 2007, Anderson filed a request with the City's community development director seeking such a finding of “similar use” so that he could open a tattoo parlor. By a letter dated June 21, 2007, the request was denied, and therefore Anderson was prohibited from opening a tattoo parlor in the City.

On September 12, 2007, Anderson filed the instant action (similar to the first) in the Central District of California. *1058 Anderson and the City filed cross-motions for summary judgment on September 22, 2008. On October 27, 2008, the district court issued a written decision granting the City's motion for summary judgment and denying Anderson's motion. The court “conclude[d] that the act of tattooing is not protected expression under the First Amendment because, although it is non-verbal conduct expressive of an idea, it is not ‘sufficiently imbued with the elements of communication’ ” to receive First Amendment protection under the Supreme Court's decision in [Spence v. Washington](#), 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (per curiam). The court reasoned that “the customer has ultimate control over which design she wants tattooed on her skin” and, therefore, “the tattoo artist does not convey an idea or message discernible to an identifiable audience.” Having determined that the act of tattooing is not protected under the First Amendment, the court applied rational basis review to the City's ordinance and held that, “[g]iven the health risks inherent in operating tattoo parlors, ... the City has a rational basis for prohibiting tattoo parlors.” Anderson timely appealed.²

II. FIRST AMENDMENT FRAMEWORK

The First Amendment, applied to the states through the Fourteenth Amendment, prohibits laws “abridging the freedom of speech.” U.S. CONST. amend. I. The First Amendment clearly includes pure speech, but not everything that communicates an idea counts as “speech” for First Amendment purposes. The Supreme Court has consistently rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” *United States v. O’Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (analyzing a prosecution for the symbolic burning of a draft card to protest the draft); see also *Cohen v. California*, 403 U.S. 15, 18, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (noting the important distinction between “a conviction resting solely upon ‘speech’ ” and one based “upon ... separately identifiable conduct which allegedly was intended ... to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message”).

Thus, although pure speech is entitled to First Amendment protection unless it falls within one of the “categories of speech ... fully outside the protection of the First Amendment,” *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1586, 176 L.Ed.2d 435 (2010); see also *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942), conduct intending to express an idea is constitutionally protected only if it is “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,” which means that “[a]n intent to convey a particularized message [is] present, and ... the likelihood [is] great that the message w[ill] be understood by those who view [] it,” *Spence*, 418 U.S. at 409–11, 94 S.Ct. 2727. And even where conduct expressive of an idea is protected by the First Amendment, “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.” *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Restrictions on protected expressive conduct are analyzed under the four-part test announced in *O’Brien*, a less stringent test than those established for regulations of pure speech.³

Accordingly, our analysis proceeds as follows. Our first task is to determine whether tattooing is (1) *purely expressive*

activity or (2) *conduct* that merely contains an expressive component. In other words, we must determine whether tattooing is more akin to writing (an example of purely expressive activity) or burning a draft card (an example of conduct that can be used to express an idea but does not necessarily do so). See *O’Brien*, 391 U.S. at 370, 376, 88 S.Ct. 1673; *Cohen*, 403 U.S. at 18, 91 S.Ct. 1780. If tattooing is purely expressive activity, then it is entitled to full First Amendment protection and the City’s regulation is constitutional only if it is a reasonable “time, place, or manner” restriction on protected speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).⁴ If, on the other hand, tattooing is merely conduct with an expressive component, then it is entitled to constitutional protection only if it is “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.” *Spence*, 418 U.S. at 409, 94 S.Ct. 2727. If so, then the constitutionality of the ordinance is governed by the *O’Brien* test. If tattooing is conduct that is *not* “sufficiently imbued with elements of communication,” *id.*, then we must determine only whether the City’s zoning regulation is rationally related to a legitimate governmental interest, see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981).

With this complex legal framework in mind, we turn to Hermosa Beach Municipal Code § 17.06.070.

III. ANALYSIS

We hold that Hermosa Beach Municipal Code § 17.06.070 is facially unconstitutional to the extent that it excludes tattoo parlors. First, we hold that tattooing is purely expressive activity rather than conduct expressive of an idea, and is thus entitled to full First Amendment protection without any need to resort to *Spence’s* “sufficiently imbued” test. Second, we hold that the City’s total ban on tattooing is not a constitutional restriction on protected expression because it is not a reasonable “time, place, or manner” restriction.

A. Tattooing as First Amendment Expression

The district court assumed that the process of tattooing is at most “non-verbal conduct expressive of an idea” rather than speech itself. This determination is consistent with cases from other courts that have emphasized the distinction between *1060 the *product* and the *process* of tattooing and have held that the physical process of tattooing is conduct subject

to *Spence's* “sufficiently imbued” test. See, e.g., *Hold Fast Tattoo*, 580 F.Supp.2d at 660 (analyzing tattooing under *Spence's* framework based on the premise that “[t]he act of tattooing is one step removed from the actual expressive conduct”); *Yurkew*, 495 F.Supp. at 1253–54 (regardless of “whether ... the image conveyed by the tattoo[] is an art form or amounts to art,” “the process of tattooing is undeniably conduct” that is subject to the *Spence* test). These courts then held that tattooing fails the *Spence* test. See, e.g., *Hold Fast Tattoo*, 580 F.Supp.2d at 660 (holding that “[t]he act of tattooing ... itself is not intended to convey a particularized message”); *Yurkew*, 495 F.Supp. at 1253–54 (holding that “the actual process of tattooing is not sufficiently communicative” to come within the First Amendment, because “there has been no showing that the normal observer ... would regard the process of injecting dye into a person's skin through the use of needles as communicative”); *White*, 560 S.E.2d at 423 (“Unlike burning [a] flag, the process of injecting dye to create [a] tattoo is not sufficiently communicative to warrant [First Amendment] protection[].”). Similarly, the City argues that “[t]he process of injecting dye into a person's skin through the use of needles,” in contrast with “any message conveyed by the tattoo image, is non-expressive conduct that must, in order to acquire First Amendment protection [under *Spence*], carry with it an intent to convey a message that will be understood by those who viewed it.”

For the reasons set forth below, we disagree with the basic premise underlying the conclusions of both the City and the lower courts that have considered this issue. The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment.

1. The Tattoo

There appears to be little dispute that the tattoo itself is pure First Amendment “speech.” The Supreme Court has consistently held that “the Constitution looks beyond written or spoken words as mediums of expression.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). Accordingly, the Supreme Court and our court have recognized various forms of entertainment and visual expression as purely expressive activities, including music without words, *Ward*, 491 U.S. at 790, 109 S.Ct. 2746; dance, *Schad*, 452 U.S. at 65–66, 101 S.Ct. 2176; topless dancing, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932–934, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); movies, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02, 72 S.Ct. 777, 96 L.Ed. 1098

(1952); parades with or without banners or written messages, *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338; and both paintings and their sale, *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir.2007). We have afforded these expressive activities full constitutional protection without relying on the *Spence* test. See *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” (citation omitted) (quoting *Spence*, 418 U.S. at 411, 94 S.Ct. 2727)).

***1061** Tattoos are generally composed of words, realistic or abstract images, symbols, or a combination of these, all of which are forms of pure expression that are entitled to full First Amendment protection. Tattoos can express a countless variety of messages and serve a wide variety of functions, “including: decorative; religious; magical; punitive; and as an indication of identity, status, occupation, or ownership.” Mark Gustafson, *The Tattoo in the Later Roman Empire and Beyond*, in WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY 17 (Jane Caplan ed., Reaktion Books 2000); see also Alan Govenar, *The Variable Context of Chicano Tattooing*, in MARKS OF CIVILIZATION 209 (Arnold Rubin ed., Regents of the University of California 1988) (discussing the religious, social, and political purposes of tattooing); Clinton R. Sanders, *Drill and Frill: Client Choice, Client Typologies, and Interactional Control in Commercial Tattooing Settings*, in MARKS OF CIVILIZATION, *supra*, at 222–23 (discussing the “wide variety of reasons” people choose to get a tattoo, including symbolization of an interpersonal relationship, participation in a group, representation of key interests and activities, self-identification, and making a decorative or aesthetic statement). We do not profess to understand the work of tattoo artists to the same degree as we know the finely wrought sketches of Leonardo da Vinci or Albrecht Dürer, but we can take judicial notice of the skill, artistry, and care that modern tattooists have demonstrated.

The principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper. This distinction has no significance in terms of the constitutional protection afforded the tattoo; a form of speech does not lose First Amendment protection based on the kind of surface it is

applied to. It is true that the nature of the surface to which a tattoo is applied and the procedure by which the tattoo is created implicate important health and safety concerns that may not be present in other visual arts, but this consideration is relevant to the governmental interest *potentially justifying* a restriction on protected speech, not to whether the speech is constitutionally protected. We have little difficulty recognizing that a tattoo is a form of pure expression entitled to full constitutional protection.

2. The Tattooing Process

Our next task is to determine whether the *process* of tattooing is purely expressive activity. We hold that it is. *Spence's* “sufficiently imbued” test has been reserved for processes that do *not* produce pure expression but rather produce symbolic conduct that, “on its face, does not necessarily convey a message.” *Cohen*, 403 U.S. at 18, 91 S.Ct. 1780. Burning a flag, *see Johnson*, 491 U.S. at 411, 109 S.Ct. 2533, burning a draft card, *see O'Brien*, 391 U.S. at 370, 88 S.Ct. 1673, and wearing a black armband, *see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), can be done for reasons having nothing to do with any expression, and so require an interpretive step to determine the expressive elements of these processes.

However, neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the ***1062** act of creation. Thus, we have not drawn a hard line between the essays John Peter Zenger published and the act of setting the type. *Cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) (holding that a tax on ink and paper “burdens rights protected by the First Amendment”). The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds. In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.

Tattooing is a process like writing words down or drawing a picture except that it is performed on a person's skin. As with putting a pen to paper, the process of tattooing is not intended to “symbolize” anything. Rather, the entire purpose of tattooing is to produce the tattoo, and the tattoo cannot be created without the tattooing process any more than the Declaration of Independence could have been created without a goose quill, foolscap, and ink. Thus, as with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection.

We are further persuaded by the fact that the process of tattooing is more akin to traditional modes of expression (like writing) than the process involved in producing a parade, which the Supreme Court has held cannot be meaningfully separated from the parade's expressive product in terms of the constitutional protection afforded. *See Hurley*, 515 U.S. at 568, 115 S.Ct. 2338 (holding that “[p]arades are ... a form of expression, not just motion,” and noting “the inherent expressiveness of marching”). Thus, we have no difficulty holding that the tattooing process is entitled to the same First Amendment protection as the process of parading.

Moreover, it makes no difference whether or not, as the district court determined, “the customer has [the] ultimate control over which design she wants tattooed on her skin.” The fact that both the tattooist and the person receiving the tattoo contribute to the creative process or that the tattooist, as Anderson put it, “provide[s] a service,” does not make the tattooing process any less expressive activity, because there is no dispute that the tattooist applies his creative talents as well. Under the district court's logic, the First Amendment would not protect the process of writing most newspaper articles—after all, writers of such articles are usually assigned particular stories by their editors, and the editors generally have the last word on what content will appear in the newspaper. Nor would the First Amendment protect painting by commission, such as Michelangelo's painting of the Sistine Chapel. As with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in expressive activity.

3. The Business of Tattooing

Finally, the fact that the City's ban relates to tattooing *businesses* rather than the tattooing process itself⁵ does not affect ***1063** whether the activity regulated is protected by the First Amendment. In *City of Sparks*, we held that even “an artist's *sale* of his original artwork constitutes

speech protected under the First Amendment.” 500 F.3d at 954 (emphasis added). We first emphasized the inherent expressiveness of the painting itself—in particular, that a painting “conveys[the artist’s] sense of form, topic, and perspective[.] ... may express a clear social position ... [or] the artist’s vision of movement and color, ... [and] holds potential to ‘affect public attitudes’ by spurring thoughtful reflection in and discussion among its viewers.” *Id.* at 956 (citation omitted) (quoting *Joseph Burstyn*, 343 U.S. at 501, 72 S.Ct. 777). We then rejected “the city’s argument that [plaintiff’s] sale of his paintings removes them from the ambit of protected expression.” *Id.*; see also *City of Lakewood v. Plain Dealer Publ’g. Co.*, 486 U.S. 750, 756 n. 5, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (“[T]he degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away.”); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (“It is well settled that a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.”).

The Second Circuit reached a similar conclusion in *Bery v. City of New York*, 97 F.3d 689 (2d Cir.1996), where the court held that the sale of visual artwork is expression fully protected by the First Amendment. *Id.* at 695. The court rejected the city’s argument that, unlike the production of art, “the sale of art is conduct” and should therefore be subject to *Spence*’s test. *Id.* The court held that “[t]he sale of protected materials is also protected,” *id.* (citing *Lakewood*, 486 U.S. at 756 n. 5, 108 S.Ct. 2138), reasoning that “without the money, the plaintiffs would not have engaged in the protected expressive activity,” *id.* at 696.

City of Sparks and *Bery* stand for the proposition that because the sale of a painting is intertwined with the process of producing the painting, the sale is entitled to full constitutional protection without any need to resort to the *Spence* test. The same logic applies to the business of tattooing. Thus, we conclude that the business of tattooing qualifies as purely expressive activity rather than conduct with an expressive component, and is therefore entitled to full constitutional protection without any need to subject it to *Spence*’s “sufficiently imbued” test. The business is subject to reasonable time, place, or manner restrictions (as explained in the next section), but the fact that the tattoo is for sale does not deprive it of its First Amendment protection.

B. The City’s Ban as a Time, Place, or Manner Restriction

Having determined that tattooing is protected by the First Amendment, our next inquiry is whether the City’s total ban on tattooing is a constitutional restriction on free expression.

A regulation that restricts protected expression based on the content of the speech is constitutional only if it withstands strict scrutiny, see *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000), meaning that it “is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end,” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). However, *1064 Anderson does not contend that Hermosa Beach Municipal Code § 17.06.070 is a content-based restriction on speech. See *supra* n. 4. Rather, he argues that the City’s regulation is an unconstitutional restriction on a *means* of expression.

Accordingly, we must determine not whether the City’s regulation survives strict scrutiny but whether the City’s regulation is a reasonable “time, place, or manner” restriction on protected speech. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746 (“Our cases make clear ... that ... the government may impose reasonable restrictions on the time, place, or manner of protected speech”). This determination requires an inquiry into whether the restriction: (1) is “justified without reference to the content of the regulated speech”; (2) is “narrowly tailored to serve a significant governmental interest”; and (3) “leave[s] open ample alternative channels for communication of the information.” *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

Before turning to this inquiry, we first emphasize that the Supreme Court “ha[s] voiced particular concern with laws that foreclose an entire medium of expression,” because “the danger they pose to the freedom of speech is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.” *City of Ladue v. Gilleo*, 512 U.S. 43, 55, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). A long line of Supreme Court cases indicates that such laws are almost *never* reasonable “time, place, or manner” restrictions. See, e.g., *id.* at 54–55, 114 S.Ct. 2038 (invalidating an ordinance forbidding the display of signs on private property); *Schad*, 452 U.S. at 75–76, 101 S.Ct. 2176 (ban on all live entertainment); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 145–49, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (ban on door-to-door distribution of literature); *Jamison v. Texas*, 318 U.S. 413, 416, 63 S.Ct. 669,

87 L.Ed. 869 (1943) (ban on distributing handbills on the public streets); *Lovell v. City of Griffin*, 303 U.S. 444, 451–52, 58 S.Ct. 666, 82 L.Ed. 949 (1938) (ban on distribution of pamphlets within the municipality); *but see Kovacs v. Cooper*, 336 U.S. 77, 89, 69 S.Ct. 448, 93 L.Ed. 513 (1949) (upholding a ban on sound trucks).

The interplay between the Court's often rigid statements about total bans on modes of expression and its traditional “time, place, or manner” test is not entirely clear. However, we need not determine whether the City's regulation is *per se* unconstitutional as a total ban of a means of expression or whether it is subject to a particularly stringent test, because we hold that it fails under even the traditional “time, place, or manner” test. We proceed now to that test.

1. Justified without Reference to Content

Anderson does not dispute that the City's regulation may be “justified without reference to the content of the regulated speech,” *Clark*, 468 U.S. at 293, 104 S.Ct. 3065. The City's regulation bans all tattoo parlors, not just those conveying a particular kind of message or subject matter, and is purportedly justified based on health and safety concerns.

2. Narrowly Tailored

A reasonable “time, place, or manner” restriction must also be “narrowly tailored to serve a significant governmental interest.” *Id.* In *Ward*, the Supreme Court clarified the meaning of this requirement:

[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests *1065 but ... it need not be the least restrictive or least intrusive means of doing so.... So long as the means chosen are not *substantially broader than necessary* to achieve the government's interest, ... the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

491 U.S. at 798, 800, 109 S.Ct. 2746 (emphasis added).

Anderson does not dispute that the City has a significant interest in regulating tattooing because of the health and safety concerns implicated by this process. Rather, Anderson argues that the regulation is substantially broader than necessary to achieve this interest because the interest could be achieved by regulations ensuring that tattooing is performed in a sanitary manner rather than outright prohibition of tattooing. The City disagrees, pointing out that Los Angeles County has only one health inspector for nearly 300 tattoo establishments and over 850 tattooists, and that there are no statewide regulations relating to sterilization, sanitation, and standards for tattooists. “Put simply,” the City argues, “there are insufficient resources to monitor the 8[5]0 tattooists operating in Los Angeles County, including the many who, like Plaintiff, are self-taught and operating in backrooms and basements.”

As other courts have found, “tattooing is a safe procedure if performed under appropriate sterilized conditions.” *Yurkew*, 495 F.Supp. at 1252; *see also* Centers for Disease Control and Prevention, *supra*. Tattooing is now permitted (subject to regulation) in all fifty states, with Oklahoma becoming the last to lift its ban as of November 1, 2006. Janice Francis-Smith, *OK Governor Henry Signs Tattoo Legalization into Law*, OKLA. CITY J. REC. (May 11, 2006), available at http://findarticles.com/p/articles/mi_qn4182/is_20060511/ai_n16412421 (last visited May 30, 2010). The City has presented no evidence that tattooing in the City *could not* be regulated in such a way that addresses the City's legitimate public health concerns. Rather, it simply argues that currently, there are insufficient resources *in place* to address these concerns. But the provision *vel non* of such resources is a matter within the City's control. Without more, we cannot approve a total ban on protected First Amendment activity simply because of the government's failure to provide the resources it thinks are necessary to regulate it.

In sum, although a total ban on tattooing might be the most convenient way of addressing the City's health concerns, the City has given us no reason to conclude that these concerns cannot be adequately addressed through regulation of tattooing rather than a total ban on tattoo parlors. Thus, particularly in light of the Supreme Court's historical “concern with laws that foreclose an entire medium of expression,” *City of Ladue*, 512 U.S. at 55, 114 S.Ct. 2038, we have little difficulty concluding that the City's ban is

“substantially broader than necessary to achieve the [City’s] interest,” *Ward*, 491 U.S. at 800, 109 S.Ct. 2746.

3. Alternative Channels

Even if the City’s regulation were narrowly tailored to serve its health and safety interests, a reasonable “time, place, or manner” restriction on protected speech must also “leave open ample alternative channels for communication of the information.” *Clark*, 468 U.S. at 293, 104 S.Ct. 3065. The City argues that, although its regulation restricts tattooists’ ability to apply images to human skin via the injection of ink, there are alternative means available *1066 for applying the exact same words, images, and symbols to skin, such as airbrushing or the use of natural henna paste to create temporary tattoos. The City also points out that the tattooist could render his designs “on a traditional canvas or other media,” such as a T-shirt. In other words, the City believes that “[t]here is nothing inherently or distinctly expressive about rendering ... designs on the skin” using the ink-injection method.

We disagree. In *City of Ladue*, the defendant city made an argument similar to the one the City makes here. The City argued that its ban on signs on private property was “a mere regulation of the time, place, or manner of speech because residents remain free to convey their desired messages by other means, such as hand-held signs, letters, handbills, flyers, telephone calls, newspaper advertisements, bumper stickers, speeches, and neighborhood or community meetings.” 512 U.S. at 56, 114 S.Ct. 2038 (quotation marks and emphasis omitted). The Supreme Court was

not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off... Displaying a sign from one’s own residence often *carries a message quite distinct* from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the ‘speaker[,]’ ... [which] is an important component of many attempts to persuade.

Id. (emphasis added). The Court held the ordinance unconstitutional because the city had “completely foreclosed a venerable means of communication that is both unique and important.” *Id.* at 54, 114 S.Ct. 2038.

As in *City of Ladue*, the City of Hermosa Beach has “completely foreclosed a venerable means of communication that is both unique and important.” *Id.* at 54, 114 S.Ct. 2038. Like music, tattooing is “one of the oldest forms of human expression,” *Ward*, 491 U.S. at 790, 109 S.Ct. 2746, as well as one of the world’s most universally practiced forms of artwork. See Jane Caplan, *Introduction*, in WRITTEN ON THE BODY, *supra*, at xi (“Physical evidence for the practice [of tattooing] survives from the late fourth millennium BC in Europe and from about 2000 BC in Egypt, and tattooing can be found in virtually all parts of the world at some time.”). And it has increased in prevalence and sophistication in recent years. See Juliet Fleming, *The Renaissance Tattoo*, in WRITTEN ON THE BODY, *supra*, at 61 (“[F]or the last quarter-century the West has been enjoying a ‘tattoo renaissance’; a movement characterized by refinements of conception ...; by technical developments ...; and by the refinement of procedure and equipment....”); Susan Benson, *Inscriptions of the Self: Reflections on Tattooing and Piercing in Contemporary Euro-America*, in WRITTEN ON THE BODY, *supra*, at 240 (discussing how the “tattoo community” has “bec[o]me more visible and more organized,” and noting that “over the past 30 years the number of tattoo establishments has grown rapidly in absolute terms, both in Europe and America”). According to a 2006 survey by the Pew Research Center, 36 percent of people from ages 18–25, 40 percent of people from ages 26–40, and 10 percent of people from ages 41–64, had or once had at least one tattoo. The Pew Research Center for the People & the Press, *How Young People View Their Lives, Futures and Politics: A Portrait of “Generation Next”* 21 (Jan. 9, 2007), available at <http://people-press.org/reports/pdf/300.pdf> (last visited May 30, 2010).

*1067 Most importantly, a permanent tattoo “often carries a message quite distinct” from displaying the same words or picture through some other medium, and “provide[s] information about the identity of the ‘speaker.’ ” *City of Ladue*, 512 U.S. at 56, 114 S.Ct. 2038. A tattoo suggests that the bearer of the tattoo is highly committed to the message he is displaying: by permanently engrafting a phrase or image onto his skin, the bearer of the tattoo suggests that the phrase or image is so important to him that he has chosen to display the phrase or image every day for the remainder of his

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life. The relative permanence of the tattoo can also make a statement of “autonomy and self-fashioning”—“of ownership over the flesh” and a “defen[se of] the embodied self against external impositions.” Benson, *supra*, at 251–52 (quotation marks omitted); *see also id.* at 251 (“[T]he permanence of the tattoo establishes ... an instantiation of the will in defiance of process and time: ‘you can never get it off.’ ”); *id.* at 250–251 (discussing how “the idea of the permanence of the tattoo is critical” in that it is linked “to ideas of the body as property and possession ... indeed as the *only* possession of the self in a world characterized by accelerating commodification and unpredictability”). Finally, the pain involved in producing a permanent tattoo is significant to its bearer as well: “Pain, like the tattoo itself, is something that cannot be appropriated; it is yours alone; it stands outside the system of signification and exchange that threatens the autonomy of the self.” *Id.* at 251. These elements are not present—or, at least, not nearly to the same degree—in the case of a temporary tattoo, a traditional canvas, or a T-shirt. Thus, we disagree with the City that “[t]here is nothing inherently or distinctly expressive about rendering ... designs on the skin” using the ink-injection method.

The City analogizes this case to *Kovacs*, the only case in which the Supreme Court has upheld a total ban on a medium of communication. In *Kovacs*, the Court upheld a Trenton, New Jersey, ordinance banning sound trucks—vehicles with attached sound amplifiers—on public streets. 336 U.S. at 89, 69 S.Ct. 448. The Court emphasized Trenton’s interest in preventing “distractions ... dangerous to traffic” and preserving “the quiet and tranquility” of the residential areas. *Id.* at 87, 69 S.Ct. 448. The Court also reasoned that the fact “[t]hat more people may be more easily and cheaply reached by sound trucks ... is not enough to call forth constitutional protection.” *Id.* at 88–89, 69 S.Ct. 448. The City argues that tattooing is just like a sound truck—it might be a more effective means to disseminate a message to the public, but the same message may be transmitted by other means. *Cf. Hold Fast Tattoo*, 580 F.Supp.2d at 660 (“The act of tattooing is one step removed from actual expressive conduct, which is similar to a sound truck, which enables each customer to express a particularized message, but the sound truck vehicle itself is not expressive.”).

The analogy to sound trucks is flawed. As discussed above, a tattoo is not merely a “more effective” means of communicating a message; rather, the tattoo “often carries a message quite *distinct*” from other media. *City of Ladue*, 512 U.S. at 56, 114 S.Ct. 2038 (emphasis added). In light of the

long line of cases in which the Supreme Court has invalidated total bans on a medium of communication, it cannot be true that any medium of communication may be banned based on the reasoning that it is merely a “more effective” means of communicating a message; by this logic, after all, a canvas could be considered merely a “more effective” means of displaying a painting than lined paper. Seeming to recognize that its reasoning *1068 was in some tension with its earlier cases, the *Kovacs* Court explained that its judgment also rested on the fact that no one within range of the sound truck could avoid the broadcast:

While this Court ... has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor’s writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign that he is unwilling to be disturbed.... The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.

Kovacs, 336 U.S. at 86–87, 69 S.Ct. 448 (quotation marks and footnote omitted) (citing *Martin*, 319 U.S. at 143, 148, 63 S.Ct. 862).

In this sense, the case at hand is easily distinguishable from *Kovacs* and indistinguishable from the Court’s other cases involving total bans on modes of expression. A tattoo does not force “unwilling listener[s]” to heed its message any more than the expletive-laden jacket at issue in *Cohen*. A tattoo is displayed passively on the person’s body, such that a member of the general public can simply avert his eyes if he does not wish to view the tattoo (assuming the tattoo is visible to the public at all). In other words, a tattoo effects no additional intrusion of privacy on members of the public beyond other types of expression clearly protected by the First Amendment. Thus, the City’s tattoo regulation is subject to

the principle in *Martin*, *Schad*, and *City of Ladue*, which, read alongside *Kovacs*, indicate that if a unique and important mode of expression does not force unwilling listeners to heed its message in an intrusive manner, the government may not ban it regardless of the availability of alternative (and less distinctive) means of communicating a similar message.

IV. CONCLUSION

In sum, we hold that the tattoo itself, the process of tattooing, and the business of tattooing are forms of pure expression fully protected by the First Amendment. We further hold that the City's total ban on tattoo parlors in Hermosa Beach is not a reasonable "time, place, or manner" restriction because it is substantially broader than necessary to achieve the City's significant health and safety interests and because it entirely forecloses a unique and important method of expression. Moreover, no genuine issue of material fact exists with respect to the constitutionality of the regulation. Thus, we hold that Hermosa Beach Municipal Code § 17.06.070 is facially unconstitutional to the extent that it excludes tattoo parlors, and we reverse the district court's order granting summary judgment in favor of the City and remand with instructions to grant Anderson's motion for summary judgment and enjoin the City to include tattoo parlors in its zoning regulations.

REVERSED.

NOONAN, Circuit Judge, concurring:

I concur in the holding of the court, and I agree with Judge Bybee's robust defense of the values protected by the First Amendment.

I write to state that tattooing may be purely expressive, not that it always is. Any text may be expressive but is not invariably so. A laundry list is normally not protected by the First Amendment, but William Carlos Williams made a grocery list into poetry. Context is all. A tattoo punitively affixed is unprotected.

*1069 Accepting the fact that a tattoo may qualify as protected speech, I note that creation of a tattoo may involve danger to the health of its recipient, so that tattooing requires regulation for health different from regulation, say, of a press. Tattooing as a business may also require regulation to assure that it does not attract minors. Finally, while we are bound to protect the First Amendment value at issue, we are not bound to recognize any special aesthetic, literary, or political value in the tattooist's toil and trade.

All Citations

621 F.3d 1051, 10 Cal. Daily Op. Serv. 11,842, 2010 Daily Journal D.A.R. 14,319, 67 A.L.R.6th 681

Footnotes

- 1 Throughout most of this opinion, we use "tattooing" as shorthand to refer not only to the process of tattooing but also to the *business* of tattooing—that is, the procedure under which the tattooist injects a tattoo into a person's skin in exchange for money. In Part III.A, however, we break down tattooing into each of its component parts: the tattoo itself, the physical process of tattooing, and the business of tattooing.
- 2 "We review de novo a grant of summary judgment and must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir.2000) (en banc).
- 3 In *O'Brien*, the Court held that a regulation of protected expressive conduct is constitutional: [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
391 U.S. at 377, 88 S.Ct. 1673.

- 4 Anderson does not contend that the City's regulation is a content-based restriction on speech. And with good reason, as the City bans all tattoo parlors, not just those that convey a particular kind of message or subject matter. Thus, we do not subject the regulation to strict scrutiny.
- 5 The City does not actually ban tattooing as such but simply does not permit tattoo *parlors* in its zoning regulations. In other words, so far as we can tell, the Code contains no provision that would prevent a person from performing a tattoo on a family member in his house for free. And the City's restrictions may not apply to cosmetic tattooing that may be performed in a doctor's office, clinic, or beauty parlor.

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EXHIBIT 3

247 Ariz. 269
Supreme Court of Arizona.

BRUSH & NIB STUDIO, LC, et al.,
Plaintiffs/Appellants/Cross-Appellees,

v.

CITY OF PHOENIX, Defendant/
Appellee/Cross-Appellant.

No. CV-18-0176-PR

|

Filed September 16, 2019

Synopsis

Background: Designers of custom wedding invitations brought action against city for declaratory and injunctive relief, alleging that ordinance, precluding discrimination on basis of sexual orientation, violated designers' right to free speech and their free exercise right under Free Exercise of Religion Act (FERA). The Superior Court, Maricopa County, No. CV2016-052251, [Karen A. Mullins](#), J., denied city's motion to dismiss but granted summary judgment to city. The Court of Appeals, 244 Ariz. 59418 P.3d 426, affirmed both denial of motion to dismiss and grant of summary judgment but struck down portion of ordinance.

Holdings: After grant of review, the Supreme Court, [Gould](#), J., held that:

claims were ripe;

custom invitations constituted pure speech entitled to full First Amendment protection;

ordinance was subject to strict scrutiny in compelled speech claim;

any governmental interest furthered by ordinance was insufficient to justify compelling speech;

ordinance substantially burdened free exercise of religion, as would support FERA claim; and

ordinance was not least restrictive means of furthering asserted governmental interest.

Court of Appeals opinion vacated in part; trial court ruling reversed.

[Bolick](#), J., filed concurring opinion.

[Bales](#), J., filed dissenting opinion in which [Timmer](#), V.C.J., and [Staring](#), J., joined.

[Timmer](#), V.C.J., filed dissenting opinion.

[Staring](#), J., filed dissenting opinion.

Procedural Posture(s): On Appeal; Petition for Discretionary Review; Motion for Declaratory Judgment; Motion to Dismiss; Motion for Permanent Injunction.

****894** Appeal from the Superior Court in Maricopa County, The Honorable [Karen A. Mullins](#), Judge, No. CV2016-052251. **REVERSED IN PART**

Opinion of the Court of Appeals, Division One, 244 Ariz. 59, 418 P.3d 426 (App. 2018). **VACATED IN PART**

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JUSTICE GOULD authored the opinion of the Court, in which JUSTICES BOLICK, LOPEZ, and PELANDER (Retired) joined. JUSTICE BOLICK filed a concurring opinion. JUSTICE BALES (Retired), joined by VICE CHIEF JUSTICE TIMMER and JUDGE STARING, * dissented. VICE CHIEF JUSTICE TIMMER filed a dissenting opinion. JUDGE [STARING](#) filed a dissenting opinion.

Opinion

JUSTICE GOULD, opinion of the Court:

****895 *274 ¶1** The rights of free speech and free exercise, so precious to this nation since its founding, are not limited to soft murmurings behind the doors of a person's home or church, or private conversations with like-minded friends and family. These guarantees protect the right of every American to express their beliefs in public. This includes the right to create and sell words, paintings, and art that express a person's sincere religious beliefs.

¶2 With these fundamental principles in mind, today we hold that the City of Phoenix (the "City") cannot apply its Human Relations Ordinance (the "Ordinance") to force Joanna Duka and Breanna Koski, owners of Brush & Nib Studios, LC ("Brush & Nib"), to create custom wedding invitations celebrating same-sex wedding ceremonies in violation of their sincerely held religious beliefs. Duka, Koski, and Brush & Nib ("Plaintiffs") have the right to refuse to express such messages under [article 2, section 6 of the Arizona Constitution](#), as well as Arizona's Free Exercise of Religion Act ("FERA"), [A.R.S. § 41-1493.01](#).

¶3 Our holding is limited to Plaintiffs' creation of custom wedding invitations that are materially similar to those contained in the record. *See* Appendix 1. We do not recognize a blanket exemption from the Ordinance for ****896 *275** all of Plaintiffs' business operations. Likewise, we do not, on jurisprudential grounds, reach the issue of whether Plaintiffs' creation of other wedding products may be exempt from the Ordinance. *See* Appendix 2.

¶4 Duka and Koski’s beliefs about same-sex marriage may seem old-fashioned, or even offensive to some. But the guarantees of free speech and freedom of religion are not only for those who are deemed sufficiently enlightened, advanced, or progressive. They are for everyone. After all, while our own ideas may be popular today, they may not be tomorrow. Indeed, “[w]e can have intellectual individualism” and “rich cultural diversities ... only at the price” of allowing others to express beliefs that we may find offensive or irrational. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641–42, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). This “freedom to differ is not limited to things that do not matter much ... [t]he test of its substance is the right to differ as to things that touch the heart of the existing order.” *Id.* at 642, 63 S.Ct. 1178.

¶5 Given this reality, the government “must not be allowed to force persons to express a message contrary to their deepest convictions.” *Nat’l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, — U.S. —, 138 S. Ct. 2361, 2379, 201 L.Ed.2d 835 (2018) (Kennedy, J., concurring). Rather, Plaintiffs are entitled to

continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

Obergefell v. Hodges, — U.S. —, 135 S. Ct. 2584, 2607, 192 L.Ed.2d 609 (2015).

¶6 Although this case is about freedom of speech and religion, it suits the preferred analysis of our dissenting colleagues to reframe it as one involving discriminatory conduct based on a customer’s sexual orientation. This mischaracterization reflects neither Plaintiffs’ position nor our holding. Literally none of the examples of invidious, status-based discrimination the dissent invokes, *see infra* ¶ 217–18, would even be remotely permitted under our holding today. Plaintiffs must, and they do, serve all customers

regardless of their sexual orientation. However, by focusing solely on the anti-discrimination purpose of the Ordinance, the dissent engages in a one-sided analysis that effectively deprives Plaintiffs of their fundamental right to express their beliefs. But no law, including a public accommodations law, is immune from the protections of free speech and free exercise. Rather, “[i]f 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 642, 63 S.Ct. 1178.

¶7 The enduring strength of the First Amendment is that it allows people to speak their minds and express their beliefs without government interference. But here, the City effectively cuts off Plaintiffs’ right to express their beliefs about same-sex marriage by telling them what they can and cannot say. And to justify this action, both the City and the primary dissent claim that if we dare to allow Plaintiffs to express their beliefs, we, in essence, run the risk of resurrecting the Jim Crow laws of the Old South.

¶8 But casting Plaintiffs’ free speech and exercise rights in such a cynical light does grave harm to a society. As Justice Jackson observed in *Barnette*, “[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men,” but, inevitably “those bent on its accomplishment must resort to an ever-increasing severity.” *Barnette*, 319 U.S. at 640, 63 S.Ct. 1178. We would be wise to heed his warning about government efforts to compel uniformity of beliefs and ideas:

[a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out **897
*276 Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination

of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Id. at 641, 63 S.Ct. 1178.

I.

¶9 Duka and Koski are the sole member-owners of Brush & Nib, a for-profit limited liability company. Duka and Koski operate Brush & Nib as an “art studio” specializing in creating custom artwork for weddings, events, special occasions, home décor, and businesses. Duka and Koski work out of Koski’s home and personally design and create their products. In addition to custom-designed products, Brush & Nib sells some pre-made products. Duka and Koski do not maintain Brush & Nib as a brick-and-mortar store but instead sell their products online through various media platforms.

¶10 Apart from Plaintiffs’ custom wedding invitations, the record contains only a few examples of their products. In contrast, there are numerous examples of Plaintiffs’ custom wedding invitations. *See* Appendix 1. All these custom invitations feature Plaintiffs’ hand-drawn images and paintings, custom lettering and calligraphy, as well as their original artwork. Additionally, the names of a female bride and a male groom are prominently displayed in every custom invitation.

¶11 The City concedes that “[a]ll the custom wedding invitations Brush & Nib creates include language that is celebratory of the wedding.” Specifically, Plaintiffs create and write celebratory statements in every custom invitation, including such statements as “[the couple or their parents] request the pleasure of your company at the *celebration* of their marriage,” “request the *honor* of your presence,” “invite you to the *celebration* of their marriage,” or “invite you to share in the *joy* of their marriage.” (Emphasis added.)

¶12 Plaintiffs closely collaborate with each client in creating their custom wedding invitations. The client provides the names of the bride and groom, as well as the location and date of the wedding. A client may also share preferences regarding the colors and style of the invitation. Plaintiffs, in turn, propose their artistic ideas for the invitation, including colors, artwork, text, and phrasing. As part of this process,

Plaintiffs “frequently suggest the particular words to use” in the invitation.

¶13 Once a client signs a contract for their services, Plaintiffs design and create the invitations. Although a client may ultimately reject Plaintiffs’ work, the contract states that Brush & Nib “retains complete artistic freedom with respect to every aspect of the design’s and artwork’s creation.” The contract provides that the client’s requested design and artwork must “express[] messages that promote [Brush & Nib’s] religious or artistic beliefs, or at least are not inconsistent with these beliefs.” Further, Brush & Nib “reserves the right to terminate” the contract if it subsequently determines, in its “sole discretion, that the requested design or artwork communicates ideas or messages ... that are inconsistent with [Brush & Nib’s] religious or artistic beliefs.”

¶14 Duka and Koski are Christians. Based on their faith, they do not believe they can do anything, either in their business or personal lives, that “violates their religious beliefs or dishonors God.” Thus, in addition to making a profit, Duka and Koski seek to operate Brush & Nib consistent with their religious beliefs. For example, Brush & Nib’s Operating Agreement (the “Agreement”) states that Brush & Nib is a “for-profit limited liability company” that “is owned solely by Christian artists who operate [Brush & Nib] as an extension of and in accordance with their artistic and religious beliefs.” The Agreement sets forth Brush & Nib’s “Core Beliefs” and provides that “Brush & Nib is unwilling to use its artistic process” or “create art” that contradicts its religious “beliefs and message.” The Agreement further provides that Brush & Nib “reserves the right to deny any request for action or artwork that violates its artistic and religious beliefs.” As examples of such objectionable artwork, the Agreement states that Brush & Nib will refuse to create ****898 *277** “custom artwork that communicates ideas or messages ... that contradict biblical truth, demean others, endorse racism, incite violence, or promote any marriage besides marriage between one man and one woman, such as same-sex marriage.”

¶15 Duka and Koski hold traditional Christian beliefs about marriage. They believe that “God created two distinct genders in His image,” and that only a man and a woman can be joined in marriage. This belief is based on the Bible; thus, for example, Plaintiffs cite Matthew 19:4–5, which states that God “made them male and female, and said, [f]or this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one.” (Internal quotation

marks omitted.) Duka testified that she believes that marriage reflects God's glory and presents a picture of "Christ and his love for the church."

¶16 As a tenet of their faith, Duka and Koski do not believe that two people of the same sex can be married. Plaintiffs stress that they will create custom artwork for, and sell pre-made artwork to, any customers regardless of their sexual orientation. However, they believe that creating a custom wedding invitation that conveys a message celebrating same-sex marriage, for any customer regardless of sexual orientation, violates their sincerely held religious convictions.

A. The Ordinance

¶17 The City of Phoenix's Ordinance, as amended in 2013, prohibits public accommodations from discriminating against persons based on their status in a "protected" group, which includes a person's sexual orientation. Phx., Ariz., City Code ("PCC") § 18-4(B). In contrast, neither Arizona's public accommodations law nor the federal civil rights public accommodations statute lists sexual orientation as a legally protected status. See A.R.S. § 41-1442(A); 42 U.S.C. § 2000a(a).

¶18 Under the Ordinance, public accommodations include "all establishments offering their services, facilities or goods to or soliciting patronage from the members of the general public." PCC § 18-3. Section 18-4(B)(2) makes it unlawful for any business operating as a public accommodation to "directly or indirectly[] refuse, withhold from, or deny to any person ... accommodations, advantages, facilities or privileges ... because of" a person's status in a protected group. Additionally, the Ordinance forbids such businesses from making any "distinction ... with respect to any person based on" status with respect to "the price or quality of any item, goods or services offered." PCC § 18-4(B)(2).

¶19 Section 18-4(B)(3) also makes it unlawful for a public accommodation "to directly or indirectly display, circulate, publicize or mail any advertisement, notice or communication which states or implies that any facility or service shall be refused or restricted because of" a person's status. This subsection also prohibits displays or publications that state or imply that based on a person's status they "would be unwelcome, objectionable, unacceptable, undesirable or not solicited." *Id.*

¶20 Complaints regarding violations of the Ordinance are initially handled by the City's Equal Opportunity Department (the "Department"). PCC § 18-5(A). If the Department determines that there is reasonable cause to believe that a violation has occurred, it must first attempt to resolve the violation through "informal methods," such as conciliation and mediation. *Id.* § 18-5(D)(2), (E), (G). However, if the Department finds no reasonable cause, the complainant may "request that the City Attorney file a criminal complaint." *Id.* § 18-5(D)(1). Further, if the business owner refuses to correct the violation through informal means, the Department may refer the matter to the City Attorney for criminal prosecution. *Id.* § 18-6.

¶21 Pursuant to § 18-7(A), any person convicted of violating the Ordinance is guilty of a class 1 misdemeanor. As punishment, a violator may be ordered to serve up to six months in jail or three years' probation, or pay a maximum fine of \$2,500, or any combination of jail, fines, and probation. *Id.* § 1-5. Section 1-5 also provides that "[e]ach day any violation" continues "shall constitute a separate offense." Continuing violations may also "be deemed a public nuisance" and "abated as provided by law." *Id.*

**899 *278 B. Procedural Background

¶22 To date, the City has not cited Plaintiffs for violating the Ordinance. Plaintiffs filed this action to enjoin the City from enforcing the Ordinance against them in the future, as well as to obtain a declaration that the Ordinance violates their right to free speech under [article 2, section 6 of the Arizona Constitution](#), and their free exercise right under FERA, § [41-1493.01](#). As part of their requested declaratory relief, Plaintiffs request an order allowing them to post a proposed statement (the "Statement") on Brush & Nib's website announcing their intention to refuse requests to create custom artwork for same-sex weddings. The Statement explains that Brush & Nib will not "create any artwork that violates our vision as defined by our religious and artistic beliefs and identity." It lists several examples of objectionable artwork, including artwork promoting businesses that "exploit women or sexually objectify the female body," exploits the environment, or "any custom artwork that demeans others, endorses racism, incites violence, contradicts our Christian faith, or promotes any marriage except marriage between one man and one woman," such as "wedding invitations[] for same-sex wedding ceremonies."

¶23 The City filed a motion to dismiss, arguing that Plaintiffs lacked standing to bring this action. Specifically, the City asserted that Plaintiffs had not yet refused to create any products for a same-sex wedding and therefore had not violated the Ordinance. The trial court denied the motion.

¶24 After an evidentiary hearing, the court denied Plaintiffs' motion for a preliminary injunction. Following the hearing, each party moved for summary judgment. The trial court denied Plaintiffs' motion but granted the City's motion. In its ruling, the court concluded that the Ordinance did not violate Plaintiffs' rights to free speech or free exercise of religion under FERA.

¶25 The court of appeals affirmed both the trial court's denial of the City's motion to dismiss and its grant of summary judgment in favor of the City. *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 68–69 ¶ 16, 78 ¶ 55, 418 P.3d 426, 435–36 (App. 2018). The court held that the Ordinance did not violate Plaintiffs' freedom of speech or substantially burden their free exercise rights under FERA. *Id.* at 72 ¶ 29, 73 ¶ 32, 77 ¶ 49, 418 P.3d at 439, 440, 444. However, the court struck down as unconstitutionally vague the provision in § 18-4(B)(3) prohibiting displays or publications stating or implying that a person in a protected group “would be unwelcome, objectionable, unacceptable, undesirable or not solicited.” *Id.* at 75–76 ¶¶ 43–45 & n.12, 418 P.3d at 442–43. The court severed this provision from the Ordinance, concluding that the remainder of § 18-4(B)(3) “operates independently and is enforceable.” *Id.* at 76 ¶ 44, 418 P.3d at 443.

¶26 We granted review because this case involves constitutional and statutory issues of statewide importance. We have jurisdiction pursuant to [article 6, section 5\(3\) of the Arizona Constitution](#).

II.

¶27 Plaintiffs contest the trial court's denial of their motion for a preliminary injunction, as well as the court's denial of their motion for summary judgment and grant of summary judgment in favor of the City. However, we need not review the trial court's denial of Plaintiffs' motion for a preliminary injunction because its rulings on the parties' summary judgment motions are dispositive here.

¶28 We review the trial court's rulings on the motions for summary judgment de novo. *Jackson v. Eagle KMC L.L.C.*, 245 Ariz. 544, 545 ¶ 7, 431 P.3d 1197, 1198 (2019). We review statutory, constitutional, and mixed questions of law and fact de novo. *City of Surprise v. Ariz. Corp. Comm'n*, 246 Ariz. 206, 210 ¶ 10, 437 P.3d 865, 869 (2019) (statutes); *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 8, 336 P.3d 717, 720 (2014) (constitutional questions); *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366 ¶ 10, 982 P.2d 1277, 1280 (1999) (mixed questions of law and fact).

¶29 Plaintiffs concede Brush & Nib is a public accommodation as defined by PCC § 18-3. However, they argue that the Ordinance, as applied by the City, compels them to use their artistic talents and personal expression **900 *279 to create custom invitations celebrating same-sex weddings in violation of their free speech rights under [article 2, section 6 of the Arizona Constitution](#) and their free exercise rights under FERA. Plaintiffs assert they will serve all customers, regardless of their sexual orientation. However, they refuse to create or express certain messages, regardless of *who* makes the request. This includes creating custom invitations that celebrate a same-sex marriage ceremony.

¶30 The City concedes that the Ordinance does not require Duka and Koski to express any messages condoning or celebrating same-sex marriage. Thus, for example, the City agrees that the Ordinance does not require Duka and Koski to create a custom invitation containing the statement, “support gay marriage,” or symbols, such as the equal sign of the Human Rights Campaign, that would be recognized by a third-party observer as expressly endorsing same-sex marriage. The City argues, however, that the Ordinance, as applied to Plaintiffs' custom wedding invitations, regulates conduct, not speech. Thus, by refusing to create or sell such invitations for use in same-sex weddings, the City contends that Plaintiffs are engaging in discriminatory conduct prohibited by the Ordinance.

¶31 For their remedy, Plaintiffs generally seek relief permitting them to (1) refuse requests to create custom-made wedding products for same-sex weddings, and (2) post their Statement regarding their intention to refuse such services. Alternatively, Plaintiffs seek partial relief limited to their creation of custom wedding invitations that are “materially similar” to the invitations contained in the record.

¶32 Plaintiffs originally raised both facial and as-applied challenges to the constitutionality of the Ordinance. However,

because Plaintiffs' facial challenge was limited to the provision struck down by the court of appeals (a ruling neither party challenges here), only Plaintiffs' as-applied challenge remains. See *Brush & Nib*, 244 Ariz. at 75–76 ¶¶ 43–45 & n.12, 418 P.3d at 442–43. Thus, we need not consider the general validity of the Ordinance or the Ordinance's application to other individuals or businesses that are not before this Court. See *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (stating that “a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity ... is beyond question,” and that “in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights”).

III.

¶33 The City argues the trial court erred in denying its motion to dismiss based on Plaintiffs' lack of standing. Specifically, the City asserts that because Plaintiffs filed this action “before any same-sex couple had requested custom wedding products,” their lawsuit is based on speculative claims about how the Ordinance might apply to hypothetical customer requests involving Plaintiffs' entire range of custom products. Because none of these abstract legal claims may ever arise, the City contends that Plaintiffs' action challenging PCC § 18-4(B)(2) is not ripe and should be dismissed.

¶34 We ordinarily review a trial court's ruling on a motion to dismiss for an abuse of discretion, *Legacy Foundation Action Fund v. Citizens Clean Elections Commission*, 243 Ariz. 404, 405 ¶ 6, 408 P.3d 828, 829 (2018), but questions of standing and ripeness are reviewed de novo, *In re Estate of Stewart*, 230 Ariz. 480, 483–84 ¶ 11, 286 P.3d 1089, 1092–93 (App. 2012) (ripeness); *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 562 ¶ 16, 81 P.3d 1016, 1021 (App. 2003) (standing).

¶35 Although the Arizona Constitution does not have a case or controversy requirement like the Federal Constitution, we do apply the doctrines of standing and ripeness “as a matter of sound judicial policy.” *Bennett v. Napolitano*, 206 Ariz. 520, 524 ¶ 16, 81 P.3d 311, 315 (2003). Because in this case the underlying concerns for standing and ripeness are the same, we simply use the term “ripeness” to apply to both

doctrines. ¶¶ 901, 280 here. See *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (“The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong.”); *Town of Gilbert v. Maricopa Cty.*, 213 Ariz. 241, 244 ¶ 8, 141 P.3d 416, 419 (App. 2006) (stating that “[r]ipeness is analogous to standing”).

¶36 Ripeness is a prudential doctrine that prevents a court from rendering a premature decision on an issue that may never arise. *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504 (1997). Though federal justiciability jurisprudence is not binding on Arizona courts, the factors federal courts use to determine whether a case is justiciable are instructive. See *Bennett*, 206 Ariz. at 525 ¶ 22, 81 P.3d at 316. Thus, as a general matter, if the plaintiff has incurred an injury, the case is ripe. See *Brewer v. Burns*, 222 Ariz. 234, 238 ¶ 15, 213 P.3d 671, 675 (2009). A case is also ripe if there is an actual controversy between the parties. *Estate of Stewart*, 230 Ariz. at 484 ¶ 12, 286 P.3d at 1093; see *Planned Parenthood Ctr. of Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 312–13, 497 P.2d 534 (1972) (stating that challengers of statute forbidding abortions under certain circumstances were not required to wait for criminal prosecution because that statute allegedly chilled their constitutional rights and therefore constituted an actual controversy).

¶37 Here, we need not speculate about how the Ordinance might apply to customer requests for Plaintiffs' custom wedding invitations. While it is true that, for most of Plaintiffs' products, the factual record is not sufficiently developed, that is not the case with respect to the custom invitations. The record, as reflected by the exhibits contained in Appendix 1, contains numerous examples of Plaintiffs' custom wedding invitations. All of these invitations contain detailed examples of Plaintiffs' words, drawings, paintings, and original artwork, and Duka and Koski have testified about their process of designing and creating these custom invitations. *Supra* ¶¶ 9–14. Additionally, in their briefs, the parties have analyzed, in detail, the legal claims and arguments based on these custom invitations.

¶38 Finally, because Plaintiffs have specifically asked this Court, as an alternative form of relief, to limit our decision to custom wedding invitations that are materially similar to the invitations contained in the record, *supra* ¶ 31, we may limit our analysis and holding to Plaintiffs' creation of this specific product. See A.R.S. § 41-1493.01(D) (permitting

FERA claimants to “obtain *appropriate relief* against a government” (emphasis added)); *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) (stating that “the scope of injunctive relief is dictated by the extent of the violation established”).

¶39 Thus, we conclude there is an actual case and controversy that exists regarding Plaintiffs’ creation of custom wedding invitations that are materially similar to those in the record. Duka and Koski face a real threat of being prosecuted for violating the Ordinance by refusing to create such invitations for a same-sex wedding. See *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298, 300–01, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (finding standing despite the lack of a concrete factual situation or criminal enforcement of the statute against the challenger because the threshold issue, whether the challengers’ activity was protected as free speech, was justiciable); see also A.R.S. § 12-1832 (authorizing any person “whose rights ... are affected by a ... municipal ordinance” to seek declaratory relief on the validity of the ordinance and “obtain a declaration of rights, status or other legal relations thereunder”). In contrast, Plaintiffs’ sweeping challenge to the Ordinance as applied to all of Brush & Nib’s remaining custom wedding products (as reflected in Appendix 2) implicates a multitude of possible factual scenarios too “imaginary” or “speculative” to be ripe. *Thomas*, 220 F.3d at 1139 (quoting *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301).

¶40 Additionally, given the City’s assertion that it can apply the Ordinance to Plaintiffs’ custom wedding invitations, which includes the threat of criminal prosecution and significant penalties, Plaintiffs have suffered an injury through the chilling of their free **902 *281 speech and free exercise rights. *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392–93, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (holding there was an injury to challenger’s speech rights prior to a challenged criminal statute becoming effective, where the state never stated it would not enforce the statute).

¶41 Accordingly, we agree with the trial court and the court of appeals that, to the extent Plaintiffs’ action is based on their custom wedding invitations, it is justiciable. We therefore affirm the trial court and the court of appeals’ denial of the City’s motion to dismiss as to Plaintiffs’ custom wedding invitations. *Brush & Nib*, 244 Ariz. at 68–69 ¶ 16, 418 P.3d at 435–36. However, Plaintiffs’ claims based on their remaining custom products are not ripe, and we therefore reverse and grant the City’s motion to dismiss as to these products.

IV.

¶42 Plaintiffs allege that the Ordinance, as applied by the City, compels them to create custom wedding invitations celebrating same-sex marriage in violation of Arizona’s free speech clause. See *Ariz. Const. art. 2, § 6* (stating that “[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right”).

¶43 Generally, “[w]e will not reach a constitutional question if a case can be fairly decided on non[-]constitutional grounds.” *R.L. Augustine Constr. Co., Inc. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368, 370, 936 P.2d 554, 556 (1997). However, when constitutional and non-constitutional issues are intertwined in a case, we must address the constitutional issue. See *State v. Church*, 109 Ariz. 39, 41, 504 P.2d 940, 942 (1973); *Katherine S. v. Foreman ex rel. County of Maricopa*, 197 Ariz. 371, 378 ¶ 16, 4 P.3d 426, 433 (App. 1999) (deciding constitutional issue because the issue was “intertwined” with non-constitutional issue and citing *Church* for the proposition that the “fact that constitutional and non-constitutional issues are interwoven justifies addressing all issues”).

¶44 Here, because Plaintiffs’ FERA claim is closely intertwined with their free speech claim, we find it necessary to address the constitutional issue in this case. *Katherine S.*, 197 Ariz. at 378 ¶ 16, 4 P.3d at 433; see also *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 160–69, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (discussing both freedom of speech and free exercise as the plaintiff’s exercise of both rights were affected by challenged law); cf. *Employment Div. v. Smith*, 494 U.S. 872, 881–82, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (collecting cases analyzing both freedom of speech and free exercise); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, — U.S. —, 138 S.Ct. 1719, 1740–48, 201 L.Ed.2d 35 (2018) (Thomas, J., concurring) (analyzing free speech issue despite concluding that challengers’ free exercise rights were violated). The legal and factual questions underlying Plaintiffs’ free speech and FERA claims require us to address the same basic issues: (1) whether the Ordinance, as applied by the City, compels Plaintiffs to express a message that violates their religious convictions, and (2) if so, whether Plaintiffs have a protected right to refuse to express that message in the operation of their business.

¶45 In examining the text of Arizona’s free speech clause, we first observe that whereas the First Amendment is phrased as a constraint on government, U.S. Const. amend. I (“Congress shall make no law ... abridging the freedom of speech.”), our state’s provision, by contrast, is a guarantee of the individual right to “freely speak, write, and publish,” subject only to constraint for the abuse of that right. See *State v. Stummer*, 219 Ariz. 137, 142 ¶ 14, 194 P.3d 1043, 1048 (2008); see also *id.* ¶ 15 (“The encompassing text of [a]rticle 2, [s]ection 6 indicates the Arizona framers’ intent to rigorously protect freedom of speech.”). Thus, by its terms, the Arizona Constitution provides broader protections for free speech than the First Amendment. See, e.g., *Coleman v. City of Mesa*, 230 Ariz. 352, 361 ¶ 36 n.5, 284 P.3d 863, 872 (2012) (stating that article 2, section 6 “is in some respects more protective of free speech rights than the First Amendment”); **903 *282 *Stummer*, 219 Ariz. at 143 ¶ 17, 194 P.3d at 1049 (“We have also stated that [a]rticle 2, [s]ection 6 has ‘greater scope than the [F]irst [A]mendment.’ ” (citation omitted)); *Mountain States Tel. & Tel., Co. v. Ariz. Corp. Comm’n*, 160 Ariz. 350, 356, 773 P.2d 455, 461 (1989) (“[W]e apply here the broader freedom of speech clause of the Arizona Constitution.”).

¶46 However, although article 2, section 6 does, by its terms, provide greater speech protection than the First Amendment, we have rarely explored the contours of that right. Rather, we have often relied on federal case law in addressing free speech claims under the Arizona Constitution. *Stummer*, 219 Ariz. at 142 ¶ 16, 194 P.3d at 1048 (stating that “Arizona courts have had few opportunities to develop Arizona’s free speech jurisprudence,” and in “construing [a]rticle 2, [s]ection 6 have followed federal interpretations of the United States Constitution”); *Mountain States*, 160 Ariz. at 358, 773 P.2d at 463 (looking to First Amendment precedent in determining that a government regulation violated Arizona’s free speech clause). Here, while Plaintiffs generally assert that their compelled speech claim, see *infra* Section IV(A)–(D), is based on the Arizona Constitution, in arguing that claim they rely almost exclusively on federal cases construing the First Amendment.

¶47 This, however, presents no difficulty for us in resolving Plaintiffs’ compelled speech claim. Specifically, because federal precedent conclusively resolves Plaintiffs’ claim, we can adequately address it under First Amendment jurisprudence. And, because a violation of First Amendment principles “necessarily implies” a violation of the broader protections of article 2, section 6 of the Arizona Constitution, by applying First Amendment jurisprudence, we therefore

address Plaintiffs’ state claim. *Coleman*, 230 Ariz. at 361 ¶ 36 n.5, 284 P.3d at 872 (noting that because plaintiffs had adequately stated a claim under the First Amendment, this “necessarily implie[d] that they ha[d] also stated claims under [a]rticle 2, [s]ection 6 of Arizona’s Constitution,” and thus there was no need to address whether Arizona’s free speech clause “might afford greater protection ... than applies under the First Amendment”); see also *Mountain States*, 160 Ariz. at 358, 773 P.2d at 463 (“As we have already determined that ‘narrow specificity’ is a requirement of a time, place, and manner regulation under the [F]irst [A]mendment, we must hold the same under the more stringent protections of the Arizona Constitution.”).

A. Compelled Speech

¶48 The compelled speech doctrine is grounded on the principle that freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (“[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say.” (citation and internal quotation marks omitted)); *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796–97, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (stating that the First Amendment guarantee of free speech necessarily includes the freedom of deciding “both what to say and what *not* to say”).

¶49 The compelled speech doctrine was first articulated in *Barnette*. There, the Supreme Court addressed a state law requiring a child who was a Jehovah’s Witness to salute the American flag. 319 U.S. at 626–29, 63 S.Ct. 1178. For both the child and his parents, saluting the flag violated their religious beliefs. *Id.* at 629, 63 S.Ct. 1178. The Court struck down the law as violating the First Amendment, stating that the government cannot compel any individual “to utter what is not in his mind,” *id.* at 634, 63 S.Ct. 1178, and that all citizens have autonomy over their “opinion[s] and personal attitude[s],” *id.* at 631, 636, 63 S.Ct. 1178; see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (stating that “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence,” and that any “[g]overnment action that ... requires

the utterance of a particular message favored by the ****904**
***283** Government[] contravenes this essential right”).

¶50 There are, generally speaking, two lines of cases addressing compelled speech. The first involves regulations requiring an individual to express a prescribed government message. For example, in *Wooley*, the Court held that a law was unconstitutional because it forced a Jehovah’s Witness, in violation of his religious beliefs, to display the state motto “Live Free or Die” on his license plate. 430 U.S. at 707–08, 717, 97 S.Ct. 1428; see also *NIFLA*, 138 S. Ct. at 2368–69, 2378 (holding that plaintiffs were likely to succeed in their claim that a state law unconstitutionally compelled speech by requiring crisis pregnancy centers, which were established to prevent abortions, to disseminate prescribed government notices about public funding for abortion services).

¶51 A second line of compelled speech cases involves a government regulation that compels a person to host or accommodate another’s message. See, e.g., *Hurley*, 515 U.S. at 572–73, 581, 115 S.Ct. 2338 (holding that a state public accommodations law could not be used to compel a parade sponsor to host or accommodate messages from parade participants the sponsor found to be objectionable). This line of cases includes government regulations compelling a person to engage in self-censorship to avoid hosting another’s message, as well as regulations forcing a person to respond to another’s speech when they would prefer to remain silent. See *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 5–7, 16–17, 21, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) (holding that a regulation requiring a privately-owned utility to include, along with its monthly bills, an editorial newsletter published by a consumer group that was critical of its ratemaking practices violated the utility’s free speech rights because the utility might “feel compelled to respond to arguments and allegations made by [the consumer group]”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 244, 256–58, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (holding that a statute granting political candidates the right to reply to unfavorable newspaper articles violated the First Amendment because it forced newspapers to either respond to the candidates’ replies or engage in compelled self-censorship by forgoing printing any articles criticizing a candidate).

¶52 The fundamental principle underlying both lines of compelled speech cases is that an individual has autonomy over his or her speech and thus may not be forced to speak a message he or she does not wish to say. *Hurley* is instructive on this point. There, a private group of veterans

(the “Council”) was granted a permit by the City of Boston to sponsor a St. Patrick’s Day parade. *Hurley*, 515 U.S. at 560, 115 S.Ct. 2338. However, the Council refused to allow a group of gay, lesbian, and bisexual descendants of Irish immigrants (“GLIB”) to march “behind a shamrock-strewn banner” stating, “Irish American Gay, Lesbian and Bisexual Group of Boston.” *Id.* at 561, 570, 115 S.Ct. 2338. The Supreme Judicial Court of Massachusetts subsequently determined that the Council’s refusal violated the state public accommodations law. *Id.* at 563–64, 115 S.Ct. 2338.

¶53 The United States Supreme Court reversed, holding that because the parade was a form of protected speech under the First Amendment, the public accommodations law could not be used to compel the Council to host GLIB’s message. *Id.* at 568–69, 573, 115 S.Ct. 2338. The Court stated that “whatever the [Council’s] reason” for keeping GLIB’s message out of the parade, “it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.” *Id.* at 575, 115 S.Ct. 2338. The Court held that compelling the Council to host GLIB’s message “violate[d] 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, 115 S.Ct. 2338. *Hurley* further emphasized that “when dissemination of a view contrary to one’s own is forced upon a speaker intimately connected with the communication advanced, the speaker’s right to autonomy over the message is compromised.” *Id.* at 576, 115 S.Ct. 2338; see also *Wooley*, 430 U.S. at 715, 97 S.Ct. 1428 (“Here, as in *Barnette*, we are faced with a ****905** ***284** state measure which forces an individual ... to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State ‘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.’” (quoting *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178)).

¶54 The importance of protecting an individual’s autonomy over his or her speech was most recently addressed in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, — U.S. —, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018). There, Janus, a nonunion employee, objected to paying “agency fees” to a union. *Id.* at 2461–62. The union claimed the agency fees were based on collective bargaining activities benefiting both union and nonunion employees. See *id.* at 2461. However, Janus objected to paying any fees to the union because he disagreed with its

collective bargaining position, which he believed was having a negative effect on the state's "fiscal crises." *Id.* at 2461–62.

¶55 The Supreme Court concluded that requiring Janus to pay the agency fees violated his free speech rights because it compelled him to subsidize the union's speech. *Id.* at 2466, 2486. The Court stated that "[c]ompelling individuals to mouth support for views they find objectionable violates" the "cardinal constitutional command" that individuals have autonomy over their speech. *Id.* at 2463. The Court explained that "[f]ree speech serves many ends," and "[w]henver the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends." *Id.* at 2464. The Court further explained that "[w]hen speech is compelled ... additional damage is done" because it "forc[es] free and independent individuals to endorse ideas they find objectionable[, which] is always demeaning," and coerces individuals "into betraying their convictions." *Id.*

B. Protected Speech

¶56 To prevail on their compelled speech claim, Plaintiffs first must show that their custom wedding invitations are protected speech under the First Amendment. See *Hurley*, 515 U.S. at 568–70, 115 S.Ct. 2338 (examining whether, as a threshold matter, a parade involves protected speech); see also *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (FAIR)*, 547 U.S. 47, 64, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (determining, as an initial matter, that access to law school interview rooms did not involve protected speech); *Coleman*, 230 Ariz. at 357 ¶ 18, 284 P.3d at 868 ("To determine if the Colemans have stated a claim for a violation of their free speech rights, we must determine whether tattooing is constitutionally protected expression.").

¶57 Plaintiffs assert that their custom invitations are "pure speech," and therefore fully protected. The City, however, contends that Plaintiffs' invitations contain no constitutionally relevant speech component. Rather, according to the City, applying the Ordinance to require Duka and Koski to create custom invitations for same-sex weddings purely involves conduct, without implicating speech.

1. Pure Speech

¶58 Pure speech is protected under both the Arizona Constitution and the First Amendment. *Coleman*, 230 Ariz. at 357–58 ¶¶ 18–19, 361 ¶ 36 n.5, 284 P.3d at 868–69, 872; see also *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010). Pure speech includes written and spoken words, as well as other media such as paintings, music, and film "that predominantly serve to express thoughts, emotions, or ideas." *Coleman*, 230 Ariz. at 358 ¶ 18, 284 P.3d at 869; see also *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (stating that books, plays, films, and video games are protected pure speech); *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (stating that music, painting, and poetry are examples of speech that are "unquestionably shielded" under the First Amendment); *Kaplan v. California*, 413 U.S. 115, 119–20, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973) (stating that "pictures, films, paintings, drawings, and engravings" enjoy First Amendment protection). Additionally, this **906 *285 Court has concluded that tattoos are pure speech. *Coleman*, 230 Ariz. at 358–59 ¶ 23, 284 P.3d at 869–70 (citing *Anderson*, 621 F.3d at 1059–60 (holding that tattoos are pure speech and thus "entitled to full First Amendment protection"))).

¶59 Pure speech also includes original artwork. See *Cressman v. Thompson*, 798 F.3d 938, 952 (10th Cir. 2015) (holding that paintings, drawings, and original artwork are protected pure speech); *White v. City of Sparks*, 500 F.3d 953, 955–56 (9th Cir. 2007) (stating that original artwork is protected speech); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (same); *Bery v. City of New York*, 97 F.3d 689, 694–96 (2d Cir. 1996) (same). As one court has stated, the First Amendment protects "art for art's sake." *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 628 (7th Cir. 1985); see also *Jucha v. City of North Chicago*, 63 F. Supp. 3d 820, 825 (N.D. Ill. 2014) ("There is no doubt that the First Amendment protects artistic expression.").

¶60 Protection for pure speech is not solely based on the medium itself. See *Coleman*, 230 Ariz. at 359 ¶ 24, 284 P.3d at 870 (stating that "whether or not something is 'speech' protected by the First Amendment cannot focus upon the medium chosen for its expression" (citation and internal quotation marks omitted)). Rather, words, pictures, paintings, and films qualify as pure speech when they are used by a person as a means of self-expression. See *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (stating that self-expression exists where the speaker is "intimately connected with the communication advanced"); *Cressman*, 798 F.3d at 954 ("Pure-speech treatment is only warranted for those images

whose creation is itself an act of self-expression.”); *Jucha*, 63 F. Supp. 3d at 827 (stating that pure speech involves self-expression through art and other forms of “expressive media”). Thus, for example, a painting is pure speech when an artist paints it to express his personal “vision of movement and color.” *White*, 500 F.3d at 956.

¶61 In addition to pure speech, the First Amendment also protects conduct that is “sufficiently imbued with elements of communication.” *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)); see *Coleman*, 230 Ariz. at 358 ¶ 19, 284 P.3d 863. However, because “an apparently limitless variety of conduct can be labeled ‘speech,’ ” *United States v. O’Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), an “interpretive step” is necessary to determine whether conduct contains an expressive element. *Anderson*, 621 F.3d at 1061. To make this determination, the Supreme Court has formulated a two-part test (referred to as the “*Spence-Johnson* test”): (1) whether the speaker intends for the conduct to convey a “particularized message,” and (2) the “likelihood [is] great” that a reasonable third-party observer would understand the message. *Spence*, 418 U.S. at 410–11, 94 S.Ct. 2727; see *Johnson*, 491 U.S. at 404, 109 S.Ct. 2533; *Coleman*, 230 Ariz. at 358 ¶ 19, 284 P.3d at 869 (discussing the *Spence-Johnson* test).

¶62 Courts do not apply the *Spence-Johnson* test to pure speech. For example, in *Hurley*, the Court stated that “a narrow, succinctly articulable message is not a condition of constitutional protection” for expression such as the “painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” 515 U.S. at 569, 115 S.Ct. 2338; see also *Anderson*, 621 F.3d at 1060 (citing *Hurley* for the proposition that the *Spence-Johnson* test does not apply to pure speech); *Coleman*, 230 Ariz. at 359 ¶ 27, 284 P.3d at 870 (citing *Hurley* for the proposition that the *Spence-Johnson* test “does not apply to paintings and music”); *Klein v. Or. Bureau of Labor & Indus.*, 289 Or.App. 507, 410 P.3d 1051, 1069–70 (2017) (citing *Hurley* for the proposition that “a particularized, discernible message is not a prerequisite for First Amendment protection” for various forms of pure speech, such as art, music, and video games), *vacated and remanded for further consideration*, — U.S. —, 139 S. Ct. 2713, — L.Ed.2d — (2019) (mem.).

¶63 Likewise, in *Coleman*, we stated that “purely expressive activity,” or pure speech, “is entitled to full First Amendment

protection,” but “conduct with an expressive component” **907 *286 is only protected if it satisfies the *Spence-Johnson* test. 230 Ariz. at 358 ¶ 19, 284 P.3d at 869 (quoting *Anderson*, 621 F.3d at 1059); see also *Anderson*, 621 F.3d at 1060 (holding that pure speech is protected “without relying on the *Spence-Johnson* test”); *Jucha*, 63 F. Supp. 3d at 827 (holding that “where the case involves purely expressive works of art or other expressive media, it is not appropriate to apply *Spence*”); cf. *Klein*, 410 P.3d at 1070 n.8 (stating that “as we understand the Supreme Court to have held[], because the creation of artwork and other inherently expressive acts are unquestionably undertaken for an expressive purpose, they need not express an articulable message to enjoy First Amendment protection”).

2. Business Activity

¶64 Generally, there is no free speech protection for non-expressive business activities. See *Coleman*, 230 Ariz. at 360 ¶ 31, 284 P.3d at 871 (stating that “generally applicable laws, such as taxes, health regulations, or nuisance ordinances, may apply to” expressive businesses); see also *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 139–40, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969) (holding that there is no First Amendment protection for newspaper publishing companies that engage in specific monopolistic commercial practices that violate antitrust laws); *Okla. Press Publ’g Co. v. Walling*, 327 U.S. 186, 192–93, 66 S.Ct. 494, 90 L.Ed. 614 (1946) (holding that the Fair Labor Standards Act applies to all business and that there is no First Amendment exemption from the Act for newspaper publishing and distribution companies).

¶65 However, some businesses, like tattoo studios and video game companies, do create and sell products that are protected free speech. *Brown*, 564 U.S. at 790, 131 S.Ct. 2729 (video games); *Coleman*, 230 Ariz. at 355 ¶ 2, 284 P.3d at 866 (tattoos). For such products, both the finished product and the process of creating that product are protected speech. *Coleman*, 230 Ariz. at 360 ¶ 26, 284 P.3d at 871 (holding that “the process of tattooing is expressive activity”).

¶66 A business does not forfeit the protections of the First Amendment because it sells its speech for profit. As we stated in *Coleman*, the “degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away.” 230 Ariz. at 360 ¶ 31, 284 P.3d at 871 (alteration in original) (quoting *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 756 n.5, 108

S.Ct. 2138, 100 L.Ed.2d 771 (1988)). Likewise, the Supreme Court stressed in *Riley* that “a speaker’s rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.” 487 U.S. at 801, 108 S.Ct. 2667; see also *Hurley*, 515 U.S. at 573–74, 115 S.Ct. 2338 (stating the right to autonomy of speech and freedom from compelled speech is “enjoyed by business corporations generally,” including “professional publishers”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) (holding that motion picture companies that operate for profit are “a form of expression whose liberty is safeguarded by the First Amendment”).

¶67 However, simply because a business creates or sells speech does not mean that it is entitled to a blanket exemption for all its business activities. Like other organizations and associations, no business “is likely ever to be exclusively engaged in expressive activities,” and even the most expressive business will be engaged in non-expressive business activities. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 635, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (O’Connor, J., concurring in part and in the judgment). Thus, for example, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385–88, 390–91, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973), the Supreme Court held that while the First Amendment protected the content of articles published by a newspaper, it did not protect the newspaper’s facilitation of illegal hiring practices by publishing gender-specific employment advertisements. See also *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 698–99, 705–06 & n.3, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) (holding that adult bookstore owner, who allowed prostitution to be solicited on his business premises, was engaged in “‘nonspeech’ conduct” that “manifest[ed] ***908 *287 absolutely no element of protected expression,” and stating that “First Amendment values may not be invoked by merely linking the words ‘sex’ and ‘books’ ”); *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (stating that while law firms may engage in free speech and freedom of association, there is no free speech protection to engage in discriminatory employment practices).

3. Plaintiffs’ Custom Wedding Invitations

¶68 Here, the First Amendment does not protect all of Plaintiffs’ business activities or products simply because they operate Brush & Nib as an “art studio.” However, Plaintiffs’ custom wedding invitations, and the process of

creating them, are protected by the First Amendment because they are pure speech. Each custom invitation created by Duka and Koski contains their hand-drawn words, images, and calligraphy, as well as their hand-painted images and original artwork. Additionally, Duka and Koski are intimately connected with the words and artwork contained in their invitations. See *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (stating that protected speech involves communications that are “intimately connected” with the speaker). For each invitation, Duka and Koski spend many hours designing and painting custom paintings, writing words and phrases, and drawing images and calligraphy. Moreover, they insist on retaining artistic control over the ideas and messages contained in the invitations to ensure they are consistent with their religious beliefs.

¶69 In short, here, like tattoos and the process of tattooing in *Coleman*, Plaintiffs’ custom wedding invitations, and the creation of those invitations, constitute pure speech entitled to full First Amendment protection. 230 Ariz. at 359 ¶¶ 23, 26, 284 P.3d at 870.

¶70 The City argues, however, that Plaintiffs’ custom invitations do not implicate pure speech protection because they often only convey “logistical” information (such as date, time, and location) about a wedding. Thus, like the scheduling emails in *FAIR*, the City contends that Plaintiffs’ custom invitations do not implicate speech in a constitutionally relevant way.

¶71 We disagree. The City concedes that every custom invitation contains “language that is celebratory of the wedding.” Moreover, viewing the invitations as a whole, it is clear that Plaintiffs’ artwork, calligraphy, and hand-lettering is designed to express a celebratory message about each wedding. See *Riley*, 487 U.S. at 795–96, 108 S.Ct. 2667 (stating that courts view the expressive content of speech as a whole, and do not separately analyze each word and phrase); cf. *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338 (stating that a parade, as a form of expression, must be viewed as a whole, and cannot be reduced to “just motion” or simply the observable fact that it involves a group of people marching from one destination to another). Moreover, Plaintiffs’ inclusion of original artwork and celebratory words and phrases has an emotive impact on the overall message of the invitations. See *Cohen v. California*, 403 U.S. 15, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (stating that in analyzing speech, words “are often chosen as much for their emotive as their cognitive force,” and the emotional force “may often be

the more important element of the overall message sought to be communicated”).

¶72 The City’s comparison of this case to *FAIR* is inapt. In *FAIR*, an association of law schools and law faculties challenged the constitutionality of the Solomon Amendment. 547 U.S. at 52–53, 126 S.Ct. 1297. That law required the Department of Defense to deny federal funding to any institution of higher education, including law schools, that prohibited military recruiters from gaining access to campuses. *Id.* at 51–53, 126 S.Ct. 1297. Because Congress had adopted a “Don’t Ask, Don’t Tell” policy excluding gays and lesbians from serving in the military, FAIR objected, on free speech grounds, to providing the military access to their campuses for recruiting purposes. *See id.* at 52–53 & n.1, 126 S.Ct. 1297.

¶73 The Court rejected FAIR’s free speech claim. Specifically, it concluded that FAIR’s actions in denying or granting access to their campuses involved conduct, not speech. *Id.* at 62, 126 S.Ct. 1297. Additionally, **909 *288 the Court stated that the emails and notices FAIR sent to students advising them about the dates, times, and locations the military was on campus were “plainly incidental to the Solomon Amendment’s regulation of conduct.” *Id.* Simply because FAIR used words “either spoken, written, or printed” as a means to grant access to their campuses did not transform FAIR’s conduct into personal expression. *See id.* (citation omitted).

¶74 At bottom, the Court recognized that FAIR could not identify any personal expression or speech intimately connected with permitting access to a room on a law school campus. *See id.* at 63–65, 126 S.Ct. 1297; *see also Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (holding that protected speech exists when the speaker is “intimately connected with the communication advanced”). The Court concluded that “the schools are not speaking when they host interviews and recruiting receptions” and that “a law school’s decision to allow recruiters on campus is not inherently expressive.” *FAIR*, 547 U.S. at 64, 126 S.Ct. 1297; *see Telescope Media Group v. Lucero*, 2019 WL 3979621 at *9 (8th Cir. Aug. 23, 2019) (stating that *FAIR* “was [] about the availability of a forum,” and that the “Supreme Court upheld the law because it did not interfere with the law schools’ expression or coopt their speech” because “[s]imply hosting recruiters was not speech”); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76–78, 87–88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (rejecting compelled speech claim where the

owner of a shopping center failed to identify any personal expression intimately connected with the shopping center and the challenged law merely required him to open his property to speakers without forcing him to speak).

¶75 This case bears no resemblance to *FAIR*. Here, Plaintiffs’ custom wedding invitations, and the creation of those invitations, constitute pure speech; Plaintiffs use their original artwork, paintings, hand-drawn images, words, and calligraphy as a means of personal expression. In contrast, FAIR was not “intimately connected” with the empty interview rooms on their campuses, nor was it compelled to create emails containing words, phrases, and artwork celebrating the military’s presence on campus.

¶76 The City claims, however, that Plaintiffs’ refusal is not really based on speech, but rather discriminatory conduct directed at a customer’s sexual orientation. The dissent similarly, but incorrectly, asserts that Plaintiffs seek to decline products or services based merely on Plaintiffs disfavoring or disapproving of certain customers. But these arguments misstate Plaintiffs’ position and are not supported by the record. Duka and Koski neither testified nor argue that their faith prohibits them from serving a customer based on their sexual orientation. Rather, Duka and Koski have testified that they are willing to serve any customer, regardless of status, and no contrary evidence has been presented. Additionally, the record contains no complaints against Plaintiffs for discriminating against customers based on their sexual orientation.

¶77 Nonetheless, the City argues that Plaintiffs’ discriminatory intent is shown by the fact that, apart from one name, a custom invitation for a same-sex couple is identical to one for a heterosexual couple. We reject this rather myopic view of the invitations, which defies the very nature of speech and art. Speech must be viewed as a whole, and even one word or brush stroke can change its entire meaning. *See Cohen*, 403 U.S. at 26, 91 S.Ct. 1780; *see also Telescope Media Group*, 2019 WL 3979621 at *4 (stating that owners of wedding videography business did not create “simple recordings, the product of planting a video camera at the end of the aisle and pressing record. Rather, they intend to shoot, assemble, and edit the videos with the goal of expressing their own views about the sanctity of marriage”). For example, in *Hurley*, the Supreme Court determined that one banner in a parade of 20,000 participants changed the expressive content of the entire parade. 515 U.S. at 560–61, 572–75, 115 S.Ct. 2338. Thus, for Duka and Koski, writing the names of two men or

two women (even when the names could refer to either a male or female) clearly *does* alter the overall expressive content of their wedding invitations. *Cf. Kaahumanu v. Hawaii*, 682 F.3d 789, 799 (9th Cir. 2012) (stating that, in the context of ****910 *289** expressive conduct, “[w]edding ceremonies convey important messages about the couple, their beliefs, and their relationship to each other and to their community”).

¶78 Ultimately, the City’s analysis is based on the flawed assumption that Plaintiffs’ custom wedding invitations are fungible products, like a hamburger or a pair of shoes. They are not. Plaintiffs do not sell “identical” invitations to anyone; every custom invitation is different and unique. For each invitation, Duka and Koski create different celebratory messages, paintings and drawings; they also personally write, in calligraphy or custom hand-lettering, the names of the specific bride and groom who are getting married. In short, Plaintiffs do not create the same wedding invitation for *any* couple, regardless of whether the wedding involves a man and a woman *or* a same-sex couple.

¶79 Next, both the City and the dissent contend that while the custom invitations themselves may contain protected speech, Plaintiffs’ refusal to create them for, and sell them to, a customer for a same-sex wedding does not implicate speech. We disagree. The process of creating and selling pure speech, which undeniably involves decisions about what to create and what not to create, is protected by the First Amendment. *Coleman*, 230 Ariz. at 359 ¶ 26, 360 ¶ 31, 284 P.3d at 870, 871 (holding that “the process of tattooing is expressive activity” and expressly rejecting a distinction between a business and the speech it creates); *see Brown*, 564 U.S. at 792 n.1, 131 S.Ct. 2729 (stating that with respect to protection of free speech, “[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference.”); *Telescope Media*, 2019 WL 3979621 at *5, 8 (rejecting the state’s argument that a public accommodation law only regulated wedding videography owners’ conduct, not their speech, and concluding that although “producing a video requires several actions, that, individually, might be mere conduct,” what was relevant for its free speech analysis “is that these activities come together to produce finished videos that are medi[a] for the communication of ideas.”) (internal quotations omitted); *Anderson*, 621 F.3d at 1060, 1062–63 (holding that like the tattoo itself, both the process and business of tattooing are protected under the First Amendment); *White*, 500 F.3d at 954 (holding that “an artist’s *sale* of his original artwork constitutes speech protected under the First Amendment” (emphasis added));

see also Riley, 487 U.S. at 795–96, 108 S.Ct. 2667 (holding that both the contributions subsidizing free speech and the professional fundraiser’s solicitation efforts in raising those contributions must be examined “as a whole,” and, as a result, the test for “fully protected expression” must be applied to both); *cf. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108, 123, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (holding that a statute regulating the income generated from books and other media by those accused or convicted of a crime constituted an impermissible regulation of speech).

¶80 The City also argues that because Plaintiffs’ refusal affects only same-sex couples, their refusal is essentially a proxy for discrimination based on sexual orientation. We disagree. The fact that Plaintiffs’ message-based refusal primarily impacts customers with certain sexual orientations does not deprive Plaintiffs of First Amendment protection. For example, in *Hurley*, the Council’s decision to exclude GLIB’s banner effectively excluded any other parade participants who may have wanted to express their pride in their sexual orientation by marching behind similar banners. But because the impact was based on *message*, not *status*, it was protected. *See Hurley*, 515 U.S. at 572–76, 580–81, 115 S.Ct. 2338; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653–54, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (discussing *Hurley* and stating “that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner”); *cf. Masterpiece Cakeshop*, 138 S. Ct. at 1723 (stating that if a wedding cake baker “refused to design a special cake with words or images celebrating the marriage ... that might be different from a refusal to sell any cake at all” and that “these details might make a difference”).

****911 *290** ¶81 The City’s reliance on *Christian Legal Society v. Martinez*, 561 U.S. 661, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010), and *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), is misplaced. Those cases stand for the proposition that a governmental regulation targeting a person’s sexual conduct is, in effect, a law that discriminates based on a person’s sexual orientation. *See Christian Legal Soc’y*, 561 U.S. at 672, 675, 689, 130 S.Ct. 2971 (relying on *Lawrence* and concluding that there was no difference between an organization’s exclusion of individuals who engage in “unrepentant homosexual conduct” and exclusion of persons based on their sexual orientation); *Lawrence*, 539 U.S. at 583, 123 S.Ct. 2472 (O’Connor, J., concurring in the judgment) (reasoning that “there can

hardly be more palpable discrimination against a class than making the conduct that defines the class criminal” (citation omitted)).

¶82 Here, Plaintiffs’ objection is based on neither a customer’s sexual orientation nor the sexual conduct that defines certain customers as a class. Plaintiffs will make custom artwork for any customers, regardless of their sexual orientation, but will not, regardless of the customer, make custom wedding invitations celebrating a same-sex marriage ceremony. Thus, although Plaintiffs’ refusal may, like *Hurley*, primarily impact same-sex couples, their decision is protected because it is not based on a customer’s sexual orientation.

¶83 The City also claims that the invitations are the customer’s speech, not Plaintiffs’ speech. According to the City, because Plaintiffs include the information requested by the customer, they merely serve as a scribe, or conduit, for the customer’s speech.

¶84 This argument is not supported by the record. Duka and Koski are involved in every aspect of designing and creating the invitations, and they retain substantial (if not complete) artistic control over the messages that are expressed in the invitations. See *supra* ¶¶ 9–14. Clearly, Duka and Koski are more than a “scribe” for the customer.

¶85 But more importantly, the fact that the invitations may contain the speech of both Plaintiffs and their customers does not mean that Plaintiffs’ speech is unprotected. In *Hurley*, the Court rejected the government’s argument that the parade did not include the personal expression of the Council because it incorporated speech originally created by others. See 515 U.S. at 569–70, 115 S.Ct. 2338. The Court stated that “First Amendment protection [does not] require a speaker to generate, as an original matter, each item featured in the communication.” *Id.* at 570, 115 S.Ct. 2338; see also *Riley*, 487 U.S. at 794 n.8, 108 S.Ct. 2667 (stating that even though “the fund-raiser, not the charity, [was] the object of the regulation[, f]ining the fund-raiser” for its solicitation efforts to subsidize “speech for the charity has an obvious and direct relation to [not only] the charity’s speech,” but also the fundraiser, who “has an independent First Amendment interest in the speech”).

¶86 Likewise, in *Coleman*, we recognized that “a tattoo reflects not only the work of the tattoo artist but also the self-expression of the person displaying the tattoo’s relatively permanent image.” 230 Ariz. at 359 ¶ 25, 284 P.3d at 870.

Thus, we concluded that a tattoo is the protected speech of both the customer and the artist, even when the artist uses a standard message or design to create the tattoo. *Id.* at 358 ¶ 23, 360 ¶ 30, 284 P.3d at 869, 871; see also *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015) (holding that tattoos display the message of both the artists and the customer); *Anderson*, 621 F.3d at 1062 (holding that “[a]s with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in expressive activity”).

¶87 The City and the dissent make several other arguments, none of which is persuasive. For example, both the City and the dissent claim that, to an objective observer, the custom invitations do not necessarily convey a message which they describe as “endorsing” same-sex marriage. This argument, however, erroneously applies the *Spence-Johnson* test for expressive conduct to pure speech. See *supra* ¶¶ 61–63. Whether a third party is able to discern any articulable “message” in pure speech, especially artwork, is simply irrelevant in terms of whether it is protected under the First Amendment. Nothing illustrates this principle more clearly than *Coleman*. There, we held that tattoos are protected pure speech, even though, as a practical matter, the message or meaning of many tattoos may well be indecipherable to an objective observer. But, because the tattoos contained the personal expression of the artist, we held the tattoos were protected pure speech. 230 Ariz. at 358–59, 360 ¶¶ 18, 23–26, 30, 284 P.3d at 869–70, 871; see *supra* ¶¶ 63, 85–86.

¶88 In a related argument, the City and the dissent claim that if Plaintiffs have any protected speech rights in their invitations, it is limited to statements expressly “endorsing” or “supporting” same-sex marriage. This argument simply ignores Plaintiffs’ right to refuse to create messages that “celebrate” a same-sex wedding. Possibly the dissent ignores this right because, as the City concedes, every custom invitation Plaintiffs create contains “language that is celebratory of the wedding.” *Supra* ¶ 11. And, of course, there is no legal justification for holding that free speech only protects messages that “endorse” or “support” same-sex weddings but not messages celebrating such weddings. Indeed, as the Supreme Court has stated, the right to free speech includes any “medium for the communication of ideas” that “may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which

characterizes all artistic expression.” *Burstyn*, 343 U.S. at 501, 72 S.Ct. 777.

¶89 The City also argues that because the invitations are sold for profit, they are a form of commercial activity, not speech. But the fact that Plaintiffs sell the custom invitations for profit has no bearing on their First Amendment protection.

¶90 In a similar vein, the dissent claims that because Plaintiffs operate Brush & Nib as a public accommodation, their free speech rights must give way to the Ordinance. However, as we explain, *infra* ¶¶ 107, 153–54, public accommodation laws are not immune to the First Amendment.

¶91 The remaining arguments raised by the dissent are equally unavailing. For example, the dissent claims that there is no compelled speech because “nothing requires Brush & Nib to identify itself as the supplier of an invitation or precludes it from disclaiming that its sales constitute an endorsement of the beliefs of its customers.” *Infra* ¶ 201. However, the essence of free speech protection is a person’s autonomy over what to say and when to say it. *See Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (stating that “protection of a speaker’s freedom would be empty” if “the government could require speakers to affirm in one breath that which they deny in the next.”) (brackets and citation omitted); *Telescope Media*, 2019 WL 3979621 at *9 (same). We fail to see how Plaintiffs’ autonomy over their speech is protected by requiring them to conceal their identity as artists and to disclaim any responsibility for creating artwork that contradicts their religious beliefs.

¶92 Additionally, by claiming that we “implausibly characterize[] [Plaintiffs’] commercially prepared wedding invitation as ‘pure speech,’ ” *infra* ¶ 183, the dissent creates a confusing and arbitrary line. For example, if, as we concluded in *Coleman*, a business tattooing images such as skulls, snakes, and barbed wire fences on a person’s skin is creating pure speech (even if these images are based on standard designs and patterns), how is Plaintiffs’ creation of original paintings, artwork, and celebratory messages for their custom invitations not pure speech? *See* 230 Ariz. at 360 ¶ 30, 284 P.3d at 871.

¶93 Accordingly, we conclude that Plaintiffs’ custom wedding invitations, and the creation of those invitations, constitute protected pure speech.

C. Level of Scrutiny

¶94 Because the custom invitations are protected pure speech, we must determine whether the Ordinance violates Plaintiffs’ free speech rights. To make this determination, we must first decide what level of scrutiny applies to the Ordinance. This requires us to examine whether the Ordinance is a content-neutral or content-based regulation of speech, or merely a regulation of conduct. *Turner Broad.*, 512 U.S. at 637, 642, 114 S.Ct. 2445 (stating that, after concluding **913 *292 cable programmers and operators were engaged in protected speech activities, a court must then decide whether the law regulates speech in a content-neutral or content-based way, which determines the appropriate level of scrutiny).

¶95 Plaintiffs assert that the Ordinance, as applied by the City, is content-based because it compels them to create custom invitations expressing messages that celebrate same-sex marriage. As a result, Plaintiffs contend the Ordinance is subject to strict scrutiny. In contrast, the City argues the Ordinance purely regulates discriminatory conduct, not speech, and therefore is subject to the rational basis test.

¶96 First, “laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.” *Turner Broad.*, 512 U.S. at 643, 114 S.Ct. 2445; *see also Reed v. Town of Gilbert*, — U.S. —, 135 S. Ct. 2218, 2227, 192 L.Ed.2d 236 (2015). A law may also be content-based “if its manifest purpose is to regulate speech because of the message it conveys.” *Turner Broad.*, 512 U.S. at 645, 114 S.Ct. 2445. Content-based laws must satisfy strict scrutiny. *Reed*, 135 S. Ct. at 2227. Thus, such laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* at 2226.

¶97 Second, content-neutral laws that regulate non-expressive conduct, and not speech, are subject to the rational basis test. *See Coleman*, 230 Ariz. at 358 ¶ 19, 284 P.3d at 869 (stating that “if the conduct is not ‘sufficiently imbued with elements of communication,’ then the regulation need only be rationally related to a legitimate governmental interest” (quoting *Anderson*, 621 F. 3d at 1059)).

¶98 Third, content-neutral regulations “that impose an incidental burden on speech” are subject to intermediate scrutiny. *Turner Broad.*, 512 U.S. at 662, 114 S.Ct. 2445. Under intermediate scrutiny, a law is justified if:

(1) “it furthers an important or substantial governmental interest,” (2) “the governmental interest is unrelated to the suppression of free expression,” and (3) any restriction on speech is incidental and “no greater than is essential” to further the government interest. *Id.* (quoting *O’Brien*, 391 U.S. at 377, 88 S.Ct. 1673).

¶99 Finally, a facially content-neutral law may, as applied to a particular plaintiff, operate as a content-based law. For example, in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010), a facially content-neutral statute that “generally function[ed] as a regulation of conduct” was, as applied to plaintiffs, a content-based statute because “the conduct triggering coverage under the statute consist[ed] of communicating a message.” See also *Masterpiece Cakeshop*, 138 S. Ct. at 1741 (Thomas, J., concurring) (stating that “[a]lthough public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech”); cf. *Dale*, 530 U.S. at 644, 120 S.Ct. 2446 (holding that a public accommodations law that was applied to force the Boy Scouts, in violation of their organizational values, to admit a gay man, who was a gay and lesbian rights advocate, violated their freedom of association under the First Amendment).

¶100 When a facially content-neutral law is applied by the government to compel speech, it operates as a content-based law. Thus, laws that “[m]andate[d] speech that a speaker would not otherwise make necessarily alters the content of the speech” and are therefore considered “content-based regulation[s] of speech.” *Riley*, 487 U.S. at 795, 108 S.Ct. 2667; see *Telescope Media*, 2019 WL 3979621 at *6 (stating that “[l]aws that compel speech or regulate it based on its content are subject to strict scrutiny”).

¶101 *Hurley* is instructive on this issue. In *Hurley*, the Court addressed a public accommodations law that did “not, on its face, target speech or discriminate on the basis of its content,” but focused on prohibiting “the act of discriminating against individuals in the provision of publicly available goods, privileges, and services.” 515 U.S. at 572, 115 S.Ct. 2338. However, the Court observed that the public accommodations law had been applied **914 *293 “in a peculiar way.” *Id.* Specifically, the law was not being applied to “address any dispute about the participation of openly gay, lesbian, or bisexual individuals” in the parade. *Id.* Indeed, like Plaintiffs here, the Council “disclaim[ed] any intent to exclude homosexuals as such, and no individual member of GLIB claim[ed] to have been excluded from parading

as a member of any group that the Council ha[d] approved to march.” *Id.* Rather, because GLIB’s banner affected the expressive content of their parade, *Hurley* concluded that the “application of the statute produced an order essentially requiring [the Council] to alter the expressive content of their parade,” and therefore “had the effect of declaring the sponsors’ speech itself to be the public accommodation.” *Id.* at 572–73, 115 S.Ct. 2338. As a result, the Court held that the public accommodations law, as applied to the Council’s parade, was unconstitutional because it compelled the Council “to modify the content of their expression.” *Id.* at 578, 115 S.Ct. 2338; see also *Riley*, 487 U.S. at 795, 108 S.Ct. 2667 (holding that law was content-based because it “[m]andate[d] speech that a speaker would not otherwise make”); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (holding that city’s public accommodations law as applied to plaintiffs compelled speech in violation of the First Amendment); cf. *Klein*, 410 P.3d at 1069 (recognizing public accommodation law may be “subject to strict scrutiny” if it was applied “to require the creation of pure speech or art”).

¶102 Here, the Ordinance, like other public accommodations laws, prohibits businesses from denying access to equal goods and services to certain protected groups. Thus, by its terms, the Ordinance is a facially content-neutral law that generally targets discriminatory conduct, not speech. See *Hurley*, 515 U.S. at 572, 115 S.Ct. 2338; see also *Masterpiece Cakeshop*, 138 S. Ct. at 1741 (Thomas, J., concurring) (stating that “public-accommodations laws generally regulate conduct”). Additionally, there is no evidence that the purpose of the Ordinance is to regulate speech.

¶103 However, the Ordinance, as applied to Plaintiffs’ custom wedding invitations, operates as a content-based law. Under the City’s application of the Ordinance, Duka and Koski face the threat of criminal prosecution, jail, fines, or closure of their business if they refuse to create custom invitations celebrating same-sex weddings. Thus, based on its onerous penalties, the Ordinance coerces Plaintiffs into abandoning their convictions, and compels them to write celebratory messages with which they disagree, such as “come celebrate the wedding of Jim and Jim,” or “share in the joy of the wedding of Sarah and Jane.” See *Telescope Media*, 2019 WL 3979621 at *6 (holding that state public accommodations law operated as a content-based regulation of owners’ wedding video business “[b]y treating the [owners’] choice to talk about one topic—opposite-sex marriages—as a trigger for compelling them to talk about a topic they would rather

avoid—same-sex marriages”). In short, like *Hurley*, the City’s application of the Ordinance in this case essentially declares Plaintiffs’ “speech itself to be the public accommodation.” *Hurley*, 515 U.S. at 572–73, 115 S.Ct. 2338.

¶104 Accordingly, because the Ordinance “necessarily alters the content” of Plaintiffs’ speech by forcing them to engage in speech they “would not otherwise make,” it must survive strict scrutiny. *Riley*, 487 U.S. at 795, 108 S.Ct. 2667.

D. Applying Strict Scrutiny

¶105 Under the strict scrutiny test, the City has the burden of showing that the Ordinance (1) furthers a compelling government interest and (2) is narrowly tailored to achieve that interest. *NIFLA*, 138 S. Ct. at 2371.

¶106 The Ordinance generally serves the compelling interest of ensuring equal access to publicly available goods and services for all citizens, regardless of their status. *See Jaycees*, 468 U.S. at 624, 104 S.Ct. 3244 (holding that the state’s “strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services ... plainly serves compelling state interests of the highest order”). However, that interest is not sufficiently overriding as to justify compelling Plaintiffs’ speech by commandeering *915 *294 their creation of custom wedding invitations, each of which expresses a celebratory message, as the means of eradicating society of biases.

¶107 In *Hurley*, the Supreme Court rejected any suggestion that a public accommodations law could justify compelling speech. The Court explained that although the government may prohibit “the act of discriminating against individuals in the provision of publicly available goods, privileges, and services,” it may not “declar[e] [another’s] speech itself to be [a] public accommodation” or grant “protected individuals ... the right to participate in [another’s] speech.” 515 U.S. at 572–73, 115 S.Ct. 2338. The Court observed that it may be argued “that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases,” and therefore “[r]equiring access to a speaker’s message would thus be not an end in itself, but a means to produce speakers free of the biases.” *Id.* at 578–79, 115 S.Ct. 2338. The Court concluded, however, that “if this indeed is the point of applying the [public accommodations] law to expressive conduct, it is a decidedly

fatal objective,” because “[w]hile 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.” *Id.* at 579, 115 S.Ct. 2338; *see Telescope Media*, 2019 WL 3979621 at *7 (stating that “[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution. And as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment”).

¶108 Accordingly, like *Hurley*, the City has failed to demonstrate that the Ordinance, as applied to Plaintiffs’ creation of custom wedding invitations, furthers a compelling governmental interest.

¶109 The dissent claims, however, that *Hurley* is “inapposite” because the compelled speech violation there involved the application of a public accommodations law to a privately organized parade, not a for-profit public accommodation like *Brush & Nib*. But *Hurley* made no such distinction. To the contrary, the Court stated that the right to autonomy of speech and freedom from compelled speech is “enjoyed by business corporations generally,” including “professional publishers.” *Hurley*, 515 U.S. at 573–74, 115 S.Ct. 2338. Indeed, as noted above, *supra* ¶ 101, what the Court considered “peculiar” was not the application of the public accommodations law to a privately organized parade, but application of the law to compel speech. 515 U.S. at 572–73, 115 S.Ct. 2338. Consistent with *Hurley*, the Supreme Court has never limited the compelled speech doctrine to non-profit organizations and has, on many occasions, applied that doctrine to for-profit businesses. *See Pac. Gas & Elec. Co.*, 475 U.S. at 6–7, 16–17, 106 S.Ct. 903 (applying the compelled speech doctrine to a for-profit, privately-owned utility); *Miami Herald Publ’g Co.*, 418 U.S. at 244, 256–58, 94 S.Ct. 2831 (applying the compelled speech doctrine to a newspaper company); *see also Coleman*, 230 Ariz. at 360 ¶ 31, 284 P.3d at 871 (“[T]he degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away.” (alterations in original) (quoting *Plain Dealer Publ’g*, 486 U.S. at 756 n.5, 108 S.Ct. 2138)); *Telescope Media*, 2019 WL 3979621 at *5–9 (applying the compelled speech doctrine to a for-profit, privately owned wedding video business operating as a public accommodation).

¶110 Additionally, because the purpose of the Ordinance is to regulate conduct, not speech, regulating Plaintiffs’

speech is not narrowly tailored to accomplish this goal. As the Court stated in *Riley*, “government regulation of speech must be measured in minimums, not maximums,” and that in seeking to promote a valid government interest, it should avoid adopting “a prophylactic rule of compelled speech” that is “unduly burdensome and not narrowly tailored.” 487 U.S. at 790, 798, 108 S.Ct. 2667; see also *Pac. Gas & Elec. Co.*, 475 U.S. at 19, 106 S.Ct. 903 (holding that a regulation was not “a narrowly tailored means of serving a compelling state interest” because, although “[t]he State’s interest in fair and effective utility **916 *295 regulation may be compelling[,] ... the State can serve that interest through means that would not violate appellant’s First Amendment rights”); *NAACP v. Button*, 371 U.S. 415, 433, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (“Because First Amendment freedoms need breathing space to survive, ... [b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” (citations omitted)).

¶111 We therefore conclude that because the Ordinance as applied to Plaintiffs’ creation of custom wedding invitations cannot survive strict scrutiny, the Ordinance runs afoul of the First Amendment, which “necessarily implies” a violation of Plaintiffs’ broader free speech right under article 2, section 6 of the Arizona Constitution. *Coleman*, 230 Ariz. at 361 ¶ 36 n.5, 284 P.3d at 872; see also *Mountain States*, 160 Ariz. at 358, 773 P.2d at 463.

¶112 The City’s concern that our decision will undermine the antidiscrimination purpose of the Ordinance, or that it will encourage other businesses to use free speech as a pretext to discriminate against protected groups, is unwarranted. Our holding today is limited to Plaintiffs’ creation of one product: custom wedding invitations that are materially similar to the invitations contained in the record. *Supra* ¶ 3. These invitations, unlike most commercial products and services sold by public accommodations, are unique because they consist of protected pure speech.

¶113 Nothing in our holding today allows a business to deny access to goods or services to customers based on their sexual orientation or other protected status. See *Telescope Media*, 2019 WL 3979621 at *10 (holding that, although the state public accommodations law must give way to the owners’ free speech rights to refuse to create videos celebrating same-sex marriage, this holding “leaves intact other applications of the [law] that do not regulate speech based on its content or

otherwise compel an individual to speak.”). Additionally, the dissent’s claim that our holding conflicts with cases such as *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964), and *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941 (D. S.C. 1966), *aff’d in part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d as modified on other grounds*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (per curiam), is incorrect. Those cases did not involve compelled speech, but rather business owners who refused to serve African-Americans based solely on their race, a practice Plaintiffs expressly condemn, and that our holding clearly neither permits nor condones. See *Heart of Atlanta*, 379 U.S. at 244, 261–62, 85 S.Ct. 348 (upholding constitutionality of Title II of the Civil Rights Act as applied to hotels and motels, against challenges under the commerce, due process, and takings clauses and the Thirteenth Amendment); *Newman*, 256 F. Supp. at 944 (holding that Title II of the Civil Rights Act prohibited an owner of a restaurant from refusing to serve African-Americans).

E. Other Jurisdictions

¶114 Finally, the City claims that several decisions from other jurisdictions support its application of the Ordinance. These decisions, however, are either distinguishable or not persuasive.

¶115 For example, in *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59–60 ¶ 7 (N.M. 2013), the owners of a commercial photography business refused, on religious grounds, to provide photography services for a same-sex wedding. But there, the court determined that the public accommodations law was not being applied to speech, but solely to the owners’ conduct in operating their photography business. *Id.* at 66 ¶¶ 34–35, 68 ¶¶ 41–43. However, we have—as has the United States Supreme Court—expressly rejected this distinction between a business and the speech that it creates. *Coleman*, 230 Ariz. at 360 ¶ 31, 284 P.3d at 871; *supra* ¶ 65.

¶116 *Elane Photography* also held that the compelled speech doctrine did not apply to the owners because they operated their business as a public accommodation that sold their photographs for profit. 309 P.3d at 65–66 ¶ 33. Specifically, the court stated that “[t]he United States Supreme Court has never found a compelled-speech violation arising **917 *296 from the application of antidiscrimination laws to a

for-profit public accommodation,” and that the Court has limited the doctrine cases where the “states have applied their public accommodation laws to free-speech events such as privately organized parades, and private membership organizations.” *Id.* at 65–66. However, as noted above, the Supreme Court has never limited the compelled speech doctrine to non-profit organizations, nor has it held that public accommodation laws are immune from the First Amendment. *See supra* ¶ 107.

¶117 The City’s reliance on *Gifford v. McCarthy*, 137 A.D.3d 30, 23 N.Y.S.3d 422 (2016), is also misplaced. There, the owners of a wedding venue (a farm) refused to rent it to a same-sex couple for their wedding ceremony. *Id.* at 426. Thus, unlike this case, *Gifford* did not address compelled pure speech, but rather conduct in denying access to a location. And, like *FAIR*, the owners could not identify any personal expression intimately connected with permitting access to the buildings and open fields on their farm. *Id.* at 431–32.

¶118 *State v. Arlene’s Flowers, Inc.*, 187 Wash.2d 804, 389 P.3d 543 (2017), *vacated and remanded*, *Arlene’s Flowers, Inc. v. Washington*, — U.S. —, 138 S. Ct. 2671, 201 L.Ed.2d 1067 (2018) (mem.)¹, and *Klein*, 410 P.3d 1051, are distinguishable. In those cases, the owners’ activities arguably implicated the expressive conduct doctrine, not pure speech. *Klein*, 410 P.3d at 1065, 1074 (cakes); *Arlene’s Flowers*, 389 P.3d at 557–59 ¶¶ 41–47 & n.13 (floral arrangements). And, consistent with our conclusion, both cases acknowledged, at least impliedly, that words and paintings are forms of pure speech that cannot be compelled. *Klein*, 410 P.3d at 1069–70 (stating that the public accommodations law may have been subject to strict scrutiny if the owners had been creating pure speech, such as music, poetry, sculpture, and art); *Arlene’s Flowers*, 389 P.3d at 559 ¶ 47 n.13 (stating that plaintiff’s floral arrangements do not implicate free expression rights associated with other “forms of pure expression” like tattoos).

¶119 Finally, another case cited by the City, *Telescope Media Group v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017), was, with respect to the issues relevant here, recently reversed in part by the Eighth Circuit Court of Appeals. *Telescope Media Group*, 2019 WL 3979621.

¶120 In sum, these decisions from other jurisdictions regarding wedding vendors are either distinguishable or unpersuasive. We therefore hold that the Ordinance’s application to Plaintiffs’ custom wedding invitations violates article 2, section 6 of the Arizona Constitution. Accordingly,

as to Plaintiffs’ creation of that particular product, the trial court erred in granting summary judgment in favor of the City and denying Plaintiffs’ motion for summary judgment on that claim.

IV.

¶121 In conjunction with their free speech claim, Plaintiffs also allege a free exercise claim under FERA, A.R.S. § 41-1493.01. Like their free speech claim, Plaintiffs’ FERA claim is based on compelling a message with which they disagree. As Christians, Plaintiffs seek to freely exercise their religion by expressing messages that are consistent with their faith, as well as refusing to express messages that are inconsistent with their faith. However, according to Plaintiffs, the Ordinance violates their free exercise protection under FERA because it forces them to create custom wedding invitations celebrating same-sex marriages, in contradiction of their religious belief that marriage can only be between one man and one woman.

****918 *297** ¶122 In analyzing Plaintiffs’ free exercise claim, it is important to understand the history of FERA. Prior to the United States Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court assessed, on a case-by-case basis, the burdens that generally applicable laws placed on a person’s free exercise of religion in cases such as *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *See Smith*, 494 U.S. at 881–82, 884–85, 110 S.Ct. 1595; *see also Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). *Smith*, however, changed the Court’s free exercise framework by holding that “the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws.” *O Centro*, 546 U.S. at 424, 126 S.Ct. 1211.

¶123 In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (“RFRA”), Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4). *See O Centro*, 546 U.S. at 424, 126 S.Ct. 1211. Congress found that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.” *Id.* at 439,

126 S.Ct. 1211 (quoting § 2000bb(a)(2)). As a result, RFRA provides that the government may not substantially burden a person's exercise of religion, "even if the burden results from a rule of general applicability." *Id.* at 424, 126 S.Ct. 1211 (quoting § 2000bb-1(a)).

¶124 Although RFRA remains operative as to the federal government, see *Guam v. Guerrero*, 290 F.3d 1210, 1220–22 (9th Cir. 2002), it was declared unconstitutional as to state laws; as a result, no state law claim is available under RFRA. See *City of Boerne v. Flores*, 521 U.S. 507, 534–36, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); see also *State v. Hardesty*, 222 Ariz. 363, 365 ¶ 7 n.6, 214 P.3d 1004, 1006 (2009). Thus, following the Supreme Court's decision in *Boerne*, in 1999, the Arizona Legislature passed FERA "to protect Arizona citizens' right to exercise their religious beliefs free from undue governmental interference." *Hardesty*, 222 Ariz. at 365 ¶ 8, 214 P.3d at 1006; see 1999 Ariz. Sess. Laws, ch. 332, § 2 (1st Reg. Sess.) [hereinafter FERA Sess. Law].

¶125 Like RFRA, FERA created a rule based on the Supreme Court's pre-*Smith* framework. See FERA Sess. Law § 2(A)(6) (stating the test "as set forth in the federal cases of *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), is a workable test for striking sensible balances between religious liberty and competing government interests"). Consistent with this pre-*Smith* framework, FERA provides that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." § 41-1493.01(B); see also *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007; cf. *Yoder*, 406 U.S. at 220, 92 S.Ct. 1526 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.").

¶126 Here, Plaintiffs concede the Ordinance is a facially neutral law of general applicability. See *Hardesty*, 222 Ariz. at 365 ¶ 7 n.6, 214 P.3d at 1006; see also *Smith*, 494 U.S. at 881–82, 110 S.Ct. 1595. As a result, their free exercise claim is based solely on FERA.

A. FERA Analysis

¶127 FERA establishes a two-step process. First, the party raising a free exercise claim must prove that: (1) their action

or refusal to act is motivated by a religious belief, (2) the religious belief is sincerely held, and (3) the government's regulation substantially burdens the free exercise of their religious beliefs. *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007; see also A.R.S. § 41-1493(2); § 41-1493.01(B). If the claimant proves these elements, then the burden shifts to the government to show that the law (1) furthers a compelling governmental interest and (2) is "the least restrictive means of furthering that compelling governmental interest." § 41-1493.01(C)(1)–(2); see also *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007. Because the text and requirements of FERA and RFRA are nearly identical, we rely on cases interpreting RFRA as persuasive authority in construing the requirements of FERA. *Hardesty*, 222 Ariz. at 367 ¶ 13 n.7, 214 P.3d at 1008.

1. Religious Belief

¶128 A free exercise claim under FERA must be based on a religious belief. A.R.S. § 41-1493(2) (defining the "[e]xercise of religion" as "the ability to act or refusal to act in a manner substantially motivated by a religious belief"); *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007; cf. *Yoder*, 406 U.S. at 215, 92 S.Ct. 1526 ("A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation ... if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."). To satisfy this element, a claimant need not prove that a belief is a central tenet of her faith. § 41-1493(2) (stating that under FERA, a claimant is not required to show that one's religious exercise "is compulsory or central to a larger system of religious belief").

¶129 Here, it is undisputed that Plaintiffs' "refusal to act," that is, declining to express messages in their custom invitations celebrating same-sex weddings, is substantially motivated by Duka and Koski's religious belief that marriage is only between a man and a woman.

2. Sincerity of Belief

¶130 The City also concedes that Duka and Koski's religious beliefs about same-sex marriage are sincere. Duka and Koski base their beliefs on the Bible and the shared traditions and practices of Christians. Cf. *Yoder*, 406 U.S. at 216, 92 S.Ct. 1526 ("[T]he traditional way of life of the Amish is not merely

a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, ‘be not conformed to this world.’ ”).

3. Substantial Burden

¶131 Once a court determines that a party has a sincere religious belief, it must examine whether the government’s regulation imposes a substantial burden on the party’s free exercise of that belief. *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007; see also A.R.S. §§ 41-1493(2), -1493.01(B). Not every burden is substantial; FERA provides that “trivial, technical or de minimis infractions” do not substantially burden a person’s free exercise of religion. § 41-1493.01(E); see *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008) (stating that under RFRA, a government regulation that merely offends a person’s “religious sensibilities” is not a substantial burden of free exercise of religion). Thus, under the pre-*Smith* framework adopted by FERA, a substantial burden exists only when government action “forces” individuals “to choose between following the precepts of [their] religion” and receiving a government benefit, *Sherbert*, 374 U.S. at 404, 83 S.Ct. 1790, or it “compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs,” *Yoder*, 406 U.S. at 218, 92 S.Ct. 1526; see also *Navajo Nation*, 535 F.3d at 1069–70 (applying the substantial burden framework set forth in *Yoder* and *Sherbert* to RFRA, and observing that a threat of civil sanctions may also constitute a substantial burden).

¶132 *Yoder* is instructive on this issue. In *Yoder*, members of the Old Order Amish were convicted of violating Wisconsin’s compulsory school attendance law because they refused to send their children to high school after completing eighth grade. 406 U.S. at 207–08, 92 S.Ct. 1526. The Amish parents believed that sending their children to a public high school “was contrary to the Amish religion and way of life.” *Id.* at 209, 92 S.Ct. 1526. The Supreme Court concluded that the statute placed a substantial burden on the **920 *299 parents’ free exercise of religion. *Id.* at 218, 92 S.Ct. 1526. The Court reasoned that the statute “affirmatively compel[led] [Amish parents], under threat of criminal sanction, to perform acts undeniably at odds with

fundamental tenets of their religious beliefs.” *Id.*; see also *id.* at 237, 92 S.Ct. 1526 (Stewart, J., concurring) (“This case involves the constitutionality of imposing criminal punishment upon Amish parents for their religiously based refusal to compel their children to attend public high schools. Wisconsin has sought to brand these parents as criminals for following their religious beliefs, and the Court today rightly holds that Wisconsin cannot constitutionally do so.”); cf. *Smith*, 494 U.S. at 898, 110 S.Ct. 1595 (O’Connor, J., concurring in the judgment) (“A State that makes criminal an individual’s religiously motivated conduct burdens that individual’s free exercise of religion in the severest manner possible, for it ‘results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.’ ” (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961))).

¶133 Similarly, in *Hobby Lobby*, the Supreme Court addressed whether a Health and Human Services (“HHS”) regulation substantially burdened the free exercise of religion under RFRA for the owners of three for-profit corporations. 573 U.S. at 688–91, 134 S.Ct. 2751. The owners, who opposed abortion on religious grounds, objected to the regulation because it required them to provide employee health care coverage for certain methods of birth control. *Id.* at 691, 134 S.Ct. 2751. Because the owners viewed these birth control procedures as a form of abortion, they refused to comply with the regulation. *Id.* at 691, 701, 703, 134 S.Ct. 2751. However, by violating the regulation, the owners faced severe financial penalties and assessments which, in some instances, totaled hundreds of millions of dollars. *Id.* at 720, 134 S.Ct. 2751.

¶134 The Court concluded that these financial sanctions and penalties clearly imposed a substantial burden on the owners’ exercise of their religious beliefs. *Id.* at 726, 134 S.Ct. 2751. Indeed, although the owners were not required to actively participate in the objectionable procedures (all of those decisions were made independently by a female employee upon consulting with her physician), the Court held that “[b]ecause the contraceptive mandate forces them to pay an enormous sum of money ... if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.” *Id.*; cf. *Holt v. Hobbs*, 574 U.S. 352, 135 S.Ct. 853, 860, 862–63, 190 L.Ed.2d 747 (2015) (holding that under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which “mirrors” RFRA in the context of free exercise claims made by prisoners, the Department of

Corrections' grooming policy, which threatened a prisoner with disciplinary action if he grew a beard as dictated by his Muslim faith, substantially burdened the prisoner's free exercise of religion).

¶135 Here, the coercion the Ordinance places on Plaintiffs to abandon their religious belief is unmistakable. The Ordinance, as applied by the City, presents Plaintiffs with a stark choice. On one hand, they can choose to forsake their religious convictions and create wedding invitations celebrating same-sex marriage. But, on the other hand, if they choose to remain faithful to their beliefs and violate the Ordinance by refusing to make such invitations, they face severe civil and criminal sanctions. Indeed, for every *day* Duka and Koski are in violation of the Ordinance, they may be ordered to serve up to six months in jail. *See* §§ 1-5; 18-4(B); 18-7(A). Thus, for example, if Plaintiffs post their proposed Statement on their website for a month, Duka and Koski could face up to *fifteen years* in jail. *See id.* Even if placed on probation, Plaintiffs face a possible fine of \$2,500; for a continuing violation, the fine could be tens of thousands of dollars. *Id.* §§ 1-5, 18-4(B). Alternatively, the City has the authority under the Ordinance's nuisance provision to simply shut down Duka and Koski's business altogether. *See id.* § 1-5.

¶136 Despite the clear coercive effect of the Ordinance, the City claims that requiring Duka and Koski to create custom invitations for same-sex weddings does not place any burden on their exercise of their religious ****921 *300** beliefs. Specifically, the City argues that Duka and Koski's "religion says nothing about making wedding invitations," and the act of creating a wedding invitation is too attenuated from their beliefs about marriage to place any burden, much less a substantial burden, on their free exercise of religion.

¶137 This argument is neither novel nor new. The United States Supreme Court rejected precisely the same argument in *Hobby Lobby*. There, in addressing the owners' RFRA claim, the Court stated that the government's main argument was "that the connection between what the [owners] must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." 573 U.S. at 723, 134 S.Ct. 2751. The Court stated, however, that "[t]his argument dodges the question" of whether the regulation imposed "a substantial burden on the ability of the [owners] to conduct business in accordance with *their religious beliefs*." *Id.* at 724, 134 S.Ct. 2751. Rather, the Court observed that the

government's argument raised "a very different question that the federal courts have no business addressing": "whether the religious belief asserted in a RFRA case is reasonable." *Id.*

¶138 In rejecting this "reasonableness" argument, the Court focused on the fact that the owners "believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." *Id.* The Court stressed that in addressing whether the regulation posed a substantial burden on the owners' religious beliefs, its "narrow function" was not to determine whether the owners' beliefs were "flawed," but whether "the line drawn [by the owners] reflects 'an honest conviction.'" *Id.* at 724–25, 134 S.Ct. 2751 (alteration in original) (citation omitted). Thus, with this framework in mind, the Court concluded that the regulation imposed a substantial burden on the owners' free exercise of religion because they "sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial." *Id.* at 725, 134 S.Ct. 2751; *cf. Masterpiece Cakeshop*, 138 S. Ct. at 1731 (stating that the government is "obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of" a person's religious beliefs, and "[i]t hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for [a person's] conscience-based objection is legitimate or illegitimate"); *cf. Dale*, 530 U.S. at 651, 653, 120 S.Ct. 2446 (stating that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent," and therefore, "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression").

¶139 Thus, based on *Hobby Lobby*, we reject the City's invitation to assess the reasonableness of Duka and Koski's sincerely held religious beliefs. This is not a proper consideration in determining whether the Ordinance places a substantial burden on their right to free exercise of religion.

¶140 By adhering to *Hobby Lobby*, we do not, as the dissent claims, eliminate the substantial burden element from the FERA analysis. Rather, we follow the well-established rule that courts may not, under the guise of conducting a substantial burden analysis, examine the reasonableness of a person's belief. 573 U.S. at 724, 134 S.Ct. 2751. This

deference does not, of course, dispose of the court's legal duty under FERA to determine whether a law places a substantial burden on a person's religious belief. As we note above, that element is satisfied here because the Ordinance coerces Plaintiffs into violating their belief. *Supra* ¶¶ 131–35.

¶141 However, the dissent seeks to evade the coercive effect of the Ordinance by attempting to refocus the substantial burden analysis on whether Plaintiffs' belief is substantial. This argument, however, is nothing more than a repackaging of the City's reasonableness argument. For example, the dissent contends that Plaintiffs' adherence to ****922 *301** their belief is flawed and inconsistent. *Infra* ¶¶ 208–09. However, by making this argument the dissent crosses the line drawn by *Hobby Lobby*, which prohibits a court from examining the alleged flaws or inconsistencies of a person's beliefs while engaging in a substantial burden analysis. 573 U.S. at 724–25, 134 S.Ct. 2751.

¶142 The dissent also asserts that Plaintiffs have failed to identify any “fundamental tenet” of their faith prohibiting them from creating the subject invitations. Of course, under FERA, Plaintiffs are not required to show that their belief is a “fundamental” tenet of their faith. A.R.S. § 41-1493(2). Moreover, this argument ignores the record, which clearly shows that Plaintiffs *do* have a fundamental, sincere belief that they cannot, consistent with their faith, create custom wedding invitations celebrating a same-sex marriage. *See supra* ¶¶ 15–16.

¶143 Next, citing *Hobby Lobby* as authority, the dissent claims that no substantial burden exists here because the Ordinance does not require Plaintiffs to participate in same-sex weddings. *Infra* ¶ 226, 228 (Timmer, J., dissenting). However, the dissent's reliance on *Hobby Lobby* is misplaced. There, the HHS regulation did not require the owners to actually attend or perform an abortion, nor did it require them to approve or be involved in an employee's decision to undergo such a procedure; rather, the Court determined that simply providing insurance coverage for these procedures was sufficient to impose a substantial burden. *See supra* ¶ 134. Here, by comparison, the Ordinance compels similar, if not greater “participation” from Plaintiffs in a same-sex wedding. For example, the Ordinance forces Plaintiffs to *personally* write, paint and create artwork celebrating a same-sex wedding. Additionally, it requires them to design and create invitations that enable and facilitate the attendance of guests at a same-sex wedding. *Cf. Masterpiece Cakeshop*, 138 S. Ct. at 1744 (Thomas, J., concurring in part and in

the judgment) (“Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are ‘weddings’ and suggest that they should be celebrated—the precise message he believes his faith forbids.”).

¶144 Finally, the dissent argues that the Ordinance “itself” does not place a substantial burden on Plaintiffs' belief. *Infra* ¶ 223 (Timmer, J., dissenting). Specifically, the dissent claims that the Ordinance does not prohibit Plaintiffs from expressing their religious beliefs about same-sex marriage, and, therefore, the penalty provisions of the Ordinance are irrelevant to the substantial burden analysis. *Id.*

¶145 This argument simply reasserts the dissents' position that the Ordinance only applies to discriminatory conduct, not speech. We disagree. The Ordinance, as applied by the City, compels Plaintiffs to express a message celebrating same-sex marriage that violates their religious belief. If they refuse to abandon their belief, they violate the Ordinance and face the threat of severe criminal and civil sanctions. This is the very definition of a substantial burden.

¶146 Accordingly, as applied to Plaintiffs' custom wedding invitations, the Ordinance substantially burdens the free exercise of Duka and Koski's religious beliefs.

B. City's Burden

¶147 Because Plaintiffs have satisfied their burden under FERA, the City bears the burden of showing that the Ordinance (1) furthers a compelling governmental interest, and (2) is the least restrictive means to further that compelling interest. A.R.S. § 41-1493.01(C); *Hardesty*, 222 Ariz. at 366 ¶ 10, 214 P.3d at 1007.

¶148 As noted above, the Ordinance generally serves the compelling purpose of eradicating discrimination in the provision of publicly available goods and services. *Supra* ¶ 106. However, like Plaintiffs' rights to free speech, that interest is not sufficiently overriding to force Plaintiffs to create custom wedding invitations celebrating same-sex marriage in violation of their sincerely held religious beliefs.

¶149 We also conclude that the Ordinance's application to Plaintiffs in this case is not the least restrictive means of furthering its asserted governmental interest. ****923 *302** Under the least restrictive means test, the government must

“show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].” *Hobby Lobby*, 573 U.S. at 728, 134 S.Ct. 2751. To prove this element, the government is not required to show that no less restrictive means is “conceivable,” but only that the proposed alternatives are “ineffective or impractical.” *Hardesty*, 222 Ariz. at 368 ¶ 21, 214 P.3d at 1009. This is a focused inquiry, requiring the government to “establish that applying the law in the particular circumstances is the least restrictive means.” *Id.* at 367 ¶ 14, 214 P.3d at 1008 (emphasis added). As part of this analysis, a court must “scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.” *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211; see also *Holt*, 135 S. Ct. at 864 (stating that under RFRA, the government must prove that denying a religious “exemption is the least restrictive means of furthering a compelling governmental interest”). This includes considering the harm an exemption may have on benefits the law confers on third parties. *Hobby Lobby*, 573 U.S. at 729 n.37, 134 S.Ct. 2751.

¶150 The City has not carried its heavy burden. Applying the Ordinance to regulate Duka and Koski’s personal expression of their religious beliefs in their custom wedding invitations is not the least restrictive means to accomplish the goal of the Ordinance. Rather, as we have noted above, the purpose of the Ordinance is properly served by permitting a narrow exemption for Plaintiff’s creation of the single product we consider in this case—Plaintiffs’ custom wedding invitations.

¶151 Both the City and the dissent argue, however, that to effectively deter discriminatory conduct, the Ordinance must be uniformly applied to all businesses and all products. According to the dissent, this goal cannot be achieved by allowing “ad hoc exemptions for businesses based on their owners’ beliefs.” *Infra* ¶ 211.

¶152 In considering a possible exemption for Plaintiffs’ invitations, the City and the dissent employ an incorrect, one-sided least restrictive means analysis. As the dissent correctly notes, *Hobby Lobby* states that, in considering an exemption, a court must consider the impact of granting an exemption on third parties. *Id.* 573 U.S. at 729 n.37, 134 S.Ct. 2751. But the dissent mistakenly suggests that *Hobby Lobby* granted an exemption *only* because it had zero impact on affected third parties—specifically, female employees of the owners’ companies. See *Hobby Lobby*, 573 U.S. at 693, 134 S.Ct. 2751. Rather, the Court simply noted that, in weighing the government’s compelling interest

against the free exercise rights of the owners, it considered the economic impact on female employees. *Id.* at 692–93, 728–32 & n.37, 134 S.Ct. 2751. Of course, no one could argue that the impact of granting the exemption in *Hobby Lobby* was “zero”; after all, granting the exemption effectively forced any female employee who wished to obtain health care coverage for certain birth control procedures to obtain their own private insurance. Moreover, logically speaking, if the least restrictive means test only permits exemptions that have “zero” impact on the government’s compelling interest, it is difficult, if not impossible, to conceive of any exemption that could satisfy the test.

¶153 But the more fundamental flaw in the dissent’s approach is that, by focusing exclusively on the impact an exemption might have on same-sex couples, it ignores the court’s duty under FERA to balance the free exercise rights of an individual against the government’s compelling interest. See 1999 Sess. Laws at 1770, § 2(A)(6) (stating that FERA adopted the pre-*Smith* framework, in part, because it provides “a workable test for striking sensible balances between religious liberty and competing government interests”). Indeed, in applying RFRA, *Hobby Lobby* used the same balancing approach in determining whether the owners were entitled to an exemption. See *id.*, 573 U.S. at 728–32, 735–36, 134 S.Ct. 2751; see also *O Centro*, 546 U.S. at 434, 435–36, 126 S.Ct. 1211 (stating that under RFRA, courts must consider whether religious exemptions are required for generally applicable laws).

¶154 Here, under the dissent’s least restrictive means test, the City’s nondiscrimination **924 *303 purpose simply overrides all conflicting individual rights and liberties. That, of course, is not the law. As *Hobby Lobby* noted, “[e]ven a compelling interest may be outweighed in some circumstances by another even weightier consideration.” *Id.* at 727, 134 S.Ct. 2751. Likewise, *Masterpiece Cakeshop* did not hold that public accommodations laws were *immune* from free exercise exemptions; rather, it clearly contemplated that *some* exemptions, if narrowly confined, were permissible. *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24, 1727–29. And while we must, in determining whether Plaintiffs’ invitations are entitled to an exemption from the Ordinance, consider the impact on the City’s nondiscrimination purpose, we must also consider the effect of compelling Plaintiffs to create these invitations. See *Janus*, 138 S. Ct. at 2464 (stating that “[w]hen speech is compelled ... additional damage is done” because it forces “free and independent individuals to endorse ideas

they find objectionable[, which] is always demeaning,” and coerces individuals “into betraying their convictions.”).

¶155 Additionally, if it is true, as the City and the dissent claim, that uniform application of the Ordinance is necessary to achieve its nondiscrimination goal, then no business or organization should be exempt from its provisions. However, pursuant to § 18-4(B)(4)(a), the Ordinance’s prohibitions regarding discrimination based on sexual orientation “shall not apply to bona fide religious organizations” or “be construed to prohibit or prevent” them “from taking any action which is calculated by the organization to promote the religious principles for which it is established or maintained.” In short, the Ordinance allows some organizations, based on their religious beliefs, to discriminate against individuals based on their sexual orientation, the very thing the Ordinance seeks to eliminate. *See Reed*, 135 S. Ct. at 2232 (stating that a law does not further a compelling state interest when it permits exemptions that “leave[] appreciable damage to that supposedly vital interest unprohibited” (citation omitted)); *cf. O Centro*, 546 U.S. at 423, 432–37, 126 S.Ct. 1211 (stating that the existence of a religious exemption for the sacramental use of peyote, a prohibited drug, belied the government’s contention that exempting a religious sect’s sacramental use of hoasca would undermine the effectiveness of federal drugs laws).

¶156 Here, the City has neither shown nor argued that allowing an exemption for religious organizations has undercut the effectiveness of the Ordinance. Of course, the City could “demonstrate a compelling interest in uniform application” of the Ordinance “by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program.” *O Centro*, 546 U.S. at 435, 126 S.Ct. 1211. But the City has made no effort to do so here. Rather, it simply asserts, with no evidence, that granting an exemption for Plaintiffs’ custom invitations would encourage other businesses to use FERA as a tool to discriminate against customers based on their sexual orientation, race and gender.²

¶157 The City’s speculation about what might happen is not evidence. Indeed, such “slippery slope” arguments not grounded in fact were rejected in *Hobby Lobby*. There, the government similarly argued that granting a religious exemption to the business owners “will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions.” *Hobby Lobby*, 573 U.S. at 732, 134 S.Ct. 2751.

Rejecting that argument, the Court stated that the government “made no effort to substantiate this prediction,” and there was no “evidence that any significant number of employers sought exemption, on religious grounds, from any of [the] coverage requirements other than the contraceptive mandate.” *Id.* at 732–33, 134 S.Ct. 2751.

¶158 Like *Hobby Lobby*, we find the same lack of evidence here. It is not our role to speculate about whether exempting Duka and Koski’s creation of custom wedding invitations **925 *304 would cause other businesses to seek a religious exemption from the Ordinance. We have no evidence in the record to make a conclusion one way or another. Absent such evidence, all we can do is enforce FERA as written, under the standards it provides. *Cf. id.* at 735–36, 134 S.Ct. 2751 (“The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business.... The wisdom of Congress’s judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes....”).

¶159 Here, like the religious organizations exempt under the Ordinance, Brush & Nib was established, and is operated, to promote certain religious principles. Although Plaintiffs operate Brush & Nib for profit, this does not mean that they cannot, like a religious organization or church, also further their “religious objectives as well.” *Id.* at 712, 134 S.Ct. 2751. And the fact Plaintiffs operate for profit has no bearing on their protection under FERA. FERA, by its terms, makes no such distinction, nor does it limit its protections to churches and other nonprofit religious organizations. *Id.* at 691–92, 705–06, 718–19, 134 S.Ct. 2751 (refusing to exclude closely-held corporations from RFRA protections because of their for-profit nature). The purpose of the exemption under the Ordinance is to allow religious organizations “to promote the religious principles for which it is established or maintained.” § 18-4(B)(4)(a).

¶160 Although the dissent claims our decision sanctions status-based discrimination, that mischaracterizes our analysis and our holding. Our decision today is limited to one, very unique product (Plaintiffs’ custom wedding invitations), and the protection afforded this product is based solely on the celebratory messages Plaintiffs convey (or refuse to convey), not the race, gender or sexual orientation of the customer. *Supra* ¶¶ 14, 16, 76. Indeed, Plaintiffs have never asserted

that their faith precludes them from serving same-sex couples, or that it requires them to refuse service to a customer based on their sexual orientation. Rather, as noted above, Plaintiffs consistently testified that they are willing to serve all customers, regardless of their status. But what they refuse to do is violate their religious convictions by creating a message for *anyone* that celebrates same-sex marriage.

¶161 Finally, FERA itself creates several barriers to any business owners seeking to use their religious beliefs to engage in status-based discrimination. For example, such an owner would have to prove that his religious belief is sincere, and not simply a pretext for engaging in illegal discrimination based on status. Our courts are well-equipped to address questionable or frivolous assertions of religious beliefs where the evidence shows that such a belief is being used for purely pretextual purposes. *Cf. Hobby Lobby*, 573 U.S. at 718, 134 S.Ct. 2751 (stating that “the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims”); *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (stating that RLUIPA “does not preclude inquiry into the sincerity of a prisoner’s professed religiosity”).

¶162 More importantly, even if a business owner could somehow prove that his status-based religious belief is sincere, and that the regulation imposed a substantial burden on that belief, FERA allows the City to show that any burden on such a belief is justified by the anti-discrimination purpose of the Ordinance. And, because an exemption based on status-based discrimination directly undermines the purpose of the Ordinance, uniform prohibition of such business practices would be the least restrictive means to prevent discrimination. *See Hardesty*, 222 Ariz. at 364 ¶¶ 1, 3, 368–69 ¶¶ 19–23, 214 P.3d 1004 (denying defendant’s request for an exemption from a statute making use of marijuana illegal, because based on defendant’s asserted religious belief in unlimited use of marijuana, including using marijuana while driving, granting an exemption would undermine the public safety purpose of the statute); *cf. Masterpiece Cakeshop*, 138 S. Ct. at 1727–28 (stating that under the Colorado public accommodations law “religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression,” but that “it is a general rule that such objections do not allow business owners and other actors ... to deny protected persons equal access to goods and services”).

¶163 We therefore conclude that the Ordinance, as applied to Plaintiffs’ creation of their custom wedding invitations, places a substantial burden on their right to free exercise of religion. Additionally, the City has failed to show that applying the Ordinance to Plaintiffs’ invitations is the least restrictive means to achieve its asserted compelling interest. Thus, the trial court erred in denying Plaintiffs’ motion for summary judgment on their FERA claim and instead granting summary judgment in favor of the City on that claim.

Conclusion

¶164 Freedom of speech and religion requires tolerance of different beliefs and points of view. In a diverse, pluralistic society such as ours, tolerance of another’s beliefs and point of view is indispensable to the survival and growth of our democracy. *See Palko v. Connecticut*, 302 U.S. 319, 326–27, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (stating that freedom of thought and expression “is the matrix, the indispensable condition, of nearly every other form of freedom”), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). For this reason, we have always recoiled at those governments and societies that repress or compel ideas or religious beliefs. *See Thomas v. Collins*, 323 U.S. 516, 545, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (Jackson, J., concurring) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.”).

¶165 It is the duty of the judiciary to enforce the text of our constitution and statutes and the fundamental rights protected within them. Enforcing and protecting these rights preserves “individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.” *Barnette*, 319 U.S. at 637, 63 S.Ct. 1178. And while our dissenting colleagues may view a result contrary to our holding today as more progressive, “it is not forward thinking to force individuals to ‘be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.’ ” *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (alteration in original) (quoting *Wooley*, 430 U.S. at 715, 97 S.Ct. 1428). After all, “[w]hile 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, 115 S.Ct. 2338.

¶166 To conclude, we hold that the Ordinance, as applied to Plaintiffs’ custom wedding invitations, and the creation of those invitations, unconstitutionally compels speech in violation of the Arizona Constitution’s free speech clause. See Appendix 1. We further conclude that the Ordinance, as applied to Plaintiffs’ creation of custom wedding invitations, substantially burdens Plaintiffs’ free exercise of religion, and that the City has not demonstrated that its application of the Ordinance to Plaintiffs in this way is the least restrictive means of achieving its asserted interest in eradicating discrimination. *Id.* Thus, the application of the Ordinance in this case violates Plaintiffs’ free exercise rights under FERA, § 41-1493.01. Finally, because Plaintiffs’ intended refusal to make custom wedding invitations celebrating a same-sex wedding is legal activity under Arizona’s free speech clause and FERA, Plaintiffs are entitled to post a statement, consistent with our holding today, indicating this choice.

¶167 We therefore vacate the court of appeals’ opinion except for paragraphs 33 through 45 and 51 through 53, reverse the trial court’s rulings on summary judgment, and direct entry of summary judgment in favor of Plaintiffs with respect to the creation of custom wedding invitations that are materially similar to the invitations in the record. See Appendix 1. further, because Plaintiffs **927 *306 have prevailed against the City on their FERA claim, upon compliance with ARCAP 21, they are entitled to a mandatory award of attorney fees under A.R.S. § 41-1493.01(D) only as to those fees incurred in this Court. *Id.* (“A party who prevails in any action to enforce this article against a government shall recover attorney fees and costs.”). We deny Plaintiffs’ remaining fee requests.

BOLICK, J., concurring.

¶168 I join the Court’s analysis and write separately to further examine the state constitutional provision under which this challenge was brought.

¶169 Article 2, section 6 of the Arizona Constitution provides in full: “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.” That language is majestic in its sweep, and we have consistently found that it provides greater protection for speech than the First Amendment. See, e.g., *Coleman v. City of Mesa*, 230 Ariz. 352, 361 ¶ 36 n.5, 284 P.3d 863 (2012) (“Article 2, Section 6 of Arizona’s Constitution ... is

in some respects more protective of free speech rights than the First Amendment.”); *State v. Stummer*, 219 Ariz. 137, 141, 143 ¶ 17, 194 P.3d 1043, 1047, 1049 (2008) (“We have also stated that Article 2, Section 6 has ‘greater scope than the first amendment.’ ” (citation omitted)); *Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm’n*, 160 Ariz. 350, 356, 773 P.2d 455, 461 (1989) (“[W]e apply here the broader freedom of speech clause of the Arizona Constitution.”). Even when the parties do not fully develop their argument on the Arizona constitutional provision, where it constitutes a question on which we granted review, we are duty-bound to construe it. Ariz. Const. art. 2, § 32 (“The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”); *Stummer*, 219 Ariz. at 140 ¶ 1, 142 ¶ 14, 194 P.3d at 1046, 1048; *Mountain States*, 160 Ariz. at 354, 773 P.2d at 459 (“Because the parties explicitly invoked Arizona’s constitution, we must implement whatever protection it extends.”).

¶170 As ours is the forty-eighth state, the framers of our constitution had abundant lessons from which to draw in framing its provisions. Former Chief Justice Rebecca Berch explained that our constitution’s framers “had the opportunity to ponder more than 100 years of United States history before penning their own constitution, allowing them to adopt or adjust provisions employed by the federal government or other states to meet Arizona’s needs.” Rebecca White Berch et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 468 (2012). As our constitution’s framers chose to secure free speech with language different and more protective than the First Amendment, our constitutional oath requires us to invest those words with their fully intended meaning.

¶171 In applying state constitutional provisions, federal constitutional jurisprudence addressing the issue at hand is always relevant because the United States Constitution sets the base-line for the protection of individual liberties. *Petersen v. City of Mesa*, 207 Ariz. 35, 37 ¶ 8 n.3, 83 P.3d 35, 37 (2004); *State v. Sieyes*, 168 Wash.2d 276, 225 P.3d 995, 1003 ¶ 28 (2010); see *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). But “a state court is entirely free to read its own State’s constitution more broadly than th[e] United States Supreme Court reads the Federal Constitution.” *City of Mesquite*, 455 U.S. at 293, 102 S.Ct. 1070. The U.S. Constitution “sets a floor for the protection of individual rights.... Other federal, state, and local government

entities generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution.” *American Legion v. American Humanist Ass’n*, — U.S. —, 139 S.Ct. 2067, 2094, 204 L.Ed.2d 452 (2019) (Kavanaugh, J., concurring) (citing J. Sutton, *51 Imperfect Solutions* (2018); Brennan, “State Constitutions and the Protection of Individual Rights, 90 *Harv. L. Rev.* 489 (1977)).

¶172 Where the language of a state constitutional provision is identical or similar to its federal counterpart, we should examine how the provision was interpreted by the federal courts at the time it was adopted by the State of Arizona to determine its meaning. See *Turken v. Gordon*, 223 Ariz. 342, 346 ¶ 10, 224 P.3d 158, 162 (2010); *Moore v. Chilson*, 26 Ariz. 244, 255, 224 P. 818 (1924) (applying prior-construction canon); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322–23 (2012) (discussing prior-construction canon). But where the language is different, we must presume it was intended to have a different meaning from its federal counterpart and determine how the different language affects the constitutional provision’s meaning. Cf. *State v. Marcus*, 104 Ariz. 231, 233–34, 450 P.2d 689 (1969) (noting “it is a general principle that the most recent Act controls over the earlier Act” when laws are inconsistent); Scalia & Garner, *supra*, at 256 (“[A] change in the language of a prior statute presumably connotes a change in meaning.”).

¶173 In so doing, if the meaning of the language is clear, we should enforce it without resorting to secondary interpretative methods. *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). Where the meaning is unclear, we should seek to determine the intent of the framers as best we can from the records of our constitution and other reliable historical sources. *Brewer v. Burns*, 222 Ariz. 234, 244, 213 P.3d 671, 681 (2009); *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 595, 790 P.2d 242, 250 (1990); *Boswell v. Phx. Newspapers, Inc.*, 152 Ariz. 9, 12, 730 P.2d 186, 189 (1986); *McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 290, 645 P.2d 801, 805 (1982). Finally, where our provision is similar to provisions in other state constitutions, we may look to court decisions and other historical records from those other states prior to our constitution’s ratification to help determine the framers’ intent in adopting them. See, e.g., *Turken*, 223 Ariz. at 345–46 ¶¶ 10–11, 224 P.3d at 161–62; *Mountain States*, 160 Ariz. at 355, 773 P.2d at 460. In construing the provisions of our Declaration of Rights, we always must be mindful of the

admonition that government is “established to protect and maintain individual rights.” Ariz. Const. art. 2, § 2.

¶174 The words of article 2, section 6 and the First Amendment are very different. The First Amendment provides in relevant part that “Congress shall make no law ... abridging the freedom of speech....” It is phrased as a constraint on government power and is applied through the Fourteenth Amendment to the states. *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) (incorporating Free Speech Clause of First Amendment); *Stummer*, 219 Ariz. at 142 ¶ 14, 194 P.3d at 1048 (noting the First Amendment is only a constraint on government). Our provision, by contrast, is a categorical guarantee of the individual right to freely speak, write, and publish, subject only to constraint for the abuse of that right. See *Stummer*, 219 Ariz. at 142 ¶ 14, 194 P.3d at 1048; see also *id.* ¶ 15 (“The encompassing text of Article 2, Section 6 indicates the Arizona framers’ intent to rigorously protect freedom of speech.”). In fact, as this Court has stated, “[t]he right of every person to freely speak, write[,] and publish may not be limited.” *Id.* ¶ 15 (citation omitted).

¶175 Although this Court has consistently held that article 2, section 6 provides greater speech protection than the First Amendment, it has never fully explored the contours of the right. This case involves a straightforward application of the plain language of article 2, section 6. Unlike cases in other jurisdictions involving such activities as photography or custom cake design, the entirety of Plaintiffs’ business, to the extent it is at issue here, comprises custom writing. As such, it is at the core of our constitutional protection.

¶176 The ordinance, as applied to Plaintiffs, requires them under threat of severe criminal penalties or loss of their livelihood to write words for purposes with which they profoundly disagree. This application of the ordinance directly implicates the speech protections of the Arizona Constitution. See *Coleman*, 230 Ariz. at 359–61 ¶¶ 24–26, 30, 36 & n.5, 284 P.3d at 870–72 (holding tattoos, even when comprised of only “standard designs or patterns,” and the creative process of tattooing are subject to protection under the Arizona Constitution’s free speech guarantee). When they have no choice to refuse to write a message with which they disagree, Plaintiffs are not “freely” writing. See *Freely*, **929 *308 Webster’s Third New International Dictionary (3d ed. 2002) (defining “freely” as “of one’s own accord”). Indeed, in concluding that a law that compelled speech violated the California Constitution’s similarly-worded free

speech guarantee, the California Supreme Court declared, “[o]ne does not speak freely when one is restrained from speaking. But neither does one speak freely when one is compelled to speak.” *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 101 Cal.Rptr.2d 470, 12 P.3d 720, 750 (2000). The City has not suggested any way, such as libel, in which Plaintiffs have abused that right, *see, e.g., Stummer*, 219 Ariz. at 142–43 ¶ 16, 194 P.3d at 1048–49.

¶177 Regardless of the circumstances under which compelled speech may be tolerated under United States Supreme Court precedent, *see, e.g., Williams-Yulee v. Fla. Bar*, — U.S. —, 135 S. Ct. 1656, 1662, 191 L.Ed.2d 570 (2015), our state constitution categorically protects an individual’s freedom to write free from compulsion, being responsible only for the abuse of that right. *See Stummer*, 219 Ariz. at 142 ¶ 15, 194 P.3d at 1048 (“[T]he words of Arizona’s free speech provision ‘are too plain for equivocation.’ ” (citation omitted)). This case does not require us to determine the complete scope of that right, such as the extent to which it protects other speech-related activities. Nor does our decision extend to anti-discrimination laws that do not by their application require individuals to speak, write, or publish.

¶178 The dissenters engage in unfortunate hyperbole when they invoke shameful historical examples of discrimination. *Infra* ¶¶ 217–18 (Bales, J. (Ret.), dissenting). Plaintiffs do not seek to employ the coercive apparatus of government to impose disabilities on others. They do not discriminate against patrons based on their sexual orientation (indeed, it remains unlawful for them to do so), but instead object to conveying certain messages regardless of who the patron is. Plaintiffs seek merely to vindicate their right not to engage in speech that offends their deeply held religious beliefs, a right not only protected by the Arizona Constitution and the Free Exercise of Religion Act, but also one of our nation’s most cherished civil liberties—one that, as Justice Robert H. Jackson declared, is “beyond the reach of majorities and officials.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629, 638, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (striking down law that required Jehovah’s Witnesses to salute the American flag). As the Court’s opinion abundantly illustrates, that right does not evaporate upon enactment of a public accommodations law, no matter how beneficently inspired.

¶179 There is a reciprocity and universality to these rights of speech and conscience that give us all a direct stake in protecting them regardless of the circumstances of a particular case. For instance, Phoenix could lawfully prohibit a gay

calligrapher from discriminating against Christian patrons whatever their beliefs but could not force the calligrapher to create a program for a church that preached against same-sex marriage. Likewise, if Michelangelo were alive, the City could require that he sell his sculptures free from discrimination but could not compel him to paint a chapel ceiling in a way he deemed blasphemous. That distinction is the fair accommodation required in a pluralistic society bounded by constitutional protections of individual rights.

BALES, J. (Ret.), joined by TIMMER, V.C.J., and STARING, J., dissenting.

¶180 Can a business selling custom wedding invitations and other wedding products discriminate against same-sex couples because its owners, based on their sincerely held religious beliefs, disapprove of same-sex marriage, itself a constitutionally protected right? We thus are faced with a tension between our fundamental values of liberty and equality, because any legal prohibition on discrimination—that is, any guarantee of equal treatment—necessarily constrains the choices of those who prefer to treat some people differently.

¶181 Because the interest in preventing discrimination is compelling, equality prevails when we are dealing with public accommodations such as businesses serving the public. Vendors can freely choose which products or services they offer but they cannot refuse to sell them to groups of customers whom they ***930 *309 disfavor. A baker, for example, might choose to sell only special-order Easter cakes decorated with the symbol of a cross, but having made that choice, the baker cannot refuse to sell those cakes to non-Christians. Similarly, a professional photographer may or may not choose to take children’s photos, but a photographer who chooses to do so cannot, based on his or her religious beliefs, refuse to photograph mixed-race children.

¶182 Brush & Nib and its owners argue that creating custom wedding products, which may include painting or calligraphy, implicates their freedom of expression and their choice to refuse to sell such products to same-sex couples is protected by the Arizona Constitution’s free speech clause and FERA. The majority accepts these arguments at least for certain “custom” wedding invitations, *supra* ¶¶ 3, 38, reasoning that barring Brush & Nib from discriminating against same-sex customers would compel its owners to engage in “pure speech” conveying a message of approval of same-sex

marriage and impermissibly burden their exercise of religion. *Supra* ¶ 2.

¶183 Our constitutions and laws do not entitle a business to discriminate among customers based on its owners' disapproval of certain groups, even if that disapproval is based on sincerely held religious beliefs. In holding otherwise, the majority implausibly characterizes a commercially prepared wedding invitation as "pure speech" on the part of the business selling the product and discounts the compelling public interest in preventing discrimination against disfavored customers by businesses and other public accommodations. Contrary to the majority, *supra* ¶¶ 7–8, requiring businesses to treat customers equally is in no way comparable to compelling public-school children to salute the flag, the issue in *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). With respect for my colleagues, I dissent.

A.

¶184 Our analysis should begin by recognizing how this case implicates the compelling interest in preventing discrimination in public accommodations. "[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent...." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); see also *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983).

¶185 As relevant here, the Phoenix Ordinance ("Ordinance") provides that a public accommodation may not refuse service "because of ... sexual orientation." Phx., Ariz., City Code ("PCC") § 18-4(B)(2). Brush & Nib offers goods and services to the general public and, as it concedes, is a public accommodation. Thus, the Ordinance requires Brush & Nib to "perform the same services for a same-sex couple as it would for an opposite-sex couple." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 66 ¶ 35 (N.M. 2013).

¶186 The Ordinance is content neutral and does not purport to regulate speech, but rather conduct. And the United States Supreme Court has stated that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target

of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 571–72, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).

¶187 Brush & Nib sells premade and made-to-order wedding products, including save-the-date cards, invitations, programs, vows, marriage certificates, place cards, escort cards, menus, and maps. The wedding invitations contained in the record identify the names of the couple to be wed, provide logistical details, and usually—but not always—expressly invite the recipient to join in the celebration of the couple's wedding. See Appendix 1. Some invitations do not refer to "celebration" but instead ask guests to "share in the joy of the marriage" or merely "[r]equest the honor of [the guest's] presence." *Id.* The invitations also include various *931 *310 colors as a background or floral designs around the border. Illustrative copies of two such invitations and Brush & Nib's other made-to-order products are attached as Appendix 2; Appendix 1 includes copies of other invitations in the record referenced by the majority.

¶188 Brush & Nib and its owners seek to refuse to provide services based on the same-sex status of the marrying couple rather than the content of the company's made-to-order products. Notably, this case does not involve any specific request that Brush & Nib prepare invitations or other artwork for a same-sex wedding, and the City acknowledges that the Ordinance does not require Brush & Nib to include any particular message (such as a statement praising marriage equality) in the items it sells. Moreover, consistent with the court of appeals' holding (unchallenged by the City), Brush & Nib is free to express on its website the owners' religious belief that marriage is between a man and a woman. See *Brush & Nib Studio, LC v. City of Phoenix*, 244 Ariz. 59, 72–73 ¶ 31, 418 P.3d 426, 439–40 (App. 2018).

¶189 Brush & Nib claims it can refuse to prepare any custom products for a same-sex wedding, even if they do not identify the gender of the two people marrying or, for items such as table place cards, even refer to the couple. At bottom, Brush & Nib argues that its owners' choosing among customers based on their sexual orientation—as distinct from identifying the content of invitations or other custom products—itself constitutes a legally protected exercise of the freedom of speech or religion.

¶190 This case does not concern the content of the made-to-order wedding products, but instead the identity

of the customer and end user. Such a refusal constitutes discrimination based on sexual orientation. This fact is not altered by Plaintiffs' assertion that they want to refuse to provide custom wedding products for a same-sex wedding whether the marrying couple or someone else buys them. Refusing to sell to the latter—for example, a parent—does not make it any less discriminatory for the business to refuse to sell to the couple, and because the refusal is based on the marriage involving a same-sex couple, it is based on sexual orientation. *See* PCC § 18-4(B) (prohibiting both directly and indirectly refusing accommodations based on sexual orientation).

¶191 Unfortunately, the majority sanctions discrimination in this manner, concluding that Brush & Nib can refuse to prepare custom wedding invitations for Jordan and Alexis who share the same sex even though it would sell identical invitations to an opposite-sex couple with the same names. Moreover, although the majority limits its holding to wedding invitations like the exemplars in the record, *supra* ¶¶ 38, 112, the majority leaves open the prospect that vendors can otherwise refuse to prepare custom wedding items that “celebrate” a same-sex wedding. *Supra* ¶ 160. Today's decision is also deeply troubling because its reasoning cannot be limited to discrimination related to same-sex marriage or based on the beliefs of any one religion, but instead extends more broadly to other claims of a “right” by businesses to deny services to disfavored customers.

¶192 We should instead recognize that the City's interest in this case is compelling and narrowly tailored to enforce “rights of public access on behalf of [] citizens” as well as protect against deprivation of “individual dignity” and “the benefits of wide participation in political, economic, and social life.” *Jaycees*, 468 U.S. at 625, 104 S.Ct. 3244. As the court of appeals cogently observed, “[t]he least restrictive way to eliminate discrimination in places of public accommodation is to expressly prohibit such places from discriminating.” *Brush & Nib*, 244 Ariz. at 78 ¶ 50, 418 P.3d at 445.

B.

¶193 Arizona's free speech clause does not entitle Brush & Nib or its owners to refuse to provide goods and services for same-sex couples that it otherwise provides to opposite-sex couples.

¶194 As an initial matter, because the majority has decided the case on statutory grounds, it should not reach the constitutional issue—a point we have repeatedly emphasized. *See Stanwitz v. Reagan*, 245 Ariz. 344, 348 ¶ 12, 429 P.3d 1138, 1142 (2018); **932 *311 *State v. Gomez*, 212 Ariz. 55, 61 ¶ 31, 127 P.3d 873, 879 (2006). Exercising such restraint is especially appropriate here, where the analysis of the free speech claim in no way depends on the statutory claim under FERA. Moreover, although Arizona's constitution provides greater protections for speech than does the First Amendment in some contexts, I agree with the majority that we should rely on First Amendment case law in analyzing the claim under Arizona's free speech clause.

¶195 In construing article 2, section 6, Arizona courts generally “have followed ... interpretations of the United States Constitution.” *State v. Stummer*, 219 Ariz. 137, 142 ¶ 16, 194 P.3d 1043, 1048, 1059 (2008). The parties below couched their arguments solely in terms of First Amendment case law, and they have identified no reason for the Court here to give greater protections under the state constitution. *See State v. Jean*, 243 Ariz. 331, 342 ¶ 39, 407 P.3d 524, 535 (2018) (“Merely referring to the Arizona Constitution without developing an argument is insufficient to preserve a claim that it offers greater protection than the Fourth Amendment.”). Finally, nothing in the text of our constitution or its history suggests that it should be read to give greater protection for discriminatory conduct by businesses or other public accommodations than does the Federal Constitution.

¶196 The Ordinance is content neutral and does not compel a vendor of publicly available goods or services to speak about anything. Rather, it ensures that once a vendor decides to offer a good or service, a vendor must not refuse to provide such goods or services to a protected class that it would otherwise provide to the public. Although the creation of wedding invitations may be expressive, the operation of a business catering to the public is not. Furthermore, we recognized in *Coleman v. City of Mesa* that a business engaged in expressive activity is still subject to generally applicable laws. 230 Ariz. 352, 360 ¶ 31, 284 P.3d 863, 871 (2012); *see also id.* at 357 ¶ 16, 284 P.3d at 868 (noting that “[t]he City is not attempting to impose a generally applicable law ... to the on-going operations of businesses engaged in protected speech.”). *Coleman* concerned a city's barring a tattoo studio from operating at a particular location; it did not address whether a business choosing to sell items with expressive content can refuse to sell things to some customers that it willingly provides to others.

¶197 Because the Ordinance regulates conduct, and not speech, any burden on speech is incidental. “[A]n incidental burden on speech ... is permissible ... so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.* (“FAIR”), 547 U.S. 47, 67, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). In *FAIR*, the United States Supreme Court upheld a requirement that universities, as a condition for federal funding, provide military recruiters the same access to students through university communications and meeting rooms as allowed other prospective employers. *Id.* at 55, 70, 126 S.Ct. 1297. The communications between the universities and their students were undoubtedly speech (even “pure” speech), but the Court recognized, citing public accommodations cases, that the First Amendment does not protect discriminatory conduct, even if such conduct is accomplished through speech. See *id.* at 62–63, 126 S.Ct. 1297.

¶198 Here the conduct prohibited by the Ordinance is a vendor’s refusing to sell to same-sex couples the same goods or services offered to others. Such a refusal is the very definition of discrimination by a public accommodation. That complying with the public accommodations law may require the vendor to engage in “speech” does not mean that discriminatory conduct is constitutionally protected. See, e.g., *FAIR*, 547 U.S. at 62, 126 S.Ct. 1297 (“[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” (citation omitted)).

¶199 *Hurley*, on which the majority relies, is inapposite. That case involved a “peculiar” application of a public accommodations law to **933 *312 a privately organized parade that the Supreme Court described as “inherent[ly] expressive[].” 515 U.S. at 568, 572, 115 S.Ct. 2338. The Court held that the parade organizer could not be compelled to include groups whose views the organizer did not share. *Id.* at 566, 115 S.Ct. 2338. *Hurley* distinguished this situation from the generally permissible application of public accommodations laws to businesses. *Id.* at 578, 115 S.Ct. 2338; see also *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1059–60 (N.D. Cal. 2007) (noting absence of a “reported decision extending the holding of *Hurley* to a commercial enterprise carrying on a commercial activity”).

To the extent a parade analogy is apt, this case is more like a supplier of banners refusing to sell to a disfavored group than a parade-organizer being compelled to include groups with objectionable views. Brush & Nib and its owners are like the suppliers, not the parade-organizers. The organizers would be the marrying couple and forcing them to include particular messages in their wedding would be more analogous to *Hurley*.

¶200 The majority also argues that the *Spence-Johnson* test for determining whether conduct contains an expressive element is inapplicable here, because the wedding invitations in the record constitute “pure speech.” *Supra* ¶ 87. The majority goes even further and holds that whether a message is attributed to a speaker is irrelevant in this case. *Supra* ¶ 87. But *Hurley* itself considered attribution relevant, and it remains a part of a free speech analysis. See *Hurley*, 515 U.S. at 575–77, 115 S.Ct. 2338; see also *FAIR*, 547 U.S. at 65, 126 S.Ct. 1297 (noting that misattribution was not likely and did not warrant exempting universities from complying with Solomon Amendment). Thus, our analysis of the issues should consider whether others would view Brush & Nib’s creation of custom invitations as expressing its owners’ endorsement of same-sex marriage.

¶201 The majority’s conclusion that requiring Brush & Nib to provide wedding invitations on a non-discriminatory basis would compel “pure speech” by the owners endorsing same-sex marriage is strained and implausible. The exemplar invitations do not suggest that they reflect the views of the business preparing them. See Appendix 1. Invitations to attend and celebrate a wedding are no more a “celebration” on the part of the business preparing them than is the wedding cake provided by a caterer or pictures taken by a wedding photographer. Contrary to the majority’s conclusion that an invitation constitutes “pure speech” reflecting that Brush & Nib endorses same-sex marriage, *supra* ¶ 68, the expression of a wedding invitation, as “perceived by spectators as part of the whole” is that of the marrying couple. See *Hurley*, 515 U.S. at 577, 115 S.Ct. 2338; cf. *Coleman*, 230 Ariz. at 359 ¶ 25, 284 P.3d at 870 (noting that “a tattoo reflects not only the work of the tattoo artist but also the self-expression of the person displaying the tattoo’s relatively permanent image”). Of course, nothing requires Brush & Nib to identify itself as the supplier of an invitation or precludes it from disclaiming that its sales constitute an endorsement of the beliefs of its customers. Cf. *FAIR*, 547 U.S. at 49, 126 S.Ct. 1297 (“Nothing about recruiting suggests that law schools agree with any

speech by recruiters, and nothing in the Solomon Amendment restricts what they may say about the military's policies.”).

¶202 Even if the Ordinance burdens speech, it is a constitutionally permissible burden because the Ordinance is content neutral, serves a compelling governmental interest, and there is no less restrictive alternative. Long-settled law recognizes that a business cannot, based on its owner's beliefs, refuse to serve customers who belong to a racial minority. See *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (describing such a claim as “patently frivolous”). Similarly, a business, even one organized as a partnership, cannot justify sex-based discrimination in its hiring by contending that its conduct reflects the freedom of association protected by the First Amendment. See *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). And although the majority suggests that cases such as *Heart of Atlanta Motel* are not relevant because they did not address the First Amendment, *supra* ¶ 113, there is no reason to think that the Supreme Court would address such cases **934

*313 differently if that ground were argued as an excuse for discriminatory conduct. In *Hurley*, the Court specifically cited to *Heart of Atlanta Motel* while noting that public accommodations laws do not generally violate the First or Fourteenth Amendments. *Hurley*, 515 U.S. at 572, 115 S.Ct. 2338; cf. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, — U.S. —, 138 S. Ct. 1719, 1727, 201 L.Ed.2d 35 (2018) (citing *Piggie Park* in noting that “it is a general rule that [religious and philosophical objections to same-sex marriage] do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”).

¶203 The majority's analysis turns on labeling the conduct at issue “pure speech,” but this legal formalism harbors two pernicious ideas: one is that a vendor's refusal to sell to certain customers is itself protected expression, the other is that the public interest in preventing discrimination does not suffice to require a vendor to serve all equally if the items sold involve expression by the vendor. One would think—indeed fervently hope—that we are long past the notion that businesses operating as public accommodations have a “right” to tell certain customers that they do not serve their kind and so they should take their patronage elsewhere. Although the majority baldly asserts that its holding will not allow “invidious, status-based discrimination,” *supra* ¶ 6, its reasoning suggests that any business offering made-to-

order goods and services with expressive content—an open universe that includes printing, painting, tattoos, videography, and other “art” broadly defined—can selectively refuse to sell to groups of customers whom the business disfavors. Free speech jurisprudence does not dictate such a result, nor the result in this case.

C.

¶204 FERA does not allow Plaintiffs to refuse services for a same-sex wedding that it would provide for an opposite-sex wedding. FERA generally protects an individual's exercise of religion from substantial governmental burdens, but that protection is not unlimited. See A.R.S. § 41-1493.01(B), (E).

¶205 To prevail on their claim under FERA, Brush & Nib's owners must show that refusing to provide same-sex couples with the same services they would provide to opposite-sex couples: (1) is motivated by their religious beliefs; (2) their beliefs are sincerely held; and (3) the government action—here, requiring equal treatment of all customers without regard to sexual orientation—substantially burdens the exercise of those beliefs. See *State v. Hardesty*, 222 Ariz. 363, 366 ¶ 10, 214 P.3d 1004, 1007 (2009). Even if these elements are established, the prohibition on discrimination will be upheld if the government meets its burden of showing that it both furthers a compelling governmental interest and is the least restrictive means of furthering that interest. See *id.*

¶206 On this record, there is no dispute that Brush & Nib's owners, in seeking to refuse to create made-to-order invitations and other custom wedding products for same-sex couples, are motivated by religious beliefs that they sincerely hold. But the City does dispute their assertion that complying with the Ordinance would substantially burden the exercise of their religious beliefs.

¶207 FERA itself does not define what constitutes a “substantial burden.” It does, however, observe that the term “is intended solely to ensure that this article is not triggered by trivial, technical, or de minimis infractions.” § 41-1493.01(E). The majority concludes that a substantial burden is imposed when state action forces someone to choose between following the precepts of their religion and receiving a government benefit, or when it compels them under threat of criminal sanction to perform acts undeniably at odds with fundamental tenets of their religious beliefs. *Supra* ¶ 131; see also *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d

1058, 1070 (9th Cir. 2008) (adopting similar standard for federal Religious Freedom Restoration Act (RFRA)).

¶208 In terms of a substantial burden, the issue here is whether the Ordinance compels Brush & Nib’s owners to perform acts undeniably at odds with fundamental tenets of **935 *314 their religious beliefs. The City notes that Brush & Nib’s owners are willing to sell prepackaged wedding products for use in same-sex weddings. The owners have also acknowledged that they are willing to sell made-to-order products to opposite-sex couples who engage in conduct they find objectionable on religious grounds. The City also observes that the owners have not identified any tenet of their faith that requires them to sell wedding products to certain customers or forbids them from selling them to others.

¶209 Because the owners do not object to selling some items for use in same-sex marriages or selling custom items for other weddings raising religious concerns, the City infers that requiring them to sell custom items for same-sex weddings does not substantially burden the exercise of their religious beliefs. The majority frames the City’s argument as declaring the owners’ religious beliefs “unreasonable,” and contends that such reasoning is foreclosed by *Hobby Lobby*. *Supra* ¶¶ 137–38. The majority errs on both points. The City has not argued that the owners’ beliefs are unreasonable; nor was such reasoning adopted by the court of appeals. *See Brush & Nib*, 244 Ariz. at 77 ¶ 49, 418 P.3d at 444. Moreover, while *Hobby Lobby* recognizes that it is not the role of courts to gauge the reasonableness of a claimant’s religious belief, both RFRA and FERA by their terms require a court to consider whether a burden is substantial, itself a legal conclusion. On the latter point, *Hobby Lobby* does not suggest a court must accept a claimant’s assertion that a substantial burden exists. *See, e.g., Real Alts., Inc. v. Sec’y Dep’t of Health & Human Servs.*, 867 F.3d 338, 356–58 (3d Cir. 2017).

¶210 Even if we assume that the Ordinance places a substantial burden on the owners’ exercise of their religious beliefs, they cannot prevail on their FERA claim because the City has a compelling interest in preventing discrimination and has done so through the least restrictive means. That interest would be thwarted if businesses can discriminate based on their owners’ views. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727 (noting that allowing vendors of wedding goods and services to refuse similar services for gay persons would result in “a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations”);

State v. Arlene’s Flowers, Inc., 193 Wash.2d 469, 441 P.3d 1203, 1235 ¶ 107 (2019). The issue is not whether the City might have authorized less severe sanctions for violations of the Ordinance, but instead whether the goal of preventing discrimination could otherwise be achieved. *See Tymes-Bey v. State*, 69 N.E.3d 488, 491 (Ind. Ct. App. 2017).

¶211 The goal of equal access cannot be achieved allowing ad hoc exemptions for businesses based on their owners’ beliefs, even if they are sincerely held. The “fundamental object” of public accommodation laws is to prevent the “deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” *Heart of Atlanta Motel*, 379 U.S. at 250, 85 S.Ct. 348 (quoting S. Rep. No. 88-872, at 16 (1964)). Allowing businesses to refuse services to groups they disfavor, and to publicly advertise those practices, is inherently unequal. This point is not undermined by the City’s excepting “bona fide religious organizations” from the Ordinance, as the issue is not whether the Ordinance has proscribed discriminatory conduct by every entity, but instead whether allowing a broader exception for businesses under FERA would undermine the statutory goal. *Cf. Hardesty*, 222 Ariz. at 368–69 ¶ 23, 214 P.3d at 1009–10 (rejecting argument that religious-use defense for possession of peyote supported also recognizing FERA-based defense for possession of marijuana and noting “disparate magnitudes” of respective uses).

¶212 In concluding that the City has not shown the Ordinance is the least restrictive means of preventing discrimination, the majority mistakenly relies on *Hobby Lobby*, 573 U.S. 682, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014), and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). *Supra* ¶¶ 155–58. Neither of those cases involved a RFRA-based claim for an exemption from a public accommodations law, much less questioned the compelling interest in preventing discrimination by businesses. **936 *315 *Cf. Hardesty*, 222 Ariz. at 368 ¶ 19, 214 P.3d at 1009 (recognizing that analysis of least restrictive means depends on compelling interest involved). In fact, *Hobby Lobby* recognized that considering impacts on third parties from a requested exemption should inform analysis of the government’s compelling interest and the availability of a less-restrictive means. *See* 573 U.S. at 729 n.37, 134 S.Ct. 2751; *id.* at 739, 134 S.Ct. 2751 (Kennedy, J., concurring) (noting that religious accommodation may not “unduly restrict other persons ... in protecting their own interests”). In granting a religious accommodation to the closely held corporations

under RFRA, the Court noted that doing so would have “precisely zero” effect on the interests of others. *Id.* at 693, 134 S.Ct. 2751. *O Centro* rejected the contention that the government’s interest in uniformly enforcing the Controlled Substances Act (CSA) was sufficiently compelling to deny a religious exemption for the use of hoasca, a ceremonial tea containing a proscribed hallucinogen, noting that the CSA itself contains an exemption for the religious use of peyote. 546 U.S. at 423, 425, 126 S.Ct. 1211. But *O Centro* itself recognized that “there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA.” *Id.* at 436, 126 S.Ct. 1211.

¶213 The “less restrictive means” contemplated by the majority—allowing businesses selectively to discriminate based on their owners’ beliefs—enables the very conduct the Ordinance legitimately seeks to prohibit. Unlike *Hobby Lobby* or *O Centro*, granting ad hoc exemptions to the Ordinance imposes discrete and identifiable harms on those subjected to discrimination. It is no answer to say that today’s holding is limited to “custom” wedding invitations or that same-sex couples may obtain wedding-related services from other vendors. The prohibition on discrimination not only promotes equal access, but also serves to eradicate discrimination and the attendant humiliation and stigma that result if businesses can selectively treat some customers as second-class citizens. *See, e.g., Jaycees*, 468 U.S. at 625, 104 S.Ct. 3244 (noting that public accommodations laws “vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments’” (quoting *Heart of Atlanta Motel*, 379 U.S. at 250, 85 S.Ct. 348)).

¶214 The majority’s outcome is even more peculiar considering that, in 2014, the legislature attempted to pass SB 1062, which would have amended the definition of “person” under FERA to include “any individual, association, partnership, corporation, church, religious assembly or institution, or other business organization,” thus giving businesses an explicit right to invoke FERA as a defense to refusing to comply with, among other things, public accommodation laws. S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/237882>. Due to concerns of discrimination against minority groups, the bill was vetoed by the governor. *See* Bill Chappell & Mark Memmott, *Arizona Gov. Brewer Vetoes Controversial Bill*, NPR (Feb. 26, 2014), [\[thetwoway/2014/02/25/282507942/arizona-gov-brewer-vetoes-controversial-bill\]\(http://thetwoway/2014/02/25/282507942/arizona-gov-brewer-vetoes-controversial-bill\); *cf. J.D. v. Hegyi*, 236 Ariz. 39, 43 ¶ 21, 335 P.3d 1118, 1122 \(2014\) \(rejecting court of appeals’ statutory interpretation in part as in tension with statutory purpose, when legislature considered and rejected proposed amendment\).](https://www.npr.org/sections/</p>
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¶215 The majority errs in concluding that the City has not met its burden under FERA. The majority is likewise unpersuasive in asserting that its holding is narrow with limited consequences. *Supra* ¶¶ 3, 112. Saying that today’s decision applies only to custom wedding invitations that are “materially similar” to those in the record, *supra* ¶ 3, does not delimit the ruling even as to wedding-related products, as the majority does not identify the salient characteristics of the invitations in the record; observes that every invitation is “different and unique,” *supra* ¶ 78; and disclaims addressing whether Brush & Nib can refuse to provide other custom products for same-sex weddings. *Supra* ¶ 3. More broadly, if religious beliefs can allow discriminatory refusals of service to same-sex couples, there is no principled reason why FERA will not also protect discriminatory denials of goods or services in other contexts to other protected groups.

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¶216 This case is not about the government compelling individuals to create art or pure speech expressing a message with which they disagree. Instead, it involves a business, undisputedly a public accommodation, whose owners wish to deny the same goods and services for a same-sex wedding that they would provide for an opposite-sex wedding. Barring those who choose to offer goods and services to the public from discriminating does not impermissibly compel speech. A vendor may no doubt engage in a form of expression by refusing to sell things to customers it disfavors. But expression through such discriminatory conduct, even if motivated by sincerely held religious beliefs, is not legally protected.

¶217 Beyond the injury to particular customers who are denied goods or services, today’s holding threatens a more general harm. It could portend a marketplace in which vendors—regardless of their religious beliefs—who make items with expressive content can openly proclaim their refusal to sell to customers whom they disfavor, as can vendors—whether or not they sell items with expressive content—who, based on their religious beliefs, object to

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selling things to some customers that they offer to others. This prospect diminishes our defining statement that all are created equal and can only dismay those who believe that this ideal should be “constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence.” Abraham Lincoln, *Speech at Springfield, Illinois (June 26, 1857)*, in Abraham Lincoln: Speeches and Writings 1832–1858 398 (1989).

¶218 Over our history, Arizonans have been denied access to housing, employment, and public accommodations based on invidious discrimination. Phoenix’s early history includes shopkeepers placing “No Mexicans Allowed” signs in their shop windows, landowners inserting restrictions against people of Chinese descent in property deeds, widespread refusals to serve black Arizonans in restaurants, and hotel operators refusing to accommodate Jewish guests. Bradford Luckingham, *Minorities in Phoenix* 40, 116, 148 (1994); Hon. Elizabeth Finn, *The Struggle for Civil Rights in Arizona*, 34 Ariz. Att’y 24, 27 (July 1998). Through years of hard work and perseverance, protections like the Ordinance have been put in place to ensure that we do not repeat the denials of access and opportunity that plagued our state in its infancy.

¶219 This case, sadly, illustrates that our progress toward equality has been tortuous and incomplete. Despite today’s mistaken holding, our constitutions and laws should not entitle a business to discriminatorily refuse to provide goods or services to customers whom the business disfavors.

TIMMER, V.C.J., dissenting.

¶220 I respect and admire people who not only profess religious faith but attempt to live by their religious principles. Nevertheless, in an ordered society of many beliefs, “every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.” *United States v. Lee*, 455 U.S. 252, 261, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982). When people of faith, like Plaintiffs, choose to engage in commercial activities, “the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” *Id.* The Ordinance, which binds businesses in the City, similarly binds Plaintiffs, and neither Arizona’s free speech provision nor FERA provides an exemption. Although I agree wholeheartedly with Justice Bales’ dissent, the alarming consequences of today’s decision

spur me to emphasize some points. I also write separately to express disagreement with the majority’s “substantial burden” analysis under FERA.

¶221 First, the majority errs by concluding that the Ordinance compels Plaintiffs to express messages supporting same-sex marriages, “cuts off the Plaintiffs’ right to express their beliefs about same-sex marriage,” and attempts to coerce “uniformity of beliefs and ideas” by “telling [Plaintiffs] what they can and cannot say.” See *supra* ¶¶ 7-8, 103. The Ordinance regulates conduct, not speech. It only requires Plaintiffs to sell the same **938 *317 products equally to all customers, regardless of sexual orientation. Plaintiffs retain control over the type of products they sell, their style and design, and the specific messages written. Thus, if Plaintiffs would not design a wedding invitation with a pink triangle or a rainbow flag for an opposite-sex couple, the Ordinance cannot compel them to do so for a same-sex couple. If they always include language in wedding invitations for opposite-sex couples describing marriage as a union only between men and women, they can insist on doing so in same-sex wedding invitations without penalty. They can freely publish views opposing same-sex marriages or say nothing at all about marriages. But because Plaintiffs design and sell custom invitations expressing customers’—not Plaintiffs’—requests for guests to “share the joy,” “celebrate,” or simply attend weddings, Plaintiffs cannot refuse to do so for same-sex couples.

¶222 Relatedly, the majority mistakenly contends that requiring Plaintiffs to sell custom wedding products intended for same-sex weddings compels them to endorse same-sex marriages in violation of their beliefs. See *supra* ¶ 103. I disagree. A wedding invitation invites attendees to celebrate a particular couple’s wedding; it does not endorse the idea of opposite-sex marriages or same-sex marriages. See *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, — U.S. —, 138 S. Ct. 2448, 2463–64, 201 L.Ed.2d 924 (2018) (“[c]ompelling individuals to mouth support for views they find objectionable” generally violates First Amendment principles). The meaning of these expressions—invitations to attend a wedding—does not change as the sexual orientation of customers varies. And it defies common sense to think that a wedding invitation expresses a commercial artist’s endorsement of the subject wedding whether it involves, for example, a same-sex couple, an opposite-sex couple in an abusive relationship, or a loveless match. Cf. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64–65, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (rejecting law schools’ argument that allowing the military to recruit at

the schools evidences the schools' agreement with military policies).

¶223 Second, the majority misapplies FERA's "substantial burden" requirement by failing to consider how the Ordinance itself—before considering penalties for violations—substantially burdens Plaintiffs' exercise of their beliefs. A.R.S. § 41-1493.01(B), (E) (providing that FERA is triggered only if government laws, rules, or other actions "substantially burden a person's exercise of religion," which excludes "trivial, technical or de minimis infractions"). If the Ordinance's proscription of discrimination in public accommodation does not substantially burden Plaintiffs' free exercise of religion in the first instance, there is no need to consider the potential penalties for violating the Ordinance. So how does requiring Plaintiffs to sell the same type of wedding products to opposite-sex and same-sex couples burden Plaintiffs' exercise of their sincerely held religious beliefs? And what makes any burden "substantial" and not "trivial, technical or de minimis"? The majority does not say. Instead, it incorrectly focuses only on the penalties for violating the Ordinance, finding a substantial burden exists here because if Plaintiffs adhere to their sincerely held religious beliefs and refuse to sell custom wedding invitations for same-sex weddings, they could suffer "severe civil and criminal sanctions." See *supra* ¶ 135.

¶224 The majority's misapplication of FERA's "substantial burden" requirement effectively eliminates it. Under the FERA paradigm announced today, a claimant need only demonstrate that exercise of a sincerely held religious belief conflicts with a law, which could result in a penalty. The claimant has no need to demonstrate that the law itself substantially burdens the claimant's exercise of religion—a requirement intended to remove trivial and de minimis infringements from FERA's protection. Thus, as the City predicts, a Phoenix taxi-cab owner with a religious belief that women should only travel with men and who therefore refuses to accept unaccompanied women riders can show a substantial burden under FERA just by demonstrating the sincerity of his beliefs and pointing to the potential penalties for violating the Ordinance. It is not difficult to imagine similarly discriminatory scenarios involving race, color, religion, sex, national origin, **939 *318 marital status, and disability, all of which the Ordinance proscribes. See Phx., Ariz., City Code § 18-4(B).

¶225 In my view, whether a "substantial burden" on the exercise of religion exists under FERA is a legal question

for the courts rather than a factual question determined by the sincerity of a person's religious beliefs and the existence of penalties for exercising those beliefs in a manner that violates a law. See *Pennsylvania v. President United States*, 930 F.3d 543, 572 n. 28 (3d Cir. 2019); *Real Alts., Inc. v. Sec'y Dep't of Health and Human Servs.*, 867 F.3d 338, 356 (3d Cir. 2017). Thus, "[w]hile the Supreme Court reinforced in *Hobby Lobby* that [courts] should defer to the reasonableness of the [RFRA claimant's] religious beliefs, this does not bar our objective evaluation of the nature of the claimed burden and substantiality of that burden on the [claimant's] religious exercise." *Real Alts.*, 867 F.3d at 356 (alterations in original and added) (citation omitted); see also *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014) (characterizing the RFRA issue as whether the government imposed a substantial burden on the parties to conduct business in accordance with their religious beliefs and not whether those beliefs are reasonable); *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011) ("[T]o make religious motivation the critical focus is ... to read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." (citation omitted)).

¶226 Relying on *Hobby Lobby*, the majority asserts it cannot decide whether the Ordinance itself substantially burdens Plaintiffs' exercise of their sincerely held religious belief that marriage occurs only between a man and a woman because doing so would require the Court to decide the reasonableness of Plaintiffs' religious views, which is nonjusticiable. See *supra* ¶¶ 136–40. I recognize that some language in *Hobby Lobby* supports the majority's position. See *Hobby Lobby*, 573 U.S. at 725, 134 S.Ct. 2751 (stating that plaintiffs "sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function ... in this context is to determine' whether the line drawn reflects 'an honest conviction' "). But the Court in *Hobby Lobby* did not address whether a sincere religious belief alone would suffice under RFRA when a business is compelled by a public accommodation law to provide goods and services equally to customers, as opposed to funding morally objectionable acts, and it may well address the issue differently in that context. Cf. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, — U.S. —, 138 S. Ct. 1719, 1727, 201 L.Ed.2d 35 (2018) (noting that while religious objections to same-sex marriage are constitutionally protected, "it is a general rule that such objections do not allow business owners and

other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law”); *id.* (stating that although objecting clergy cannot be compelled to perform a same-sex wedding ceremony, “if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations”). Regardless, although instructive, *Hobby Lobby* is not binding on our interpretation of FERA any more than RFRA is binding on the City.

¶227 A “substantial burden” under FERA occurs only if the Ordinance (1) compels claimants “to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept work, on the other hand,” *Sherbert v. Verner*, 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), or (2) threatens claimants with criminal sanctions unless they “perform acts undeniably at odds with fundamental tenets of their religious beliefs.” *Wisconsin v. Yoder*, 406 U.S. 205, 218, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). A court’s inquiry should focus on “the nexus between religious practice and religious tenet: **940 *319 whether the regulation at issue forced plaintiffs to engage in conduct that their religion forbids or prevents them from engaging in conduct their religion requires.” *Mahoney*, 642 F.3d at 1121 (interlineations accepted) (citation omitted).

¶228 Plaintiffs have not shown that the Ordinance substantially burdens the exercise of their religious beliefs. The Ordinance does not compel them to express approval of same-sex marriages, and they would not be penalized for refusing to design wedding products expressing such approval. See *Sherbert*, 374 U.S. at 404, 83 S.Ct. 1790. Plaintiffs do not claim that “fundamental tenets of their religious beliefs,” see *Yoder*, 406 U.S. at 218, 92 S.Ct. 1526, require them to refrain from selling custom wedding products (as opposed to non-custom goods) related to same-sex weddings. See *supra* ¶ 160 (“Plaintiffs have never asserted that their faith precludes them from serving same-sex couples, or that it requires them to refuse service to a customer based on their sexual orientation.”). Nor does selling custom wedding products for same-sex weddings make Plaintiffs participants in such weddings as such items do not themselves “enabl[e] or facilitat[e]” weddings any more than would the artistically created but non-custom wedding products

Plaintiffs willingly sell for use in same-sex weddings. See *Hobby Lobby*, 573 U.S. at 724, 134 S.Ct. 2751.

¶229 Selling custom wedding products for same-sex weddings may “decrease[] the spirituality, the fervor, or the satisfaction” with which Plaintiffs practice their religion. See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) (stating that such impacts do not constitute a “substantial burden” under RFRA). But they have not shown that selling the same custom items to customers for use in opposite-sex and same-sex weddings forces Plaintiffs to choose between running their business and following their faith, see *Sherbert*, 374 U.S. at 404, 83 S.Ct. 1790, or is “undeniably at odds with fundamental tenets of their religious beliefs.” See *Yoder*, 406 U.S. at 218, 92 S.Ct. 1526.

¶230 Despite the majority’s unfounded assertion, see *supra* ¶¶ 141-42, I fully embrace that Plaintiffs’ religious beliefs are sincere and substantial. Nevertheless, deference to Plaintiffs’ sincere religious beliefs should not require deference to their assertion that the Ordinance substantially burdens their exercise of those beliefs. It is our role as jurists to decide whether they proved FERA’s substantial burden requirement. On this record, like the trial court, I conclude they have only shown a de minimis burden and so FERA is not triggered. See § 41-1493.01(E).

¶231 Third, the majority ignores Plaintiffs’ request to be relieved from designing other custom wedding-related items for same-sex marriages, such as wedding invitations that do not include celebratory messages, “save the date” notices, table numbers, menus, and “welcome” signs. Samples of those items are in the record, so no reason exists not to address them. See Appendix 2. The majority possibly ignores the request because, for example, it is difficult to understand how a menu proclaiming that guests are having beef tenderloin for dinner communicates anything other than what meal guests will be served. That message remains the same whether those guests are attending an opposite-sex wedding or a same-sex wedding. And it is difficult to discern how designing and selling such items substantially burdens Plaintiffs’ exercise of their religious beliefs in violation of FERA. Putting aside whether requiring Plaintiffs to design custom wedding invitations expressing messages of “celebration” or “joy” for same-sex weddings is compelled speech and violates FERA, the majority missteps by neglecting to tell Plaintiffs they must at least design and sell wedding invitations lacking celebratory language and items like table numbers, menus, and welcome signs equally for both same-sex weddings

and opposite-sex weddings. As a result, the City, Plaintiffs, like-minded businesses, and the lower courts are left with incomplete guidance.

¶232 I greatly respect my colleagues in the majority. Regardless, in my view, their analysis is flawed, it leaves issues unresolved, and, most distressingly, it unduly hinders public accommodation laws seeking to ensure that businesses serve persons equally regardless of their status, including sexual orientation. I dissent.

STARING, J., dissenting.

**941 *320 ¶233 I respectfully dissent, joining Justice Bales's dissent. I write separately to briefly address the following points.

¶234 For “custom wedding invitations that are materially similar to the invitations contained in the record,” *supra* ¶112, the majority finds an exception to the general enforceability of public accommodation laws, *see Masterpiece Cakeshop*, 138 S. Ct. at 1727 (importance of limiting exceptions to public accommodation laws); *Hurley*, 515 U.S. at 572, 115 S.Ct. 2338 (public accommodation laws “do not, as a general matter, violate the First or Fourteenth Amendments”). I am, however, very skeptical concerning the effectiveness of the majority's expressions of limitation. It is hardly difficult to envision objections to providing public accommodations involving other forms of artistic expression no less substantial than the custom wedding invitations here. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723 (“examples of possibilities that seem all but endless”). Is there, for example, a meaningful difference between drawings and lettering on cardstock and the same drawings and lettering on a cake? Must the baker use the piping bag to provide exactly the same message for the very same wedding the calligrapher may refuse to employ the pen? Our state's lower courts—one of which I sit on—will struggle with limiting today's holding when confronted with circumstances that are not meaningfully distinct. This case will sweep much more broadly than the majority expresses.

¶235 Among other things, I am concerned that, ironically, today's holding could be relied on to discriminate against individuals based on their religion and religious beliefs, notwithstanding the fact that both Arizona and Phoenix include religion as a basis for protection in their public accommodation laws. *See A.R.S. § 41-1442(A)*; PCC § 18-4(B). This concern is partially premised on the fact that, based on the plain language of *A.R.S. § 41-1493.01(E)*, the

holding in *Hobby Lobby*, and the axiomatic constitutional proscription against government evaluation of the validity of religious beliefs, *see Masterpiece Cakeshop*, 138 S. Ct. at 1731, the task of showing a substantial burdening of sincerely held religious beliefs under FERA may be accomplished with relative ease. In fact, in light of these authorities, I generally agree with the majority's conclusion—although not with all facets of its analysis—that Brush & Nib has established that PCC § 18-4(B) substantially burdens its owners' free exercise of religion. But the ease with which a party may establish a substantial burden places a premium on correctly analyzing the compelling state interest and least restrictive means elements of FERA, particularly in a circumstance like considering whether to grant an exception to public accommodation laws. Justice Bales correctly analyzes those elements in his dissent, which, as noted, I join.

APPENDIX 1

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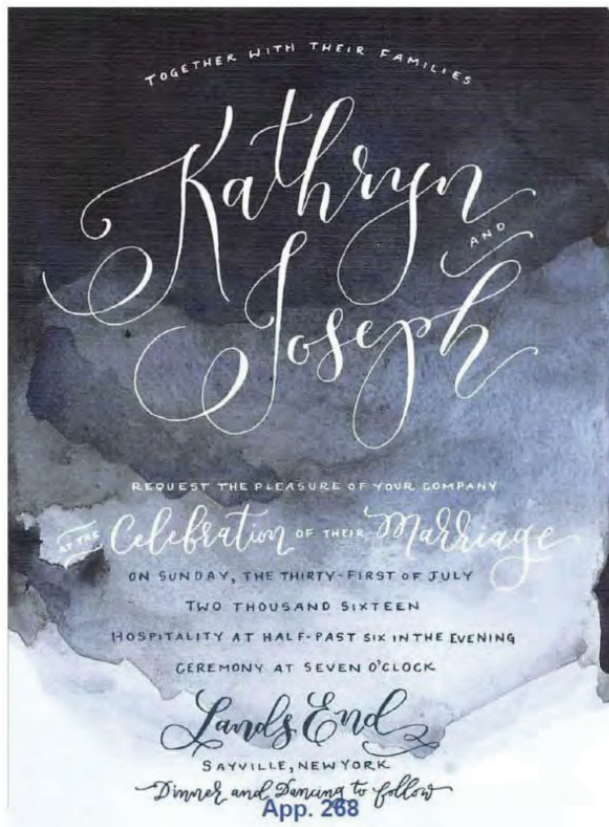


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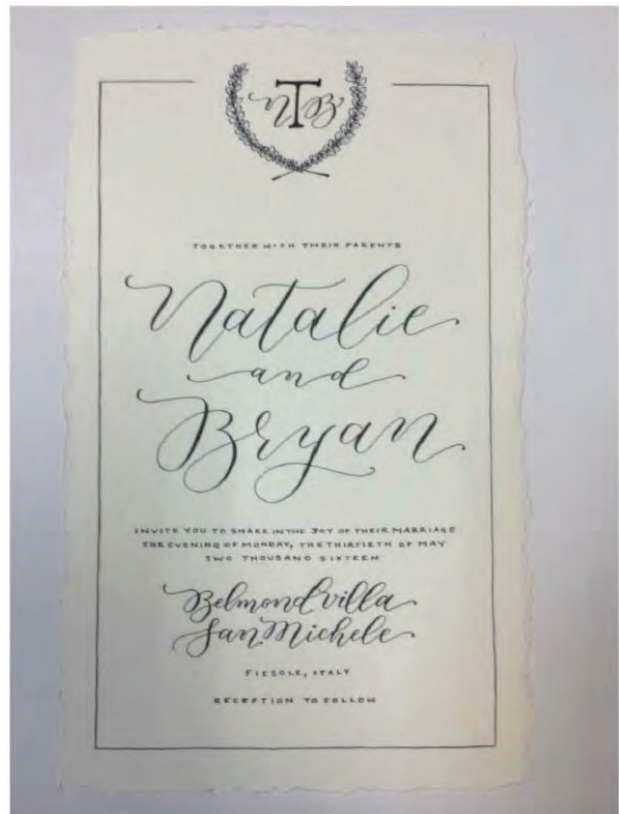


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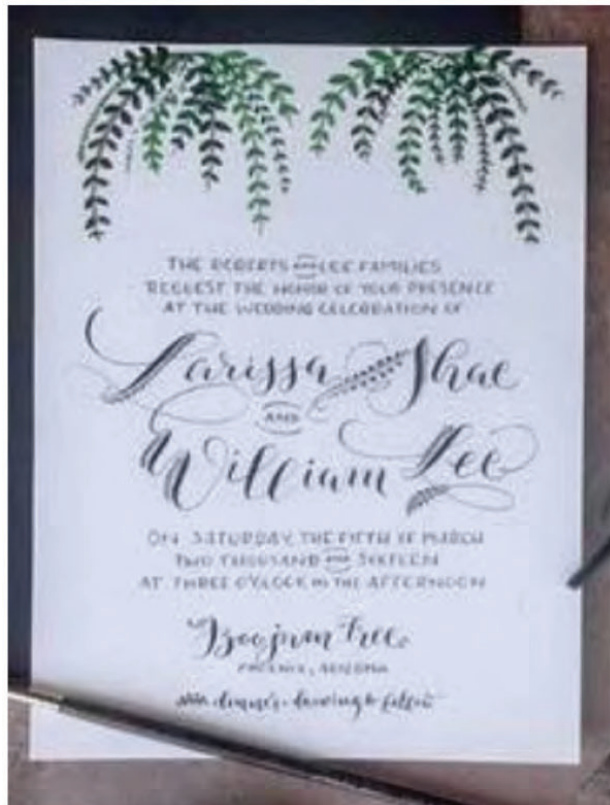
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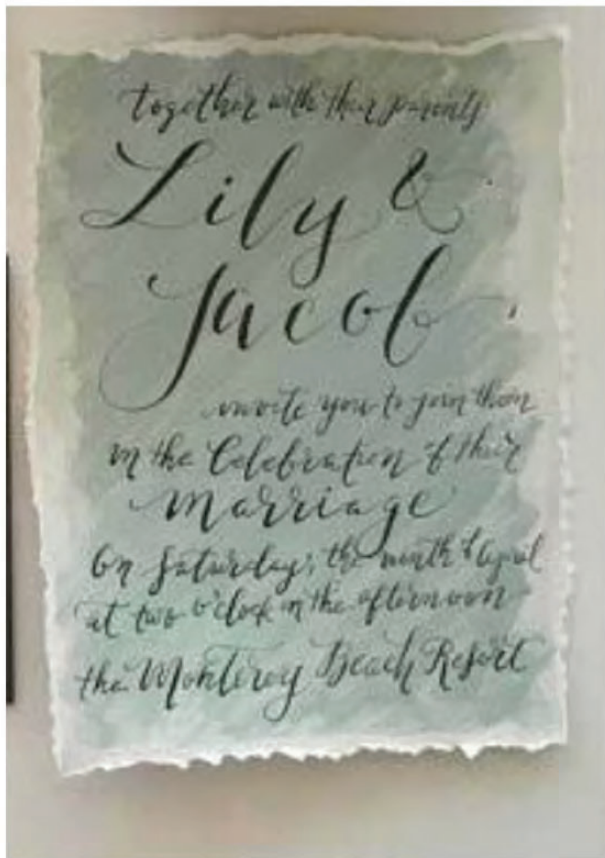


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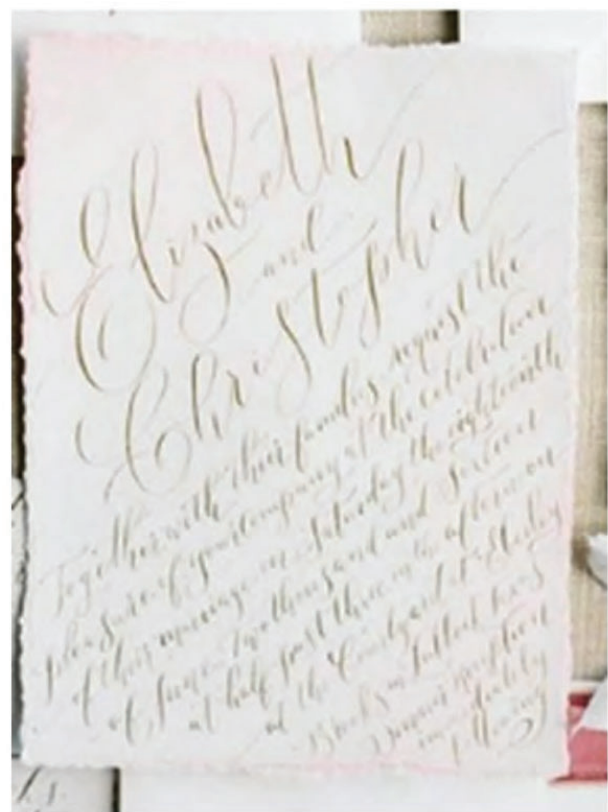


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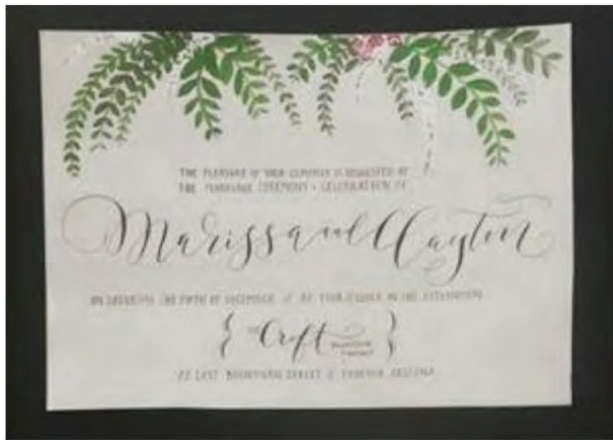
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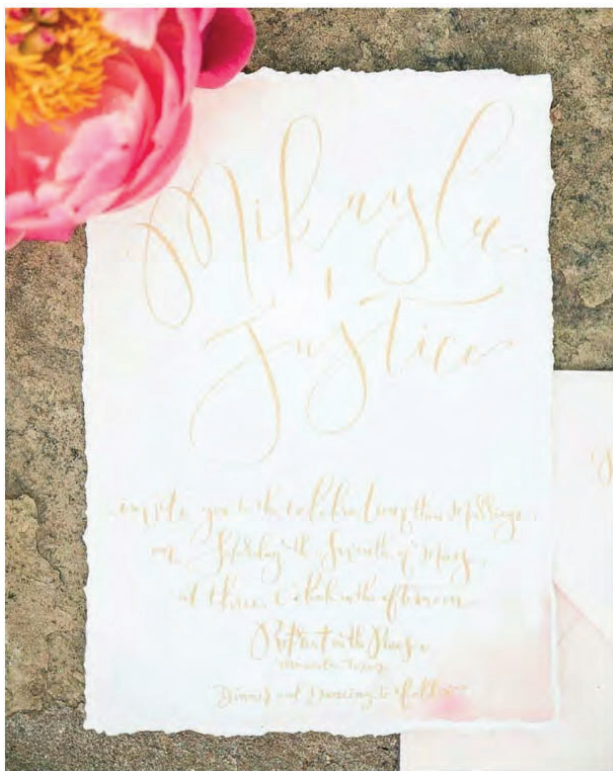
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**963 *342 APPENDIX 2



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All Citations

247 Ariz. 269, 1 Arizona Cases Digest 4, 448 P.3d 890

Footnotes

- * Chief Justice Robert M. Brutinel has recused himself from this case. Pursuant to [article 6, section 3 of the Arizona Constitution](#), the Honorable Christopher P. Staring, Judge of the Arizona Court of Appeals, Division Two, was designated to sit in this matter.
- 1 We note that on June 6, 2019, the Washington Supreme Court issued its opinion after the United States Supreme Court remanded in light of [Masterpiece Cakeshop, — U.S. —, 138 S. Ct. 1719, 201 L.Ed.2d 35. State v. Arlene's Flowers, Inc., 193 Wash.2d 469, 441 P.3d 1203 \(2019\)](#). The court once again affirmed, concluding that “the courts resolved this dispute with tolerance” and thus did not run afoul of the First Amendment’s requirement that courts must adjudicate such claims with religious neutrality. *Id.* at 1237 ¶ 120;

see *Masterpiece Cakeshop*, 138 S. Ct. at 1732. The court affirmed its previous holding that the state public accommodations law as applied to the flower shop owner did not violate the owner's free speech rights, and its reasoning did not materially differ. *Arlene's Flowers*, 441 P.3d at 1237–38 ¶ 120. Thus, the 2019 decision does not affect our analysis here.

- 2 We note that the Ordinance's exemption could not be used even by a bona fide religious organization, let alone a business owner, to refuse service based on "race, color, religion, sex, national origin ... or disability"; the exemption, by its terms, only applies to marital status, sexual orientation, and gender identity or expression. See PCC § 18-4(B)(2), 18-4(B)(4).

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EXHIBIT 4

2021 WL 2152961 (Cal.Super.) (Trial Order)
Superior Court of California.
Kern County

Father Trevor BURFITT, Plaintiff,

v.

Gavin NEWSOM, in his official capacity as the Governor of California, et al., Defendants.

No. BCV-20-102267.

January 5, 2021.

***1 IMAGED FILE**

Date: December 10, 2020

Time: 8:30 a.m.

Div.: H

Action Filed: September 29, 2020

Order Granting Motion for a Preliminary Injunction

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Hon. Gregory Pulskamp, Judge.

ORDER

Plaintiff Father Trevor Burfitt's Motion for a Preliminary Injunction in the above-entitled action came on for hearing on December 10, 2020 at 8:30 a.m. in Division H of the Kern County Superior Court, Metropolitan Division, the Honorable Gregory Pulskamp presiding. Plaintiff Father Trevor Burfitt appeared telephonically through his counsel of record, Christopher A. Ferrara and Paul M. Jonna. Defendants Gavin Newsom, Xavier Becerra, Sandra Shewry, and Erica Pan appeared telephonically through their counsel of record Anna Ferrari and Todd Grabarsky; Defendants Matthew Constantine and Donny Youngblood appeared telephonically through their counsel of record Kyle W. Holmes; Defendant Greg Terry appeared telephonically through his counsel of record Heather Cohen; Defendants Corwin Porter and John McMahon appeared telephonically through their counsel of record Heidi K. Williams; Defendants Wilma J. Wooten and William D. Gore appeared telephonically through their counsel of record Timothy White; Defendants Barbara Ferrer, Alejandro Villanueva, and Muntu Davis appeared telephonically through their counsel of record Jason Tokoro, Timothy Coates, Edward Morrissey, Judy Whitehurst, and Kiva Schrager; Defendants Eric Garcetti and Michel Moore appeared telephonically through their counsel of record Benjamin F. Chapman and Jonathan Eisenman; Defendants Mike Hadden and Robert Guthrie appeared telephonically through their counsel of record Jeffrey Dunn.

Based on the evidence presented, submissions of the parties, the complete file in this matter, the oral argument of the parties, and good cause appearing, and as stated in this Court's Minute Order dated December 10, 2020, which is copied and incorporated in its entirety below, it is hereby ORDERED and DECREED as follows: The Court grants Plaintiff Father Trevor Burfitt's Motion for Preliminary Injunction as to all Defendants.

DISCUSSION

In this case, the Court is presented with issues involving two very important, but competing interests: public health and freedom of religion. Specifically, Plaintiff contends, inter alia, that the government Defendants' implementation of Covid-19 safety protocols unconstitutionally infringes on the free exercise of religion. The current motion, Plaintiff's Motion for a Preliminary Injunction, entails several complex factual and legal issues. Fortunately, the United States Supreme Court has very recently issued opinions in the case of *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) 592 U.S. ____,  2020 WL 6948354 (*Roman Catholic Diocese*) and *Harvest Rock Church v. Newsom* (2020) 592 U.S. ____, 2020 WL 7061630, which provide clear guidance on these issues. (See also, the subsequent orders from the U.S. Court of Appeals, Ninth Circuit, *Harvest Rock*

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Church v. Newsom, No. 20-55907, 2020 WL 7075072 and  *South Bay United Pentecostal Church v. Newsom*, No. 20-55533, 2020 WL 7224194.) These opinions, as well as the relevant pre-existing body of law, lead this Court to conclude that Plaintiff's action has merit and that the issuance of a preliminary injunction is appropriate.

***2** When deciding whether to issue a preliminary injunction, courts must evaluate 1) the likelihood that the plaintiff will prevail on the merits at trial and 2) the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the injunction were granted. ( *IT Corporation v. County of Imperial* (1983) 35 Cal.3d 63, 70.) It is also clear that Plaintiff, as the moving party, has the burden to establish all the elements necessary to support the issuance of a preliminary injunction. ( *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.)

In order to evaluate the likelihood of Plaintiff prevailing at trial, the Court must first determine which legal standard should be used to analyze the Covid-19 restrictions at issue. Although Defendants collectively advocate for the use of a “rational basis” standard, it is clear that when restrictions appear to treat religious activity less favorably than comparable secular activities, the restrictions are subject to “strict scrutiny.” ( *Church of Lukumi v. Hialeah* (1993) 508 U.S. 520, 533-38, 546, 113 S.Ct. 2217 (*Lukumi*).) In other words, as noted in Roman Catholic Diocese, when “the challenged restrictions are not ‘neutral’ and of ‘general applicability,’ they must satisfy ‘strict scrutiny,’ and this means that they must be ‘narrowly tailored’ to serve a ‘compelling’ state interest.” (*Roman Catholic Diocese, supra*, at p. 3 [citations omitted].) In this case, the restrictions are not “neutral” and of “general applicability” because they assign entities into disparate classifications which results in religious activities being treated less favorably than comparable secular activities. For example, the “Purple Tier” of the “Blueprint for a Safer Economy,” and the most recent “Regional Stay at Home Order,” both impose a total ban on indoor religious services while simultaneously permitting a wide range of secular indoor activities to varying degrees. Entities permitted to engage in indoor activities – also known as “essential businesses” or “critical infrastructure” – include big-box retail stores, grocery stores, home improvement stores, hotels, airports, train stations, bus stations, movie production houses, warehouses, factories, schools, and a lengthy list of additional businesses. It is important to note that almost all of the entities that are allowed to host indoor operations do not engage in activity that is constitutionally protected, whereas houses of worship do. ( *Calvary Chapel Dayton Valley v. Sisolak* (2020) 140 S.Ct. 2603, 2603-04 (diss. opn. of Alito, J.).) Therefore, strict scrutiny is the appropriate standard in this case.

In applying the strict scrutiny standard, Defendants are given the opportunity to justify why religious activity is treated less favorably than comparable secular activity. ( *Lukumi, supra*, 508 U.S. 520 at pp. 533-39, 542-546.). In other words. Defendants must establish to a strict scrutiny standard why houses of worship are not treated like the favored class of entities. (*Ibid.* See also, *Roman Catholic Diocese, supra*, at p. 8 (conc. opn. of Kavanaugh, J.).) Stopping the spread of Covid-19 is undisputedly a “compelling state interest,” so one element of the standard is satisfied. However, Defendants' efforts to distinguish the permitted secular activity from the prohibited religious activity are not persuasive. For example, Defendants contend that the congregations of shoppers in big-box stores, grocery stores, etc., are not comparable to religious services in terms of crowd size, proximity, and length of stay. To the contrary, based on the evidence presented (or lack thereof) and common knowledge, it appears that shoppers at a Costco, Walmart, Home Depot, etc. may - and frequently do - congregate in numbers, proximity, and duration that is very comparable to worshippers in houses of worship. Defendants have not convincingly established that the health risks associated with houses of worship would be any different than “essential businesses” or “critical infrastructure,” assuming the same requirements of social distancing and the wearing of masks were applied across the board. As Justice Kavanaugh noted:

***3** “Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? [citations omitted.] The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot ‘assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives

in permitted social settings.”  *South Bay United Pentecostal Church v. Newsom* (2020) 140 S.Ct. 1613, 1615 (diss. opn. of Kavanaugh, J.).)

In addition, the restrictions at issue in this case are not “narrowly tailored” because the occupancy limits imposed on places of worship by the Purple Tier of the Blueprint for a Safer Economy and the Regional Stay at Home Order are zero - a total and complete ban of indoor religious services. These restrictions are arguably harsher than any other set of restrictions considered by the courts in all of the cases cited by the parties in this action. In *Roman Catholic Diocese*, the court considered New York's religious services occupancy limits of 10 persons in “Red Zones” and 25 persons in “orange zones” to be “very severe restrictions” and “far more restrictive than any Covid-related regulations that have previously come before the Court [footnote omitted], much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services.” (*Roman Catholic Diocese, supra*, at p. 1, 2.) What then should the courts think of California's total ban on indoor services? “Narrowly tailored” regulations mean “the least restrictive means available” and may potentially include a variety of less draconian measures such as “social distancing, wearing masks, leaving doors and windows open, forgoing singing, and disinfecting spaces between services.” (*Roman Catholic Diocese, supra*, at p. 4 (conc. opn. of Gorsuch, J.)) Therefore, it seems highly probable that Plaintiffs will prevail in this case should the matter proceed to trial.

In terms of evaluating, or balancing, the interim harm to the parties, “[t]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm [as] [t]he loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury.” (*Roman Catholic Diocese, supra*, at p. 3.) Although Plaintiff's action does not allege violations of the First Amendment, it does allege violations of Article I, Section 4, of the California Constitution which is at least as protective of religious liberties as the First Amendment (*Catholic Charities of Sacramento v. Superior Court* (2004) 32 Cal.4th 527, 562.) At the time of this writing (12/10/20), California does not permit indoor religious services in the four counties in which Plaintiff operates. In fact, between the Blueprint for a Safer Economy and the Regional Stay at Home Order, the State does not currently permit indoor religious services anywhere in the entire state. The harm to Plaintiff is self-evident. On the other hand, Defendants have not shown that adding religious organizations to the long list of entities that are permitted indoor operations would negatively impact public health, assuming the same healthcare precautions were implemented. Defendants' contention that the permissibility of outdoor religious services negates Plaintiff's claims is not well received because, as noted above, several less burdensome means are available to advance the goals of public health and safety. Similarly, Defendants' protestations that religious services may still be offered through means of modern telecommunication, such as TV or web-based platforms, seem specious because, as noted in *Roman Catholic Diocese*, “such remote viewing is not the same as personal attendance.” (*Roman Catholic Diocese, supra*, at p. 3.) Therefore, the interim harm to Plaintiff if the Motion for Preliminary Injunction were denied, would significantly outweigh the interim harm to Defendants if the motion were granted.

*4 In closing, this Court wholeheartedly agrees with the following sentiment:

“Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.” (*Roman Catholic Diocese, supra*, at p. 3.)

The free exercise of religion clause in the California Constitution prohibits Defendants from treating religious activities worse than comparable secular activities. California's current Covid-related restrictions do exactly that. This Court is not in a position to rewrite the restrictions or dictate to Defendants specifically how the restrictions may be cured. However, the Court is in a position to prohibit enforcement of the restrictions against Plaintiff pending trial, and rules accordingly. The Court makes no rulings at this time with respect to Plaintiff's separation of powers claim. The Court also does not make any rulings with respect

to Defendants' Covid-related restrictions that were created at the city and county levels, except that those restrictions are also not enforceable against Plaintiff to the extent that they incorporate the State of California's restrictions.

DISPOSITION

Pending a full trial on the merits, Defendants, their agents, and representatives, are hereby enjoined from enforcing against Plaintiff the provisions of the Blueprint for a Safer Economy, the Regional Stay at Home Order, and all Covid-19 restrictions that fail to treat houses of worship equal to the favored class of entities.

IT IS SO ORDERED.

Dated: 1/5/21

JUDGE OF THE SUPERIOR COURT

<<signature>>

Hon. Gregory Pulskamp

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EXHIBIT 5

479 F.Supp.3d 543
United States District Court, W.D. Kentucky.

CHELSEY NELSON PHOTOGRAPHY
LLC, et al., Plaintiffs

v.

LOUISVILLE/JEFFERSON COUNTY
METRO GOVERNMENT, et al., Defendants

CIVIL ACTION NO. 3:19-CV-851-JRW

|
Signed 08/14/2020

Synopsis

Background: Wedding photographer brought action against county, county commissions, and officials, alleging county ordinances, which required that companies serve gay and lesbian customers and refrain from advertising that they would not serve them, infringed on her free speech and religious liberty rights under the First Amendment because they required her to photograph same-sex weddings just as she photographs opposite-sex weddings. Photographer filed motion to preliminarily enjoin enforcement of ordinances and defendants filed motion to dismiss.

Holdings: The District Court, [Justin R. Walker](#), J., held that:

photographer intended to act in a way that implicated constitutional rights;

photographer intended to act in a way that violated county ordinances;

photographer's intended actions raised a credible threat of prosecution;

photographer failed to allege sufficient causal connection between chilling effect of ordinances and lost business;

photographs were speech under the First Amendment;

government interest in enforcement of ordinance that required that companies serve gay and lesbian customers, as applied to photographer, was not compelling;

legality of photographer's blog posts depended on what they said; and

government failed to show greater interest than preventing dissemination of truthful commercial information in enforcement of ordinance that required that companies serve gay and lesbian customers.

Motions granted in part and denied in part.

Procedural Posture(s): Motion for Preliminary Injunction; Motion to Dismiss.

Attorneys and Law Firms

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[Casey L. Hinkle](#), [David S. Kaplan](#), Kaplan Johnson Abate & Bird LLP, Jason D. Fowler, [John F. Carroll, Jr.](#), [Peter Frank Ervin](#), Jefferson County Attorney, Louisville, KY, for Defendants Louisville/Jefferson County Metro Government, Louisville Metro Human Relations Commission-Enforcement, Louisville Metro Human Relations Commission-Advocacy, Kendall Boyd, [Marie Dever](#), Kevin Delahanty, [Charles Lanier, Sr.](#), Laila Ramey, [William Sutter](#), Ibrahim Syed, Leonard Thomas.

[Gregory A. Napier](#), Troutman & Napier, PLLC, Lexington, KY, for Defendants Center for Religious Expression, Inc.

ORDER

[Justin R. Walker](#), District Judge

1. The Court **GRANTS in part** and **DENIES in part** Louisville's motion to dismiss (DN 14).¹

*547 2. The Court **DISMISSES** without prejudice the damages claims filed by Chelsey Nelson Photography, LLC and Chelsey Nelson (together, "Nelson").

3. The Court **GRANTS in part** and **DENIES in part** Nelson's preliminary injunction motion (DN 3).

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PRELIMINARY INJUNCTION

The Court **PRELIMINARILY ENJOINS**² Louisville/Jefferson County Metro Government; Louisville Metro Human Relations Commission – Enforcement; Kendall Boyd; Marie Dever; Kevin Delahanty; Charles Lanier, Sr.; Laila Ramey; William Sutter; Ibrahim Syed; and Leonard Thomas (in their official capacities) from taking the following actions against Nelson:

1. Invoking Metro Ordinance § 92.05(A) to compel Nelson to provide her wedding photography services to express messages inconsistent with Nelson's beliefs in marriage between one man and one woman, such as providing these services for same-sex wedding ceremonies; and

2. Invoking Metro Ordinance § 92.05(B) to prohibit Nelson from posting her desired statements (DN 1-2; DN 1-3) on her website and from making materially similar statements on her studio's website, on her studio's social media sites, or directly to prospective clients.

Nelson is substantially likely to succeed on her Free Speech claim. She doesn't need to post a bond.³

MEMORANDUM OPINION

A generation ago, ten Louisvillians founded the Fairness Campaign.⁴ At the time, discrimination against gay and lesbian people was legal in every Kentucky city.⁵ But with “extraordinary vision, tenacity, and grit — battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives,”⁶ the Fairness Campaign and its allies changed that.

In 1999, Louisville passed the Fairness Ordinance, which prohibits discrimination based on sexual orientation and gender identity in housing, public accommodations, and employment.⁷ The Fairness Ordinance requires that companies serve gay and lesbian customers and refrain from advertising that they won't serve them.⁸ In the two decades since then, 19 Kentucky *548 communities have passed similar laws.⁹

Chelsey Nelson is a wedding photographer. Like many Americans, she believes that marriage is between one man and one woman. She says the Fairness Ordinance infringes on her free speech and religious liberty rights because it requires her to photograph same-sex weddings just as she photographs opposite-sex weddings.

To cut to the chase, Nelson is likely to win by applying binding precedents and straightforward principles:

- Her photography is art.¹⁰
- Art is speech.¹¹
- The government can't compel speech when it violates the speaker's religious or political principles.¹²

True, photography is wordless. But so too is refusing to salute the flag.¹³ Or marching in a parade.¹⁴ And in the context of a public-accommodations law, when the law has “the effect of declaring [someone's] speech itself to be the public accommodation,” the First Amendment applies.¹⁵ A unanimous Supreme Court made that clear twenty-five years ago in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* when it said the state can't require a private organization to include a gay-rights group in its St. Patrick's Day parade.¹⁶

The scope of *Hurley* aside, this case requires us to confront a larger question at the heart of our nation's promise: Is America wide enough both for you and “a man whose words make your blood boil, who's standing center stage and advocating at the top of his lungs that which you would spend a lifetime opposing at the top of yours”?¹⁷

Just as gay and lesbian Americans “cannot be treated as social outcasts or as inferior in dignity and worth,”¹⁸ neither can Americans “with a deep faith that requires them to do things passing legislative majorities might find unseemly or uncouth.”¹⁹ “They are members of the community too.”²⁰ And under our Constitution, the government can't force them to march for,²¹ or salute in favor of,²² or create an artistic expression that celebrates,²³ a marriage *549 that their conscience doesn't condone.

America is wide enough for those who applaud same-sex marriage and those who refuse to. The Constitution does not

require a choice between gay rights and freedom of speech. It demands both.

I.

Nelson is a photographer, editor, and blogger.²⁴ She takes engagement and wedding photos with artistic skill.²⁵ She professionally edits the photos she takes as well as those of other photographers.²⁶ She also blogs about weddings.²⁷ For each of these services, her expressive goal is “telling positive stories about weddings because weddings are such significant and joyous events and because she believes marriage is a gift from God that should be treasured and celebrated.”²⁸

Nelson is also a Christian. Her faith shapes everything she does, including how she operates her photography studio.²⁹ She believes that marriage is between one man and one woman.³⁰ For that reason, she would decline to photograph a same-sex wedding, and she would decline to edit photos from a same-sex wedding.³¹ She wants to explain these views on her website so she can be up front with potential customers about what she believes and what she will and won't do.³²

Nelson fears that if she declines to photograph a same-sex wedding or declines to edit photos from a same-sex wedding, she will violate the Fairness Ordinance.³³ She also fears that she will violate it if she explains her policy on her website.³⁴ She asks this Court to block Louisville from enforcing the Fairness Ordinance against her.³⁵

II.

The Constitution limits the Court's jurisdiction to only “Cases” and “Controversies.”³⁶ So before it can decide anything in a case, the Court must determine if the question before it presents an actual case with an actual controversy.³⁷

A.

One could imagine a court system that prevented a party from challenging a law unless the law had already been enforced against that party. If no enforcement, then no injury,

so no case or controversy. *550 But that is not our system. Nelson has standing to bring pre-enforcement challenges to the Fairness Ordinance's Accommodations Provision³⁸ and Publication Provision³⁹ — and those challenges are ripe⁴⁰ — if she alleges for each that (1) she intends to act in a way that implicates constitutional rights; (2) the provision prohibits what she intends to do; and (3) her intended actions raise “a credible threat of prosecution” under the Fairness Ordinance.⁴¹

Nelson easily clears the first two hurdles for both provisions. She wants to photograph and edit photographs of only opposite-sex weddings.⁴² She also wants to post messages on her website explaining her religious objections to photographing same-sex weddings and editing photographs of same-sex weddings.⁴³ The First Amendment's scope includes blog posts.⁴⁴ And as explained later, it also covers the photographs themselves.⁴⁵

Next, what Nelson intends to do violates the Fairness Ordinance.⁴⁶ Specifically, refusing to photograph same-sex weddings violates the Fairness Ordinance, which prohibits Nelson from denying the “full and equal enjoyment” of her photography service to same-sex couples “on the ground of ... sexual orientation.”⁴⁷ So too, does refusing to edit photographs of same-sex *551 weddings.⁴⁸ Nelson's proposed blog posts also violate the Fairness Ordinance, which prohibits her from advertising that she will refuse to photograph same-sex weddings or edit photographs of same-sex weddings.⁴⁹

The third hurdle is taller, but Nelson clears it too. A “credible threat of prosecution” requires an allegation of subjective chill, which Nelson has undeniably alleged,⁵⁰ and “some combination of the following factors: (1) a history of past enforcement against the plaintiffs or others; (2) enforcement warning letters sent to the plaintiffs regarding their specific conduct; and/or (3) an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action.”⁵¹ An additional factor is (4) “a defendant's refusal to disavow enforcement of the challenged statute against a particular plaintiff.”⁵²

The second factor cuts in Louisville's favor. No same-sex couple has asked Nelson to photograph their wedding.⁵³

Likely because of that, Louisville hasn't acted against Nelson.⁵⁴ In fact, it says that until she filed this lawsuit, it had never even heard of her.⁵⁵

But the other three factors cut decisively in Nelson's favor. There is “a history of past enforcement”: Between 2010 and 2017, Louisville investigated 93 businesses for alleged violations of the Fairness Ordinance.⁵⁶ Louisville refuses “to disavow enforcement of the challenged statute against” Nelson.⁵⁷ And the Fairness Ordinance *552 has “a provision allowing any member of the public to initiate an enforcement action.”⁵⁸

Other civil rights agencies can also refer complaints to the Enforcement Commission.⁵⁹ In addition, commissioners can “file a complaint without ever receiving a complaint from an aggrieved person.”⁶⁰ Those roads all lead to the same destination: a detailed administrative process that resembles what happens in traditional courtrooms.⁶¹

Meanwhile, Nelson alleges that a different route bypasses the administrative process altogether. If customers are unlawfully denied service, they can go directly to state court.⁶² There, plaintiffs suing for violations of the Fairness Ordinance may recover damages, attorneys’ fees, and costs.⁶³

In short, Louisville's Fairness Ordinance has real teeth. That has undoubtedly made it more effective in achieving its worthy goals. But it also means Nelson faces a credible threat of enforcement.⁶⁴

In addition, no “practical obstacles keep us from considering” Nelson's challenges of the Fairness Ordinance's application to her refusal to photograph same-sex marriages and her plan to post that policy on her website.⁶⁵ “The parties have described their conduct with plenty of detail.”⁶⁶ Louisville has said the Fairness Ordinance proscribes Nelson's policy and its publication. And Louisville has refused to disavow enforcement. Nelson has therefore “laid the foundation” for that challenge.⁶⁷

Nelson's claims for injunctive and declaratory relief may therefore go forward.⁶⁸ So can her claim for attorneys’ *553 fees.⁶⁹

B.

The Court does not, however, have jurisdiction to consider Nelson's claims for nominal and compensatory damages.⁷⁰ Even assuming her company lost money it otherwise would have made if Nelson had felt free to speak her mind, it's too speculative to blame the Fairness Ordinance for that lost business, so she hasn't alleged a “sufficient causal connection” between the chilling effect and the lost business.⁷¹

Dismissing Nelson's claim for compensatory damages without prejudice is thus appropriate.⁷² And because “[n]o readily apparent theory emerges as to how nominal damages might redress past chill,” Nelson's nominal damages claim also fails.⁷³

III.

Louisville cannot enforce the Fairness Ordinance against Nelson without unconstitutionally “abridging the freedom of speech.”⁷⁴

A.

The First Amendment generally prohibits the government from suppressing expression “because of its message, its ideas, its subject matter, or its content.”⁷⁵ *554 A “core” First Amendment principle is that “[t]he government may not discriminate against speech based on the ideas or opinions it conveys.”⁷⁶

As bad as content-based restrictions on expression are, viewpoint-based restrictions are worse.⁷⁷ “Viewpoint discrimination is poison to a free society.”⁷⁸ It occurs when the government suppresses “particular views on a subject” because it disapproves of the message.⁷⁹ Louisville can't ban expression just because it finds the expression offensive.⁸⁰

Worst of all is when the government compels citizens to express “views they find objectionable.”⁸¹ Forcing citizens to express ideas “contrary to their deepest convictions”⁸² is

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“always demeaning.”⁸³ It doesn't matter if most people agree with the expression the government compels.⁸⁴ Free thought “includes both the right to speak freely” and to say nothing at all.⁸⁵

***555** To sum up: A content-based limit on speech on topics outside politics and religion is highly suspect;⁸⁶ a content-based limit on political or religious speech is worse;⁸⁷ a viewpoint-based limit on such speech is even worse than that;⁸⁸ and a viewpoint-based compulsion to speak on politics or religion is the worst of all.⁸⁹

B.

Nelson challenges the Accommodations Provision of Louisville's Fairness Ordinance. The Accommodations Provision prohibits a business from denying its service to an individual based on that individual's sexual orientation.⁹⁰ When applied to Nelson's photographs, the key question is whether those photographs are “speech” protected by the First Amendment's “freedom of speech.”

1.

“The protection of the First Amendment is not limited to written or spoken words.”⁹¹ It “includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.”⁹² The “content of [a] photograph” conveys a “message,” often with “newsworthiness or educational value.”⁹³ And in America, the government can neither censor nor compel ***556** a speaker's message.⁹⁴

Of course, most conduct is not speech, even if it has expressive elements. The Supreme Court has “rejected the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea.”⁹⁵ For example, there's plenty expressive about road rage, but it's not speech. Neither is cooking barbecue⁹⁶ or running a motel.⁹⁷

Other conduct, however, is “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”⁹⁸ Examples include:

- nude dancing;⁹⁹
- flag-burning in protest of the 1984 Republican National Convention;¹⁰⁰
- displaying swastikas;¹⁰¹
- taping a peace sign on an upside-down flag to protest the invasion of Cambodia and the killings at Kent State University;¹⁰²
- **• dressing** up as a soldier to criticize the government in an anti-Vietnam War skit;¹⁰³
- wearing a black armband to oppose the Vietnam War;¹⁰⁴
- conducting a sit-in to protest segregation;¹⁰⁵
- refusing to salute the flag;¹⁰⁶ and
- flying a red flag in support of international communism.¹⁰⁷

Each of those examples conveyed, without words, a “particularized message.”¹⁰⁸

***557** Many of those decisions were controversial and required difficult line drawing. What, for example, is the difference between burning a draft card (not speech) and burning an American flag (speech)?¹⁰⁹ But the line Nelson asks this Court to draw here isn't a difficult one because the First Amendment “unquestionably” protects art, music, and literature.¹¹⁰ And among those expressive art forms, long-protected by the First Amendment, is photography.

Photos send messages, and sometimes tough ones.¹¹¹ A child runs as she wails from her Napalm burns. An unknown protester confronts a tank. Sure, we could just read about them, but the photos trigger outrage in a way that words can't.

Photos also send messages of humor, happiness, and beauty. That's why we display snapshots at our desks, in our homes, and on Instagram. They remind us of our travels to faraway places, loved ones who have gone before us, and yes, the unbridled joy of a wedding day.

Photography can also say as much about the picture-taker as it does about the person whose picture is being taken or the person displaying it.¹¹² When we use our iPhone camera to capture a moment, we reveal something about ourselves. In the same way, when we crop, frame, and add filters, we make a great memory even better by focusing on what we want to emphasize and taking out what we don't.

2.

The Court need not declare that all photography, always and anywhere, is speech. Perhaps there's no speech when a baby accidentally presses the red button in the camera app on her parent's phone. And maybe there's no speech when a photobooth malfunctions and takes a picture of nothing. But photography is speech when the photographer's artistic talents are combined to tell a story about the beauty and joy of marriage. That — not the baby, not the photobooth — is this case.¹¹³

Here, Nelson's Complaint explains several messages of her wedding photography.¹¹⁴ For example, she “believes that by capturing and conveying engagements, weddings, and marriages between one man and one woman, she can show the beauty *558 and joy of marriage as God intends it and she can convince her clients, their friends, and the public that this type of marriage should be pursued and valued.”¹¹⁵

At oral argument, Louisville emphasized that Nelson's photographs might mean different things to different people. They surely do. In fact, they might mean different things to the same people at different times — more perhaps to a newly married couple than to the same couple when newly divorced. Likewise, a painting by Jackson Pollock can mean 100 different things to 100 different people.¹¹⁶ Ambiguity about the meaning of a message — from “Yes We Can” to “Make America Great Again” — doesn't mean the message has no meaning.¹¹⁷

So too for Nelson's message. The meaning of her photos is open to interpretation. But through them, she — unlike many wedding vendors¹¹⁸ — tells a story. And storytelling is speech. A government can no more compel that speech than it can compel a freelance speechwriter to write for a political candidate she opposes.¹¹⁹

The Eighth Circuit reached the same conclusion as this Court in a case about wedding videography: The Government cannot compel a person “to talk about ... same-sex marriages” simply because she chooses “to talk about ... opposite-sex marriages.”¹²⁰ And the Arizona Supreme Court reached the same conclusion with regard to custom wedding invitations: Applying a public-accommodations law there “coerces” individuals into “abandoning their convictions, and compels them to [communicate] celebratory messages” they disagree with.¹²¹

Other state courts have read the First Amendment more narrowly.¹²² But for the reasons already explained in this opinion, the Eighth Circuit and Arizona Supreme Court have the better reading.

3.

Because the Accommodations Provision compels Nelson to express herself in a manner contrary to her conscience, the *559 Court presumes that the provision — as applied to Nelson — is unconstitutional.¹²³ Thus, Louisville must at least prove that the Accommodations Provision is narrowly tailored to serve a compelling interest.¹²⁴ And even if Louisville *could* satisfy that standard, it might still lose here, where it is attempting to compel religious speech at the core of the First Amendment.¹²⁵

For the same reason the public accommodations law in *Hurley* did not survive strict scrutiny,¹²⁶ it's highly unlikely that applying the Accommodations Provision to Nelson can survive it either. Here, as in *Hurley*, “the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference.”¹²⁷ And outside the context of requiring or restricting expressive activity, that government interest is unquestionably compelling. But “[w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own.”¹²⁸ That government interest is not compelling because “in the absence

of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.”¹²⁹

To be sure, without discovery or even an Answer from Louisville, it's premature to say Nelson will definitely prevail. But it's highly likely. And because she is substantially likely to succeed on her Free Speech claim, it's unnecessary to address her other as-applied challenges to the Accommodations Provision.¹³⁰

Likewise, because “[p]reliminary injunctions in constitutional cases often turn on likelihood of success on the merits,” it's “unnecessary to dwell on the remaining three factors.”¹³¹ “The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.”¹³² The ***560** Court will therefore preliminarily enjoin Louisville from requiring Nelson to photograph same-sex weddings.¹³³

C.

In addition to challenging the Fairness Ordinance's Accommodations Provision, Nelson also challenges its Publication Provision.

The Publication Provision has two parts: the Denial Clause and the Unwelcome Clause. The Denial Clause prohibits a business from advertising that it will deny its services to an individual based on that individual's sexual orientation.¹³⁴ The Unwelcome Clause prohibits a business from advertising that an individual's presence at that business is “objectionable, unwelcome, unacceptable, or undesirable” based on the individual's sexual orientation.¹³⁵

The Publication Provision is a content-based restriction on Nelson's expression. That's because the legality of Nelson's blog posts depends on what they say.¹³⁶ If Nelson advertises that she will ***561** refuse her wedding photography services for same-sex weddings, her posts violate both the Denial Clause and the Unwelcome Clause. But if another wedding photographer advertises her willingness to photograph same-sex weddings, those posts would comply with both clauses.¹³⁷

Here, the constitutionality of the Publication Provision (as applied to Nelson) depends on the constitutionality of the Accommodations Provision (again, as applied to Nelson). In most other contexts, where the Accommodations Provision doesn't violate the First Amendment, the Publication Provision merely prohibits a business from engaging in “commercial speech related to illegal activity.”¹³⁸ When “commercial speech concerns unlawful activity,” it “is not protected by the First Amendment.”¹³⁹

But as applied to Nelson's policy on same-sex weddings, the Publication Provision prohibits “the dissemination of concededly truthful information about entirely lawful activity.”¹⁴⁰ It prohibits Nelson from truthfully advertising that she will not abide by an Accommodations Provision that itself cannot be validly applied to her wedding photography. To hold otherwise would allow Louisville to ban Nelson from saying she will refuse to photograph weddings that she has a constitutional right not to photograph.¹⁴¹ Bans on truthful commercial speech about lawful activity require the government to show more than that it assumes the public can't handle the truth.¹⁴²

Here, at this early stage, Louisville has not made that showing. Nelson is thus likely to succeed on the merits of her as-applied challenge to the Publication Provision. And since that challenge rests on free-speech grounds, Nelson has shown “irreparable injury sufficient to justify injunctive relief.”¹⁴³ The Court will preliminarily enjoin Louisville from penalizing Nelson for publishing her policy against photographing same-sex weddings.¹⁴⁴

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Nelson seeks other remedies that the Court can't provide at this time. Generally, a court's injunction “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”¹⁴⁵

First, Nelson seeks an injunction barring Louisville from requiring her to “participate” in same-sex weddings. But that injunction is unnecessary because Nelson provides no wedding services other than photography.¹⁴⁶ Blocking Louisville from forcing her to photograph same-sex weddings means that she won't have to attend same-sex weddings.¹⁴⁷

Second, it's also unnecessary to enjoin the Advocacy Commission, as Nelson proposes.¹⁴⁸ The Advocacy Commission's goal is "to promote and secure mutual understanding and respect among all economic, social, religious, ethnic, and social groups" in Louisville.¹⁴⁹ It's unclear how exactly its unpaid commissioners go about doing that,¹⁵⁰ but it doesn't sound like they have the power to enforce the Fairness Ordinance (or anything else). Nelson thus hasn't shown why the Court should stop the Advocacy Commission from enforcing a law that it isn't even clear it enforces.

Third and finally, Nelson asks the Court to block Louisville from enforcing the Unwelcome Clause against anyone, not just her.¹⁵¹ But as noted earlier, when "commercial speech concerns unlawful activity," it "is not protected by the First Amendment."¹⁵² And because most commercial conduct covered by the Accommodations Provision is unprotected by the Free Speech Clause,¹⁵³ most advertisements covered by the Unwelcome Clause are likewise unprotected.¹⁵⁴

In *Masterpiece Cakeshop*, the Supreme Court cautioned that "any decision in favor of the baker [who would not create a custom-made cake for a same-sex wedding] would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to *563 put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons."¹⁵⁵ Thus, this Court will not block Louisville from enforcing the Unwelcome Clause against businesses that must welcome customers regardless of their sexual orientation or gender identity, including restaurants, hotels, and common carriers.

* * *

Five years ago, in *Obergefell v. Hodges*, the Supreme Court ruled in favor of same-sex marriage. In doing so, it said:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts,

same-sex marriage should not be condoned. **The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.** The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate.¹⁵⁶

Those words were written by Justice Kennedy, the author of *Romer*,¹⁵⁷ *Lawrence*,¹⁵⁸ and *Windsor*.¹⁵⁹ And they were joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

We would do well to heed them. They affirm that the same Constitution held by *Obergefell* to guarantee the right of same-sex couples to marry also protects religious and philosophical objections to same-sex marriage.¹⁶⁰ That our society has largely accepted same-sex marriage "is all the more reason to protect the First Amendment rights of those who wish to voice a difference view."¹⁶¹ Although a sometimes "hazardous freedom," free speech is a "basis of our national strength."¹⁶²

So too is our religious diversity. While some have criticized recent Supreme Court majorities for securing the rights of religious Americans "to the *n*th degree,"¹⁶³ a *564 solid majority on the Court appears unphased.¹⁶⁴

To be clear, most applications of antidiscrimination laws — including Louisville's Fairness Ordinance — are constitutional.¹⁶⁵ Today's ruling is not a license to discriminate. Nor does it allow for the "serious stigma" that results from a sign in the window announcing that an owner won't serve gay and lesbian customers.¹⁶⁶

Document received by the CA 5th District Court of Appeal.

In Louisville, since 1999 and still today, Marriott cannot refuse a room to a same-sex couple.¹⁶⁷ McDonald's cannot deny a man dinner simply because he is gay.¹⁶⁸ Neither an empty hotel room, nor a Big Mac, is speech.¹⁶⁹ And it is unnecessary today to decide any questions unrelated to speech.

"Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law."¹⁷⁰ Our nation is better because of it. But their progress depended on the First Amendment's protection of expressive conduct that was once far less popular than it is today, from marching in pride parades to flying rainbow flags. That same First *565 Amendment also protected the storytelling behind *La Cage Aux Folles*, *Philadelphia*, *Will &*

Grace, and *Born This Way*. Now is no time to weaken that protection.

Challenging questions remain unanswered at the intersection of free speech, religious liberty, and equal treatment. Courts must navigate these difficult issues without imposing indignities on religious believers when they engage in expressive conduct and "without subjecting gay persons to indignities when they seek goods and services in an open market."¹⁷¹

The solution is more dialogue, not less.¹⁷²

All Citations

479 F.Supp.3d 543

Footnotes

- 1 The Defendants are: Louisville/Jefferson County Metro Government; Louisville Metro Human Relations Commission – Enforcement; Louisville Metro Human Relations Commission – Advocacy; Kendall Boyd; Marie Dever; Kevin Delahanty; Charles Lanier, Sr.; Laila Ramey; William Sutter; Ibrahim Syed; and Leonard Thomas, all in their official capacities (together, "Louisville").
- 2 Generally, a court's injunction "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979).
- 3 See Fed. R. Civ. P. 65(c); see *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995).
- 4 *About Us*, FAIRNESS CAMPAIGN, <https://www.fairness.org/about-us/>.
- 5 *Id.*
- 6 *Bostock v. Clayton County, Georgia*, — U.S. —, 140 S.Ct. 1731, 1837, 207 L.Ed.2d 218 (2020) (Kavanaugh, J., dissenting); see also Joseph Lord, *Kentucky Fairness Campaign Director Chris Hartman's Car Damaged, Defaced With Swastika*, WFPL, <https://wfpl.org/kentucky-fairness-campaign-director-chris-hartmans-car-damaged-defaced-swastika/> (Mar. 24, 2013).
- 7 Metro Ordinance §§ 92.03, 92.05, & 92.06.
- 8 *Id.* at § 92.05(A) & (B).
- 9 *About Us*, FAIRNESS CAMPAIGN.
- 10 *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003).
- 11 *Id.*
- 12 *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).
- 13 *Id.*
- 14 *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995).
- 15 *Id.* at 573, 115 S.Ct. 2338.
- 16 *Id.*
- 17 *The American President* (Columbia Pictures 1995).

- 18 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, — U.S. —, 138 S.Ct. 1719, 1727, 201 L.Ed.2d 35 (2018); *Bostock*, 140 S.Ct. at 1823 (Kavanaugh, J., dissenting).
- 19 *Espinoza v. Montana Department of Revenue*, — U.S. —, 140 S.Ct. 2246, 2277, 207 L.Ed.2d 679 (2020) (Gorsuch, J. concurring).
- 20 *Id.* at 2262 (majority op.) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, — U.S. —, 137 S.Ct. 2012, 2022, 198 L.Ed.2d 551 (2017)) (cleaned up).
- 21 *Hurley*, 515 U.S. at 573, 115 S.Ct. 2338.
- 22 *Barnette*, 319 U.S. at 632, 63 S.Ct. 1178 (“There is no doubt that, in connection with the pledges, the flag salute is a form of utterance.”).
- 23 *Cf. Masterpiece Cakeshop*, 138 S.Ct. at 1743 (Thomas, J., concurring in part and concurring in the judgment); *but see Washington v. Arlene’s Flowers, Inc.*, 193 Wash.2d 469, 441 P.3d 1203, 1226 (2019) (“The decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about that wedding.”), *petition for cert. filed*, (Sept. 11, 2019) (No. 19-333).
- 24 DN 1 ¶ 26.
- 25 DN 1 ¶ 61.
- 26 *Id.* ¶¶ 62, 167.
- 27 *Id.* ¶ 64.
- 28 *Id.* ¶ 38.
- 29 *See id.* ¶¶ 20-25; *id.* ¶ 75, 77.
- 30 *Id.* ¶ 190.
- 31 *Id.* ¶ 191.
- 32 *See id.* ¶¶ 80, 252.
- 33 *Id.* ¶¶ 221-225.
- 34 *Id.* ¶ 226, 252; *see also* DNs 1-2 & 1-3.
- 35 DN 1 ¶ 325.
- 36 U.S. CONST. Art. III, § 2; *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).
- 37 *See United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002) (“subject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived”).
- 38 Metro Ordinance § 92.05(A); *see* DN 15-3 at #803.
- 39 Metro Ordinance § 92.05(B); *see* DN 15-3 at #803.
- 40 *Winter v. Wolnitzek*, 834 F.3d 681, 687 (6th Cir. 2016) (“The line between Article III standing and ripeness in preenforcement First Amendment challenges has evaporated.”) (citing *Susan B. Anthony List*, 573 U.S. at 167-68, 134 S.Ct. 2334).
- 41 *Susan B. Anthony List*, 573 U.S. at 159, 134 S.Ct. 2334 (citing *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)).
- 42 DN 1 ¶ 191.
- 43 DNs 1-2 & 1-3.
- 44 *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 364, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (Kennedy, J.) (“Yet, § 441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. The First Amendment does not permit Congress to make these categorical distinctions based on the identity of the speaker and the content of the political speech.”) (cleaned up); *cf. Kaplan v. California*, 413 U.S. 115, 119-20, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973) (“As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection”).
- 45 *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (“the Constitution looks beyond written or spoken words as mediums of expression”); *ETW Corp. v. Jireh Publishing*, 332 F.3d 915, 924 (6th Cir. 2003) (“The 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.”) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338); see also *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (finding a “statute [which] restricts visual and auditory depictions, such as photographs, videos, or sound recordings” unconstitutionally overbroad) (cleaned up); *Regan v. Time, Inc.*, 468 U.S. 641, 648, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (White, J., plurality op.) (“A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers.”).

See, e.g., DN 15-1 at #773 (“An Expressed Policy To Refuse Service To Same-Sex Couples Would Amount to Discrimination”).

Metro Ordinance § 92.05(A); see DN 15-3 at #803.

Id.

Id. § 92.05(B); see DN 15-3 at #803; Oral Argument, August 7, 2020 (conceding that Nelson has a stronger standing argument in challenging the Denial Clause).

See, e.g., DN 1 ¶ 259 (“If not for Louisville’s Denial Clause and Unwelcome Clause, Chelsey would immediately post the statements in Exhibits 1 and 2 or materially similar statements on her studio’s website.”).

McKay v. Federspiel, 823 F.3d 862, 869 (6th Cir. 2016) (cleaned up).

Id.

DN 14-1 at #740; see also DN 14-2 ¶ 3. Someone did once inquire into Nelson’s editing services, which Nelson believed may have required her to edit photos from a same-sex wedding. It’s unclear how she handled that. DN 1 ¶ 237.

See *Clapper v. Amnesty International USA*, 568 U.S. 398, 414 n.5, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (“In addition, plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant’s *actual action* has caused the substantial risk of harm.”) (emphasis added).

DN 14-1 at #740; see also DN 14-2 ¶ 3.

McKay, 823 F.3d at 869; see DN 1 ¶ 304; DN 39-1 at #1155 (Louisville has “received a total of 173 complaints based on sexual orientation discrimination” since 2002); cf. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) (“The Government tells us that it has charged about 150 persons with violating § 2339B, and that several of those prosecutions involved the enforcement of the statutory terms at issue here.”); *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (6th Cir. 2015) (finding a plaintiff’s fear of prosecution reasonable “especially where the agency tasked with enforcing the statute receives complaints on a relatively frequent basis”).

McKay, 823 F.3d at 869. See DN 39 at #1147 (“Further, the fact that Metro or the other Defendants have not disavowed future action is not determinative of whether standing exists.”); Oral Argument, August 7, 2020 (When asked if it was refusing to promise not to enforce the Fairness Ordinance against Nelson, Louisville replied, “That’s right.”); see also *Susan B. Anthony List*, 573 U.S. at 165, 134 S.Ct. 2334 (“Moreover, respondents have not disavowed enforcement if petitioners make similar statements in the future.”); *Humanitarian Law Project*, 561 U.S. at 16, 130 S.Ct. 2705 (“The Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do.”); *United Farm Workers*, 442 U.S. at 302, 99 S.Ct. 2301 (“Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices.”).

McKay, 823 F.3d at 869 (cleaned up). See DN 1 ¶ 277 (citing Metro Ordinance § 92.09(A)).

DN 1 ¶ 280 (citing Metro Ordinance § 92.09(C)).

Id. ¶ 279 (citing Metro Ordinance § 92.09(A)).

See *Susan B. Anthony List*, 573 U.S. at 165, 134 S.Ct. 2334 (“We take the threatened Commission proceedings into account because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review.”).

DN 1 ¶¶ 301, 302 (citing Metro Ordinance § 92.09(A)).

Id. ¶ 302 (citing Metro Ordinance § 92.09(A)).

- 64 See *Susan B. Anthony List*, 573 U.S. at 158, 134 S.Ct. 2334 (“An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.”) (cleaned up).
- 65 *Winter*, 834 F.3d at 687.
- 66 *Id.*
- 67 *Id.* at 688.
- 68 At oral argument, Louisville said Nelson might have standing to challenge the Denial Clause. See Oral Argument, August 7, 2020 (Louisville: “I concede on the denial clause. It’s a much stronger case for standing.”); *but see* DN 14-1 at #743 (“Plaintiffs have not met their burden of proving standing to file suit.”). Of course, the Court must assess standing regardless of any concessions, and the Court must do so for each claim, independent of a plaintiff’s other claims. But assume for the sake of argument that Nelson has standing to challenge only the Publication Provision’s Denial Clause. In that case, although the Court would have no jurisdiction to enjoin Louisville from enforcing the Accommodation Provision, the Court would still need to consider its constitutionality because, as explained later, its constitutionality affects the constitutionality of the Publication Provision.
- 69 See 42 U.S.C. § 1988(b) (Louisville may be liable for Nelson’s attorneys’ fees if she prevails).
- 70 DN 1 at #51.
- 71 *Susan B. Anthony List*, 573 U.S. at 158, 134 S.Ct. 2334 (cleaned up); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (“Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.”) (cleaned up).
- 72 Because the Court agrees with Louisville that Nelson can’t recover damages, it doesn’t also need to address Louisville’s immunity argument. See DN 14-1 at #745.
- 73 *Morrison v. Board of Education of Boyd County*, 521 F.3d 602, 610 (6th Cir. 2008).
- 74 U.S. CONST. amend. I (“Congress shall make no law ... abridging the freedom of speech.”); U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); *see also Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015) (the “government” includes a “municipal government vested with state authority”).
- 75 *Barr v. American Association of Political Consultants, Inc.*, — U.S. —, 140 S.Ct. 2335, 2346, 207 L.Ed.2d 784 (2020) (plurality op.); *National Institute of Family & Life Advocates (N.I.F.L.A.) v. Becerra*, — U.S. —, 138 S. Ct. 2361, 2371, 201 L.Ed.2d 835 (2018); 576 U.S. at 163, 135 S.Ct. 2218; *McCullen v. Coakley*, 573 U.S. 464, 477, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014); *United States v. Alvarez*, 567 U.S. 709, 716, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality op.); *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 791, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011); *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010); *R.A.V. v. St. Paul*, 505 U.S. 377, 384 n.4, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105, 126, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (Kennedy, J., concurring); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 776, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (Stewart, J., concurring); *Erznoznik v. Jacksonville*, 422 U.S. 205, 215, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).
- 76 *Iancu v. Brunetti*, — U.S. —, 139 S.Ct. 2294, 2299, 204 L.Ed.2d 714 (2019).
- 77 *Reed*, 576 U.S. at 163, 135 S.Ct. 2218; *see also Iancu*, 139 S.Ct. at 2299.
- 78 *Iancu*, 139 S.Ct. at 2302 (Alito, J., concurring).

- 79 *Matal v. Tam*, — U.S. —, 137 S.Ct. 1744, 1766, 198 L.Ed.2d 366 (2017) (Kennedy, J., concurring in the judgment); see also *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (“Clearly, the prohibition of expression of one particular opinion ... is not constitutionally permissible.”).
- 80 *Tam*, 137 S.Ct. at 1751 (Alito, J., plurality op.); see also *id.* at 1763 (“We have said time and again that ‘the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.’”) (quoting *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969)); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, — U.S. —, 138 S.Ct. 1719, 1731, 201 L.Ed.2d 35 (2018) (“it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive”); *Spence v. Washington*, 418 U.S. 405, 412, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (per curiam); *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).
- 81 *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, — U.S. —, 138 S.Ct. 2448, 2463, 201 L.Ed.2d 924 (2018) (“Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned.”); *id.* at 2464 (“When speech is compelled, however, additional damage is done.”); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-34, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)); *Barnette*, 319 U.S. at 633, 63 S.Ct. 1178 (“It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.”).
- 82 *N.I.F.L.A.*, 138 S.Ct. at 2379 (Kennedy, J., concurring).
- 83 *Janus*, 138 S.Ct. at 2464.
- 84 *Maynard*, 430 U.S. at 715, 97 S.Ct. 1428 (“The fact that most individuals agree with the thrust of New Hampshire’s motto [Live Free or Die] is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.”).
- 85 *Janus*, 138 S.Ct. at 2463 (quoting *Maynard*, 430 U.S. at 714, 97 S.Ct. 1428).
- 86 *Entertainment Merchants Association*, 564 U.S. at 791, 131 S.Ct. 2729; *Virginia State Board of Pharmacy*, 425 U.S. at 776, 96 S.Ct. 1817 (Stewart, J., concurring).
- 87 *Citizens United v. Federal Election Commission*, 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (“political speech must prevail against laws that would suppress it”); *id.* at 349, 130 S.Ct. 876 (“If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”).
- 88 *Reed*, 576 U.S. at 156, 135 S.Ct. 2218 (“Government discrimination among viewpoints is a ‘more blatant’ and ‘egregious form of content discrimination.’”) (quoting *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)); see also *Tam*, 137 S.Ct. at 1766 (Kennedy, J., concurring in the judgment) (viewpoint discrimination goes “further” than content discrimination).
- 89 *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178 (“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.”); *Janus*, 138 S.Ct. at 2464 (“Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding ‘involuntary affirmation’ of objected-to beliefs would require ‘even more immediate and urgent grounds’ than a law demanding silence.”) (quoting *Barnette*, 319 U.S. at 633, 63 S.Ct. 1178).
- 90 “Except as otherwise provided herein, it is an unlawful practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort or amusement as defined in § 92.02, on the ground of race, color, religion,

national origin, disability, sexual orientation or gender identity.” Metro Ordinance § 92.05(A); DN 15-3 at #803; compare, *Telescope Media Group v. Lucero*, 936 F.3d 740, 748 (8th Cir. 2019) (similar).

91 *ETW Corp. v. Jireh Publishing*, 332 F.3d 915, 924 (6th Cir. 2003); Oral Argument, August 7, 2020 (conceding that the First Amendment’s speech protections cover more than just words).

92 *Id.*; see also *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (the First Amendment covers “visual and auditory depictions, such as photographs, videos, or sound recordings”) (cleaned up).

93 *Regan v. Time, Inc.*, 468 U.S. 641, 648, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (White, J., plurality op.).

94 See, e.g., *Citizens United*, 558 U.S. at 354, 130 S.Ct. 876 (“The censorship we now confront is vast in its reach.”); *Janus*, 138 S.Ct. at 2464 (“Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed.”).

95 *Johnson*, 491 U.S. at 404, 109 S.Ct. 2533 (cleaned up); see also *Masterpiece Cakeshop*, 138 S.Ct. at 1742 (Thomas, J., concurring) (“Of course, conduct does not qualify as protected speech simply because the person engaging in it intends thereby to express an idea.”) (cleaned up).

96 *Katzenbach v. McClung*, 379 U.S. 294, 296, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964).

97 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); cf. Oral Argument, August 7, 2020 (Court: “And the 1964 Civil Rights Act is constitutional as applied, at least for most – most applications?” Nelson: “Yes.”).

98 *Johnson*, 491 U.S. at 404, 109 S.Ct. 2533 (quoting *Spence*, 418 U.S. at 409, 94 S.Ct. 2727); see also *Telescope Media Group*, 936 F.3d at 752 (“Speech is not conduct just because the government says it is.”).

99 *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66, 572, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing is expressive, although the city’s law survives constitutional scrutiny).

100 *Johnson*, 491 U.S. at 420, 109 S.Ct. 2533.

101 Cf. *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam).

102 *Spence*, 418 U.S. at 406, 408, 94 S.Ct. 2727 (per curiam).

103 *Schacht v. United States*, 398 U.S. 58, 63, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970).

104 *Tinker*, 393 U.S. at 514, 89 S.Ct. 733.

105 *Brown v. Louisiana*, 383 U.S. 131, 141-42, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (plurality op.).

106 *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178.

107 *Stromberg v. California*, 283 U.S. 359, 369-70, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

108 *Johnson*, 491 U.S. at 404, 109 S.Ct. 2533 (quoting *Spence*, 418 U.S. at 410-11, 94 S.Ct. 2727); see *Tinker*, 393 U.S. at 514, 89 S.Ct. 733 (“They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them.”); *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (“A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant’s point at the time he made it.”); see also Oral Argument, August 7, 2020 (Court: “Speech does not have to have words?” Louisville: “That’s correct.”).

109 Compare *United States v. O’Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), with *Johnson*, 491 U.S. at 401, 109 S.Ct. 2533.

110 *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338.

111 TIME MAGAZINE, 100 PHOTOS: THE MOST INFLUENTIAL IMAGES OF ALL TIME, <http://100photos.time.com/>.

112 Cf. *Masterpiece Cakeshop*, 138 S.Ct. at 1744 n.3 (Thomas, J., concurring) (“Nor does it matter that the couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time.”).

113 DN 1 ¶ 95 (Nelson wants to counteract the current “cultural narrative” through her pictorial storytelling.).

- 114 See, e.g., *id.* ¶ 151 (“Each component of Chelsey’s wedding celebration services — her photography, editing, and blogging — separately and in combination, is expressive in nature, as it involves either text, images, symbols, or other modes of expression.”).
- 115 *Id.* ¶ 93.
- 116 *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338.
- 117 See *id.* (a “particularized message” is not required for First Amendment protection); *Masterpiece Cakeshop*, 138 S.Ct. at 1742 (Thomas, J., concurring) (same).
- 118 Nelson represented at Oral Argument that many goods and services for weddings are *not* speech. According to her, as a general matter, the following wedding vendors are not speakers: the wedding venue operator; the wedding insurance salesperson; the tailor for the tux; the baker that sells a plain white pre-designed cake; the seller of generic stationary; the jeweler with non-custom wedding rings; the blow dry bar stylist; the makeup artist; the manicurist; the on-site chef for the reception; the waiters there; the limo driver for the married couple; the Uber driver for wedding guests; and the travel agent for the honeymoon. Oral Argument, August 7, 2020. The Court takes no position on these hypotheticals, which are not at issue here.
- 119 Cf. Oral Argument, August 7, 2020 (Louisville: The First Amendment would not stop a government from compelling a freelance speechwriter or photographer “to provide that service to the climate change deniers” even if she wants to work only for environmentalist causes.).
- 120 *Telescope Media Group*, 936 F.3d at 752-53.
- 121 *Brush & Nib*, 448 P.3d at 914; see also *id.* (“the Ordinance, as applied to Plaintiffs’ custom wedding invitations, operates as a content-based law”).
- 122 See *Arlene’s Flowers*, 441 P.3d at 1225-26; *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013).
- 123 See *Reed*, 576 U.S. at 163, 135 S.Ct. 2218 (content-based restrictions); *Tam*, 137 S.Ct. at 1766 (Kennedy, J., concurring in the judgment) (viewpoint-based restrictions).
- 124 See *Reed*, 576 U.S. at 163, 135 S.Ct. 2218 (content-based restrictions); *Tam*, 137 S.Ct. at 1765 (Kennedy, J., concurring in the judgment) (viewpoint-based restrictions).
- 125 See *Janus*, 138 S.Ct. at 2464; *Citizens United*, 558 U.S. at 340, 130 S.Ct. 876 (“it might be maintained that political speech simply cannot be banned or restricted as a categorical matter”) (citing *Simon & Schuster*, 502 U.S. at 124, 112 S.Ct. 501 (Kennedy, J., concurring in judgment)).
- 126 *Hurley*, 515 U.S. at 578, 115 S.Ct. 2338.
- 127 *Id.*
- 128 *Id.*
- 129 *Id.*
- 130 See DN 1 ¶¶ 343-59 (Free Exercise Clause Claim); *id.* ¶¶ 360-65 (Establishment Clause Claim); *id.* ¶¶ 373-81 (Kentucky Religious Freedom Restoration Act Claim).
- 131 *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam); cf. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”).
- 132 *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).
- 133 Nelson’s suit does not present two questions that would undoubtedly be more difficult for a plaintiff to prevail on — questions on which the Court takes no position.
- The first is a hypothetical with all the same facts as Nelson’s case, except the same-sex couple lives in a small town without another photographer. See Oral Argument, August 7, 2020 (Court: “So maybe in that small town [where there is only one vendor for a wedding service, you think] the government would survive the strict scrutiny analysis. Is that what you’re saying?” Nelson: “I’d say perhaps, Your Honor.”).
- The second is a hypothetical case with all the same facts as Nelson’s case, except the photographer refuses to photograph an interracial wedding. See *id.* (Nelson: “I think that would be different.... *Loving* said that objections to interracial marriage are inherently based on invidious racial discrimination designed to maintain

white superiority. That's a quote. Versus we look at *Obergefell* where it said that objections to same-sex marriage are based on decent and honorable religious and philosophical principles.... [T]hen you go to ... *Peña-Rodriguez versus Colorado*, where it specifically said racial bias is a unique constitutional harm.... So I think the interest analysis would be much stronger for the state"); *see also id.* (Louisville: "It would be erroneous to suggest that somebody like Miss Nelson, who has the views that she has, should be viewed in the same way as somebody who opposed mixed-race marriage. So the position of [Louisville] Metro is not to build up any type of equivalence there or to cast aspersions and say that you're as bad as a racist if you believe in traditional marriage. That's not a position that we need to endorse here."); *but see id.* (Louisville: "I don't think there's any principled basis to distinguish how compelling is the state interest in rooting out invidious racial discrimination versus evaluating how compelling is a state or local government's interest in eradicating invidious discrimination against sexual orientation.").

134 "It is an unlawful practice for a person, directly or indirectly, to publish, circulate, issue, display, or mail, or cause to be published, circulated, issued, displayed, or mailed, a written, printed, oral or visual communication, notice, or advertisement, which indicates that the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort or amusement, will be refused, withheld, or denied an individual on account of his race, color, religion, national origin, disability, sexual orientation or gender identity." Metro Ordinance § 92.05(B); DN 15-3 at #803. At oral argument, Nelson conceded that the Denial Clause is facially constitutional.

135 "It is an unlawful practice for a person, directly or indirectly, to publish, circulate, issue, display, or mail, or cause to be published, circulated, issued, displayed, or mailed, a written, printed, oral or visual communication, notice, or advertisement, which indicates that ... patronage of, or presence at, a place of public accommodation, resort or amusement, of an individual, on account of his race, color, religion, national origin, disability, sexual orientation or gender identity is objectionable, unwelcome, unacceptable, or undesirable." Metro Ordinance § 92.05(B); DN 15-3 at #803.

136 *American Association of Political Consultants*, 140 S.Ct. at 2346 ("As relevant here, a law is content-based if a regulation of speech on its face draws distinctions based on the message a speaker conveys.") (quoting *Reed*, 576 U.S. at 163, 135 S.Ct. 2218) (cleaned up).

137 See DN 1 ¶¶ 310.

138 *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (citing *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973)).

139 *Thompson v. Western States Medical Center*, 535 U.S. 357, 367, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002); *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343 ("For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.").

140 *Virginia State Board of Pharmacy*, 425 U.S. at 773, 96 S.Ct. 1817.

141 See *Thompson*, 535 U.S. at 374, 122 S.Ct. 1497 ("We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information.").

142 *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) (opinion of Stevens, J.) ("[B]ans against truthful, nonmisleading commercial speech ... usually rest solely on the offensive assumption that the public will respond irrationally to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (cleaned up).

143 *Newsom*, 888 F.2d at 378.

144 Because the Publication Provision is likely an unconstitutional content-based restriction on Nelson's speech, it is unnecessary to decide if it is also an unconstitutional viewpoint-based restriction. Likewise, it's unnecessary to decide Nelson's other as-applied challenges to the Publication Provision. See DN 1 ¶¶ 343-59 (Free Exercise Clause Claim); *id.* ¶¶ 366-72 (Due Process Clause Claim); *id.* ¶¶ 373-81 (Kentucky Religious Freedom Restoration Act Claim).

- 145 *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979).
- 146 See DN 1 ¶¶ 122, 194; DN 3-5 at #672.
- 147 Oral Argument, August 7, 2020 (Court: “I would think if you get a preliminary injunction [saying] Louisville can’t fine – Louisville can’t make Chelsey Nelson photograph a gay wedding, then you don’t need an injunction that says Louisville can’t make her attend a gay wedding. Because she is a wedding photographer, there’s no reason for her to be at a wedding other than to photograph it. I mean, weddings are private events.” Nelson: “That’s correct, Your Honor.”).
- 148 See DN 3-5 at #670-72.
- 149 Metro Ordinance § 32.761(B).
- 150 Metro Ordinance § 32.761(A)(3).
- 151 DN 1 ¶¶ 334, 366-72; DN 3-5 at #672.
- 152 *Thompson*, 535 U.S. at 367, 122 S.Ct. 1497; see also *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343.
- 153 Oral Argument, August 7, 2020 (Nelson conceded that most applications of public accommodations laws are constitutional).
- 154 See *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (“In the First Amendment context ... this Court recognizes ‘a second type of facial challenge,’ whereby a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)).
- 155 *Masterpiece Cakeshop*, 138 S.Ct. at 1728-29.
- 156 *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 2607, 192 L.Ed.2d 609 (2015) (emphasis added).
- 157 *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).
- 158 *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).
- 159 *United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).
- 160 See *Obergefell*, 135 S.Ct. at 2605; *Windsor*, 570 U.S. at 775, 133 S.Ct. 2675; *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, — U.S. —, 138 S.Ct. 1719, 1727, 201 L.Ed.2d 35 (2018).
- 161 *Boy Scouts of America v. Dale*, 530 U.S. 640, 660, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000); see *Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 448 P.3d 890, 896 (2019) (“Duka and Koski’s beliefs about same-sex marriage may seem old-fashioned, or even offensive to some. But the guarantees of free speech and freedom of religion are not only for those who are deemed sufficiently enlightened, advanced, or progressive. They are for everyone.”).
- 162 *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508-9, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).
- 163 *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, — U.S. —, 140 S.Ct. 2367, 2400, 207 L.Ed.2d 819 (2020) (Ginsburg, J., dissenting).
- 164 See *id.* (majority op.); *Our Lady of Guadalupe School v. Morrissey-Berru*, — U.S. —, 140 S.Ct. 2049, 207 L.Ed.2d 870 (2020); *Espinoza v. Montana Department of Revenue*, — U.S. —, 140 S.Ct. 2246, 207 L.Ed.2d 679 (2020); *American Legion v. American Humanist Association*, — U.S. —, 139 S.Ct. 2067, 204 L.Ed.2d 452 (2019); *Masterpiece Cakeshop*, 138 S.Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017); *Holt v. Hobbs*, 574 U.S. 352, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015); *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 135 S.Ct. 2028, 192 L.Ed.2d 35 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014); *Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014); *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012).
- 165 See Oral Argument, August 7, 2020 (Court: “[M]ost applications of an anti-discrimination law are constitutional?” Nelson: “Your Honor, that’s correct.”); *Telescope Media Group v. Lucero*, 936 F.3d 740, 758 (8th Cir. 2019) (“our holding leaves intact other applications of the [Minnesota Human Rights Act] that do not regulate speech based on its content or otherwise compel an individual to speak”); *Brush & Nib*, 448 P.3d at 916 (“Our holding today is limited to Plaintiffs’ creation of one product: custom wedding invitations that

are materially similar to the invitations contained in the record. These invitations, unlike most commercial products and services sold by public accommodations, are unique because they consist of protected pure speech.”) (cleaned up); *Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals*, 592 S.W.3d 291, 294 (Ky. 2019) (“The ability of federal, state and local governments to protect individuals from discrimination by places of public accommodation is beyond question.”).

- 166 See *Masterpiece Cakeshop*, 138 S.Ct. at 1729; see also *Telescope Media Group*, 936 F.3d at 757 (“An employment-discrimination law, for example, can unquestionably require an employer to take down a sign reading ‘White Applicants Only.’”) (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (F.A.I.R.), 547 U.S. 47, 62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006)) (cleaned up).
- 167 See Oral Argument, August 7, 2020 (Court: “So, for example, like a Marriott hotel can constitutionally be fined by the government if it says, ‘I won’t rent a gay couple a room for the night,’ correct?” Nelson: “Of course.”).
- 168 See *id.* (Court: “And McDonald’s can [constitutionally] be fined if they say to a gay couple, ‘I’m not going to sell you a hamburger’?” Nelson: “Yes.”).
- 169 Cf. *F.A.I.R.*, 547 U.S. at 60, 126 S.Ct. 1297 (withholding funds from law schools that deny military recruiters access to empty hotel rooms and other venues for job interviews “neither limits what law schools may say nor requires them to say anything”).
- 170 *Bostock v. Clayton County*, — U.S. —, 140 S.Ct. 1731, 1837, 207 L.Ed.2d 218 (2020) (Kavanaugh, J., dissenting).
- 171 *Masterpiece Cakeshop*, 138 S.Ct. at 1732.
- 172 See *Whitney v. California*, 274 U.S. 357, 377, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

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EXHIBIT 6

964 F.Supp. 299
United States District Court,
N.D. California.

Mark CLOUTIER, Plaintiff,

v.

PRUDENTIAL INSURANCE COMPANY OF
AMERICA, a New Jersey corporation, Defendant.

No. C-96-1166 WHO.

|
April 22, 1997.

Synopsis

Life insurance applicant, who was denied coverage because of his partner's HIV-positive status, brought action against insurer for discrimination in violation of public accommodation provisions of Americans with Disabilities Act (ADA) and California's Unruh Civil Rights Act. On insurer's motion for summary judgment, the District Court, [Orrick, J.](#), held that: (1) applicant had standing to pursue claim under ADA's public accommodation provisions without any physical barriers to access; (2) applicant demonstrated existence of material dispute as to whether insurer based its decision upon sound actuarial principles or reasonably anticipated experience, precluding summary judgment for insurer under safe harbor exemption from ADA's public accommodation provisions; and (3) denial of summary judgment under ADA required denial under Unruh Civil Rights Act.

Motion denied.

Procedural Posture(s): Motion for Summary Judgment.

Attorneys and Law Firms

***300** [Emily Duskow](#), Oakland, CA, for Plaintiff.

[Steven Frankel](#), [Mary Lacy](#), Sonnenschein, Nath & Rosenthal, San Francisco, CA, for Defendant.

OPINION AND ORDER

[ORRICK](#), District Judge.

The Memorandum Decision and Order filed in this action on March 24, 1997, is redesignated as an Opinion and Order and is amended as follows:

Plaintiff Mark Cloutier filed this action on March 29, 1996 against defendant Prudential Life Insurance Company of America ("Prudential"), asserting claims under of Title III of the Americans with Disabilities Act ("Title III" or "ADA"), [42 U.S.C. § 12101 et seq.](#), the Unruh Civil Rights Act ("Unruh Act"), [§ 51 et seq. of the California Civil Code](#), and [§ 10140 of the California Insurance Code](#), and for negligent and intentional infliction of emotional distress. Prudential now moves for summary judgment as to all causes of action. By stipulation of the parties, the Court dismisses the [§ 10140](#) and emotional distress claims. For the reasons stated herein, the Court otherwise denies Prudential's motion for summary judgment.

I.

On February 8, 1995, plaintiff applied for an individual Variable Appreciable Life insurance policy from Prudential in the face amount of \$500,000. With plaintiff's consent, Prudential reviewed his medical records, in accordance with its standard individual policy underwriting procedures. Those records revealed that plaintiff "has safe sex through [a] partner [who] is HIV [-positive]" and that plaintiff "has had persistently low CD-4 [white cell blood] count." (Joint Statement of Undisputed Facts ("Joint Statement") ¶ 4; Spessard Decl. ¶ 4, Ex. C.) The records also revealed an HIV-negative result in plaintiff's own blood test. Plaintiff attributes his low CD4 blood count to an unrelated bout with a viral infection many years ago, an assessment that Prudential apparently does not dispute.

The Prudential underwriter, Sara Lang, referred the file to Prudential's Director of Medical Services, Dr. Amy Bennett, and to two other Prudential underwriting officials. Each recommended that Prudential decline plaintiff's application. Plaintiff alleges that deposition testimony of these key Prudential employees reveals that none of them "consulted medical literature, epidemiological experts, or even in-house actuaries," in arriving at their conclusion. (Pl.'s Opp'n at 4:1-2.) On March 31, 1995, Prudential issued a letter to plaintiff reciting its decision.

Plaintiff requested further information, and on August 1, 1995, Prudential issued a second letter, characterizing plaintiff's situation as "rare," but explaining that Prudential had "consistently declined applications received from HIV negative individuals who [were] in a [sexual] relationship

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with an HIV positive partner.” (Joint Statement ¶ 13; Spessard Decl. ¶ 9, Ex. F.) The parties do not dispute that Prudential refuses to issue individually underwritten life insurance policies to *any* individual regardless of gender, sexual orientation, race, etc., where the applicant's file reveals that the applicant engages in sexual relations with an HIV-positive partner.

In October 1995, plaintiff applied to participate in his employer's group underwritten life insurance policy, in the face amount of \$57,000, the maximum allowable under the employer's plan. Prudential issued that policy in November without consulting plaintiff's medical records, as the company's guidelines did not require a medical review for the issuance of policies to participants in group plans.

In June and July 1996, New York Life Insurance Company (“New York Life”) issued two individual life insurance policies to *301 plaintiff in the face amounts of \$500,000 and \$250,000, respectively. (Cloutier Decl. Exs. A & B.) Plaintiff alleges that he informed the New York Life agent—as he informed Prudential—of the medical history of himself and his partner, and that he authorized the release of the same medical records to New York Life.

On March 29, 1996, plaintiff filed his complaint, and Prudential now moves for summary judgment on all claims. Plaintiff does not contest Prudential's motion as to the § 10140 and emotional distress claims, leaving only the ADA and Unruh Act claims for the Court's resolution.

II.

A.

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” A party seeking summary judgment must show the absence of a genuine issue of material fact to prevail. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) Once the movant has made this showing, the nonmovant must “designate ‘specific facts showing that there is a genuine issue for trial.’ ” *Id.* at 324, 106 S.Ct. at 2553 (quoting *Fed.R.Civ.P.* 56(c)). “When the moving party has carried its burden under

Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (citations omitted). Nonetheless, the Court must view inferences drawn from the evidence in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962).

B.

In relevant part, Title III of the ADA prohibits the discrimination of persons “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases ... or operates a place of public accommodation.” 42 U.S.C. § 12182(a) (1995). The list of specific prohibitions includes “the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying any goods, services, facilities, [etc.]” and “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, [etc.] to individuals with disabilities.” 42 U.S.C. § 12182(b)(2)(A)(i)–(ii). While these provisions would appear to subject Prudential to the ADA's antidiscrimination provisions, § 501(c) (now codified at 42 U.S.C. § 12201(c)) contains an explicit “safe harbor” for insurance companies. Specifically, § 501(c)(1) provides that the ADA “shall not be construed to prohibit or restrict .(1) an insurer ... from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.” 42 U.S.C. § 12201(c)(1) (1995).

Plaintiff claims standing to sue under the ADA by virtue of the statute's prohibition of discrimination against “an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.” 42 U.S.C. § 12182(b)(1) (E). Plaintiff's partner, who is HIV-positive, has a cognizable physical disability.

1.

Prudential first argues that plaintiff “lacks standing” to pursue an ADA claim because these provisions merely prohibit discrimination in providing physical access to offices, restaurants, amusement parks, and *302 other places of public accommodation.¹ Prudential's refusal to issue an insurance policy has nothing to do with plaintiff's ability to obtain physical access to Prudential offices and, hence, Prudential argues, does not give rise to a Title III claim.

Nothing within the plain language of the statute lends itself to such a narrow reading. The statute's general prohibitions ban the discriminatory “denial of the opportunity ... to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.” 42 U.S.C. § 12182(b)(1)(A)(i). The Court should construe statutes to “avoid rendering superfluous any parts thereof.” *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112, 111 S.Ct. 2166, 2171–72, 115 L.Ed.2d 96 (1991) (citation omitted). Interpreting Title III to prohibit only physical barriers to the access of “facilities” would dispense with the language mandating equal opportunity to “participate in or benefit from” the “goods,” “services,” “privileges,” and “advantages” of a commercial transaction.² Equally telling, Title III's specific prohibitions against discriminatory “application of eligibility criteria,” “failure to make reasonable modifications in policies, practices, or procedures,” and “failure to take such steps ... to ensure that no individual with a disability is excluded, denied services, or otherwise treated differently,” could easily apply to the case of an insurer's rejection of a prospective customer without any physical barriers to access. 42 U.S.C. § 12182(b)(2)(A)(i)–(iii); see *Kotev v. First Colony Life Ins. Co.*, 927 F.Supp. 1316, 1321–22 (C.D.Cal.1996) (relying in part on § 12182(b)(2)(A)(i)–(iii) to determine that Title III applied to insurer's rejection of policy applicant).

Although the Ninth Circuit has not spoken on this issue, two courts within this circuit have similarly applied a broad reading to the term “place of public accommodation” in the statute. See *Shultz v. Hemet Youth Pony League, Inc.*, 943 F.Supp. 1222, 1225 (C.D.Cal.1996) (granting plaintiff's summary judgment motion on Title III claim where youth baseball league excluded him due to his affliction with palsy); *Kotev*, 927 F.Supp. 1316. In particular, *Kotev*'s facts lie on all fours with those of the instant case; there, the plaintiff, whose spouse was diagnosed with HIV, sued an insurer for its

refusal to issue him a policy. *Id.* at 1318. The insurer moved to dismiss under Fed.R.Civ.P. 12(b), alleging that the ADA does not encompass an insurer's denial of a policy application. *Id.* at 1320–21. The court denied the motion after a lengthy examination of the statutory language and legislative history. *Id.* at 1320–23. The thorough reasoning of *Kotev*, as well as that of courts in other circuits, suffice to persuade this Court of the applicability of Title III to Prudential's denial of plaintiff's application. See, e.g., *Carparts Distrib. Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19–20 (1st Cir.1994) (finding that limiting the application of Title III to “physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent”); *Doukas v. Metropolitan Life Ins. Co.*, 950 F.Supp. 422, 427 (D.N.H.1996) (extending Title III to insurer's denial of applicant for mortgage disability policy).

2.

This conclusion alone does not enable plaintiff to survive summary judgment. He must also wrestle with the safe harbor granted to insurers in § 501(c), which generally exempts risk “underwriting ..., classifying ..., and administering” from Title III's reach. 42 U.S.C. § 12201(c). Nonetheless, the language and the legislative history of the statute makes clear that Congress did not intend for § 501(c) to confer blanket *303 immunity on insurers in every insurance-related decision.

The plain text of § 501(c) leaves insurance companies vulnerable in two ways. First, the statute exempts only those underwriting, classification, and administration decisions “that are based on or not inconsistent with State law.” 42 U.S.C. § 12201(c)(1). Thus, actions inconsistent state law, such as the Unruh Act, will lose ADA exemption. In this way, plaintiff's claims appear closely linked; prevailing on the state claim subjects Prudential's actions to closer ADA scrutiny.³ A second way for plaintiff to pierce Prudential's § 12201(c) protection comes from the last line of that subsection, which provides “[p]aragraphs (1), (2), and (3) [containing exemptions for insurance companies, hospitals, HMO's, employers, and ERISA plans] shall not be used as a subterfuge to evade the purposes of subchapter[s] I and III of this chapter.” (Footnote omitted.)

The legislative history supports this narrow reading of the § 501(c) exemption. For instance, one House Report stated that the “ADA requires that underwriting and classification

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of risks be based on sound actuarial principles or be related to actual or reasonably anticipated experience.” H.R.Rep. No. 485, pt. 3 at 71 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 267, 303, 494. This implies that where underwriting lacks such a basis, it fails to comply with the ADA.

Plaintiff thus must show a dispute of material fact as to whether Prudential has violated state law. After conceding that Prudential has not violated the California Insurance Code (*see* Pl.’s Opp’n at 4), plaintiff has only a potential Unruh Act violation to support him. The Unruh Act provides in part that “[a]ll persons ... no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever....” Cal. Civ.Code § 51. The law does not afford relief, however, where a business practice “is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, or disability.” *Id.* In light of this provision, and in light of the standards applied by California courts, Prudential does not appear to have directly violated the Unruh Act.

In *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1142, 278 Cal.Rptr. 614, 805 P.2d 873 (1991), the California Supreme Court held that a landlord could impose an income requirement on all prospective tenants without running afoul of the Unruh Act. The *Harris* Court limited Unruh Act claims to those classes of people specifically listed in the statute, or to other persons who allege discrimination based on their “personal characteristics,” as opposed to mere “financial or economic ones.” *Id.* at 1161, 278 Cal.Rptr. at 624–25, 805 P.2d at 883–84. The Court also found that the landlord applied the financial criteria in a uniform and neutral manner, and that the landlord’s legitimate business interest justified the distinctions made on the basis of the applicants’ financial status. *Id.* at 1169, 278 Cal.Rptr. at 630, 805 P.2d at 889. Finally, the Court repeated earlier holdings that the Unruh Act only requires that business rules or practices be “reasonable” and not result in “arbitrary discrimination.” *Id.* at 1165, 278 Cal.Rptr. at 627, 805 P.2d at 886.

Prudential asserts that its exclusion of applicants who engage in sexual activities with HIV-positive partners is both neutrally applied and rationally related to its legitimate business objectives, as in *Harris*. It is neutral because all persons, regardless of gender or sexual orientation, are excluded if they engage in sex with an HIV-positive partner. It is rational because, in Prudential’s view, it cannot

profitably underwrite the uncertain and high mortality risks accompanying such activities. Thus, *Harris* should bar plaintiff’s claim.

Plaintiff distinguishes *Harris* on the basis that the *Harris* plaintiffs were not persons in a protected class, and that fact proved critical in the court’s decision in that case. *See* *304 *id.* at 1169, 278 Cal.Rptr. at 630, 805 P.2d at 889. In this case, plaintiff seeks to characterize his status as a partner of an HIV-positive individual as a “personal characteristic” under *Harris*.

As Prudential notes, however, the Unruh Act does not prohibit discrimination based on one’s marital or partner status. *See Beaty v. Truck Ins. Exch.*, 6 Cal.App.4th 1455, 8 Cal.Rptr.2d 593 (1992) (finding that refusal to issue unmarried homosexual couple a joint policy did not violate Unruh Act, where insurer uniformly rejected all unmarried applicants, homosexual or not). Prudential further argues that it did not deny plaintiff’s application based on his *status*, but rather on his risky *conduct*, that is, having sexual relations with an HIV-infected individual. The Unruh Act does not prohibit discrimination against persons based upon their conduct, but only prohibits that discrimination resulting from the individual’s membership in a particular class of persons.⁴ *See Gayer v. Polk Gulch, Inc.*, 231 Cal.App.3d 515, 282 Cal.Rptr. 556, 562 (1991) (finding that plaintiff, who had earlier filed a discrimination suit against a bar, could not bring a § 51 action against it because of the bar’s refusal to serve him, where subsequent acts of discrimination merely responded to plaintiff’s conduct in filing suit).

3.

With state law avenues blocked, plaintiff can alternatively argue that Prudential’s reliance on § 501(c) constitutes a “subterfuge” to avoid the antidiscrimination provisions of the ADA. Defining what constitutes a “subterfuge” obviously raises difficult questions, particularly in light of the paucity of case law on the matter. The legislative history, however, suggests the propriety of a broad definition of the term. In supporting the bill, senior members of the House and Senate Judiciary Committees have noted that “subterfuge” does not imply that a court must find “malicious intent” on the part of the insurer to make the latter liable under the ADA. 136 Cong. Rec. H4624 (daily ed. May 17, 1990) (statement of Rep. Edwards); 136 Cong. Rec. § 9697 (daily ed. July 13, 1990) (statement of Sen. Kennedy).⁵ House drafters

simply intended the subterfuge provision to assure that an insurer's "refusal, limitation [of coverage], or rate differential is based on sound actuarial principles, or is related to actual or reasonably anticipated experience." H.R.Rep. No. 485, pt. 3 at 70, *reprinted in* 1990 U.S.C.C.A.N. 267, 493. Interpreting the entire subsection § 501(c), the House conferees intended to require that "the standards used [in underwriting be] based on sound actuarial data and not on speculation." *Id.*; *see also id.* pt. 2 at 138, 1990 U.S.C.C.A.N. at 421 (requiring insurers undertake risk underwriting "in accordance with accepted principles of insurance risk classification").

Borrowing from this language, the Court can fashion a legal standard by which to evaluate the facts of this case: insurers retain their § 501(c) exemption so long as their underwriting decisions are in accord with either (a) sound actuarial principles, or (b) actual or reasonably anticipated experience.

Prudential alleges that it bases its underwriting practices on "medical principles establishing that, as a group, these individuals [who engage in sex with HIV-positive partners] present a greater risk of becoming infected with HIV ... than does a group where neither sexual partner is HIV-positive." (Grigg Decl. ¶ 7; *see also* Bennett Decl. ¶ 4.) Assuming that Prudential rejected plaintiff's policy application on this basis ***305** alone—as the Court must in the absence of any additional evidence—Prudential views the issue too narrowly. The mere fact that a particular individual presents a greater risk does not compel the conclusion that the individual presents an uninsurable risk. Common sense suggests that an insurer that confronts a heterogeneous pool of applicants merely consults actuarial tables to adjust its rates to account for varying levels of risk presented by those applicants. Indeed, Prudential's practices typically conform with this logic, as the company admits that it charges about 10 percent of its applicants a premium commensurate with the additional risk that those applicants bring to its pool. (Grigg Decl. ¶ 5.) Yet Prudential offers no actuarial or other data to justify its outright rejection of plaintiff's policy application. As one court noted in a case involving an insurer's rejection of an AIDS-afflicted plaintiff in the group life insurance context:

[T]he ADA explicitly allows some disability-based distinctions within insurance policies to be drawn by insurers. However, total denial of ... coverage to an individual

does not implicate risks. In other words, disability-based distinctions are only relevant when some coverage is extended to an individual with disabilities. No actuarial risk makes someone uninsurable.

Anderson v. Gus Mayer Boston Store, 924 F.Supp. 763, 779 (E.D.Tex.1996) (footnote omitted). Although the instant dispute involves the refusal to issue individual coverage, as opposed to the extension of group coverage to an individual, *Anderson*'s logic applies with equal force here.

More important, Prudential does not point to any specific evidence to support this assertion. It argues that it need not offer specific actuarial data to support its decision where it seems so obviously supported by "accepted medical principles" and common knowledge about AIDS and its associated mortality risks.⁶ (Def.'s Reply at 6, n. 4.) The Court disagrees. Though Prudential can meet its initial burden as a **Rule 56** movant without presenting evidence that negates plaintiff's claim, *see Celotex*, 477 U.S. at 323, 106 S.Ct. at 2552–53, plaintiff has demonstrated the existence of a material dispute as to whether Prudential based its decision upon sound actuarial principles or reasonably anticipated experience. In response to plaintiff's showing, Prudential must point to data, studies, or other information relevant to its risk assessment in order to establish the absence of a dispute of material fact.

Specifically, plaintiff discharged his burden by pointing to deposition testimony from Prudential underwriters who "admitted that they either did not recall seeking or definitely did not seek information outside of their own knowledge regarding HIV. None of them recalled specifics of any special training relating to HIV or its transmission, and only one of them had any medical training." (Pl.'s Opp'n at 11:15–21; *see* Daskow Decl., Exs. B, C, D, E.) Plaintiff further asserts that none of the key Prudential employees "consulted medical literature, epidemiological experts, or even in-house actuaries," in deciding to reject plaintiff's application. (Pl.'s Opp'n at 4:1–2.) Plaintiff also points to the declaration of Harry Woodman, a former Chief Underwriter at New York Life, with forty-six years of underwriting experience. Woodman alleges that "in order to make a decision based on sound actuarial reasoning and on a legitimate basis, Prudential should have evaluated [plaintiff's] actual risk of contracting HIV before making a final decision on his

application.” (Woodman Decl. ¶ 3.) Woodman concludes that he would have offered plaintiff an insurance policy had he been confronted with the same application. (*Id.* ¶ 10.)

Not only does the evidence suggest that Prudential did not base its decision on sound actuarial data, but the rejection of his application *306 may not have accorded with reasonably anticipated experience. Prudential's review of plaintiff's medical records could only have revealed that plaintiff engaged in “safe sex”—that is, protected sex—with an HIV-positive partner. Plaintiff's blood test results remained HIV-negative. Despite that fact, Prudential does not offer any evidence that one has a heightened risk, let alone a uninsurable risk, of contracting HIV by engaging in protected sex. Persons such as plaintiff, who took the initiative to report the nature of his sexual activity to his doctor, could conceivably have a *lower* likelihood of contracting the virus than someone who does not regularly see a doctor, does not seek medical advice, and does not purport to take precautions before engaging in sexual activity.

Of course, plaintiff could become infected with the HIV virus in spite of his apparent precautions. In Prudential's most specific allegation on the topic, its Director of Medical Services, Dr. Amy Bennett, states that “[b]ecause the HIV retrovirus becomes incorporated into the genome of the host's immune cells, it is extremely difficult to develop antiviral chemotherapeutic agents or vaccines to eradicate the disease.” (Bennett Decl. ¶ 3.) But the medical profession need not eradicate the disease to enable HIV-infected persons to enjoy a life of a reasonably lengthy duration. As Woodman notes, the recent development of antiviral drugs and other medications have enabled persons who contract the HIV virus to live another twenty-five years after exposure. (Woodman Decl. ¶ 6.) In particular, the recent use of *protease* inhibitors in combination with other antiviral treatments has reduced the presence of the HIV virus to undetectable levels in some patients. See Christine Gorman, “A New Attack on AIDS Multidrug Therapy Seems to Offer the Best Hope so Far of Beating Back the Deadly Virus,” *Time*, Vol. 148, No. 3, July 8, 1996 at 52.

If one can live many years after infection, such persons as plaintiff hardly present uninsurable risks for a life insurance company. New York Life's decision to issue plaintiff two individual policies in 1996, in spite of New York Life's full knowledge of plaintiff's sexual activities, bolsters this conclusion.

In light of the conflicting evidence, Prudential can only prevail if it provides the Court with facts sufficiently specific to convince the Court of an absence of disputed fact. The Court does not stand alone in demanding such a showing, as revealed by other courts that have addressed the question in the context of HIV-infected insurance applicants. *Anderson*, 924 F.Supp. at 779, and *Piquard v. City of East Peoria*, 887 F.Supp. 1106, 1125–26 (C.D.Ill.1995). In *Anderson*, the court ruled against the defendant where its insurer “made no claim that it has conducted any ... studies.” In the context of an employer-sponsored group benefit plan, the court further opined that the ADA “puts the burden on those actors classifying risks to show both their rationality and permissibility.” In *Piquard*, also a benefit plan case, the court required that an employer or the employer's insurer bear the burden of providing “risk assessment and actuarial data” to prevail on summary judgment. *Id.* at 1126. Although the court declined to reach the question of whether the “subterfuge” provision of the larger § 501(c) required a similar showing, the reasoning appears equally compelling in either context:

The EEOC explains [in its Interim Policy] that requiring the defendant to bear the burden of proof is consistent with the principle that the burden of proof should rest with the party who has the greatest access to the relevant facts. In the health insurance context, the defendant ... has control of the risk assessment, actuarial, and/or claims data relied upon in adopting the challenged disability-based distinction. The plaintiff has no access to such data.

Id. at 1127 (citing *Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181, 109 S.Ct. 2854, 2868–69, 106 L.Ed.2d 134 (1989)).

Applicable regulations also support the imposition of a burden to provide data on the ADA defendant. The Department of Justice does not require insurance companies to include actuarial data with every rejection of an application because that “information would presumably be obtainable in a court proceeding where the insurer's actuarial data *307 was the basis for different treatment of persons with disabilities.” 29 C.F.R. Ch. I, Pt. 36, App. B, § 36.212 (1996).

The passage continues, “[b]ecause the legislative history of the ADA clarifies that different treatment of individuals with disabilities in insurance may be justified by sound actuarial data, *such actuarial data will be critical to any potential litigation on this issue.*” *Id.* (emphasis added).

It defies the spirit of the ADA for the Court to accept Prudential's proffer of vague explanations of the risks of HIV infection where the business of insurance requires sound risk assessment practices. Because plaintiff has pointed to evidence revealing the possibility of discriminatory denial of an insurance policy, Prudential can only prevail on summary judgment by coming forward with actuarial or other data supporting its actions.

C.

Plaintiff also brings a claim for discrimination under the Unruh Act. Although the Court has already concluded that plaintiff cannot show how Prudential has directly violated the Unruh Act, there appears to exist a “federal-law back door” to § 51 liability. That is, the California legislature amended the Unruh Act in 1992 to provide that “[a] violation of the right of any individual under the Americans with Disabilities Act of

1990 ... shall also constitute a violation of this section.” [Cal. Civ.Code § 51](#). Because the Court denies Prudential's motion for summary judgment as to the ADA claim, it must deny the motion as to the Unruh Act claim as well.

III.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendant's motion for summary judgment on plaintiff's claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of [California Insurance Code § 10140](#) is GRANTED.

2. Defendant's motion for summary judgment of plaintiff's claims under the ADA and the Unruh Act is DENIED.

All Citations

964 F.Supp. 299, 7 A.D. Cases 1249, 23 A.D.D. 359, 97 Daily Journal D.A.R. 12,841

Footnotes

- 1 More likely, the question does not amount to one of “standing” or any related issue of justiciability, as Prudential contends, but rather a question of whether plaintiff has stated a claim upon which relief can be granted.
- 2 Congress uses this same language repeatedly throughout the statute, further suggesting the importance of considering each noun in the series. See, e.g., [42 U.S.C. § 12182\(a\)](#) (prohibiting discrimination on the basis of disability “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations”).
- 3 The Unruh Civil Rights Act does provide that “[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 ... shall also constitute a violation of this section.” [Cal. Civ.Code § 51](#). Although this provision means that any ADA violation constitutes an Unruh Act violation, it would be illogical to combine [§ 12201\(c\)\(1\)](#) with the revised [§ 51](#) to allow plaintiffs to bootstrap their way to an ADA claim by asserting a nonexistent Unruh Act violation.
- 4 While this argument may avail Prudential in the Unruh Act context, it does not do so in the context of the ADA, because the ADA explicitly protects persons having “a relationship or association” with a person with a disability. [42 U.S.C. § 12182\(b\)\(1\)\(E\)](#). Because virtually any association or relationship requires conduct of some kind, i.e., payment of membership dues, participation in meetings, etc., characterizing plaintiff's relationship with his mate as “conduct” does not remove him from protected status under the ADA.

- 5 Senator Kennedy and Representative Edwards also emphasized that an insurer does not escape liability simply because it instituted its policy prior to the ADA's passage. 136 Cong. Rec. § 9697 (daily ed. July 13, 1990) (statement of Sen. Kennedy); 136 Cong. Rec. H4624 (daily ed. May 17, 1990) (statement of Rep. Edwards).
- 6 Admittedly, Prudential did note that plaintiff's case presents a risk that is "infrequently encountered in the underwriting process." (Spessard Decl. ¶ 5.) This suggests that conventional actuarial data may not be available for plaintiff's application. Even assuming this to be true, Prudential does not point to any epidemiological or other medical evidence relied upon by any member of its Medical Department to justify its rejection of plaintiff's application. In a nation with hundreds of thousands of HIV-positive citizens, clearly Prudential could find studies of some kind on the disease.

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EXHIBIT 7

2018 WL 747835 (Cal.Super.) (Trial Order)
Superior Court of California.
Bakersfield Department 11
Kern County

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, an Agency of the State of California, Plaintiff,

v.

Cathy MILLER, Defendant,
CATHY'S CREATIONS, INC. dba Tastries, a California Corporation, Defendant,
Eileen RODRIGUEZ-DEL RIO, Non-Party,
Mireya RODRIGUEZ-DEL RIO, Non-Party.

No. BCV-17-102855.
February 5, 2018.

**Nature of Proceedings: Ruling on Order to Show Cause In Re: Preliminary Injunction;
Filed by Plaintiff Department of Fair Housing; Heretofore Submitted on February 2, 2018**

Gregory J Mann, CA Dept of Fair Employment and Housing, 320 West 4th Street 10th Floor, Los Angeles CA 90013.

Charles S Limandri, Law OFC, PO Box 9120, Rancho Santa FE CA 92067.

David R. Lampe, Judge.

Introduction

***1** The State of California brings this action under the Unruh Civil Rights Act,  Civil Code section 51, against defendants Cathy's Creations, Inc. and Cathy Miller. Miller refuses to design and create wedding cakes to be used in the celebration of same sex marriages. She believes that such marriages violate her deeply held religious convictions. The State seeks to enjoin this conduct as unlawfully discriminatory. The State brings the action upon the administrative complaint of a same-sex married couple, complainants Rodriguez-Del Rios.

The State cannot succeed on the facts presented as a matter of law. The right to freedom of speech under the First Amendment outweighs the State's interest in ensuring a freely accessible marketplace.

The right of freedom of thought guaranteed by the First Amendment includes the right to speak, and the right to refrain from speaking. Sometimes the most profound protest is silence.

No public commentator in the marketplace of ideas may be forced by law to publish any opinion with which he disagrees in the name of equal access. No person may be forced by the State to stand and recite the Pledge of Allegiance against her will. The law cannot compel anyone to stand for the National Anthem. No persons may be forced to advertise a state-sponsored slogan on license plates against their religious beliefs.

The State's purpose to ensure an accessible public marketplace free from discrimination is a laudable and necessary public goal. No vendor may refuse to sell their public goods, or services (not fundamentally founded upon speech) based upon their perception of the gender identification of their customer, even upon religious grounds. A retail tire shop may not refuse to sell a tire because the owner does not want to sell tires to same sex couples. There is nothing sacred or expressive about a tire.

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No artist, having placed their work for public sale, may refuse to sell for an unlawful discriminatory purpose. No baker may place their wares in a public display case, open their shop, and then refuse to sell because of race, religion, gender, or gender identification.

The difference here is that the cake in question is not yet baked. The State is not petitioning the court to order defendants to sell a cake. The State asks this court to compel Miller to use her talents to design and create a cake she has not yet conceived with the knowledge that her work will be displayed in celebration of a marital union her religion forbids. For this court to force such compliance would do violence to the essentials of Free Speech guaranteed under the First Amendment.

The Unruh Act prohibits discrimination on the basis of religion, as well as sexual orientation. Would this court force a baker who strongly favored GLBT rights to create and design a wedding cake she had refused to a Catholic couple, in her protest of the Catholic Church's proscription against same-sex marriage? The answer is “No.” This court has an obligation to protect Free Speech, regardless of whose foot the shoe is on. The court takes judicial notice, not of the content, but of the fact, that before the hearing on this matter there was a gathering in front of the courthouse where both sides of the debate voiced their views. Would this court order one side or the other to be quiet? Such an order would be the stuff of tyranny. Both sides advocate with strong and heartfelt beliefs, and this court has a duty to ensure that all are given the freedom to speak them. The government must remain neutral in the marketplace of ideas.¹

1



F.C.C. v. Pacifica Found. (1978) 438 U.S. 726, 745-46, 98 S. Ct. 3026, 3038, 57 L. Ed. 2d 1073.

*2 No matter how the court should rule, one side or the other may be visited with some degree of hurt, insult, and indignity. The court finds that any harm here is equal to either complainants or defendant Miller, one way or the other. If anything, the harm to Miller is the greater harm, because it carries significant economic consequences. When one feels injured, insulted, or angered by the words or expressive conduct of others, the harm is many times self-inflicted. The most effective Free Speech in the family of our nation is when we speak and listen with respect. In any case, the court cannot guarantee that no one will be harmed when the law is enforced. Quite the contrary, when the law is enforced, someone necessarily loses. Nevertheless, the court's duty is to the law. Whenever anyone exercises the right of Free Speech, someone else may be angered or hurt. This is the nature of a free society under our Constitution.

Facts

Complainants Eileen and Mireya Rodriguez-Del Rio met in the late 1990's at Bakersfield College, and built a close and strong friendship before becoming a couple in 2015. They married in December 2016, in a ceremony before their immediate family, and set a date of October 7, 2017, for a vow exchange and traditional wedding reception with over 100 guests. They planned to order a wedding cake for their celebration. After tastings at other bakeries, Eileen and Mireya visited Tastries in August 17, 2017 to see sample wedding cakes. A Tastries employee named Rosemary met with the couple, showed them wedding cakes on display in the bakery, and recorded the details of the cake they wanted. Eileen and Mireya selected a design based on a display cake. The couple did not want or request any written words or messages on the cake. They booked a cake tasting at Tastries for August 26, 2017. On August 26, Mireya, Eileen, and others came to Tastries, where the owner, Cathy Miller, after apologizing, told them that she would provide their order to Gimme Some Sugar—a competitor bakery—because she does not condone same-sex marriage.

On October 18, 2017, Rodriguez-Del Rios filed an administrative complaint with the State, alleging that Defendants violated the Unruh Act by denying them full and equal services on the basis of sexual orientation. On the basis of its preliminary investigation, the State concluded that prompt judicial action was necessary, and this action ensued.

Cathy Miller is a creative designer who owns and operates Cathy's Creations, Inc., doing business as “Tastries,” a small bakery in Bakersfield, California. As part of its business, Tastries creates specially designed custom cakes, including wedding cakes.

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Miller is a practicing Christian and considers herself a woman of deep faith.

Miller is a creative artist and participates in every part of the custom cake design and creation process.

While Miller offers her services and products generally without discrimination, including her pre-made wares, she will not design or create any custom cake that expresses or celebrates matters that she finds offend her heartfelt religious principles. Thus, she refuses to create or design wedding cakes for same-sex marriage celebrations, because of her belief that such unions violate a Biblical command that marriage is only between a man and a woman.

Miller has entered into an agreement to refer same-sex couples to a competitor, Gimme Some Sugar, based upon her understanding that the owner of that bakery does not have any prohibitory policies.

Miller does not deny that she refused to design and create a custom wedding cake for Rodriguez-Del Rio.

Analysis

The right of freedom of thought protected by the First Amendment includes both the right to speak freely and the right to remain mute. ( *Wooley v. Maynard* (1977) 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L. Ed. 2d 752.) The relevant principles are well presented in the Court's *Wooley* decision.

In ruling that no child may be compelled by the educational system to perform the flag salute under threat of state discipline, the Court held that such a ceremony so touched upon matters of opinion and political attitude that it could not be imposed under our Constitution, finding that “[t]o enforce those rights today is ... to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.” ( *W. Virginia State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 636, 637, 63 S. Ct. 1178, 1184, 1185, 87 L. Ed. 1628.)

*3 In the case of  *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730, the Court held a Florida statute unconstitutional which placed an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. The Court concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit. (See also  *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California* (1986) 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1.)

In *Wooley*, the Court held that the State of New Hampshire could not compel residents to display the state motto “Live Free or Die” upon their vehicle license plates against their religious principles.

This case falls well within the reach of the Supreme Court's “compelled speech” doctrine.  *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), establishes that generally applicable public-accommodation laws violate the Free Speech Clause when applied to compel speech. In *Hurley*, the Supreme Court, by Justice Souter, held that a state courts' application of public accommodation law to essentially require defendants to alter the expressive content of their parade by permitting a group of participants to march behind a GLBT banner violated the First Amendment.

The State here makes two arguments against the application of the “compelled speech” doctrine. The State argues that Unruh Act enforcement here does not compel speech, but only conduct—the baking and selling of a cake, citing  *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, (FAIR) (2006) 547 U.S. 47. The State also argues that this is not a compelled speech case because such case are limited to those occasions where government requires a speaker to disseminate another's message

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and here the State is not compelling any particular design, also principally citing *FAIR*, *Wooley*, and *Tornillo*. The State takes a far too narrow view of both the case law and the circumstances to satisfy constitutional scrutiny. The State does ask the court to limit Miller's design, because the State acknowledges that she cannot create any element of the design that would disparage same-sex marriage, because that design element would be unacceptable to Rodriguez-Del Rios. *FAIR* recognized, in considering *Wooley* and *Tornillo*, that when a speaker is engaged in expression, and the government allows or compels that another may co-opt it, it necessarily affects the speaker's expression. (547 U.S. at 63-64.) *FAIR* is also distinguishable because the law schools in that case did not speak when they hosted interviews and held recruiting receptions. (Id. at 64.)

A wedding cake is not just a cake in a Free Speech analysis. It is an artistic expression by the person making it that is to be used traditionally as a centerpiece in the celebration of a marriage. There could not be a greater form of expressive conduct. Here, Rodriguez-Del Rios plan to engage in speech. They plan a celebration to declare the validity of their marital union and their enduring love for one another. The State asks this court to compel Miller against her will and religion to allow her artistic expression in celebration of marriage to be co-opted to promote the message desired by same-sex marital partners, and with which Miller disagrees.

*4 Identifying the interests here as implicating First Amendment protections does not end the inquiry. The court must also determine whether the State's countervailing interest is sufficiently compelling to justify the intrusion into a protected right.

The State principally cites United States v. O'Brien (1968) 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672, for the proposition that the State's interest in compelling a marketplace free from discrimination outweighs Miller's First Amendment Free Speech interests. In *O'Brien*, the Supreme Court, by Chief Justice Warren, held that because of the government's substantial interest in assuring the continuing availability of issued selective service certificates, because the statute punishing knowing destruction or mutilation of such certificates was an appropriately narrow means of protecting such interest, and condemned only the independent non-communicative impact of conduct within its reach, and because the non-communicative impact of defendant's act of burning his registration certificate frustrated the government's interest, a sufficient governmental interest was shown to justify defendant's conviction, as against defendant's claim that his act was protected "symbolic speech."

Here, Miller is not burning her business license or refusing to display it to protest government regulation of the small bakery industry. She is not refusing to post any government requirement to display the caloric content of her pastries. (See Beeman v. Anthem Prescription Mgmt., LLC (2013) 58 Cal. 4th 329, 356.) The application of the Unruh Act in these circumstances requires "strict scrutiny" by the court. Under strict scrutiny, a law cannot be applied in a manner that substantially burdens a constitutional right unless the State shows that the law represents the least restrictive means of achieving a compelling interest. (N. Coast Women's Care Med. Grp. Inc. v. San Diego Cty. Superior Court (2008) 44 Cal. 4th 1145, 1158.)

The State cannot meet the test that its interest outweighs the Free Speech right at issue in this particular case, or that the law is being applied by the least restrictive means. The court cannot retreat from protecting the Free Speech right implicated in this case based upon the specter of factual scenarios not before it. Small-minded bigots will find no recourse in committing discriminatory acts, expecting to be sheltered from Unruh Act prohibitions by a false cry of Free Speech. No court evaluates Free Speech rights against the interest of the State in enforcing public access laws in a vacuum, without regard to circumstances, history, culture, social norms, and the application of common sense. Here, Miller's desire to express through her wedding cakes that marriage is a sacramental commitment between a man and a woman that should be celebrated, while she will not express the same sentiment toward same-sex unions, is not trivial, arbitrary, nonsensical, or outrageous. Miller is expressing a belief that is part of the orthodox doctrines of all three world Abrahamic religions, if not also part of the orthodox beliefs of Hinduism and major sects of Buddhism. That Miller's expression of her beliefs is entitled to protection is affirmed in the opinion of Justice Kennedy in Obergefell v. Hodges (2015) 135 S. Ct. 2584, 192 L. Ed. 2d 609 wherein the Court established that same-sex marriages are entitled to Equal Protection. Therein, the Court noted: "[f]inally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-

sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.” (Id at 2607.)

*5 Furthermore, here the State minimizes the fact that Miller has provided for an alternative means for potential customers to receive the product they desire through the services of another talented baker who does not share Miller's belief. Miller is not the only wedding cake creator in Bakersfield.

The fact that Rodriguez-Del Rios feel they will suffer indignity from Miller's choice is not sufficient to deny constitutional protection. *Hurley* established that the State's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression. The Court there recognized that “the point of all speech protection ... is to shield just those choices of content that in someone's eyes are ... hurtful.” (Hurley, supra, 515 U.S. at 574.)

An interest in preventing dignitary harms thus is not a compelling basis for infringing free speech. (See Texas v. Johnson (1989) 491 U.S. 397, 409; see also Hustler Magazine, Inc. v. Falwell (1988) 485 U.S. 46, 56.)

The defendants' argument that the case implicates the Free Exercise of Religion Clause is less clear. In light of the court's discussion above, the court does not reach the question of Free Exercise. In addressing the constitutional protection for free exercise of religion, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. To determine the object of a law, the court begins with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. The Free Exercise Clause extends beyond facial discrimination. The Clause “forbids subtle departures from neutrality.” Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.

The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. (Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520,533- 534, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472.)

It is difficult to say what standard of scrutiny the court should use to evaluate the application of the Free Exercise clause to the circumstances of this case after Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and which resulted in Congress passing the Religious Freedom Restoration Act of 1993. (See Burwell v. Hobby Lobby Stores, Inc. (2014)134 S. Ct. 2751, 2760, 189 L. Ed. 2d 675.)

The Unruh Act is neutral on its face and does not per se constitute a direct restraint upon religion. In fact, by its terms, the Unruh Act itself protects religious discrimination in the marketplace. By its term it does not constitute an indirect restraint. There is also no evidence before the court that the State is targeting Christian bakers for Unruh Act enforcement under these circumstances. Designing and creating a cake, even a wedding cake, may not in and of itself constitute a religious practice under the Free Exercise clause. It is the use that Miller's design effort will be put to that causes her to object. Whether the application of the Unruh Act in these circumstances violates the Free Exercise clause is an open question, and the court does not address it because the case is sufficiently resolved upon Free Speech grounds.

Conclusion

*6 For the reasons stated above, the application for preliminary injunction is denied. The State cannot succeed upon the merits, and the balance of hardships does not favor the State.

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Ruling Upon Objections

The court rules as follows upon the evidentiary objections presented.

Defendant's Objections:

The court sustains objections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, and 18. The court overrules all other objections.

State's Objections:

The court sustains objections 8, 13, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 35, 36, 42, 43, and 44. The court overrules all other objections.

Moving party shall prepare and order after hearing consistent with this ruling and pursuant to California Rules of Court, Rule 3.1312.

Copy of minute order mailed to all parties as stated on the attached certificate of mailing.

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EXHIBIT 8

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141 S.Ct. 1868
Supreme Court of the United States.

Sharonell FULTON, et al., Petitioners

v.

CITY OF PHILADELPHIA, PENNSYLVANIA, et al.

No. 19-123

Argued November 4, 2020

Decided June 17, 2021

Synopsis

Background: State-licensed foster care agency affiliated with Roman Catholic Archdiocese, together with three foster parents affiliated with the agency, brought § 1983 action against city and city departments, alleging the city's refusal to contract with the agency unless it agreed to certify same-sex couples as foster parents violated the Free Exercise and Free Speech Clauses of the First Amendment. After organizations intervened as defendants, the United States District Court for the Eastern District of Pennsylvania, [Petrese B. Tucker, J.](#), [320 F.Supp.3d 661](#), denied the motions for a temporary restraining order (TRO) and preliminary injunction filed by the agency and foster parents, and they appealed. The United States Court of Appeals for the Third Circuit, [Ambro](#), Circuit Judge, [922 F.3d 140](#), affirmed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice [Roberts](#), held that:

city burdened agency's religious exercise by putting agency to choice of curtailing its mission or approving relationships inconsistent with its beliefs;

non-discrimination requirement in city's standard foster care contract was not generally applicable, and thus was subject to strict scrutiny;

agency was not a public accommodation subject to city ordinance's prohibition on discrimination on the basis of sexual orientation when agency certified foster parents;

maximizing the number of foster families was not a compelling interest that justified city's burdening of agency's free exercise rights;

protecting city from liability was not a compelling interest that justified city's burdening of agency's free exercise rights; and

city's interest in the equal treatment of prospective foster parents and foster children, though weighty, was not a compelling interest that justified city's burdening of agency's free exercise rights.

Reversed and remanded.

Justice [Barrett](#) filed a concurring opinion, in which Justice [Kavanaugh](#) joined, and in which Justice [Breyer](#) joined in part.

Justice [Alito](#) filed an opinion concurring in the judgment, in which Justice [Thomas](#) and Justice [Gorsuch](#) joined.

Justice [Gorsuch](#) filed an opinion concurring in the judgment, in which Justice [Thomas](#) and Justice [Alito](#) joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion for Preliminary Injunction; Motion for Temporary Restraining Order (TRO).

1871 Syllabus

Philadelphia's foster care system relies on cooperation between the City and private foster care agencies. The City enters standard annual contracts with the agencies to place children with foster families. One of the responsibilities of the agencies is certifying prospective foster families under state statutory criteria. Petitioner Catholic Social Services has contracted with the City to provide foster care services for over 50 years, continuing the centuries-old mission of the Catholic Church to serve Philadelphia's needy children. CSS holds the religious belief that marriage is a sacred bond between a man and a woman. Because CSS believes that certification of prospective foster families is an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. But other private foster agencies in Philadelphia will certify same-sex couples, and no same-sex couple has sought certification from CSS. Against this backdrop, a 2018 newspaper story recounted the Archdiocese of Philadelphia's position that CSS could not consider prospective foster parents in same-sex marriages. Calls for investigation followed, and the City ultimately informed CSS that unless it agreed to certify same-sex couples the City

would no longer refer children to the agency or enter a full foster care contract with it in the future. The City explained that the refusal of CSS to certify same-sex couples violated both a non-discrimination provision in the agency's contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance.

CSS and three affiliated foster parents filed suit seeking to enjoin the City's referral freeze on the grounds that the City's actions violated the Free Exercise and Free Speech Clauses of the First Amendment. The District Court denied preliminary relief. It reasoned that the contractual non-discrimination requirement and the Fair Practices Ordinance were both neutral and generally applicable under *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876, and that CSS's free exercise claim was therefore unlikely to succeed. The Court of Appeals for the Third Circuit affirmed. Given the expiration of the parties' contract, the Third Circuit examined whether the City could condition contract renewal on the inclusion of new language forbidding discrimination on the basis of sexual orientation. The court concluded that the City's proposed contractual terms stated a neutral and generally applicable policy under *Smith*. CSS and the foster parents challenge the Third Circuit's determination that the City's actions were permissible under *Smith* and also ask the Court to reconsider that decision.

Held: The refusal of Philadelphia to contract with CSS for the provision of foster care services unless CSS agrees to certify same-sex couples as foster parents violates the Free Exercise Clause of the First Amendment. Pp. 1876 – 1882.

(a) The City's actions burdened CSS's religious exercise by forcing it either to curtail its mission or to certify same-sex couples as foster parents in violation of its religious beliefs. *Smith* held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are both neutral and generally applicable. 494 U.S. at 878–882, 110 S.Ct. 1595. This case falls outside *Smith* because the City has burdened CSS's religious exercise through policies that do not satisfy the threshold requirement of being neutral and generally applicable. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217, 124 L.Ed.2d 472. A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions. *Smith*, 494 U.S. at 884, 110 S.Ct. 1595. Where such a system of

individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason. *Ibid.* Pp. 1876 – 1878.

(1) The non-discrimination requirement of the City's standard foster care contract is not generally applicable. Section 3.21 of the contract requires an agency to provide services defined in the contract to prospective foster parents without regard to their sexual orientation. But section 3.21 also permits exceptions to this requirement at the “sole discretion” of the Commissioner. This inclusion of a mechanism for entirely discretionary exceptions renders the non-discrimination provision not generally applicable. *Smith*, 494 U.S. at 884, 110 S.Ct. 1595. The City maintains that greater deference should apply to its treatment of private contractors, but the result here is the same under any level of deference. Similarly unavailing is the City's recent contention that section 3.21 does not even apply to CSS's refusal to certify same-sex couples. That contention ignores the broad sweep of section 3.21's text, as well as the fact that the City adopted the current version of section 3.21 shortly after declaring that it would make CSS's obligation to certify same-sex couples “explicit” in future contracts. Finally, because state law makes clear that the City's authority to grant exceptions from section 3.21 also governs section 15.1's general prohibition on sexual orientation discrimination, the contract as a whole contains no generally applicable non-discrimination requirement. Pp. 1877 – 1880.

(2) Philadelphia's Fair Practices Ordinance, which as relevant forbids interfering with the public accommodations opportunities of an individual based on sexual orientation, does not apply to CSS's actions here. The Ordinance defines a public accommodation in relevant part to include a provider “whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.” Phila. Code § 9–1102(1) (w). Certification is not “made available to the public” in the usual sense of the words. Certification as a foster parent is not readily accessible to the public; the process involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The District Court's contrary conclusion did not take into account the uniquely selective nature of foster care certification. Pp. 1879 – 1881.

(b) The contractual non-discrimination requirement burdens CSS's religious exercise and is not generally applicable, so it is subject to “the most rigorous of scrutiny.” *Lukumi*, 508

U.S. at 546, 113 S.Ct. 2217. A government policy can survive strict scrutiny only if it advances compelling interests and is narrowly tailored to achieve those interests. *Ibid.* The question is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS. Under the circumstances here, the City does not have a compelling interest in refusing to contract with CSS. CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless the agency agrees to certify same-sex couples as foster parents cannot survive strict scrutiny and violates the Free Exercise Clause of the First Amendment. The Court does not consider whether the City's actions also violate the Free Speech Clause. Pp. 1881 – 1882.

922 F.3d 140, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which BREYER, SOTOMAYOR, KAGAN, KAVANAUGH, and BARRETT, JJ., joined. BARRETT, J., filed a concurring opinion, in which KAVANAUGH, J., joined, and in which BREYER, J., joined as to all but the first paragraph. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS and GORSUCH, JJ., joined. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS and ALITO, JJ., joined.

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Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

*1874 Catholic Social Services is a foster care agency in Philadelphia. The City stopped referring children to CSS upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The City will renew its foster care contract with CSS only if the agency agrees to certify same-sex couples. The question presented is whether the actions of Philadelphia violate the First Amendment.

I

The Catholic Church has served the needy children of Philadelphia for over two centuries. In 1798, a priest in the City organized an association to care for orphans whose parents had died in a yellow fever epidemic. H. Folks, *The Care of Destitute, Neglected, and Delinquent Children* 10 (1902). During the 19th century, nuns ran asylums for

orphaned and destitute *1875 youth. T. Hacsí, Second Home: Orphan Asylums and Poor Families in America 24 (1997). When criticism of asylums mounted in the Progressive Era, see *id.*, at 37–40, the Church established the Catholic Children's Bureau to place children in foster homes. Petitioner CSS continues that mission today.

The Philadelphia foster care system depends on cooperation between the City and private foster agencies like CSS. When children cannot remain in their homes, the City's Department of Human Services assumes custody of them. The Department enters standard annual contracts with private foster agencies to place some of those children with foster families.

The placement process begins with review of prospective foster families. Pennsylvania law gives the authority to certify foster families to state-licensed foster agencies like CSS. 55 Pa. Code § 3700.61 (2020). Before certifying a family, an agency must conduct a home study during which it considers statutory criteria including the family's "ability to provide care, nurturing and supervision to children," "[e]xisting family relationships," and ability "to work in partnership" with a foster agency. § 3700.64. The agency must decide whether to "approve, disapprove or provisionally approve the foster family." § 3700.69.

When the Department seeks to place a child with a foster family, it sends its contracted agencies a request, known as a referral. The agencies report whether any of their certified families are available, and the Department places the child with what it regards as the most suitable family. The agency continues to support the family throughout the placement.

The religious views of CSS inform its work in this system. CSS believes that "marriage is a sacred bond between a man and a woman." App. 171. Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples—regardless of their sexual orientation—or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples. For over 50 years, CSS successfully contracted with the City to provide foster care services while holding to these beliefs.

But things changed in 2018. After receiving a complaint about a different agency, a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages. The City Council called for an investigation, saying that the City had "laws in place to protect its people from discrimination that occurs under the guise of religious freedom." App. to Pet. for Cert. 147a. The Philadelphia Commission on Human Relations launched an inquiry. And the Commissioner of the Department of Human Services held a meeting with the leadership of CSS. She remarked that "things have changed since 100 years ago," and "it would be great if we followed the teachings of Pope Francis, the voice of the Catholic Church." App. 366. Immediately after the meeting, the Department informed CSS that it would no longer refer children to the agency. The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance. The City stated that it would not enter a full foster care contract *1876 with CSS in the future unless the agency agreed to certify same-sex couples.

CSS and three foster parents affiliated with the agency filed suit against the City, the Department, and the Commission. The Support Center for Child Advocates and Philadelphia Family Pride intervened as defendants. As relevant here, CSS alleged that the referral freeze violated the Free Exercise and Free Speech Clauses of the First Amendment. CSS sought a temporary restraining order and preliminary injunction directing the Department to continue referring children to CSS without requiring the agency to certify same-sex couples.

The District Court denied preliminary relief. It concluded that the contractual non-discrimination requirement and the Fair Practices Ordinance were neutral and generally applicable under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), and that the free exercise claim was therefore unlikely to succeed. 320 F.Supp.3d 661, 680–690 (E.D. Pa. 2018). The court also determined that the free speech claims were unlikely to succeed because CSS performed certifications as part of a government program. *Id.*, at 695–700.

The Court of Appeals for the Third Circuit affirmed. Because the contract between the parties had expired, the court focused on whether the City could insist on the inclusion of new

language forbidding discrimination on the basis of sexual orientation as a condition of contract renewal. 922 F.3d 140, 153 (2019). The court concluded that the proposed contractual terms were a neutral and generally applicable policy under *Smith*. 922 F.3d at 152–159. The court rejected the agency's free speech claims on the same grounds as the District Court. *Id.*, at 160–162.

CSS and the foster parents sought review. They challenged the Third Circuit's determination that the City's actions were permissible under *Smith* and also asked this Court to reconsider that precedent.

We granted certiorari. 589 U. S. —, 140 S.Ct. 1104, 206 L.Ed.2d 177 (2020).

II

A

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that “Congress shall make no law ... prohibiting the free exercise” of religion. As an initial matter, it is plain that the City's actions have burdened CSS's religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.

Smith held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. 494 U.S. at 878–882, 110 S.Ct. 1595. CSS urges us to overrule *Smith*, and the concurrences in the judgment argue in favor of doing so, see *post*, pp. 1883 – 1884 (opinion of ALITO, J.); *post*, p. 1926 (opinion of GORSUCH, J.). *1877 But we need not revisit that decision here. This case falls outside *Smith* because the City has burdened the religious exercise of CSS through policies that do not meet the requirement of

being neutral and generally applicable. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. —, —, —, 138 S.Ct. 1719, 1730–1732, 201 L.Ed.2d 35 (2018); *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. CSS points to evidence in the record that it believes demonstrates that the City has transgressed this neutrality standard, but we find it more straightforward to resolve this case under the rubric of general applicability.

A law is not generally applicable if it “invite[s]” the government to consider the particular reasons for a person's conduct by providing “ ‘a mechanism for individualized exemptions.’ ” *Smith*, 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Bowen v. Roy*, 476 U.S. 693, 708, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986) (opinion of BURGER, C. J., joined by POWELL AND REHNQUIST, JJ.)). For example, in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), a Seventh-day Adventist was fired because she would not work on Saturdays. Unable to find a job that would allow her to keep the Sabbath as her faith required, she applied for unemployment benefits. *Id.*, at 399–400, 83 S.Ct. 1790. The State denied her application under a law prohibiting eligibility to claimants who had “failed, without good cause ... to accept available suitable work.” *Id.*, at 401, 83 S.Ct. 1790 (internal quotation marks omitted). We held that the denial infringed her free exercise rights and could be justified only by a compelling interest. *Id.*, at 406, 83 S.Ct. 1790.

Smith later explained that the unemployment benefits law in *Sherbert* was not generally applicable because the “good cause” standard permitted the government to grant exemptions based on the circumstances underlying each application. See 494 U.S. at 884, 110 S.Ct. 1595 (citing *Roy*, 476 U.S. at 708, 106 S.Ct. 2147; *Sherbert*, 374 U.S. at 401, n. 4, 83 S.Ct. 1790). *Smith* went on to hold that “where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Roy*, 476 U.S. at 708, 106 S.Ct. 2147); see also *Lukumi*, 508 U.S. at 537, 113 S.Ct. 2217 (same).

A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the

government's asserted interests in a similar way. See *id.*, at 542–546, 113 S.Ct. 2217. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, for instance, the City of Hialeah adopted several ordinances prohibiting animal sacrifice, a practice of the Santeria faith. *Id.*, at 524–528, 113 S.Ct. 2217. The City claimed that the ordinances were necessary in part to protect public health, which was “threatened by the disposal of animal carcasses in open public places.” *Id.*, at 544, 113 S.Ct. 2217. But the ordinances did not regulate hunters’ disposal of their kills or improper garbage disposal by restaurants, both of which posed a similar hazard. *Id.*, at 544–545, 113 S.Ct. 2217. The Court concluded that this and other forms of underinclusiveness meant that the ordinances were not generally applicable. *Id.*, at 545–546, 113 S.Ct. 2217.

*1878 B

The City initially argued that CSS's practice violated section 3.21 of its standard foster care contract. We conclude, however, that this provision is not generally applicable as required by *Smith*. The current version of section 3.21 specifies in pertinent part:

“Rejection of Referral. Provider shall not reject a child or family including, but not limited to, ... prospective foster or adoptive parents, for Services based upon ... their ... sexual orientation ... unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion.” Supp. App. to Brief for City Respondents 16–17.

This provision requires an agency to provide “Services,” defined as “the work to be performed under this Contract,” App. 560, to prospective foster parents regardless of their sexual orientation.

Like the good cause provision in *Sherbert*, section 3.21 incorporates a system of individual exemptions, made available in this case at the “sole discretion” of the Commissioner. The City has made clear that the Commissioner “has no intention of granting an exception” to CSS. App. to Pet. for Cert. 168a. But the City “may not refuse to extend that [exemption] system to cases of ‘religious hardship’ without compelling reason.” *Smith*, 494 U.S. at 884, 110 S.Ct. 1595 (quoting *Roy*, 476 U.S. at 708, 106 S.Ct. 2147).

The City and intervenor-respondents resist this conclusion on several grounds. They first argue that governments should enjoy greater leeway under the Free Exercise Clause when setting rules for contractors than when regulating the general public. The government, they observe, commands heightened powers when managing its internal operations. See *NASA v. Nelson*, 562 U.S. 134, 150, 131 S.Ct. 746, 178 L.Ed.2d 667 (2011); *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 598–600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008). And when individuals enter into government employment or contracts, they accept certain restrictions on their freedom as part of the deal. See *Garcetti v. Ceballos*, 547 U.S. 410, 418–420, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 677–678, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). Given this context, the City and intervenor-respondents contend, the government should have a freer hand when dealing with contractors like CSS.

These considerations cannot save the City here. As Philadelphia rightly acknowledges, “principles of neutrality and general applicability still constrain the government in its capacity as manager.” Brief for City Respondents 11–12. We have never suggested that the government may discriminate against religion when acting in its managerial role. And *Smith* itself drew support for the neutral and generally applicable standard from cases involving internal government affairs. See 494 U.S. at 883–885, and n. 2, 110 S.Ct. 1595 (citing *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988); *Roy*, 476 U.S. 693, 106 S.Ct. 2147). The City and intervenor-respondents accordingly ask only that courts apply a more deferential approach in determining whether a policy is neutral and generally applicable in the contracting context. We find no need to resolve that narrow issue in this case. No matter the level of deference we extend to the City, the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable.

Perhaps all this explains why the City now contends that section 3.21 does not *1879 apply to CSS's refusal to certify same-sex couples after all. Contrast App. to Pet. for Cert. 167a–168a with Brief for City Respondents 35–36. Instead, the City says that section 3.21 addresses only “an agency's right to refuse ‘referrals’ to place a child with a certified foster family.” Brief for City Respondents 36. We think the City had it right the first time. Although the section is titled “Rejection of Referral,” the text sweeps more broadly,

forbidding the rejection of “prospective foster ... parents” for “Services,” without limitation. Supp. App. to Brief for City Respondents 16. The City maintains that certification is one of the services foster agencies are hired to perform, so its attempt to backtrack on the reach of section 3.21 is unavailing. See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 222 (2012) (“[A] title or heading should never be allowed to override the plain words of a text.”). Moreover, the City adopted the current version of section 3.21 shortly after declaring that it would make CSS's obligation to certify same-sex couples “explicit” in future contracts, App. to Pet. for Cert. 170a, confirming our understanding of the text of the provision.

The City and intervenor-respondents add that, notwithstanding the system of exceptions in section 3.21, a separate provision in the contract independently prohibits discrimination in the certification of foster parents. That provision, section 15.1, bars discrimination on the basis of sexual orientation, and it does not on its face allow for exceptions. See Supp. App. to Brief for City Respondents 31. But state law makes clear that “one part of a contract cannot be so interpreted as to annul another part.” *Shehadi v. Northeastern Nat. Bank of Pa.*, 474 Pa. 232, 236, 378 A.2d 304, 306 (1977); see *Commonwealth ex rel. Kane v. UPMC*, 634 Pa. 97, 135, 129 A.3d 441, 464 (2015). Applying that “fundamental” rule here, *Shehadi*, 474 Pa. at 236, 378 A.2d at 306, an exception from section 3.21 also must govern the prohibition in section 15.1, lest the City's reservation of the authority to grant such an exception be a nullity. As a result, the contract as a whole contains no generally applicable non-discrimination requirement.

Finally, the City and intervenor-respondents contend that the availability of exceptions under section 3.21 is irrelevant because the Commissioner has never granted one. That misapprehends the issue. The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it “invite[s]” the government to decide which reasons for not complying with the policy are worthy of solicitude, *Smith*, 494 U.S. at 884, 110 S.Ct. 1595—here, at the Commissioner's “sole discretion.”

The concurrence objects that no party raised these arguments in this Court. *Post*, at 1928 – 1929 (opinion of GORSUCH, J.). But CSS, supported by the United States, contended that the City's “made-for-CSS Section 3.21 permits discretionary ‘exception[s]’ from the requirement ‘not [to] reject a child

or family’ based upon ‘their ... sexual orientation,’ ” which “alone triggers strict scrutiny.” Reply Brief 5 (quoting Supp. App. to Brief for City Respondents 16; some alterations in original); see also Brief for Petitioners 26–27 (section 3.21 triggers strict scrutiny); Brief for United States as *Amicus Curiae* 21–22 (same). The concurrence favors the City's reading of section 3.21, see *post*, at 1928 – 1929, but we find CSS's position more persuasive.

C

In addition to relying on the contract, the City argues that CSS's refusal *1880 to certify same-sex couples constitutes an “Unlawful Public Accommodations Practice[]” in violation of the Fair Practices Ordinance. That ordinance forbids “deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her race, ethnicity, color, sex, sexual orientation, ... disability, marital status, familial status,” or several other protected categories. Phila. Code § 9–1106(1) (2016). The City contends that foster care agencies are public accommodations and therefore forbidden from discriminating on the basis of sexual orientation when certifying foster parents.

CSS counters that “foster care has never been treated as a ‘public accommodation’ in Philadelphia.” Brief for Petitioners 13. In any event, CSS adds, the ordinance cannot qualify as generally applicable because the City allows exceptions to it for secular reasons despite denying one for CSS's religious exercise. But that constitutional issue arises only if the ordinance applies to CSS in the first place. We conclude that it does not because foster care agencies do not act as public accommodations in performing certifications.

The ordinance defines a public accommodation in relevant part as “[a]ny place, provider or public conveyance, whether licensed or not, which solicits or accepts the patronage or trade of the public or whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.” § 9–1102(1)(w). Certification is not “made available to the public” in the usual sense of the words. To make a service “available” means to make it “accessible, obtainable.” Merriam-Webster's Collegiate Dictionary 84 (11th ed. 2005); see also 1 Oxford English Dictionary 812 (2d ed. 1989) (“capable of being made use of, at one's disposal, within one's reach”). Related state law illustrates the same point.

A Pennsylvania antidiscrimination statute similarly defines a public accommodation as an accommodation that is “open to, accepts or solicits the patronage of the general public.” *Pa. Stat. Ann.*, Tit. 43, § 954(*l*) (Purdon Cum. Supp. 2009). It fleshes out that definition with examples like hotels, restaurants, drug stores, swimming pools, barbershops, and public conveyances. *Ibid.* The “common theme” is that a public accommodation must “provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire.” *Blizzard v. Floyd*, 149 Pa.Comm.w. 503, 506, 613 A.2d 619, 621 (1992).

Certification as a foster parent, by contrast, is not readily accessible to the public. It involves a customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus. The process takes three to six months. Applicants must pass background checks and a medical exam. Foster agencies are required to conduct an intensive home study during which they evaluate, among other things, applicants’ “mental and emotional adjustment,” “community ties with family, friends, and neighbors,” and “[e]xisting family relationships, attitudes and expectations regarding the applicant’s own children and parent/child relationships.” 55 Pa. Code § 3700.64. Such inquiries would raise eyebrows at the local bus station. And agencies understandably approach this sensitive process from different angles. As the City itself explains to prospective foster parents, “[e]ach agency has slightly different requirements, specialties, and training programs.” App. to Pet. for Cert. 197a. All of this confirms that the one-size-fits-all public accommodations model is a poor match for the foster care system.

***1881** The City asks us to adhere to the District Court’s contrary determination that CSS qualifies as a public accommodation under the ordinance. The concurrence adopts the City’s argument, seeing no incongruity in deeming a private religious foster agency a public accommodation. See *post*, at 1927 (opinion of GORSUCH, J.). We respectfully disagree with the view of the City and the concurrence. Although “we ordinarily defer to lower court constructions of state statutes, we do not invariably do so.” *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (citation omitted). Deference would be inappropriate here. The District Court did not take into account the uniquely selective nature of the certification process, which must inform the applicability of the ordinance. We agree with CSS’s position, which it has maintained from the beginning of this dispute, that its “foster services do not constitute a ‘public

accommodation’ under the City’s Fair Practices Ordinance, and therefore it is not bound by that ordinance.” App. to Pet. for Cert. 159a. We therefore have no need to assess whether the ordinance is generally applicable.

III

The contractual non-discrimination requirement imposes a burden on CSS’s religious exercise and does not qualify as generally applicable. The concurrence protests that the “Court granted certiorari to decide whether to overrule [*Smith*],” and chides the Court for seeking to “sidestep the question.” *Post*, at 1926 (opinion of GORSUCH, J.). But the Court also granted review to decide whether Philadelphia’s actions were permissible under our precedents. See Pet. for Cert. i. CSS has demonstrated that the City’s actions are subject to “the most rigorous of scrutiny” under those precedents. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217. Because the City’s actions are therefore examined under the strictest scrutiny regardless of *Smith*, we have no occasion to reconsider that decision here.

A government policy can survive strict scrutiny only if it advances “interests of the highest order” and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217 (internal quotation marks omitted). Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

The City asserts that its non-discrimination policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children. The City states these objectives at a high level of generality, but the First Amendment demands a more precise analysis. See *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 430–432, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006) (discussing the compelling interest test applied in *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)). Rather than rely on “broadly formulated interests,” courts must “scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.” *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211. The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.

Once properly narrowed, the City's asserted interests are insufficient. Maximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals *1882 at risk. If anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents. As for liability, the City offers only speculation that it might be sued over CSS's certification practices. Such speculation is insufficient to satisfy strict scrutiny, see *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 799–800, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011), particularly because the authority to certify foster families is delegated to agencies by the State, not the City, see 55 Pa. Code § 3700.61.

That leaves the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop*, 584 U.S., at —, 138 S.Ct., at 1727. On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise. The creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures. See *Lukumi*, 508 U.S. at 546–547, 113 S.Ct. 2217. The City offers no compelling reason why it has a particular interest in denying an exception to CSS while making them available to others.

* * *

As Philadelphia acknowledges, CSS has “long been a point of light in the City's foster-care system.” Brief for City Respondents 1. CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else. The refusal of Philadelphia to contract with CSS for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment.

In view of our conclusion that the actions of the City violate the Free Exercise Clause, we need not consider whether they also violate the Free Speech Clause.

The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice [BARRETT](#), with whom Justice [KAVANAUGH](#) joins, and with whom Justice [BREYER](#) joins as to all but the first paragraph, concurring.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), this Court held that a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise. Petitioners, their *amici*, scholars, and Justices of this Court have made serious arguments that *Smith* ought to be overruled. While history looms large in this debate, I find the historical record more silent than supportive on the question whether the founding generation understood the First Amendment to require religious exemptions from generally applicable laws in at least some circumstances. In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination.

Yet what should replace *Smith*? The prevailing assumption seems to be that strict scrutiny would apply whenever a *1883 neutral and generally applicable law burdens religious exercise. But I am skeptical about swapping *Smith*'s categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced. There would be a number of issues to work through if *Smith* were overruled. To name a few: Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Cf. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). Should there be a distinction between indirect and direct burdens on religious exercise? Cf. *Braunfeld v. Brown*, 366 U.S. 599, 606–607, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion). What forms of scrutiny should apply? Compare *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (assessing whether government's interest is “‘compelling’”), with *Gillette v. United States*, 401 U.S. 437, 462, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (assessing whether government's interest is “substantial”). And if the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to

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garden-variety laws come out the same way? See *Smith*, 494 U.S. at 888–889, 110 S.Ct. 1595.

We need not wrestle with these questions in this case, though, because the same standard applies regardless whether *Smith* stays or goes. A longstanding tenet of our free exercise jurisprudence—one that both pre-dates and survives *Smith*—is that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions. See *id.*, at 884, 110 S.Ct. 1595 (law not generally applicable “where the State has in place a system of individual exemptions” (citing *Sherbert*, 374 U.S. at 401, n. 4, 83 S.Ct. 1790)); see also *Cantwell v. Connecticut*, 310 U.S. 296, 303–307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (subjecting statute to heightened scrutiny because exemptions lay in discretion of government official). As the Court's opinion today explains, the government contract at issue provides for individualized exemptions from its nondiscrimination rule, thus triggering strict scrutiny. And all nine Justices agree that the City cannot satisfy strict scrutiny. I therefore see no reason to decide in this case whether *Smith* should be overruled, much less what should replace it. I join the Court's opinion in full.

Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, concurring in the judgment.

This case presents an important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Court abruptly pushed aside nearly 30 years of precedent and held that the First Amendment's Free Exercise Clause tolerates any rule that categorically prohibits or commands specified conduct so long as it does not target religious practice. Even if a rule serves no important purpose and has a devastating effect on religious freedom, the Constitution, according to *Smith*, provides no protection. This severe holding is ripe for reexamination.

I

There is no question that *Smith*'s interpretation can have startling consequences. *1884 Here are a few examples.

Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. See Pub. L. 66, § 3, 41 Stat. 308–309. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States.¹ Or suppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious.² That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter.³ Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants.⁴ A San Francisco ballot initiative in 2010 proposed just that.⁵ A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice.⁶ Or suppose that this Court or some other court enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy *Smith* even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing. Many other examples could be added.

We may hope that legislators and others with rulemaking authority will not go as far as *Smith* allows, but the present case shows that the dangers posed by *Smith* are not hypothetical. The city of Philadelphia (City) has issued an ultimatum to an arm of the Catholic Church: Either engage in conduct that the Church views as contrary to the traditional Christian understanding of marriage or abandon a mission that dates back to the earliest days of the Church—providing for the care of orphaned and abandoned children.

Many people believe they have a religious obligation to assist such children. Jews and Christians regard this as a scriptural *1885 command,⁷ and it is a mission that the Catholic Church has undertaken since ancient times. One of the first known orphanages is said to have been founded by St. Basil the Great in the fourth century,⁸ and for centuries, the care of orphaned and abandoned children was carried out by religious orders.⁹

In the New World, religious groups continued to take the lead. The first known orphanage in what is now the United States was founded by an order of Catholic nuns in New Orleans around 1729.¹⁰ In the 1730s, the first two orphanages in what became the United States at the founding were established in Georgia by Lutherans and by Rev. George Whitefield, a

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leader in the “First Great Awakening.”¹¹ In the late 18th and early 19th centuries, Protestants and Catholics established orphanages in major cities. One of the first orphanages in Philadelphia was founded by a Catholic priest in 1798.¹² The Jewish Society for the Relief of Orphans and Children of Indigent Parents began its work in Charleston in 1801.¹³

During the latter part of the 19th century and continuing into the 20th century, the care of children was shifted from orphanages to foster families,¹⁴ but for many years, state and local government participation in this field was quite limited. As one of Philadelphia's *amici* puts it, “[i]nto the early twentieth century, the care of orphaned and abandoned children in the United States remained largely in the hands of private charitable and religious organizations.”¹⁵ In later years, an influx of federal money¹⁶ spurred States and local governments to take a more active role, and today many governments administer what is essentially a licensing system. As is typical in other jurisdictions, no private charitable group may recruit, vet, or support foster parents in Philadelphia without the City's approval.

Whether with or without government participation, Catholic foster care agencies in Philadelphia and other cities have a long record of finding homes for children whose parents are unable or unwilling to care for them. Over the years, they have helped thousands of foster children and parents, and they take special pride in finding homes for children who are hard to place, including older children and those with special needs.¹⁷

***1886** Recently, however, the City has barred Catholic Social Services (CSS) from continuing this work. Because the Catholic Church continues to believe that marriage is a bond between one man and one woman, CSS will not vet same-sex couples. As far as the record reflects, no same-sex couple has ever approached CSS, but if that were to occur, CSS would simply refer the couple to another agency that is happy to provide that service—and there are at least 27 such agencies in Philadelphia. App. 171; App. to Pet. for Cert. 137a; see also *id.*, at 286a. Thus, not only is there no evidence that CSS's policy has ever interfered in the slightest with the efforts of a same-sex couple to care for a foster child, there is no reason to fear that it would ever have that effect.

None of that mattered to Philadelphia. When a newspaper publicized CSS's policy, the City barred CSS from continuing its foster care work. Remarkably, the City took this step

even though it threatens the welfare of children awaiting placement in foster homes. There is an acute shortage of foster parents, both in Philadelphia and in the country at large.¹⁸ By ousting CSS, the City eliminated one of its major sources of foster homes. And that's not all. The City went so far as to prohibit the placement of any children in homes that CSS had previously vetted and approved. Exemplary foster parents like petitioners Sharonell Fulton and Toni Lynn Simms-Busch are blocked from providing loving homes for children they were eager to ***1887** help.¹⁹ The City apparently prefers to risk leaving children without foster parents than to allow CSS to follow its religiously dictated policy, which threatens no tangible harm.

CSS broadly implies that the fundamental objective of City officials is to force the Philadelphia Archdiocese to change its position on marriage. Among other things, they point to statements by a City official deriding the Archdiocese's position as out of step with Pope Francis's teaching and 21st century moral views.²⁰ But whether or not this is the City's real objective, there can be no doubt that Philadelphia's ultimatum restricts CSS's ability to do what it believes the Catholic faith requires.

Philadelphia argues that its stance is allowed by *Smith* because, it claims, a City policy categorically prohibits foster care agencies from discriminating against same-sex couples. Bound by *Smith*, the lower courts accepted this argument, 320 F.Supp.3d 661, 682–684 (E.D. Pa. 2018), 922 F.3d 140, 156–159 (C.A.3 2019), and we then granted certiorari, 589 U. S. —, 140 S.Ct. 1104, 206 L.Ed.2d 177 (2020). One of the questions that we accepted for review is “[w]hether *Employment Division v. Smith* should be revisited.” We should confront that question.

Regrettably, the Court declines to do so. Instead, it reverses based on what appears to be a superfluous (and likely to be short-lived) feature of the City's standard annual contract with foster care agencies. *Smith*'s holding about categorical rules does not apply if a rule permits individualized exemptions, 494 U.S. at 884, 110 S.Ct. 1595, and the majority seizes on the presence in the City's standard contract of language giving a City official the power to grant exemptions. *Ante*, at 1877. The City tells us that it has never granted such an exemption and has no intention of handing one to CSS, Brief for City Respondents 36; App. to Pet. for Cert. 168a, but the majority reverses the decision below because the contract supposedly confers that never-used power. *Ante*, at 1879 – 1880, 1882.

This decision might as well be written on the dissolving paper sold in magic shops. The City has been adamant about pressuring CSS to give in, and if the City wants to get around today's decision, it can simply eliminate the never-used exemption power.²¹ If it does that, then, voilà, today's decision will vanish—and the parties will be back where they started. The City will claim that it is protected by *Smith*; CSS will argue that *Smith* should be overruled; the lower courts, bound by *Smith*, will *1888 reject that argument; and CSS will file a new petition in this Court challenging *Smith*. What is the point of going around in this circle?

Not only is the Court's decision unlikely to resolve the present dispute, it provides no guidance regarding similar controversies in other jurisdictions. From 2006 to 2011, Catholic Charities in Boston, San Francisco, Washington, D. C., and Illinois ceased providing adoption or foster care services after the city or state government insisted that they serve same-sex couples. Although the precise legal grounds for these actions are not always clear, it appears that they were based on laws or regulations generally prohibiting discrimination on the basis of sexual orientation.²² And some jurisdictions have adopted anti-discrimination rules that expressly target adoption services.²³ Today's decision will be of no help in other cases involving the exclusion of faith-based foster care and adoption agencies unless by some chance the relevant laws contain the same glitch as the Philadelphia contractual provision on which the majority's decision hangs. The decision will be even less significant in all the other important religious liberty cases that are bubbling up.

We should reconsider *Smith* without further delay. The correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith*'s interpretation is hard to defend. It can't be squared with the ordinary meaning of the text of the Free Exercise Clause or with the prevalent understanding of the scope of the free-exercise right at the time of the First Amendment's adoption. It swept aside decades of established precedent, and it has not aged well. Its interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause. Contrary to what many initially expected, *Smith* has not provided a clear-cut rule that is easy to apply, and experience has disproved the *Smith* majority's fear that retention of the Court's prior free-exercise jurisprudence would lead to “anarchy.” 494 U.S. at 888, 110 S.Ct. 1595.

*1889 When *Smith* reinterpreted the Free Exercise Clause, four Justices—Brennan, Marshall, Blackmun, and O'Connor—registered strong disagreement. *Id.*, at 891, 892, 110 S.Ct. 1595 (O'CONNOR, J., joined in part by BRENNAN, MARSHALL, and BLACKMUN, JJ., concurring in judgment); *id.*, at 907–908, 110 S.Ct. 1595 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting). After joining the Court, Justice Souter called for *Smith* to be reexamined. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 559, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (opinion concurring in part and concurring in judgment). So have five sitting Justices. *Kennedy v. Bremerton School Dist.*, 586 U. S. —, — – —, 139 S.Ct. 634, 636–637, 203 L.Ed.2d 137 (2019) (ALITO, J., joined by THOMAS, GORSUCH, and KAVANAUGH, JJ., concurring in denial of certiorari); *City of Boerne v. Flores*, 521 U.S. 507, 566, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (BREYER, J., dissenting). So have some of the country's most distinguished scholars of the Religion Clauses. See, e.g., McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990) (McConnell, *Free Exercise Revisionism*); Laycock, *The Supreme Court's Assault on Free Exercise*, and the Amicus Brief That Was Never Filed, 8 J. L. & Religion 99 (1990). On two separate occasions, Congress, with virtual unanimity, expressed the view that *Smith*'s interpretation is contrary to our society's deep-rooted commitment to religious liberty. In enacting the Religious Freedom Restoration Act of 1993, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb *et seq.*), and the Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq.*), Congress tried to restore the constitutional rule in place before *Smith* was handed down. Those laws, however, do not apply to most state action, and they leave huge gaps.

It is high time for us to take a fresh look at what the Free Exercise Clause demands.

II

A

To fully appreciate what the Court did in *Smith*, it is necessary to recall the substantial body of precedent that it displaced. Our seminal decision on the question of religious exemptions from generally applicable laws was *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), which had been in place for nearly three decades when *Smith* was

decided. In that earlier case, Adell Sherbert, a Seventh-day Adventist, was fired because she refused to work on Saturday, her Sabbath Day. 374 U.S. at 399, 83 S.Ct. 1790. Unable to find other employment that did not require Saturday work, she applied for unemployment compensation but was rejected because state law disqualified claimants who “failed, without good cause ... to accept available suitable work when offered.” *Id.*, at 399–401, 83 S.Ct. 1790, and n. 3 (internal quotation marks omitted). The State Supreme Court held that this denial of benefits did not violate Sherbert’s free-exercise right, but this Court reversed.

In an opinion authored by Justice Brennan, the Court began by surveying the Court’s few prior cases involving claims for religious exemptions from generally applicable laws. *Id.*, at 402–403, 83 S.Ct. 1790. In those decisions, the Court had not articulated a clear standard for resolving such conflicts, but as the *Sherbert* opinion accurately recounted, where claims for religious exemptions had been rejected, “[t]he conduct or actions [in question] invariably posed some substantial threat to public *1890 safety, peace or order.” *Id.*, at 403, 83 S.Ct. 1790. (As will be shown below, this description of the earlier decisions corresponds closely with the understanding of the scope of the free-exercise right at the time of the First Amendment’s adoption. See *infra*, at 1899 – 1903.)

After noting these earlier decisions, the Court turned to the case at hand and concluded that the denial of benefits imposed a substantial burden on Sherbert’s free exercise of religion. 374 U.S. at 404, 83 S.Ct. 1790. It “force[d] her 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.” *Ibid.* As a result, the Court reasoned, the decision below could be sustained only if it was “justified by a ‘compelling state interest.’ ” *Id.*, at 403, 406, 83 S.Ct. 1790. The State argued that its law was needed to prevent “the filing of fraudulent claims by unscrupulous claimants feigning religious objections,” but Justice Brennan’s opinion found this justification insufficient because the State failed to show that “no alternative forms of regulation would combat such abuses without infringing First Amendment rights.” *Id.*, at 407, 83 S.Ct. 1790.

The test distilled from *Sherbert*—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule for the next 27 years. Applying that test, the Court sometimes vindicated free-exercise claims. In

Wisconsin v. Yoder, 406 U.S. 205, 234, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), for example, the Court held that a state law requiring all students to remain in school until the age of 16 violated the free-exercise rights of Amish parents whose religion required that children leave school after the eighth grade. The Court acknowledged the State’s “admittedly strong interest in compulsory education” but concluded that the State had failed to “show with ... particularity how [that interest] would be adversely affected by granting an exemption to the Amish.” *Id.*, at 236, 92 S.Ct. 1526. And in holding that the Amish were entitled to a special exemption, the Court expressly rejected the interpretation of the Free Exercise Clause that was later embraced in *Smith*. Indeed, the *Yoder* Court stated this point again and again: “[T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability”; “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion”; insisting that Amish children abide by the compulsory attendance requirement was unconstitutional even though it “applie[d] uniformly to all citizens of the State and d[id] not, on its face, discriminate against religions or a particular religion, [and was] motivated by legitimate secular concerns.” *Id.*, at 220, 92 S.Ct. 1526 (emphasis added).

Other decisions also accepted free-exercise claims under the *Sherbert* test. In *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 710, 720, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the Court concluded that a State could not withhold unemployment benefits from a Jehovah’s Witness who quit his job because he refused to do work that he viewed as contributing to the production of military weapons. In so holding, the Court reiterated that “‘[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.’ ” *Id.*, at 717, 101 S.Ct. 1425 (quoting *Yoder*, 406 U.S. at 220, 92 S.Ct. 1526).

*1891 Subsequently, in *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987), the Court found that a state rule that was “‘neutral and uniform in its application’ ” nevertheless violated the Free Exercise Clause under the *Sherbert* test. A similar violation was found in *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 109 S.Ct. 1514, 103 L.Ed.2d 914 (1989).

Other cases applied *Sherbert* but found no violation. In *United States v. Lee*, 455 U.S. 252, 258, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), the Court held that mandatory contributions to Social Security were constitutional because they were “indispensable to the fiscal vitality of the social security system.” In *Gillette v. United States*, 401 U.S. 437, 462, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), denying conscientious-objector status to men whose opposition to war was limited to one particular conflict was held to be “strictly justified by substantial governmental interests.” In still other cases, the Court found *Sherbert* inapplicable either because the challenged law did not implicate the conduct of the individual seeking an exemption, see *Bowen v. Roy*, 476 U.S. 693, 700, 106 S.Ct. 2147, 90 L.Ed.2d 735 (1986); *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 450–451, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), or because the case arose in a context where the government exercised broader authority over assertions of individual rights, see *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 353, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987) (prison); *Goldman v. Weinberger*, 475 U.S. 503, 506, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) (military). None of these decisions questioned the validity of *Sherbert*’s interpretation of the free-exercise right.

B

This is where our case law stood when *Smith* reached the Court. The underlying situation in *Smith* was very similar to that in *Sherbert*. Just as Adell Sherbert had been denied unemployment benefits due to conduct mandated by her religion (refraining from work on Saturday), Alfred Smith and Galen Black were denied unemployment benefits because of a religious practice (ingesting peyote as part of a worship service of the Native American Church). 494 U.S. at 874, 110 S.Ct. 1595. Applying the *Sherbert* test, the Oregon Supreme Court held that this denial of benefits violated Smith’s and Black’s free-exercise rights, and this Court granted review.²⁴

The State defended the denial of benefits under the *Sherbert* framework. It argued that it had a compelling interest in combating the use of dangerous drugs and that accommodating their use for religious purposes would upset its enforcement scheme. Brief for Petitioners in *Employment Div., Dept. of Human Resources v. Smith*, No. 88–1213, O. T. 1988, pp. 5–7, 12, 16. The State never suggested that *Sherbert* should be overruled. See Brief for Petitioners in No. 88–1213, at 11. Instead, the crux of its disagreement with Smith

*1892 and Black and the State Supreme Court was whether its interest in preventing drug use could be served by a more narrowly tailored rule that made an exception for religious use by members of the Native American Church.

The question divided the four Justices who objected to the *Smith* majority’s rationale. Compare 494 U.S. at 905–907, 110 S.Ct. 1595 (O’CONNOR J., concurring in judgment), with *id.*, at 909–919, 110 S.Ct. 1595 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting). And the *Smith* majority wanted no part of that question. Instead, without briefing or argument on whether *Sherbert* should be cast aside, the Court adopted what it seems to have thought was a clear-cut test that would be easy to apply: A “generally applicable and otherwise valid” rule does not violate the Free Exercise Clause “if prohibiting the exercise of religion ... is not [its] object ... but merely the incidental effect of ” its operation. 494 U.S. at 878, 110 S.Ct. 1595. Other than cases involving rules that target religious conduct, the *Sherbert* test was held to apply to only two narrow categories of cases: (1) those involving the award of unemployment benefits or other schemes allowing individualized exemptions and (2) so-called “hybrid rights” cases. See 494 U.S. at 881–884, 110 S.Ct. 1595.²⁵

To clear the way for this new regime, the majority was willing to take liberties. Paying little attention to the terms of the Free Exercise Clause, it was satisfied that its interpretation represented a “permissible” reading of the text, *Smith*, 494 U.S. at 878, 110 S.Ct. 1595, and it did not even stop to explain why that was so. The majority made no effort to ascertain the original understanding of the free-exercise right, and it limited past precedents on grounds never previously suggested. *Sherbert*, *Thomas*, and *Hobbie* were placed in a *1893 special category because they concerned the award of unemployment compensation, *Smith*, 494 U.S. at 883, 110 S.Ct. 1595, and *Yoder* was distinguished on the ground that it involved both a free-exercise claim and a parental-rights claim, *Smith*, 494 U.S. at 881, 110 S.Ct. 1595. Not only did these distinctions lack support in prior case law, the issue in *Smith* itself could easily be viewed as falling into both of these special categories. After all, it involved claims for unemployment benefits, and members of the Native American Church who ingest peyote as part of a religious ceremony are surely engaging in expressive conduct that falls within the scope of the Free Speech Clause. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

None of these obstacles stopped the *Smith* majority from adopting its new rule and displacing decades of precedent. The majority feared that continued adherence to that case law would “cour[t] anarchy” because it “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.” 494 U.S. at 888, 110 S.Ct. 1595. The majority recognized that its new interpretation would place small religious groups at a “relative disadvantage,” but the majority found that preferable to the problems it envisioned if the *Sherbert* test had been retained. 494 U.S. at 890, 110 S.Ct. 1595.

Four Justices emphatically disagreed with *Smith*’s reinterpretation of the Free Exercise Clause. Justice O’Connor wrote that this new reading “dramatically depart[ed] from well-settled First Amendment jurisprudence” and was “incompatible with our Nation’s fundamental commitment to individual religious liberty.” 494 U.S. at 891, 110 S.Ct. 1595 (opinion concurring in judgment). Justices Brennan, Marshall, and Blackmun protested that the majority had “mischaracteriz[ed]” and “discard[ed]” the Court’s free-exercise jurisprudence on its way to “perfunctorily dismiss[ing]” the “settled and inviolate principle” that state laws burdening religious freedom may stand only if “justified by a compelling interest that cannot be served by less restrictive means.” *Id.*, at 907–908, 110 S.Ct. 1595 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting).

Smith’s impact was quickly felt, and Congress was inundated with reports of the decision’s consequences.²⁶ In response, it attempted to restore the *Sherbert* test. In the House, then-Representative Charles Schumer introduced a bill that made a version of that test applicable to all actions taken by the Federal Government or the States. H. R. 1308, 103d Cong., 1st Sess. (1993). This bill, which eventually became the Religious Freedom Restoration Act (RFRA), passed in the House without dissent, *1894 was approved in the Senate by a vote of 97 to 3, and was enthusiastically signed into law by President Clinton. 139 Cong. Rec. 27239–27341 (1993) (House voice vote); *id.*, at 26416 (Senate vote); Remarks on Signing the Religious Freedom Restoration Act of 1993, 29 Weekly Comp. of Pres. Doc. 2377 (1993). And when this Court later held in *City of Boerne*, 521 U.S. 507, 117 S.Ct. 2157, that Congress lacked the power under the 14th Amendment to impose these rules on the States, Congress responded by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA) under its spending power and its power to regulate interstate commerce. See

114 Stat. 803. Introduced in the Senate by Sen. Orrin Hatch and cosponsored by Sen. Edward Kennedy, RLUIPA imposed the same rules as RFRA on land use and prison regulations. S. 2869, 106th Cong., 2d Sess. (2000); 42 U.S.C. § 2000cc *et seq.*; 146 Cong. Rec. 16698 (2000). RLUIPA passed both Houses of Congress without a single negative vote and, like RFRA, was signed by President Clinton. *Id.*, at 16703, 16623; Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 36 Weekly Comp. of Pres. Doc. 2168 (2000).

RFRA and RLUIPA have restored part of the protection that *Smith* withdrew, but they are both limited in scope and can be weakened or repealed by Congress at any time. They are no substitute for a proper interpretation of the Free Exercise Clause.

III

A

That project must begin with the constitutional text. In *Martin v. Hunter’s Lessee*, 1 Wheat. 304, 338–339, 4 L.Ed. 97 (1816), Justice Story laid down the guiding principle: “If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.” And even though we now have a thick body of precedent regarding the meaning of most provisions of the Constitution, our opinions continue to respect the primacy of the Constitution’s text. See, e.g., *Chiafalo v. Washington*, 591 U.S. —, —, —, 140 S.Ct. 2316, 2323–2326, 207 L.Ed.2d 761 (2020) (starting with the text of Art. II, § 1, before considering historical practice); *Knick v. Township of Scott*, 588 U.S. —, —, 139 S.Ct. 2162, 2169–2170, 204 L.Ed.2d 558 (2019) (beginning analysis with the text of the Takings Clause); *Gamble v. United States*, 587 U.S. —, —, —, 139 S.Ct. 1960, 1964–1965, 204 L.Ed.2d 322 (2019) (starting with the text of the Fifth Amendment before turning to history and precedent); *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157 (“In assessing the breadth of § 5’s enforcement power, we begin with its text”).

Smith, however, paid shockingly little attention to the text of the Free Exercise Clause. Instead of examining what readers would have understood its words to mean when adopted, the opinion merely asked whether it was “permissible” to read the text to have the meaning that the majority favored. 494 U.S. at 878, 110 S.Ct. 1595. This strange treatment of

the constitutional text cannot be justified—and is especially surprising since it clashes so sharply with the way in which *Smith*'s author, Justice Scalia, generally treated the text of the Constitution (and, indeed, with his entire theory of legal interpretation). As he put it, "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text." A. Scalia, *A Matter of Interpretation* 38 (1997). See also *NLRB v. Noel Canning*, 573 U.S. 513, 575–583, 134 S.Ct. 2550, 189 L.Ed.2d 538 (2014) (SCALIA, J., concurring in judgment); **1895 Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702, 722, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) (plurality opinion of SCALIA, J.); *Maryland v. Craig*, 497 U.S. 836, 860–861, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (SCALIA, J., dissenting).

Justice Scalia's opinion for the Court in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), is a prime example of his usual approach, and it is a model of what a reexamination of the Free Exercise Clause should entail. In *Heller*, after observing that the "Constitution was written to be understood by the voters," Justice Scalia's opinion begins by presuming that the "words and phrases" of the Second Amendment carry "their normal and ordinary ... meaning." *Id.*, at 576, 128 S.Ct. 2783 (internal quotation marks omitted). The opinion then undertakes a careful examination of all the Amendment's key terms. It does not simply ask whether its interpretation of the text is "permissible." *Smith*, 494 U.S. at 878, 110 S.Ct. 1595.

B

Following the sound approach that the Court took in *Heller*, we should begin by considering the "normal and ordinary" meaning of the text of the Free Exercise Clause: "Congress shall make no law ... prohibiting the free exercise [of religion]." Most of these terms and phrases—"Congress,"²⁷ "shall make," "no law,"²⁸ and "religion" **1896* ²⁹—do not require discussion for present purposes, and we can therefore focus on what remains: the term "prohibiting" and the phrase "the free exercise of religion."

Those words had essentially the same meaning in 1791 as they do today. "To prohibit" meant either "[t]o forbid" or "to hinder." 2 S. Johnson, *A Dictionary of the English Language* (1755) (Johnson (1755)).³⁰ The term "exercise" had both a broad primary definition ("[p]ractice" or "outward

performance") and a narrower secondary one (an "[a]ct of divine worship whether publick or private"). 1 *id.*³¹ (The Court long ago declined to give the First Amendment's reference to "exercise" this narrow reading. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303–304, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).) And "free," in the sense relevant here, meant "unrestrained." 1 Johnson (1755).³²

If we put these definitions together, the ordinary meaning of "prohibiting the free exercise of religion" was (and still is) forbidding or hindering unrestrained religious practices or worship. That straightforward understanding is a far cry from the interpretation adopted in *Smith*. It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted.

**1897* As interpreted in *Smith*, the Clause is essentially an anti-discrimination provision: It means that the Federal Government and the States cannot restrict conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct. *Smith* made no real attempt to square that equal-treatment interpretation with the ordinary meaning of the Free Exercise Clause's language, and it is hard to see how that could be done.

The key point for present purposes is that the text of the Free Exercise Clause gives a specific group of people (those who wish to engage in the "exercise of religion") the right to do so without hindrance. The language of the Clause does not tie this right to the treatment of persons not in this group.

The oddity of *Smith*'s interpretation can be illustrated by considering what the same sort of interpretation would mean if applied to other provisions of the Bill of Rights. Take the Sixth Amendment, which gives a specified group of people (the "accused" in criminal cases) a particular right (the right to the "Assistance of Counsel for [their] defence"). Suppose that Congress or a state legislature adopted a law banning counsel in *all litigation*, civil and criminal. Would anyone doubt that this law would violate the Sixth Amendment rights of criminal defendants?

Or consider the Seventh Amendment, which gives a specified group of people (parties in most civil "Suits at common law") "the right of trial by jury." Would there be any question that a law abolishing juries in *all* civil cases would violate the rights of parties in cases that fall within the Seventh Amendment's scope?

Other examples involving language similar to that in the Free Exercise Clause are easy to imagine. Suppose that the amount of time generally allotted to complete a state bar exam is 12 hours but that applicants with disabilities secure a consent decree allowing them an extra hour. Suppose that the State later adopts a rule requiring all applicants to complete the exam in 11 hours. Would anyone argue that this was consistent with the decree?

Suppose that classic car enthusiasts secure the passage of a state constitutional amendment exempting cars of a certain age from annual safety inspections, but the legislature later enacts a law requiring such inspections for all vehicles regardless of age. Can there be any doubt that this would violate the state constitution?

It is not necessary to belabor this point further. What all these examples show is that *Smith*'s interpretation conflicts with the ordinary meaning of the First Amendment's terms.

C

Is there any way to bring about a reconciliation? The short answer is "no." Survey all the briefs filed in support of respondents (they total more than 40) and three decades of law review articles, and what will you find? Philadelphia's brief refers in passing to one possible argument—and the source it cites is a law review article by one of *Smith*'s leading academic critics, Professor Michael W. McConnell. See Brief for City Respondents 49 (citing McConnell, Free Exercise Revisionism 1115). Trying to see if there was any way to make *Smith* fit with the constitutional text, Professor McConnell came up with this argument—but then rejected it. McConnell, Free Exercise Revisionism 1115–1116.

The argument goes as follows: Even if a law prohibits conduct that constitutes an essential religious practice, it cannot be said to "prohibit" the free exercise of religion ***1898** unless that was the lawmakers' specific object.

This is a hair-splitting interpretation. It certainly does not represent the "normal and ordinary" meaning of the Free Exercise Clause's terms. See *Heller*, 554 U.S. at 576, 128 S.Ct. 2783. Consider how it would play out if applied to some of the hypothetical laws discussed at the beginning of this opinion. A law categorically banning all wine would not "prohibit" the celebration of a Catholic Mass? A law

categorically forbidding the slaughter of a conscious animal would not "prohibit" kosher and halal slaughterhouses? A rule categorically banning any head covering in a courtroom would not "prohibit" appearances by orthodox Jewish men, Sikh men, and Muslim women who wear hijabs? It is no wonder that *Smith*'s many defenders have almost uniformly forgone this argument.

D

Not only is it difficult to square *Smith*'s interpretation with the terms of the Free Exercise Clause, the absence of any language referring to equal treatment is striking. If equal treatment was the objective, why didn't Congress say that? And since it would have been simple to cast the Free Exercise Clause in equal-treatment terms, why would the state legislators who voted for ratification have read the Clause that way?

It is not as if there were no models that could have been used. Other constitutional provisions contain non-discrimination language. For example, Art. I, § 9, cl. 6, provides that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." Under Art. IV, § 2, cl. 1, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article V provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Language mandating equal treatment of one sort or another also appeared in the religious liberty provisions of colonial charters and state constitutions.³³ But Congress eschewed those models. The contrast between these readily available anti-discrimination models and the language that appears in the First Amendment speaks volumes.

IV

A

While we presume that the words of the Constitution carry their ordinary and normal meaning, we cannot disregard the possibility that some of the terms in the Free Exercise Clause had a special meaning that was well understood at the time. *Heller*, again, provides a helpful example. *Heller* did not hold that the right to keep and bear arms means that everyone has the right to keep and bear every type of weaponry in all places

and at all times. Instead, it held that the Second Amendment protects a known right that was understood to **1899* have defined dimensions. 554 U.S. at 626–628, 128 S.Ct. 2783.

Following *Heller*'s lead, we must ask whether the Free Exercise Clause protects a right that was known at the time of adoption to have defined dimensions. But in doing so, we must keep in mind that there is a presumption that the words of the Constitution are to be interpreted in accordance with their "normal and ordinary" sense. *Id.*, at 576, 128 S.Ct. 2783 (internal quotation marks omitted). Anyone advocating a different reading must overcome that presumption.

B

1

What was the free-exercise right understood to mean when the Bill of Rights was ratified? And in particular, was it clearly understood that the right simply required equal treatment for religious and secular conduct? When *Smith* was decided, scholars had not devoted much attention to the original meaning of the Free Exercise Clause, and the parties' briefs ignored this issue, as did the opinion of the Court. Since then, however, the historical record has been plumbed in detail,³⁴ and we are now in a good position to examine how the free-exercise right was understood when the First Amendment was adopted.

By that date, the right to religious liberty already had a long, rich, and complex history in this country. What appears to be the first "free exercise" provision was adopted in 1649.

Prompted by Lord Baltimore,³⁵ the Maryland Assembly enacted a provision protecting the right of all Christians to engage in "the free exercise" of religion.³⁶ Rhode Island's 1663 Charter extended the right to all. See Charter of Rhode Island and Providence Plantations (1663), in Cogan 34. Early colonial charters and agreements in Carolina, Delaware, **1900* New Jersey, New York, and Pennsylvania also recognized the right to free exercise,³⁷ and by 1789, every State except Connecticut had a constitutional provision protecting religious liberty. McConnell, *Origins* 1455. In fact, the Free Exercise Clause had more analogs in State Constitutions than any other individual right. See Calabresi, Agudo, & Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?* 85 S. Cal. L. Rev. 1451, 1463–

1464, 1472–1473 (2012). In all of those State Constitutions, freedom of religion enjoyed broad protection, and the right "was universally said to be an unalienable right." McConnell, *Origins* 1456.³⁸

*1901 2

What was this right understood to protect? In seeking to discern that meaning, it is easy to get lost in the voluminous discussion of religious liberty that occurred during the long period from the first British settlements to the adoption of the Bill of Rights. Many different political figures, religious leaders, and others spoke and wrote about religious liberty and the relationship between the authority of civil governments and religious bodies. The works of a variety of thinkers were influential, and views on religious liberty were informed by religion, philosophy, historical experience, particular controversies and issues, and in no small measure by the practical task of uniting the Nation. The picture is complex.

For present purposes, we can narrow our focus and concentrate on the circumstances that relate most directly to the adoption of the Free Exercise Clause. As has often been recounted, critical state ratifying conventions approved the Constitution on the understanding that it would be amended to provide express protection for certain fundamental rights,³⁹ and the right to religious liberty was unquestionably one of those rights. As noted, it was expressly protected in 12 of the 13 State Constitutions, and these state constitutional provisions provide the best evidence of the scope of the right embodied in the First Amendment.

When we look at these provisions, we see one predominant model. This model extends broad protection for religious liberty but expressly provides that the right does not protect conduct that would endanger "the public peace" or "safety."

This model had deep roots in early colonial charters. It appeared in the Rhode Island Charter of 1663,⁴⁰ the Second Charter **1902* of Carolina in 1665,⁴¹ and the New York Act Declaring Rights & Privileges in 1691.⁴²

By the founding, more than half of the State Constitutions contained free-exercise provisions subject to a "peace and safety" carveout or something similar. The Georgia Constitution is a good example. It provided that "[a]ll

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persons whatever shall have the free exercise of their religion; provided it be not repugnant to the *peace and safety* of the State.” Ga. Const., Art. LVI (1777), in Cogan 16 (emphasis added). The founding era Constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina all contained broad protections for religious exercise, subject to limited peace-and-safety carveouts.⁴³

***1903** The predominance of this model is highlighted by its use in the laws governing the Northwest Territory. In the Northwest Ordinance of 1787, the Continental Congress provided that “[n]o person, demeaning himself in a *peaceable and orderly manner*, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.” Art. I (emphasis added). After the ratification of the Constitution, the First Congress used similar language in the Northwest Ordinance of 1789. See Act of Aug. 7, 1789, 1 Stat. 52 (reaffirming Art. I of Northwest Ordinance of 1787). Since the First Congress also framed and approved the Bill of Rights, we have often said that its apparent understanding of the scope of those rights is entitled to great respect. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565, 575–578, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014); *Harmelin v. Michigan*, 501 U.S. 957, 980, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (opinion of SCALIA, J.); *Marsh v. Chambers*, 463 U.S. 783, 786–792, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983); *Carroll v. United States*, 267 U.S. 132, 150–151, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

3

The model favored by Congress and the state legislatures—providing broad protection for the free exercise of religion except where public “peace” or “safety” would be endangered—is antithetical to *Smith*. If, as *Smith* held, the free-exercise right does not require any religious exemptions from generally applicable laws, it is not easy to imagine situations in which a public-peace-or-safety carveout would be necessary. Legislatures enact generally applicable laws to protect public peace and safety. If those laws are thought to be sufficient to address a particular type of conduct when engaged in for a secular purpose, why wouldn’t they also be sufficient to address the same type of conduct when carried out for a religious reason?

Smith’s defenders have no good answer. Their chief response is that the free-exercise provisions that included these

carveouts were tantamount to the *Smith* rule because any conduct that is generally prohibited or generally required can be regarded as necessary to protect public peace or safety. See *City of Boerne*, 521 U.S. at 539, 117 S.Ct. 2157 (SCALIA, J., concurring in part) (“At the time these provisos were enacted, keeping ‘peace’ and ‘order’ seems to have meant, precisely, obeying the laws”).

This argument gives “public peace and safety” an unnaturally broad interpretation. Samuel Johnson’s 1755 dictionary defined “peace” as: “1. Respite from war.... 2. Quiet from suits or disturbances.... 3. Rest from any commotion. 4. Stil[l]ness from riots or tumults.... 5. Reconciliation of differences.... 6. A state not hostile.... 7. Rest; quiet; content; freedom from terror; heavenly rest....” 2 Johnson.⁴⁴

***1904** In ordinary usage, the term “safety” was understood to mean: “1. Freedom from danger... 2. Exemption from hurt. 3. Preservation from hurt....” *Ibid.*⁴⁵

When “peace” and “safety” are understood in this way, it cannot be said that every violation of every law imperils public “peace” or “safety.” In 1791 (and today), violations of many laws do not threaten “war,” “disturbances,” “commotion,” “riots,” “terror,” “danger,” or “hurt.” Blackstone catalogs numerous violations that do not threaten any such harms, including “cursing”;⁴⁶ refusing to pay assessments for “the repairs of sea banks and sea walls” and the “cleansing of rivers, public streams, ditches and other conduits”;⁴⁷ “retaining a man’s hired servant before his time is expired”;⁴⁸ an attorney’s failure to show up for a trial;⁴⁹ the unauthorized “solemniz[ing of a] marriage in any other place besides a church, or public chapel wherein banns have been usually published”;⁵⁰ “transporting and seducing our artists to settle abroad”;⁵¹ engaging in the conduct of “a common scold”;⁵² and “exercis[ing] a trade in any town, without having previously served as an apprentice for seven years.”⁵³

In contrast to these violations, Blackstone lists “offences against the public peace.” 4 Commentaries on the Laws of England 142–153 (1769). Those include: riotous assembling of 12 persons or more; unlawful hunting; anonymous threats and demands; destruction of public floodgates, locks, or sluices on a navigable river; public fighting; riots or unlawful assemblies; “tumultuous” petitioning; forcible entry or detainer; riding or “going armed” with dangerous or

unusual weapons; spreading false news to “make discord between the king and nobility, or concerning any great man of the realm”; spreading “false and pretended” prophecies to disturb the peace; provoking breaches of the peace; and libel “to provoke ... wrath, or expose [an individual] to public hatred, contempt, and ridicule.” *Ibid.* (emphasis deleted); see also McConnell, *Freedom from Persecution* 835–836. These offenses might inform what constitutes actual or threatened breaches of public peace or safety in the ordinary sense of those terms.⁵⁴ But the *1905 ordinary meaning of offenses that threaten public peace or safety must be stretched beyond the breaking point to encompass *all* violations of *any* law.⁵⁵

C

That the free-exercise right included the right to certain religious exemptions is strongly supported by the practice of the Colonies and States. When there were important clashes between generally applicable laws and the religious practices of particular groups, colonial and state legislatures were willing to grant exemptions—even when the generally applicable laws served critical state interests.

Oath exemptions are illustrative. Oath requirements were considered “indispensable” to civil society because they were thought to ensure that individuals gave truthful testimony and fulfilled commitments. McConnell, *Origins* 1467. Quakers and members of some other religious groups refused to take oaths, *ibid.*, and therefore a categorical oath requirement would have resulted in the complete exclusion of these Americans from important civic activities, such as testifying in court and voting, see *ibid.*

Tellingly, that is not what happened. In the 1600s, Carolina allowed Quakers to enter a pledge rather than swearing an oath. *Ibid.* In 1691, New York permitted Quakers to give testimony after giving an affirmation. *Ibid.* Massachusetts did the same in 1743. *Id.*, at 1467–1468. In 1734, New York also allowed Quakers to qualify to vote by making an affirmation, and in 1740, Georgia granted an exemption to Jews, allowing them to omit the phrase “ ‘on the faith of a Christian’ ” from the State’s naturalization oath. *Id.*, at 1467. By 1789, almost all States had passed oath exemptions. *Id.*, at 1468.

Some early State Constitutions and declarations of rights formally provided oath exemptions for religious objectors. For instance, the Maryland Declaration of Rights of 1776 declared that Quakers, Mennonites, and members of some

other religious groups “ought to be allowed to make their solemn affirmation” instead of an oath. § 36, in Cogan 18. Similarly, the Massachusetts Constitution of 1780 permitted Quakers holding certain government positions to decline to take the prescribed oath of office, allowing affirmations instead. Pt. II, ch. VI, Art. I, in *id.*, at 22. The Federal Constitution likewise permits federal and state officials to make either an “Oath *or* Affirmation, to support this Constitution.” Art. VI, cl. 3 (emphasis added); see also Art. I, § 3, cl. 6; Art. II, § 1, cl. 8.

Military conscription provides an even more revealing example. In the Colonies *1906 and later in the States, able-bodied men of a certain age were required to serve in the militia, see *Heller*, 554 U.S. at 595–596, 128 S.Ct. 2783, but Quakers, Mennonites, and members of some other religious groups objected to militia service on religious grounds, see McConnell, *Origins* 1468. The militia was regarded as essential to the security of the State and the preservation of freedom, see *Heller*, 554 U.S. at 597–598, 128 S.Ct. 2783, but colonial governments nevertheless granted religious exemptions, see McConnell, *Origins* 1468. Rhode Island, Maryland, North Carolina, and New Hampshire did so in the founding era. *Ibid.* In 1755, New York permitted a conscientious objector to obtain an exemption if he paid a fee or sent a substitute. *Ibid.* Massachusetts adopted a similar law two years later, and Virginia followed suit in 1776. *Ibid.*, and n. 297.

The Continental Congress also granted exemptions to religious objectors because conscription would do “violence to their consciences.” Resolution of July 18, 1775, in 2 *Journals of the Continental Congress, 1774–1789*, p. 189 (W. Ford ed. 1905) (quoted in McConnell, *Origins* 1469, and n. 299). This decision is especially revealing because during that time the Continental Army was periodically in desperate need of soldiers,⁵⁶ the very survival of the new Nation often seemed in danger,⁵⁷ and the Members of Congress faced bleak personal prospects if the war was lost.⁵⁸ Yet despite these stakes, exemptions were granted.

Colonies with established churches also permitted non-members to decline to pay special taxes dedicated to the support of ministers of the established church. McConnell, *Origins* 1469. Massachusetts and Connecticut exempted Baptists and Quakers in 1727. *Ibid.* Virginia provided exemptions to Huguenots in 1700, German Lutherans in 1730, and dissenters from the Church of England in 1776. *Ibid.*; see also S. Cobb, *The Rise of Religious Liberty*

in America 98, 492 (1902). Beginning in 1692, New Hampshire exempted those who could prove they were “‘conscientiously’ ” of a “‘different persuasion,’ ” regularly attended their own religious services, and contributed financially to their faith. McConnell, *Origins* 1469.

Various other religious exemptions were also provided. North Carolina and Maryland granted exemptions from the requirement that individuals remove their hats in court, a gesture that Quakers viewed as an impermissible showing of respect to a secular authority. *Id.*, at 1471–1472. And Rhode Island exempted Jews from some marriage laws. *Id.*, at 1471.

In an effort to dismiss the significance of these legislative exemptions, it has been argued that they show only what the Constitution permits, not what it requires. *City of Boerne*, 521 U.S. at 541, 117 S.Ct. 2157 *1907 (opinion of SCALIA, J.). But legislatures provided those accommodations before the concept of judicial review took hold, and their actions are therefore strong evidence of the founding era's understanding of the free-exercise right. See McConnell, *Free Exercise Revisionism* 1119. Cf. *Heller*, 554 U.S. at 600–603, 128 S.Ct. 2783 (looking to state constitutions that preceded the adoption of the Second Amendment).

D

Defenders of *Smith* have advanced historical arguments of their own, but they are unconvincing, and in any event, plainly insufficient to overcome the ordinary meaning of the constitutional text.

1

One prominent argument points to language in some founding-era charters and constitutions prohibiting laws or government actions that were taken “for” or “on account” of religion. See *City of Boerne*, 521 U.S. at 538–539, 117 S.Ct. 2157 (opinion of SCALIA, J.). That phrasing, it is argued, reaches only measures that target religion, not neutral and generally applicable laws. This argument has many flaws.

No such language appears in the Free Exercise Clause, and in any event, the argument rests on a crabbed reading of the words “for” or “on account of” religion. As Professor McConnell has explained, “[i]f a member of the Native American Church is arrested for ingesting peyote during a

religious ceremony, then he surely is molested ‘for’ or ‘on account of’ his religious practice—even though the law under which he is arrested is neutral and generally applicable.” *Freedom From Persecution* 834.

This argument also ignores the full text of many of the provisions on which it relies. *Id.*, at 833–834. While some protect against government actions taken “for” or “on account of” religion, they do not stop there. Instead, they go on to provide broader protection for religious liberty. See, e.g., Maryland Act Concerning Religion (1649), in Cogan 17 (guaranteeing residents not be “troubled ... in the free exercise [of religion]”); New York Constitution (1777), in *id.*, at 26 (guaranteeing “the free Exercise and Enjoyment of religious Profession and Worship”).

2

Another argument advanced by *Smith*'s defenders relies on the paucity of early cases “refusing to enforce a generally applicable statute because of its failure to make accommodation,” *City of Boerne*, 521 U.S. at 542, 117 S.Ct. 2157 (opinion of SCALIA, J.). If exemptions were thought to be constitutionally required, they contend, we would see many such cases.

There might be something to this argument if there were a great many cases denying exemptions and few granting them, but the fact is that diligent research has found only a handful of cases going either way. Commentators have discussed the dearth of cases, and as they note, there are many possible explanations.⁵⁹ Early 19th century legislation imposed only limited restrictions on private conduct, and this minimized the chances of conflict between generally applicable laws and religious practices. The principal conflicts that arose—involving oaths, conscription, and taxes to support an established church—were largely resolved by state constitutional *1908 provisions and laws granting exemptions. And the religious demographics of the time decreased the likelihood of conflicts. The population was overwhelmingly Christian and Protestant, the major Protestant denominations made up the great bulk of the religious adherents,⁶⁰ and other than with respect to the issue of taxes to support an established church, it is hard to think of conflicts between the practices of the members of these denominations and generally applicable laws that a state legislature might have enacted.

Members of minority religions are most likely to encounter such conflicts, and the largest minority group, the Quakers, who totaled about 10% of religious adherents,⁶¹ had received exemptions for the practices that conflicted with generally applicable laws. As will later be shown, see *infra*, at 1908 – 1911, the small number of religious-exemption cases that occurred during the early 19th century involved members of what were then tiny religious groups—such as Catholics, Jews, and Covenanters.⁶² Given the size of these groups, one would not expect a large number of cases. And where cases arose, the courts' decisions may not have always been reported. Barclay, *The Historical Origins of Judicial Religious Exemptions*, 96 Notre Dame L. Rev. 55, 70 (2020).

3

When the body of potentially relevant cases is examined, they provide little support for *Smith's* interpretation of the free-exercise right. Not only are these decisions few in number, but they reached mixed results. In addition, some are unreasoned; some provide ambiguous explanations; and many of the cases denying exemptions were based on grounds that do not support *Smith*.

The most influential early case granting an exemption was *People v. Philips*, 1 W. L. J. 109, 112–113 (Gen. Sess., N. Y. 1813), where the court held that a Catholic priest could not be compelled to testify about a confession. The priest's refusal, the court reasoned, was protected by the state constitutional right to the free exercise of religion and did not fall within the exception for “acts of licentiousness” and “practices inconsistent with the peace or safety of th[e] State.”⁶³ This, of course, is exactly the understanding of the free-exercise right that is seen in the founding era State Constitutions.

Although *Philips* was not officially reported, knowledge of the decision appears to have spread widely. Four years later, another New York court implicitly reaffirmed the principle *Philips* recognized but found the decision inapplicable because the Protestant minister who was called to testify did not feel a religious obligation to refuse. See *Smith's Case*, 2 N. Y. City-Hall Recorder 77, 80, and n. (1817); McConnell, *Origins 1505–1506*; Walsh 40–41.

***1909** In 1827, a South Carolina court relied on *Philips* as support for its decision to grant an exemption from a state law relied on to bar the testimony of a witness who

denied a belief in punishment after death for testifying falsely, and the State's newly constituted high court approved that opinion. *Farnandis v. Henderson*, 1 Carolina L. J. 202, 213, 214 (1827).⁶⁴

In *Commonwealth v. Cronin*, 2 Va.Cir. 488, 498, 500, 505 (1855), a Virginia court followed *Philips* and held that a priest's free-exercise right required an exemption from the general common law rule compelling a witness to “disclose all he may know” when giving testimony.

On the other side of the ledger, the most prominent opponent of exemptions was John Bannister Gibson of the Pennsylvania Supreme Court. Today, Gibson is best known for his dissent in *Eakin v. Raub*, 12 Serg. & Rawle 330, 355–356 (1825), which challenged John Marshall's argument for judicial review in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). See McConnell, *Origins 1507*. Three years after *Eakin*, Gibson's dissent in *Commonwealth v. Leshner*, 17 Serg. & Rawle 155 (Pa. 1828), advanced a related argument against decisions granting religious exemptions. Gibson agreed that the state constitutional provision protecting religious liberty conferred the right to do or forbear from doing any act “not prejudicial to the public weal,” but he argued that judges had no authority to override legislative judgments about what the public weal required. *Id.*, at 160–161 (emphasis deleted).

Three years later, he made a similar argument in dicta in *Philips's Executors v. Gratz*, 2 Pen. & W. 412, 412–413 (Pa. 1831), where a Jewish plaintiff had taken a non-suit (agreed to a dismissal) in a civil case scheduled for trial on a Saturday. Gibson's opinion for the Court set aside the non-suit on other grounds but rejected the plaintiff's religious objection to trial on Saturday. *Id.*, at 416–417. He proclaimed that a citizen's obligation to the State must always take precedence over any religious obligation, and he expressly registered disagreement with the New York court's decision in *Philips*. *Id.*, at 417.

In South Carolina, an exemption claim was denied in *State v. Willson*, 13 S. C. L. 393, 394–397 (1823), where the court refused to exempt a member of the Covenanters religious movement from jury service. Because Covenanters opposed the Constitution on religious grounds, they refused to engage in activities, such as jury service and voting, that required an oath to support the Constitution or otherwise enlisted their participation in the Nation's scheme of government.⁶⁵ It is possible to read the opinion in *Willson* as embodying something like the *Smith* rule—or as concluding that granting the exemption would have opened the floodgates and

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undermined public peace and safety. See 13 S. C. L. at 395 (“who could distinguish ... between the pious asseveration of a holy *1910 man and that of an accomplished villain”). But if *Willson* is read as rejecting religious exemptions, South Carolina's reconstituted high court reversed that position in *Farnandis*.⁶⁶

Other cases denying exemptions are even less helpful to *Smith*'s defenders. Three decisions rejected challenges to Sunday closing laws by merchants who celebrated Saturday as the Sabbath, but at least two of these were based on the court's conclusion that the asserted religious belief was unfounded. See *City Council of Charleston v. Benjamin*, 33 S. C. L. 508, 529 (1848) (“There is ... no violation of the Hebrew's religion, in requiring him to cease from labor on another day than his Sabbath, if he be left free to observe the latter according to his religion” (emphasis deleted)); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 50, 51 (Pa. 1817) (“[T]he Jewish Talmud ... asserts no such doctrine” and the objection was made “out of mere caprice”). That reasoning is contrary to a principle that *Smith* reaffirmed: “Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim.” 494 U.S. at 887, 110 S.Ct. 1595.

A third Sunday closing law decision appears to rest at least in part on a similar ground. See *Specht v. Commonwealth*, 8 Pa. 312 (1848). The court observed that the merchant's conscience rights might have been violated if his religion actually required him to work on Sunday, but the court concluded that the commandment to keep holy the Sabbath had never been understood to impose “an imperative obligation to fill up each day of the other six with some worldly employment.” *Id.*, at 326.

Other cases cited as denying exemptions were decided on nebulous grounds. In *Stansbury v. Marks*, 2 Dall. 213, 1 L.Ed. 353 (Pa. 1793), a decision of the Pennsylvania Supreme Court, the case report in its entirety states: “In this cause (which was tried on Saturday, the 5th of April) the defendant offered Jonas Phillips, a Jew, as a witness; but he refused to be sworn, because it was his Sabbath. The Court, therefore, fined him £10; but the defendant, afterwards, waving the benefit of his testimony, he was discharged from the fine.” (Emphasis deleted.) What can be deduced from this cryptic summary? Was the issue mooted when the defendant waived the benefit of Phillips's testimony? Who can tell?

In *Commonwealth v. Drake*, 15 Mass. 161 (1818), the Supreme Judicial Court of Massachusetts summarily affirmed the conviction of a criminal defendant who was convicted after the trial court admitted the testimony of his fellow church members before whom he had confessed. The State argued that the defendant had voluntarily confessed, that his confession was not required by any “ecclesiastical rule,” and that he had confessed “not to the church” but “to his friends and neighbours.” *Id.*, at 162. Because the court provided no explanation of its decision, this case sheds no light on the understanding of the free-exercise right.

All told, this mixed bag of antebellum decisions does little to support *Smith*, and extending the search past the Civil War does not advance *Smith*'s cause. One of the objectives of the Fourteenth Amendment, *1911 it has been argued, was to protect the religious liberty of African-Americans in the South, where a combination of laws that did not facially target religious practice had been used to suppress religious exercise by slaves. See generally Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994).

4

Some have claimed that the drafting history of the Bill of Rights supports *Smith*. See Brief for First Amendment Scholars as *Amici Curiae* 10–11; Muñoz, *Original Meaning* 1085. But as Professor Philip Hamburger, one of *Smith*'s most prominent academic defenders, has concluded, “[w]hat any of this [history] implies about the meaning of the Free Exercise Clause is speculative.” Religious Exemption 928.

Here is the relevant history. The House debated a provision, originally proposed by Madison, that protected the right to bear arms but included language stating that “no person, religiously scrupulous, shall be compelled to bear arms.” 1 Annals of Cong. 749, 766 (1789); see also Muñoz, *Original Meaning* 1112. Some Members spoke in favor of the proposal,⁶⁷ others opposed it,⁶⁸ and in the end, after adding the words “in person” at the end of the clause, the House adopted it.⁶⁹ The Senate, however, rejected the proposal (for reasons not provided on the public record), *id.*, at 1116, and the House acceded to the deletion.

Those who claim that this episode supports *Smith* argue that the House would not have found it necessary to include this proviso in the Second Amendment if it had

thought that the Free Exercise Clause already protected conscientious objectors from conscription, Muñoz, Original Meaning 1120, but that conclusion is unfounded. Those who favored Madison's language might have thought it necessary, not because the free-exercise right *never* required religious exemptions but because they feared that exemption from military service would be held to fall into the free-exercise right's carveout for conduct that threatens public safety.⁷⁰ And of course, it could be argued that the willingness of the House to constitutionalize this exemption despite its potential effect on national security shows the depth of the Members' commitment to the concept of religious exemptions.

As for the Senate's rejection of the proviso, we have often warned against drawing inferences from Congress's failure to adopt a legislative proposal. See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306, 108 S.Ct. 1145, 99 L.Ed.2d 316 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act"); *Brecht v. Abrahamson*, 507 U.S. 619, 632–633, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (collecting cases). And in this instance, there are many possible explanations for what happened in the Senate. The rejection of the proviso *could* have been due to a general objection to religious exemptions, but it could also have been based on *1912 any of the following grounds: opposition to this particular exemption, the belief that conscientious objectors were already protected by the Free Exercise Clause, a belief that military service fell within the public safety carveout, or the view that Congress should be able to decide whether to grant or withhold such exemptions based on its assessment of what national security required at particular times.

* * *

In sum, based on the text of the Free Exercise Clause and evidence about the original understanding of the free-exercise right, the case for *Smith* fails to overcome the more natural reading of the text. Indeed, the case against *Smith* is very convincing.

V

That conclusion cannot end our analysis. "We will not overturn a past decision unless there are strong grounds for doing so," *Janus v. State, County, and Municipal Employees*, 585 U.S. —, —, 138 S.Ct. 2448, 2478, 201 L.Ed.2d 924 (2018), but at the same time, *stare decisis* is "not an inexorable

command." *Ibid.* (internal quotation marks omitted). It "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). And it applies with "perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus*, 585 U.S., at —, 138 S.Ct., at 2478; see also *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 500, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (SCALIA, J., concurring in part and concurring in judgment) ("This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)" (internal quotation marks omitted)); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 365, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 60 S.Ct. 1010, 84 L.Ed. 1375 (1940)).

In assessing whether to overrule a past decision that appears to be incorrect, we have considered a variety of factors, and four of those weigh strongly against *Smith*: its reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down. See *Janus*, 585 U.S., at — — —, 138 S.Ct., at 2478–2479. No relevant factor, including reliance, weighs in *Smith*'s favor.

A

Smith's reasoning. As explained in detail above, *Smith* is a methodological outlier. It ignored the "normal and ordinary" meaning of the constitutional text, see *Heller*, 554 U.S. at 576, 128 S.Ct. 2783, and it made no real effort to explore the understanding of the free-exercise right at the time of the First Amendment's adoption. And the Court adopted its reading of the Free Exercise Clause with no briefing on the issue from the parties or *amici*. Laycock, 8 J. L. & Religion, at 101.

Then there is *Smith's* treatment of precedent. It looked for precedential support in strange places, and the many precedents that stood in its way received remarkably rough treatment.

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Looking for a case that had endorsed its no-exemptions view, *Smith* turned to *Gobitis*, 310 U.S. at 586, 60 S.Ct. 1010, a decision *1913 that Justice Scalia himself later acknowledged was “erroneous,” *Wisconsin Right to Life, Inc.*, 551 U.S. at 500–501, 127 S.Ct. 2652 (opinion concurring in part). William Gobitas,⁷¹ a 10-year-old fifth grader, and his 12-year-old sister Lillian refused to salute the flag during the Pledge of Allegiance because, along with other Jehovah's Witnesses, they thought the salute constituted idolatry. 310 U.S. at 591–592, 60 S.Ct. 1010.⁷² William's “teacher tried to force his arm up, but William held on to his pocket and successfully resisted.”⁷³ The Gobitas children were expelled from school, and the family grocery was boycotted.⁷⁴

This Court upheld the children's expulsion because, in ringing rhetoric quoted by *Smith*, “[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.” 310 U.S. at 594, 60 S.Ct. 1010; see also *Smith*, 494 U.S. at 879, 110 S.Ct. 1595 (quoting this passage). This declaration was overblown when issued in 1940. (As noted, many religious exemptions had been granted by legislative bodies, and the 1940 statute instituting the peacetime draft continued that tradition by exempting conscientious objectors. Selective Training and Service Act, 54 Stat. 885, 889.) By 1990, when *Smith* was handed down, the pronouncement flew in the face of nearly 30 years of Supreme Court precedent.

But even if all that is put aside, *Smith*'s recourse to *Gobitis* was surprising because the decision was overruled just three years later when three of the Justices in the majority had second thoughts. See *Barnette*, 319 U.S. at 642, 63 S.Ct. 1178; *id.*, at 643–644, 63 S.Ct. 1178 (Black and Douglas, JJ., concurring); *id.*, at 644–646, 63 S.Ct. 1178 (MURPHY, J., concurring). Turning *Gobitis*'s words on their head, *Barnette* held that students with religious objections to saluting the flag were indeed “relieved ... from obedience to a general [rule] not aimed at the promotion or restriction of religious beliefs.” *Gobitis*, 310 U.S. at 594, 60 S.Ct. 1010.

After reviving *Gobitis*'s anti-exemption rhetoric, *Smith* turned to *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244, an 1879 decision upholding the polygamy conviction of a member of the Church of Jesus Christ of Latter-day Saints. Unlike *Gobitis*, *Reynolds* at least had not been overruled,⁷⁵ but the decision was not based on anything like *Smith*'s interpretation of the Free Exercise Clause. It rested primarily

on the proposition that the Free Exercise Clause protects beliefs, not conduct. 98 U.S. at 166–167. The Court had repudiated that distinction a half century before *Smith* was decided. See *Cantwell*, 310 U.S. at 303–304, 60 S.Ct. 900; *Murdock v. Pennsylvania*, 319 U.S. 105, 110–111, 117, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). And *Smith* itself agreed! See 494 U.S. at 877, 110 S.Ct. 1595.

The remaining pre-*Sherbert* cases cited by *Smith* actually cut against its interpretation. None was based on the rule that *Smith* adopted. Although these decisions ended up denying exemptions, they did so on other grounds. In *1914 *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), where a Jehovah's Witness who enlisted a child to distribute religious literature was convicted for violating a state child labor law, the decision was based on the Court's assessment of the strength of the State's interest. *Id.*, at 159–160, 162, 169–170, 64 S.Ct. 438; see also *Yoder*, 406 U.S. at 230–231, 92 S.Ct. 1526 (describing the *Prince* Court's rationale).

In *Braunfeld v. Brown*, 366 U.S. 599, 601, 609, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion), which rejected a Jewish merchant's challenge to Pennsylvania's Sunday closing laws, the Court balanced the competing interests. The Court attached diminished weight to the burden imposed by the law (because it did not require work on Saturday), *id.*, at 606, 81 S.Ct. 1144,⁷⁶ and on the other side of the balance, the Court accepted the Commonwealth's view that the public welfare was served by providing a uniform day of rest, *id.*, at 608–609, 81 S.Ct. 1144; see *Sherbert*, 374 U.S. at 408–409, 83 S.Ct. 1790 (discussing *Braunfeld*).

When *Smith* came to post-*Sherbert* cases, the picture did not improve. First, in order to place *Sherbert*, *Hobbie*, and *Thomas* in a special category reserved for cases involving unemployment compensation, an inventive transformation was required. None of those opinions contained a hint that they were limited in that way. And since *Smith* itself involved the award of unemployment compensation benefits under a scheme that allowed individualized exemptions, it is hard to see why that case did not fall into the same category.

The Court tried to escape this problem by framing Alfred Smith's and Galen Black's free-exercise claims as requests for exemptions from the Oregon law criminalizing the possession of peyote, see 494 U.S. at 876, 110 S.Ct. 1595, but neither Smith nor Black was prosecuted for that offense even though the State was well aware of what they had done. The State

had the discretion to decline prosecution based on the facts of particular cases, and that is presumably what it did regarding Smith and Black. Why this was not sufficient to bring the case within *Smith*'s rule about individualized exemptions is unclear. See McConnell, Free Exercise Revisionism 1124.

Having pigeon-holed *Sherbert*, *Hobbie*, and *Thomas* as unemployment compensation decisions, *Smith* still faced problems. For one thing, the Court had previously applied the *Sherbert* test in many cases not involving unemployment compensation, including *Hernandez v. Commissioner*, 490 U.S. 680, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) (disallowance of tax deduction); *Lee*, 455 U.S. 252, 102 S.Ct. 1051 (payment of taxes); and *Gillette*, 401 U.S. 437, 91 S.Ct. 828 (denial of conscientious objector status to person with religious objection to a particular war). To get these cases out of the way, *Smith* claimed that, because they ultimately found no free-exercise violations, they merely “purported to apply the *Sherbert* test.” 494 U.S. at 883, 110 S.Ct. 1595 (emphasis added).

This was a curious observation. In all those cases, the Court invoked the *Sherbert* test but found that it did not require relief. See *Hernandez*, 490 U.S. at 699, 109 S.Ct. 2136; *Lee*, 455 U.S. at 257–260, 102 S.Ct. 1051; *Gillette*, 401 U.S. at 462, 91 S.Ct. 828. Was the *Smith* Court questioning the sincerity of these earlier opinions? If not, then in what sense did those decisions merely “purport” to apply *Sherbert*?

Finally, having swept all these cases from the board, *Smith* still faced at least one big troublesome precedent: *Yoder*. *1915 *Yoder* not only applied the *Sherbert* test but held that the Free Exercise Clause required an exemption totally unrelated to unemployment benefits. 406 U.S. at 220–221, 236, 92 S.Ct. 1526. To dispose of *Yoder*, *Smith* was forced to invent yet another special category of cases, those involving “hybrid-rights” claims. *Yoder* fell into this category because it implicated both the Amish parents’ free-exercise claim and a parental-rights claim stemming from *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). See *Smith*, 494 U.S. at 881, 110 S.Ct. 1595. And in such hybrid cases, *Smith* held, the *Sherbert* test survived. See 494 U.S. at 881–882, 110 S.Ct. 1595.

It is hard to see the justification for this curious doctrine. The idea seems to be that if two independently insufficient constitutional claims join forces they may merge into a single valid hybrid claim, but surely the rule cannot be that asserting two invalid claims, no matter how weak, is always enough. So

perhaps the doctrine requires the assignment of a numerical score to each claim. If a passing grade is 70 and a party advances a free-speech claim that earns a grade of 40 and a free-exercise claim that merits a grade of 31, the result would be a (barely) sufficient hybrid claim. Such a scheme is obviously unworkable and has never been recognized outside of *Smith*.

And then there is the problem that the hybrid-rights exception would largely swallow up *Smith*'s general rule. A great many claims for religious exemptions can easily be understood as hybrid free-exercise/free-speech claims. Take the claim in *Smith* itself. To members of the Native American Church, the ingestion of peyote during a religious ceremony is a sacrament. When Smith and Black participated in this sacrament, weren't they engaging in a form of expressive conduct? Their ingestion of peyote “communicate[d], in a rather dramatic way, [their] faith in the tenets of the Native American Church,” and the State's prohibition of that practice “interfered with their ability to communicate this message” in violation of the Free Speech Clause. McConnell, Free Exercise Revisionism 1122. And, “if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in [the so-called] hybrid cases to have mentioned the Free Exercise Clause at all.” *Lukumi*, 508 U.S. at 566–567, 113 S.Ct. 2217 (opinion of SOUTER, J.); see also Laycock, 8 J. L. & Religion, at 106 (noting that *Smith* “reduces the free exercise clause to a cautious redundancy, relevant only to ‘hybrid’ cases”). It is telling that this Court has never once accepted a “hybrid rights” claim in the more than three decades since *Smith*.

In addition to all these maneuvers—creating special categories for unemployment compensation cases, cases involving individualized exemptions, and hybrid-rights cases—*Smith* ignored the multiple occasions when the Court had directly repudiated the very rule that *Smith* adopted. See *supra*, at 1881 – 1882.

Smith's rough treatment of prior decisions diminishes its own status as a precedent.

B

Consistency with other precedents. *Smith* is also discordant with other precedents. *Smith* did not overrule *Sherbert* or any

of the other cases that built on *Sherbert* from 1963 to 1990, and for the reasons just discussed, *Smith* is tough to harmonize with those precedents.

The same is true about more recent decisions. In *1916 *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012), the Court essentially held that the First Amendment entitled a religious school to a special exemption from the requirements of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq.* When the school discharged a teacher, she claimed that she had been terminated because of disability. 565 U.S. at 178–179, 132 S.Ct. 694. Since the school considered her a “minister” and she provided religious instruction for her students, the school argued that her discharge fell within the so-called “ministerial exception” to generally applicable employment laws. *Id.*, at 180, 132 S.Ct. 694. The Equal Employment Opportunity Commission maintained that *Smith* precluded recognition of this exception because “the ADA’s prohibition on retaliation, like Oregon’s prohibition on peyote use, is a valid and neutral law of general applicability.” *Id.*, at 190, 132 S.Ct. 694; see *id.*, at 189–190, 132 S.Ct. 694. We nevertheless held that the exception applied. *Id.*, at 190, 132 S.Ct. 694.⁷⁷ Similarly, in *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. —, —, 140 S.Ct. 2049, 2066–2067, 207 L.Ed.2d 870 (2020), we found that other religious schools were entitled to similar exemptions from both the ADA and the Age Discrimination in Employment Act of 1967.

There is also tension between *Smith* and our opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U.S. —, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018). In that case, we observed that “[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion.” *Id.*, at —, 138 S.Ct., at 1727. The clear import of this observation is that such a member of the clergy would be entitled to a religious exemption from a state law restricting the authority to perform a state-recognized marriage to individuals who are willing to officiate both opposite-sex and same-sex weddings.

Other inconsistencies exist. *Smith* declared that “a private right to ignore generally applicable laws” would be a “constitutional anomaly,” 494 U.S. at 886, 110 S.Ct. 1595, but this Court has often permitted exemptions from generally applicable laws in First Amendment cases. For instance, in

Boy Scouts of America v. Dale, 530 U.S. 640, 656, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000), we granted the Boy Scouts an exemption from an otherwise generally applicable state public accommodations law. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), parade sponsors’ speech was exempted from the requirements of a similar law.

The granting of an exemption from a generally applicable law is tantamount to a holding that a law is unconstitutional as applied to a particular set of facts, see *1917 Barclay & Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 Boston College L. Rev. 1595, 1611 (2018), and cases holding generally applicable laws unconstitutional as applied are unremarkable. “[T]he normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact.” *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) (internal quotation marks omitted; emphasis added). Thus, in *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87, 103 S.Ct. 416, 74 L.Ed.2d 250 (1982), we held that a law requiring disclosure of campaign contributions and expenditures could not be “constitutionally applied” to a minor party whose members and contributors would face “threats, harassment or reprisals.” *Id.*, at 101–102, 103 S.Ct. 416. Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (exempting the NAACP from a disclosure order entered to purportedly investigate compliance with a generally applicable statute). In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), and *Snyder v. Phelps*, 562 U.S. 443, 459, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011), the Court held that an established and generally applicable tort claim (the intentional infliction of emotional distress) could not constitutionally be applied to the particular expression at issue. Similarly, breach-of-the-peace laws, although generally valid, have been held to violate the Free Speech Clause under certain circumstances. See *Cohen v. California*, 403 U.S. 15, 16, 26, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Cantwell*, 310 U.S. at 300, 311, 60 S.Ct. 900; see also *Bartnicki v. Vopper*, 532 U.S. 514, 517, 535, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) (respondents not liable under law prohibiting disclosure of illegally intercepted communications because their speech was protected by the First Amendment); *United States v. Treasury Employees*, 513 U.S. 454, 477, 115 S.Ct.

1003, 130 L.Ed.2d 964 (1995) (respondents not subject to the honoraria ban because it would violate their First Amendment rights); *United States v. Grace*, 461 U.S. 171, 175, 179, 183, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (respondents engaging in expressive conduct on public sidewalks not subject to law generally regulating conduct on Supreme Court grounds).

Finally, *Smith*'s treatment of the free-exercise right is fundamentally at odds with how we usually think about liberties guaranteed by the Bill of Rights. As Justice Jackson famously put it, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials." *Barnette*, 319 U.S. at 638, 63 S.Ct. 1178. *Smith*, by contrast, held that protection of religious liberty was better left to the political process than to courts. 494 U.S. at 890, 110 S.Ct. 1595. In *Smith*'s view, the Nation simply could not "afford the luxury" of protecting the free exercise of religion from generally applicable laws. *Id.*, at 888, 110 S.Ct. 1595. Under this interpretation, the free exercise of religion does not receive the judicial protection afforded to other, favored rights.

C

Workability. One of *Smith*'s supposed virtues was ease of application, but things have not turned out that way. Instead, at least four serious problems have arisen and continue to plague courts when called upon to apply *Smith*.

*1918 1

"Hybrid-rights" cases. The "hybrid rights" exception, which was essential to distinguish *Yoder*, has baffled the lower courts. They are divided into at least three camps. See *Combs v. Homer-Center School Dist.*, 540 F.3d 231, 244–247 (C.A.3 2008) (describing Circuit split). Some courts have taken the extraordinary step of openly refusing to follow this part of *Smith*'s interpretation. The Sixth Circuit was remarkably blunt: "[H]old[ing] that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights ... is completely illogical." *Kissinger v. Board of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (1993). The Second and Third Circuits have taken a similar approach. See *Leebaert v. Harrington*, 332 F.3d 134, 144 (C.A.2 2003) ("We ... can think of no good reason for the standard of review to vary simply with the

number of constitutional rights that the plaintiff asserts have been violated"); *Knight v. Connecticut Dept. of Pub. Health*, 275 F.3d 156, 167 (C.A.2 2001); *Combs*, 540 F.3d at 247 ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta").

A second camp holds that the hybrid-rights exception applies only when a free-exercise claim is joined with some other independently viable claim. See *Archdiocese of Washington v. WMATA*, 897 F.3d 314, 331 (C.A.D.C. 2018) (A "hybrid rights claim ... requires independently viable free speech and free exercise claims"); *Gary S. v. Manchester School Dist.*, 374 F.3d 15, 19 (C.A.1 2004) (adopting District Court's reasoning that "the [hybrid-rights] exception can be invoked only if the plaintiff has joined a free exercise challenge with another independently viable constitutional claim," 241 F.Supp.2d 111, 121 (D.N.H. 2003)); *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525, 539 (C.A.1 1995). But this approach essentially makes the free-exercise claim irrelevant. See *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1296–1297 (C.A.10 2004) ("[I]t makes no sense to adopt a strict standard that essentially requires a *successful* companion claim because such a test would make the free exercise claim unnecessary"); see also *Lukumi*, 508 U.S. at 567, 113 S.Ct. 2217 (opinion of SOUTER, J.) (making the same point).

The third group requires that the non-free-exercise claim be "colorable." See *Cornerstone Christian Schools v. University Interscholastic League*, 563 F.3d 127, 136, n. 8 (C.A.5 2009); *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024, 1032–1033 (C.A.9 2004); *Axson-Flynn*, 356 F.3d at 1295–1297. But what that means is obscure. See, e.g., *id.*, at 1295 (referring to "helpful" analogies such as the "likelihood of success on the merits" standard for preliminary injunctions" or the pre-Antiterrorism and Effective Death Penalty Act standard for obtaining an evidentiary hearing, *i.e.*, a "colorable showing of factual innocence").⁷⁸

It is rare to encounter a holding of this Court that has so thoroughly stymied or elicited such open derision from the Courts of Appeals.

2

Rules that "target" religion. Post-*Smith* cases have also struggled with the task of *1919 determining whether a purportedly neutral rule "targets" religious exercise or has the restriction of religious exercise as its "object." *Lukumi*, 508

U.S. at 534, 113 S.Ct. 2217; *Smith*, 494 U.S. at 878, 110 S.Ct. 1595. A threshold question is whether “targeting” calls for an objective or subjective inquiry. Must “targeting” be assessed based solely on the terms of the relevant rule or rules? Or can evidence of the rulemakers’ motivation be taken into account? If subjective motivations may be considered, does it matter whether the challenged state action is an adjudication, the promulgation of a rule, or the enactment of legislation? Should courts consider the motivations of only the officials who took the challenged action, or may they also take into account comments by superiors and others in a position of influence? And what degree of hostility to religion or a religious group is required to prove “targeting”?

The genesis of this problem was *Smith*’s holding that a rule is not neutral “if prohibiting the exercise of religion” is its “object.” 494 U.S. at 878, 110 S.Ct. 1595. *Smith* did not elaborate on what that meant, and later in *Lukumi*, which concerned city ordinances that burdened the practice of Santeria, 508 U.S. at 525–528, 113 S.Ct. 2217, Justices in the *Smith* majority adopted different interpretations. Justice Scalia and Chief Justice Rehnquist took the position that the “object” of a rule must be determined by its terms and that evidence of the rulemakers’ motivation should not be considered. 508 U.S. at 557–559, 113 S.Ct. 2217. This interpretation had the disadvantage of allowing skillful rulemakers to target religious exercise by devising a facially neutral rule that applies to both the targeted religious conduct and a slice of secular conduct that can be burdened without eliciting unacceptable opposition from those whose interests are affected.

The alternative to this approach takes courts into the difficult business of ascertaining the subjective motivations of rulemakers. In *Lukumi*, Justices Kennedy and Stevens took that path and relied on numerous statements by council members showing that their object was to ban the practice of Santeria within the city’s borders. *Id.*, at 540–542, 113 S.Ct. 2217. Thus, *Lukumi* left the meaning of a rule’s “object” up in the air.

When the issue returned in *Masterpiece Cakeshop*, the question was only partially resolved. Holding that the Colorado Civil Rights Commission violated the free-exercise rights of a baker who refused for religious reasons to create a cake for a same-sex wedding, the Court pointed to disparaging statements made by commission members, and the Court noted that these comments, “by an adjudicatory body deciding a particular case,” “were made in a very

different context” from the remarks by the council members in *Lukumi*. *Masterpiece Cakeshop*, 584 U.S., at —, 138 S.Ct., at 1729–1730. That is as far as this Court’s decisions have gone on the question of targeting, and thus many important questions remain open.

The present case highlights two—specifically, which officials’ motivations are relevant and what degree of disparagement must be shown to establish unconstitutional targeting. In *Masterpiece Cakeshop*, the commissioners’ statements—comparing the baker’s actions to the Holocaust and slavery and suggesting that his beliefs were just an excuse for bigotry—went too far. *Id.*, at — – —, 138 S.Ct., at 1728–1730. But what about the comments of Philadelphia officials in this case? The city council labeled CSS’s policy “discrimination that occurs under the guise of religious freedom.” App. to Pet. for Cert. 147a. The mayor had said that the Archbishop’s actions were not “Christian,” and *1920 he once called on the Pope “to kick some ass here.” *Id.*, at 173a, 177a–178a. In addition, the commissioner of the Department of Human Services (DHS), who serves at the mayor’s pleasure,⁷⁹ disparaged CSS’s policy as out of date and out of touch with Pope Francis’s teachings.⁸⁰

The Third Circuit found this evidence insufficient. Although the mayor conferred with the DHS commissioner both before and after her meeting with CSS representatives, the mayor’s remarks were disregarded because there was no evidence “that he played a *direct* role, or even a *significant* role, in the process.” 922 F.3d at 157 (emphasis added). The city council’s suggestion that CSS’s religious liberty claim was a “guise” for discrimination was found to “fal[l] into [a] grey zone,” and the commissioner’s debate with a CSS representative about up-to-date Catholic teaching, which “some might think ... improper” “if taken out of context” was “best viewed as an effort to reach common ground with [CSS] by appealing to an authority within their shared religious tradition.” *Ibid.* One may agree or disagree with the Third Circuit’s characterization and evaluation of the statements of the City officials, but the court’s analysis highlights the extremely impressionistic inquiry that *Smith*’s targeting requirement may entail.

Confusion and disagreement about “targeting” have surfaced in other cases. Recently in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. —, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (*per curiam*), there were conflicting views about comments made by the Governor of New York. On the day before he severely restricted religious services

in Brooklyn, the Governor “said that if the ‘ultra-Orthodox [Jewish] community’ would not agree to enforce the rules, ‘then we’ll close the institutions down.’ ” *Agudath Israel of America v. Cuomo*, 980 F.3d 222, 229 (C.A.2 2020) (PARK, J., dissenting). A dissenting judge on the Second Circuit thought the Governor had crossed the line, *ibid.*, and we ultimately enjoined enforcement of the rules, *Roman Catholic Diocese*, 592 U.S., at —, 141 S.Ct., at —. But two Justices who dissented found the Governor’s comments inconsequential. *Id.*, at — — —, 141 S.Ct., at 79–81 (opinion of SOTOMAYOR, J., joined by KAGAN, J.).

In *Stormans, Inc. v. Wiesman*, 579 U.S. —, 136 S.Ct. 2433, 195 L.Ed.2d 870 (2016) (denying certiorari), there was similar disagreement. That case featured strong evidence that pro-life Christian pharmacists who refused to dispense emergency contraceptives were the object of a new rule requiring every pharmacy to dispense every Food and Drug Administration-approved drug. A primary drafter of the rule all but admitted that the rule was aimed at these pharmacists, and the Governor took unusual steps to secure adoption of the rule. *1921 *Stormans, Inc. v. Selecky*, 854 F.Supp.2d 925, 937–943 (W.D. Wash. 2012). After a 12-day trial, the District Court found that Christian pharmacists had been targeted, *id.*, at 966, 987, but the Ninth Circuit refused to accept that finding, *Stormans, Inc.*, 794 F.3d 1064, 1079 (2015). Compare *Stormans, Inc.*, 579 U.S., at — — —, and n. 3, 136 S.Ct., at 2436–2437, and n. 3 (ALITO, J., joined by ROBERTS, C. J., and THOMAS, J., dissenting from denial of certiorari) (questioning Ninth Circuit’s finding).

Decisions of the lower courts on the issue of targeting remain in disarray. Compare *F. F. v. State*, 66 Misc.3d 467, 479–482, 114 N.Y.S.3d 852, 865–867 (2019) (declining to consider individual legislators’ comments); *Tenafly Eruv Assn., Inc. v. Tenafly*, 309 F.3d 144, 168, n. 30 (C.A.3 2002) (declining to reach issue), with *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 211 (C.A.2 2012) (considering legislative history); *St. John’s United Church of Christ v. Chicago*, 502 F.3d 616, 633 (C.A.7 2007) (“[W]e must look at ... the ‘historical background of the decision under challenge’ ” (quoting *Lukumi*, 508 U.S. at 540, 113 S.Ct. 2217)); *Children’s Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (C.A.8 2000) (targeting can be evidenced by legislative history).

The nature and scope of exemptions. There is confusion about the meaning of *Smith*’s holding on exemptions from generally applicable laws. Some decisions apply this special rule if multiple secular exemptions are granted. See, e.g., *Horen v. Commonwealth*, 23 Va.App. 735, 743–744, 479 S.E.2d 553, 557 (1997); *Rader v. Johnston*, 924 F.Supp. 1540, 1551–1553 (D.Neb. 1996). Others conclude that even one secular exemption is enough. See, e.g., *Midrash Sephardi, Inc. v. Surfside*, 366 F.3d 1214, 1234–1235 (C.A.11 2004); *Fraternal Order of Police Newark Lodge No. 12 v. Newark*, 170 F.3d 359, 365 (C.A.3 1999). And still others have applied the rule where the law, although allowing no exemptions on its face, was widely unenforced in cases involving secular conduct. See, e.g., *Tenafly Eruv Assn.*, 309 F.3d at 167–168.

Identifying appropriate comparators. To determine whether a law provides equal treatment for secular and religious conduct, two steps are required. First, a court must identify the secular conduct with which the religious conduct is to be compared. Second, the court must determine whether the State’s reasons for regulating the religious conduct apply with equal force to the secular conduct with which it is compared. See *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. In *Smith*, this inquiry undoubtedly seemed straightforward: The secular conduct and the religious conduct prohibited by the Oregon criminal statute were identical. But things are not always that simple.

Cases involving rules designed to slow the spread of COVID–19 have driven that point home. State and local rules adopted for this purpose have typically imposed different restrictions for different categories of activities. Sometimes religious services have been placed in a category with certain secular activities, and sometimes religious services have been given a separate category of their own. To determine whether COVID–19 rules provided neutral treatment for religious and secular conduct, it has been necessary to compare the restrictions on religious services with the restrictions on secular activities that present a comparable risk of spreading the virus, and identifying the secular activities *1922 that should be used for comparison has been hotly contested.

In *South Bay United Pentecostal Church v. Newsom*, 590 U.S. —, 140 S.Ct. 1613, 207 L.Ed.2d 154 (2020), where the Court refused to enjoin restrictions on religious services, THE CHIEF JUSTICE’s concurrence likened religious services

to lectures, concerts, movies, sports events, and theatrical performances. *Id.*, at —, 140 S.Ct., at 1614–1615. The dissenters, on the other hand, focused on “supermarkets, restaurants, factories, and offices.” *Id.*, at —, 140 S.Ct., at 1615 (opinion of KAVANAUGH, J., joined by THOMAS and GORSUCH, JJ.).

In *Calvary Chapel Dayton Valley v. Sisolak*, 591 U. S. —, 140 S.Ct. 2603, 207 L.Ed.2d 1129 (2020), Nevada defended a rule imposing severe limits on attendance at religious services and argued that houses of worship should be compared with “movie theaters, museums, art galleries, zoos, aquariums, trade schools, and technical schools.” Response to Emergency Application for Injunction, O. T. 2019, No. 19A1070, pp. 7, 14–15. Members of this Court who would have enjoined the Nevada rule looked to the State’s more generous rules for casinos, bowling alleys, and fitness facilities. 591 U. S., at — – —, 140 S.Ct., at 2614–2615 (ALITO, J., joined by THOMAS and KAVANAUGH, JJ., dissenting).

In *Roman Catholic Diocese of Brooklyn*, 592 U. S. —, 141 S.Ct. 63, Justices in the majority compared houses of worship with large retail establishments, factories, schools, liquor stores, bicycle repair shops, and pet shops, *id.*, at —, 141 S.Ct., at 69; *id.*, at —, 141 S.Ct., at 69–70 (GORSUCH, J., concurring), *id.*, at —, 141 S.Ct., at 73–74 (KAVANAUGH, J., concurring), while dissenters cited theaters and concert halls, *id.*, at —, 141 S.Ct., 77–78 (opinion of SOTOMAYOR, J., joined by KAGAN, J.).

In *Danville Christian Academy, Inc. v. Beshear*, 592 U. S. —, 141 S.Ct. 527, 208 L.Ed.2d 504 (2020), the District Court enjoined enforcement of an executive order that compelled the closing of a religiously affiliated school, reasoning that the State permitted pre-schools, colleges, and universities to stay open and also allowed attendance at concerts and lectures. *Danville Christian Academy, Inc. v. Beshear*, 503 F.Supp.3d 516, 523–24 (E.D. Ky., 2020). The Sixth Circuit reversed, concluding that the rule was neutral and generally applicable because it applied to all elementary and secondary schools, whether secular or religious. *Kentucky ex rel. Danville Christian Academy, Inc. v. Beshear*, 981 F.3d 505, 509 (2020).

Much of *Smith*’s initial appeal was likely its apparent simplicity. *Smith* seemed to offer a relatively simple and clear-cut rule that would be easy to apply. Experience has shown otherwise.

D

Subsequent developments. Developments since *Smith* provide additional reasons for changing course. The *Smith* majority thought that adherence to *Sherbert* would invite “anarchy,” 494 U.S. at 888, 110 S.Ct. 1595, but experience has shown that this fear was not well founded. Both RFRA and RLUIPA impose essentially the same requirements as *Sherbert*, and we have observed that the courts are well “up to the task” of applying that test. *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 436, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). See also *Cutter v. Wilkinson*, 544 U.S. 709, 722, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (noting “no cause to believe” the test could not be “applied in an appropriately balanced way”).

*1923 Another significant development is the subsequent profusion of studies on the original meaning of the Free Exercise Clause. When *Smith* was decided, the available scholarship was thin, and the Court received no briefing on the subject. Since then, scholars have explored the subject in great depth.⁸¹

* * *

Multiple factors strongly favor overruling *Smith*. Are there countervailing factors?

E

None is apparent. Reliance is often the strongest factor favoring the retention of a challenged precedent, but no strong reliance interests are cited in any of the numerous briefs urging us to preserve *Smith*. Indeed, the term is rarely even mentioned.

All that the City has to say on the subject is that overruling *Smith* would cause “substantial regulatory ... disruption” by displacing RFRA, RLUIPA, and related state laws, Brief for City Respondents 51 (internal quotation marks omitted), but this is a baffling argument. How would overruling *Smith* disrupt the operation of laws that were enacted to abrogate *Smith*?

One of the City’s *amici*, the New York State Bar Association, offers a different reliance argument. It claims that some individuals, relying on *Smith*, have moved to jurisdictions

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with anti-discrimination laws that do not permit religious exemptions. Brief for New York State Bar Association as *Amicus Curiae* 11. The bar association does not cite any actual examples of individuals who fall into this category, and there is reason to doubt that many actually exist.

For the hypothesized course of conduct to make sense, all of the following conditions would have to be met. First, it would be necessary for the individuals in question to believe that a religiously motivated party in the jurisdiction they left or avoided might engage in conduct that harmed them. Second, this conduct would have to be conduct not already protected by *Smith* in that it (a) did not violate a generally applicable state law, (b) that law did not allow individual exemptions, and (c) there was insufficient proof of religious targeting. Third, the feared conduct would have to fall outside the scope of RLUIPA. Fourth, the conduct, although not protected by *Smith*, would have to be otherwise permitted by local law, for example, through a state version of RFRA. Fifth, this fear of harm at the hands of a religiously motivated actor would have to be a but-for cause of the decision to move. Perhaps there are individuals who fall into the category that the bar association hypothesizes, but we should not allow violations of the Free Exercise Clause in perpetuity based on such speculation.

Indeed, even if more substantial reliance could be shown, *Smith*'s dubious standing would weigh against giving this factor too much weight. *Smith* has been embattled since the day it was decided, and calls for its reexamination have intensified in recent years. See *Masterpiece Cakeshop*, 584 U. S., at —, 138 S.Ct., at 1734 (GORSUCH, J., joined by ALITO, J., concurring); *1924 *Kennedy*, 586 U. S., at — – —, 139 S.Ct., at 636–637 (ALITO, J., joined by THOMAS, GORSUCH, and KAVANAUGH, JJ., concurring in denial of certiorari); *City of Boerne* 521 U.S. at 566, 117 S.Ct. 2157 (BREYER, J., dissenting) (“[T]he Court should direct the parties to brief the question whether [*Smith*] was correctly decided”); *id.*, at 565, 117 S.Ct. 2157 (O’CONNOR, J., joined by BREYER, J., dissenting) (“[I]t is essential for the Court to reconsider its holding in *Smith*”); *Lukumi*, 508 U.S. at 559, 113 S.Ct. 2217 (SOUTER, J., concurring in part and concurring in judgment) (“[I]n a case presenting the issue, the Court should reexamine the rule *Smith* declared”). Thus, parties have long been on notice that the decision might soon be reconsidered. See *Janus*, 585 U. S., at —, 138 S.Ct., at 2484–2485.

* * *

Smith was wrongly decided. As long as it remains on the books, it threatens a fundamental freedom. And while precedent should not lightly be cast aside, the Court's error in *Smith* should now be corrected.

VI

A

If *Smith* is overruled, what legal standard should be applied in this case? The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest.

Whether this test should be rephrased or supplemented with specific rules is a question that need not be resolved here because Philadelphia's ouster of CSS from foster care work simply does not further any interest that can properly be protected in this case. As noted, CSS's policy has not hindered any same-sex couples from becoming foster parents, and there is no threat that it will do so in the future.

CSS's policy has only one effect: It expresses the idea that same-sex couples should not be foster parents because only a man and a woman should marry. Many people today find this idea not only objectionable but hurtful. Nevertheless, protecting against this form of harm is not an interest that can justify the abridgment of First Amendment rights.

We have covered this ground repeatedly in free speech cases. In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding. See *Matal v. Tam*, 582 U. S. —, — – —, 137 S.Ct. 1744, 1751, 198 L.Ed.2d 366 (2017) (“Speech may not be banned on the ground that it expresses ideas that offend”); *Hurley*, 515 U.S. at 579, 115 S.Ct. 2338 (“[T]he law ... 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”); *Johnson*, 491 U.S. at 414, 109 S.Ct. 2533 (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (opinion of STEVENS, J.) (“[T]he fact that society may find speech offensive is not a sufficient

reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection"); *Street v. New York*, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves *1925 offensive to some of their hearers"); Cf. *Coates v. Cincinnati*, 402 U.S. 611, 615, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) ("Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of ... constitutional freedoms").

The same fundamental principle applies to religious practices that give offense. The preservation of religious freedom depends on that principle. Many core religious beliefs are perceived as hateful by members of other religions or nonbelievers. Proclaiming that there is only one God is offensive to polytheists, and saying that there are many gods is anathema to Jews, Christians, and Muslims. Declaring that Jesus was the Son of God is offensive to Judaism and Islam, and stating that Jesus was not the Son of God is insulting to Christian belief. Expressing a belief in God is nonsense to atheists, but denying the existence of God or proclaiming that religion has been a plague is infuriating to those for whom religion is all-important.

Suppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game. While CSS's ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs. In *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), the majority made a commitment. It refused to equate traditional beliefs about marriage, which it termed "decent and honorable," *id.*, at 672, 135 S.Ct. 2584, with racism, which is neither. And it promised that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Id.*, at 679, 135 S.Ct. 2584. An open society can keep that promise while still respecting the "dignity," "worth," and fundamental equality of all members of the community. *Masterpiece Cakeshop*, 584 U. S., at —, 138 S.Ct., at 1727.

B

One final argument must be addressed. Philadelphia and many of its *amici* contend that preservation of the City's

policy is not dependent on *Smith*. They argue that the City is simply asserting the right to control its own internal operations, and they analogize CSS to either a City employee or a contractor hired to perform an exclusively governmental function.

This argument mischaracterizes the relationship between CSS and the City. The members of CSS's staff are not City employees; the power asserted by the City goes far beyond a refusal to enter into a contract; and the function that CSS and other private foster care agencies have been performing for decades has not historically been an exclusively governmental function. See, e.g., *Leshko v. Servis*, 423 F.3d 337, 343–344 (C.A.3 2005) ("No aspect of providing care to foster children in Pennsylvania has ever been the exclusive province of the government"); *Rayburn v. Hogue*, 241 F.3d 1341, 1347 (C.A.11 2001) (acknowledging that foster care is not traditionally an exclusive state prerogative); *Milburn v. Anne Arundel Cty. Dept. of Social Servs.*, 871 F.2d 474, 479 (C.A.4 1989) (same); *Malachowski v. Keene*, 787 F.2d 704, 711 (C.A.1 1986) (same); see also *Ismail v. County of Orange*, 693 Fed.Appx. 507, 512 (C.A.9 2017) (concluding that foster parents were not state actors). On the contrary, States and cities were latecomers to this field, and even today, they typically leave most of the work to private agencies.

The power that the City asserts is essentially the power to deny CSS a license *1926 to continue to perform work that it has carried out for decades and that religious groups have performed since time immemorial. Therefore, the cases that provide the basis for the City's argument—such as *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006), and *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996)—are far afield. A government cannot "reduce a group's First Amendment rights by simply imposing a licensing requirement." *National Institute of Family and Life Advocates v. Becerra*, 585 U. S. —, —, 138 S.Ct. 2361, 2375, 201 L.Ed.2d 835 (2018).

* * *

For all these reasons, I would overrule *Smith* and reverse the decision below. Philadelphia's exclusion of CSS from foster care work violates the Free Exercise Clause, and CSS is therefore entitled to an injunction barring Philadelphia from taking such action.

After receiving more than 2,500 pages of briefing and after more than a half-year of post-argument cogitation, the Court has emitted a wisp of a decision that leaves religious liberty in a confused and vulnerable state. Those who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, concurring in the judgment.

The Court granted certiorari to decide whether to overrule *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). As Justice ALITO's opinion demonstrates, *Smith* failed to respect this Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice. A majority of our colleagues, however, seek to sidestep the question. They agree that the City of Philadelphia's treatment of Catholic Social Services (CSS) violates the Free Exercise Clause. But, they say, there's no “need” or “reason” to address the error of *Smith* today. *Ante*, at 1876 – 1877 (majority opinion); *ante*, at 1883 (BARRETT, J., concurring).

On the surface it may seem a nice move, but dig an inch deep and problems emerge. *Smith* exempts “neutral” and “generally applicable” laws from First Amendment scrutiny. 494 U.S. at 878–881, 110 S.Ct. 1595. The City argues that its challenged rules qualify for that exemption because they require all foster-care agencies—religious and non-religious alike—to recruit and certify same-sex couples interested in serving as foster parents. For its part, the majority assumes (without deciding) that Philadelphia's rule is indeed “neutral” toward religion. *Ante*, at 1876 – 1877. So to avoid *Smith*'s exemption and subject the City's policy to First Amendment scrutiny, the majority must carry the burden of showing that the policy isn't “generally applicable.”

*

That path turns out to be a long and lonely one. The district court held that the City's public accommodations law (its Fair Practices Ordinance or FPO) is both generally applicable and applicable to CSS. At least initially, the majority chooses to bypass the district court's major premise—that the FPO qualifies as “generally applicable” under *Smith*. It's a curious choice given that the FPO applies only to certain defined entities that qualify as public accommodations while the “generally applicable law” in *Smith* was “an across-the-board criminal prohibition” enforceable against anyone. 494 U.S. at

884, 110 S.Ct. 1595. But if the goal is to turn a big *1927 dispute of constitutional law into a small one, the majority's choice to focus its attack on the district court's minor premise—that the FPO applies to CSS as a matter of municipal law—begins to make some sense. Still, it isn't exactly an obvious path. The Third Circuit did not address the district court's interpretation of the FPO. And not one of the over 80 briefs before us contests it. To get to where it wishes to go, then, the majority must go it alone. So much for the adversarial process and being “a court of review, not of first view.” *Brownback v. King*, 592 U. S. —, —, n. 4, 141 S.Ct. 740, 747, n. 4, 209 L.Ed.2d 33 (2021) (internal quotation marks omitted).

Trailblazing through the Philadelphia city code turns out to be no walk in the park either. As the district court observed, the City's FPO defines “public accommodations” expansively to include “[a]ny provider” that “solicits or accepts patronage” of “the public or whose ... services [or] facilities” are “made available to the public.” App. to Pet. for Cert. 77a (alteration omitted; emphasis deleted). And, the district court held, this definition covers CSS because (among other things) it “publicly solicits prospective foster parents” and “provides professional ‘services’ to the public.” *Id.*, at 78a. All of which would seem to block the majority's way. So how does it get around that problem?

It changes the conversation. The majority ignores the FPO's expansive definition of “public accommodations.” It ignores the reason the district court offered for why CSS falls within that definition. Instead, it asks us to look to a *different* public accommodations law—a Commonwealth of Pennsylvania public accommodations statute. See *ante*, at 1879 – 1880 (discussing Pa. Stat. Ann., Tit. 43, § 954(I) (Purdon Cum. Supp. 2009)). And, the majority promises, CSS fails to qualify as a public accommodation under the terms of *that* law. But why should we ignore the City's law and look to the Commonwealth's? No one knows because the majority doesn't say.

Even playing along with this statutory shell game doesn't solve the problem. The majority highlights the fact that the state law lists various examples of public accommodations—including hotels, restaurants, and swimming pools. *Ante*, at 1880. The majority then argues that foster agencies fail to qualify as public accommodations because, unlike these listed entities, foster agencies “involve a customized and selective assessment.” *Ibid*. But where does *that* distinction come from? Not the text of the state statute, not state case law, and certainly not from the briefs. The majority just declares it

—a new rule of Pennsylvania common law handed down by the United States Supreme Court.

The majority's gloss on state law isn't just novel, it's probably wrong. While the statute lists hotels, restaurants, and swimming pools as examples of public accommodations, it also lists over 40 other kinds of institutions—and the statute emphasizes that these examples are illustrative, not exhaustive. See § 954(l). Among its illustrations, too, the statute offers public “colleges and universities” as examples of public accommodations. *Ibid.* Often these institutions *do* engage in a “customized and selective assessment” of their clients (students) and employees (faculty). And if *they* can qualify as public accommodations under the state statute, it isn't exactly clear why foster agencies cannot. What does the majority have to say about this problem? Again, silence.

If anything, the majority's next move only adds to the confusion. It denies cooking up any of these arguments on its own. It says it merely means to “agree with CSS's position ... that its ‘foster services do not constitute a “public accommodation” *1928 under the City's Fair Practices Ordinance.’ ” *Ante*, at 1881 (quoting App. to Pet. for Cert. 159a). But CSS's cited “position”—which comes from a letter it sent to the City before litigation even began—includes nothing like the majority's convoluted chain of reasoning involving a separate state statute. *Id.*, at 159a–160a. Instead, CSS's letter contends that the organization's services do not qualify as “public accommodations” because they are “only available to at-risk children who have been removed by the state and are in need of a loving home.” *Ibid.* The majority tells us with assurance that it “agree[s] with” this position, adding that it would be “incongru[ous]” to “dee[m] a private religious foster agency a public accommodation.” *Ante*, at 1881.

What to make of all this? Maybe this part of the majority opinion should be read only as reaching for something—anything—to support its curious separate-statute move. But maybe the majority means to reject the district court's major premise after all—suggesting it would be incongruous for public accommodations laws to qualify as generally applicable under *Smith* because they do not apply to everyone. Or maybe the majority means to invoke a canon of constitutional avoidance: Before concluding that a public accommodations law is generally applicable under *Smith*, courts must ask themselves whether it would be “incongru[ous]” to apply that law to religious groups. Maybe all this ambiguity is deliberate, maybe not. The only thing

certain here is that the majority's attempt to cloak itself in CSS's argument introduces more questions than answers.

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Still that's not the end of it. Even now, the majority's circumnavigation of *Smith* remains only half complete. The City argues that, in addition to the FPO, *another* generally applicable nondiscrimination rule can be found in § 15.1 of its contract with CSS. That provision independently instructs that foster service providers “shall not discriminate or permit discrimination against any individual on the basis of ... sexual orientation.” Supp. App. to Brief for City Respondents 31. This provision, the City contends, amounts to a second and separate rule of general applicability exempt from First Amendment scrutiny under *Smith*. Once more, the majority must find some way around the problem. Its attempt to do so proceeds in three steps.

First, the majority directs our attention to another provision of the contract—§ 3.21. See *ante*, at 1877 – 1879. Entitled “Rejection of Referral,” this provision prohibits discrimination based on sexual orientation, race, religion, or other grounds “unless an exception is granted” in the government's “sole discretion.” Supp. App. to Brief for City Respondents 16–17. Clearly, the majority says, *that* provision doesn't state a generally applicable rule against discrimination because it expressly contemplates “exceptions.” *Ante*, at 1878.

But how does that help? As § 3.21's title indicates, the provision contemplates exceptions only when it comes to the referral stage of the foster process—where the government seeks to place a particular child with an available foster family. See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 221 (2012) (“The title and headings are permissible indicators of meaning” (boldface deleted)). So, for example, the City has taken race into account when placing a child who “used racial slurs” to avoid placing him with parents “of that race.” Tr. of Oral Arg. 61. Meanwhile, our case has nothing to do with the referral—or placement—stage of the foster process. This case concerns the recruitment and certification stages—where foster agencies like CSS *1929 screen and enroll adults who wish to serve as foster parents. And in *those* stages of the foster process, § 15.1 seems to prohibit discrimination absolutely.

That difficulty leads the majority to its second step. It asks us to ignore § 3.21's title and its limited application to the referral stage. See *ante*, at 1879. Instead, the majority suggests, we should reconceive § 3.21 as authorizing exceptions to the City's nondiscrimination rule at *every* stage of the foster process. Once we do that, the majority stresses, § 3.21's reservation of discretion is irreconcilable with § 15.1's blanket prohibition against discrimination. See *ante*, at 1879.

This sets up the majority's final move—where the real magic happens. Having conjured a conflict within the contract, the majority devises its own solution. It points to some state court decisions that, it says, set forth the “rule” that Pennsylvania courts shouldn't interpret one provision in a contract “to annul” another part. *Ibid*. To avoid nullifying § 3.21's reservation of discretion, the majority insists, it has no choice but to rewrite § 15.1. All so that—*voilà*—§ 15.1 now contains *its own* parallel reservation of discretion. See *ante*, at 1879. As rewritten, the contract contains no generally applicable rule against discrimination anywhere in the foster process.

From start to finish, it is a dizzying series of maneuvers. The majority changes the terms of the parties' contract, adopting an uncharitably broad reading (really revision) of § 3.21. It asks us to ignore the usual rule that a more specific contractual provision can comfortably coexist with a more general one. And it proceeds to resolve a conflict it created by rewriting § 15.1. Once more, too, no party, *amicus*, or lower court argued for any of this.

To be sure, the majority again claims otherwise—representing that it merely adopts the arguments of CSS and the United States. See *ante*, at 1879. But here, too, the majority's representation raises rather than resolves questions. Instead of pursuing anything like the majority's contract arguments, CSS and the United States suggest that § 3.21 “*alone* triggers strict scrutiny,” Reply Brief 5 (emphasis added), because that provision authorizes the City “to grant formal exemptions *from its policy*” of nondiscrimination, Brief for United States as *Amicus Curiae* 26 (emphasis added). On this theory, it's irrelevant whether § 3.21 or § 15.1 reserve discretion to grant exemptions at all stages of the process or at only one stage. Instead, the City's power to grant exemptions from its nondiscrimination policy *anywhere* “undercuts its asserted interests” and thus “trigger[s] strict scrutiny” for applying the policy *everywhere*. *Id.*, at 21. Exceptions for one means strict scrutiny for all. See, e.g., *Tandon v. Newsom*, *ante*, at 1874 – 1875 (*per curiam*). All of which leaves us to wonder: Is

the majority just stretching to claim some cover for its novel arguments? Or does it actually mean to adopt the theory it professes to adopt?

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Given all the maneuvering, it's hard not to wonder if the majority is so anxious to say nothing about *Smith*'s fate that it is willing to say pretty much anything about municipal law and the parties' briefs. One way or another, the majority seems determined to declare there is no “need” or “reason” to revisit *Smith* today. *Ante*, at 1876 – 1877 (majority opinion); *ante*, at 1883 (BARRETT, J., concurring).

But tell that to CSS. Its litigation has already lasted years—and today's (ir)resolution promises more of the same. Had we followed the path Justice ALITO outlines—holding that the City's rules cannot avoid strict scrutiny even if they qualify as neutral and generally applicable—this case ***1930** would end today. Instead, the majority's course guarantees that this litigation is only getting started. As the final arbiter of state law, the Pennsylvania Supreme Court can effectively overrule the majority's reading of the Commonwealth's public accommodations law. The City can revise its FPO to make even plainer still that its law does encompass foster services. Or with a flick of a pen, municipal lawyers may rewrite the City's contract to close the § 3.21 loophole.

Once any of that happens, CSS will find itself back where it started. The City has made clear that it will never tolerate CSS carrying out its foster-care mission in accordance with its sincerely held religious beliefs. To the City, it makes no difference that CSS has not denied service to a single same-sex couple; that dozens of other foster agencies stand willing to serve same-sex couples; or that CSS is committed to help any inquiring same-sex couples find those other agencies. The City has expressed its determination to put CSS to a choice: Give up your sincerely held religious beliefs or give up serving foster children and families. If CSS is unwilling to provide foster-care services to same-sex couples, the City prefers that CSS provide no foster-care services at all. This litigation thus promises to slog on for years to come, consuming time and resources in court that could be better spent serving children. And throughout it all, the opacity of the majority's professed endorsement of CSS's arguments ensures the parties will be forced to devote resources to the unenviable task of debating what it *even means*.

Nor will CSS bear the costs of the Court's indecision alone. Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties. Consider Jack Phillips, the baker whose religious beliefs prevented him from creating custom cakes to celebrate same-sex weddings. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U. S. —, 138 S.Ct. 1719, 201 L.Ed.2d 35 (2018). After being forced to litigate all the way to the Supreme Court, we ruled for him on narrow grounds similar to those the majority invokes today. Because certain government officials responsible for deciding Mr. Phillips's compliance with a local public accommodations law uttered statements exhibiting hostility to his religion, the Court held, those officials failed to act “neutrally” under *Smith*. See 584 U. S., at —, —, 138 S.Ct., at 1730–1732. But with *Smith* still on the books, all that victory assured Mr. Phillips was a new round of litigation—with officials now presumably more careful about admitting their motives. See Associated Press, Lakewood Baker Jack Phillips Sued for Refusing Gender Transition Cake (Mar. 22, 2021), <https://denver.cbslocal.com/2021/03/22/jack-phillips-masterpiece-cakeshop-lakewood-transgender/>. A nine-year odyssey thus barrels on. No doubt, too, those who cannot afford such endless litigation under *Smith*'s regime have been and will continue to be forced to forfeit religious freedom that the Constitution protects.

The costs of today's indecision fall on lower courts too. As recent cases involving COVID–19 regulations highlight, judges across the country continue to struggle to understand and apply *Smith*'s test even thirty years after it was announced. In the last nine months alone, this Court has had to intervene at least half a dozen times to clarify how *Smith* works. See, e.g., *Tandon*, ante, at p. 1874; *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. —, 141 S.Ct. 63, 208 L.Ed.2d 206 (2020) (*per curiam*); *High Plains Harvest Church v. Polis*, 592 U. S. —, 141 S.Ct. 527, 208 L.Ed.2d 503 (2020). To be sure, this Court began to resolve at least some of the confusion surrounding *Smith*'s application *1931 in *Tandon*. But *Tandon* treated the symptoms, not the underlying ailment. We owe it to the parties, to religious believers, and to our colleagues on the lower courts to cure the problem this Court created.

It's not as if we don't know the right answer. *Smith* has been criticized since the day it was decided. No fewer than

ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution. See *ante*, at 1887 – 1889 (ALITO, J., concurring in judgment); *ante*, at 1882 – 1883 (BARRETT, J., concurring). The Court granted certiorari in this case to resolve its fate. The parties and *amici* responded with over 80 thoughtful briefs addressing every angle of the problem. Justice ALITO has offered a comprehensive opinion explaining why *Smith* should be overruled. And not a single Justice has lifted a pen to defend the decision. So what are we waiting for?

We hardly need to “wrestle” today with every conceivable question that might follow from recognizing *Smith* was wrong. See *ante*, at 1883 (BARRETT, J., concurring). To be sure, any time this Court turns from misguided precedent back toward the Constitution's original public meaning, challenging questions may arise across a large field of cases and controversies. But that's no excuse for refusing to apply the original public meaning in the dispute actually before us. Rather than adhere to *Smith* until we settle on some “grand unified theory” of the Free Exercise Clause for all future cases until the end of time, see *American Legion v. American Humanist Assn.*, 588 U. S. —, —, 139 S.Ct. 2067, 2086–2087, 204 L.Ed.2d 452 (2019) (plurality opinion), the Court should overrule it now, set us back on the correct course, and address each case as it comes.

What possible benefit does the majority see in its studious indecision about *Smith* when the costs are so many? The particular appeal before us arises at the intersection of public accommodations laws and the First Amendment; it involves same-sex couples and the Catholic Church. Perhaps our colleagues believe today's circuitous path will at least steer the Court around the controversial subject matter and avoid “picking a side.” But refusing to give CSS the benefit of what we know to be the correct interpretation of the Constitution is picking a side. *Smith* committed a constitutional error. Only we can fix it. Dodging the question today guarantees it will recur tomorrow. These cases will keep coming until the Court musters the fortitude to supply an answer. Respectfully, it should have done so today.

All Citations

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Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 Code of Canon Law, Canon § 924 (Eng. transl. 1998).
- 2 See Law Library of Congress, Global Legal Research Center, Legal Restrictions on Religious Slaughter in Europe (Mar. 2018), www.loc.gov/law/help/religious-slaughter/religious-slaughter-europe.pdf.
- 3 *Id.*, at 1–2.
- 4 See Frisch et al., Cultural Bias in the AAP's 2012 Technical Report and Policy Statement on *Male Circumcision*, 131 *Pediatrics* 796, 799 (2013) (representatives of pediatric medical associations in 16 European countries and Canada recommending against circumcision because the practice “has no compelling health benefits, causes postoperative pain, can have serious long-term consequences, constitutes a violation of the United Nations’ Declaration of the Rights of the Child, and conflicts with the Hippocratic oath”).
- 5 See Initiative Measure To Be Submitted Directly to the Voters: Genital Cutting of Male Minors (Oct. 13, 2010) (online source archived at www.supremecourt.gov); see also *Jewish Community Relations Council of San Francisco v. Arntz*, 2012 WL 11891474, *1 (Super. Ct. San Francisco Cty., Cal., Apr. 6, 2012) (ordering that the proposed initiative be removed from the ballot because it was preempted by California law).
- 6 See 4 *Encyclopaedia Judaica* 730 (2d ed. 2007) (“Jewish circumcision originated, according to the biblical account, with Abraham”); *The Shengold Jewish Encyclopedia* 62 (3d ed. 2003) (“[Circumcision] has become a basic law among Jews. In times of persecution, Jews risked their lives to fulfill the commandment”); B. Abramowitz, *The Law of Israel: A Compilation of the Hayye Adam* 206 (1897) (“It is a positive commandment that a father shall circumcise his son or that he shall appoint another Israelite to act as his agent therein”); 3 *Encyclopedia of Religion* 1798 (2d ed. 2005) (“Muslims agree that [circumcision] must occur before marriage and is required of male converts”); H. Gibb & J. Kramers, *Shorter Encyclopaedia of Islam* 254 (1953).
- 7 See Holy Bible, Deuteronomy 10:18, 16:11, 26:12–13; James 1:27.
- 8 See A. Crislip, *From Monastery to Hospital: Christian Monasticism & the Transformation of Health Care in Late Antiquity* 104, 111 (2005) (describing Basil of Caesarea’s use of his 4th century monastery as a “place for the nourishment of orphans,” who “lived in their own wing of the monastery,” “were provided with all the necessities of life[,] and were raised by the monastics acting as surrogate parents” (internal quotation marks omitted)).
- 9 Ransel, *Orphans and Foundlings*, in 3 *Encyclopedia of European Social History* 497, 498 (2001).
- 10 T. Hacsí, *Second Home: Orphan Asylums and Poor Families in America* 17 (1997).
- 11 *Id.*, at 17–18; F. Chapell, *The Great Awakening of 1740*, pp. 90–91 (1903).
- 12 2 *Encyclopedia of the New American Nation* 477 (2006); Hacsí, *Second Home*, at 18.
- 13 15 *Encyclopaedia Judaica* 485.
- 14 2 *Encyclopedia of Children and Childhood* 639–640 (2004); Brief for Historians of Child Welfare as *Amici Curiae* 16–17.
- 15 Brief for Annie E. Casey Foundation et al. as *Amici Curiae* 4–5.
- 16 See Social Security Act, § 521, 49 Stat. 627, 633; Social Security Act Amendments of 1961, 75 Stat. 131.
- 17 See United States Conference of Catholic Bishops, *Discrimination Against Catholic Adoption Services* (2018), <https://www.usccb.org/issues-and-action/religious-liberty/upload/Discrimination-against-Catholic-adoption-services.pdf>.
- 18 See Brief for Petitioners 11–12 (citing Wax-Thibodeaux, “We Are Just Destroying These Kids”: The Foster Children Growing Up Inside Detention Centers, *Washington Post* (Dec. 30, 2019), https://www.washingtonpost.com/national/we-are-just-destroying-these-kids-the-foster-children-growing-up-inside-detention-centers/2019/12/30/97f65f3a-aaa2-11e9-9c6d-436a0df4f31d_story.html (describing the placement of foster children in emergency shelters and juvenile detention centers)); Brief in

Opposition for City Respondents 4 (acknowledging 5,000 children in need of care in Philadelphia); Terruso, Philly Puts Out “Urgent” Call—300 Families Needed for Fostering, Philadelphia Inquirer (Mar. 8, 2018), <https://www.inquirer.com/philly/news/foster-parents-dhs-philly-child-welfare-adoptions-20180308.html>; see also Haskins, Kohomban, & Rodriguez, Keeping Up With the Caseload: How To Recruit and Retain Foster Parents, The Brookings Institution (Apr. 24, 2019), <https://www.brookings.edu/blog/upfront/2019/04/24/keeping-up-with-the-caseload-how-to-recruit-and-retain-foster-parents/> (explaining that “[t]he number of children in foster care ha[d] risen for the fifth consecutive year” to nearly 443,000 in 2017 and noting that “between 30 to 50 percent of foster families step down each year”); Adams, Foster Care Crisis: More Kids Are Entering, but Fewer Families Are Willing To Take Them In, NBC News (Dec. 30, 2020), <https://www.nbcnews.com/news/nbcblk/foster-care-crisis-more-kids-are-entering-fewer-families-are-n1252450> (explaining how the COVID–19 pandemic has overwhelmed the United States’ foster care system); Satija, For Troubled Foster Kids in Houston, Sleeping in Offices Is “Rock Bottom,” Texas Tribune (Apr. 20, 2017), <https://www.texastribune.org/2017/04/20/texas-foster-care-placement-crisis/> (describing Texas’s shortage of placement options, which resulted in children sleeping in office buildings where “no one is likely to stop them” if they decide to run away); Associated Press, Indiana Agencies Desperate To Find Foster Parents With Children Entering System at All-Time High, Fox 59 (Mar. 7, 2017), <https://fox59.com/news/indianaagencies-desperate-to-find-foster-parents-with-children-entering-system-at-all-time-high/> (noting that nearly 1,000 children in Indiana are in need of care and that, in the span of one month, the State’s largest not-for-profit child services agency was able to place 3 children out of 150 to 200 in one region); Lawrence, Georgia Foster Care System in Crisis Due to Shortage of Foster Homes, ABC News Channel 9 (Feb. 15, 2017), <https://newschannel9.com/news/local/georgia-foster-care-system-in-crisis-due-to-shortage-of-foster-homes> (reporting on a county in Georgia with 116 children in need of care but only 14 foster families).

19 See App. to Pet. for Cert. 19a, 64a, 140a; see also App. 59 (plaintiff Cecilia Paul testifying that, at the time of the evidentiary hearing below, she had no children in her care due to the City’s policy).

20 *Id.*, at 182, 365–366 (describing Department of Human Services commissioner’s comments to CSS that “it would be great if we followed the teachings of Pope Francis” and that “things have changed since 100 years ago”).

21 The Court’s decision also depends on its own contested interpretation of local and state law. See *post*, at 1926 – 1930 (GORSUCH, J., concurring in judgment). Instead of addressing whether the City’s Fair Practices Ordinance is generally applicable, the Court concludes that the ordinance does not apply to CSS because CSS’s foster care certification services do not constitute “public accommodations” under the FPO. *Ante*, at 1880. Of course, this Court’s interpretation of state and local law is not binding on state courts. See, e.g., *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236, 61 S.Ct. 179, 85 L.Ed. 139 (1940); see also *Danforth v. Minnesota*, 552 U.S. 264, 291, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (ROBERTS, C. J., dissenting) (“State courts are the final arbiters of their own state law”). Should the Pennsylvania courts interpret the FPO differently, they would effectively abrogate the Court’s decision in this case.

22 See 102 Code Mass. Regs. 1.03(1) (1997) (prohibiting discrimination on the basis of sexual orientation as a condition of receiving the state license required to provide adoption services); San Francisco Admin. Code § 12B.1(a) (2021) (requiring that all contracts with the city include a provision “obligating the contractor not to discriminate on the basis of” sexual orientation and noting that the code section was last amended in 2000); D. C. Code §§ 2–1401.02(24), 2–1402.31 (2008) (prohibiting, on the basis of sexual orientation, the direct or indirect denial of “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations,” defined to include “establishments dealing with goods or services of any kind”); Ill. Comp. Stat., ch. 775, §§ 5/1–103(O–1), (Q), 5/5–101(A), 5/5–102 (2011) (prohibiting discrimination on the basis of sexual orientation in a “place of public accommodation,” defined by a list of non-exclusive examples).

23 See, e.g., Cal. Welf. & Inst. Code Ann. § 16013(a) (West 2018) (declaring that “all persons engaged in providing care and services to foster children, including ... foster parents [and] adoptive parents ... shall have fair and equal access to all available programs, services, benefits, and licensing processes, and shall not be

subjected to discrimination ... on the basis of ... sexual orientation"); D. C. Munic. Regs., tit. 29, § 6003.1(d) (2018) (providing that foster parents are "[t]o not be subject to discrimination as provided in the D. C. Human Rights Act," which prohibits discrimination on the basis of sexual orientation); see also 110 Code Mass. Regs. 1.09(1) (2008) ("No applicant for or recipient of Department [of Children and Families] services shall, on the ground of ... sexual orientation ... be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in connection with any service, program, or activity administered or provided by the Department").

24 This Court actually granted review twice: once, after the state court first held that the denial of benefits was unconstitutional, see *Smith v. Employment Div., Dept. of Human Resources*, 301 Ore. 209, 220, 721 P.2d 445, 451 (1986), cert. granted 480 U.S. 916, 107 S.Ct. 1368, 94 L.Ed.2d 684 (1987), and then again after the case was remanded for the state court to determine whether peyote consumption for religious use was unlawful under Oregon law, see *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 485 U.S. 660, 662, 673–674, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988). When the state court held that it was and reaffirmed its prior decision, 307 Ore. 68, 72–73, 763 P.2d 146, 147–148 (1988), the Court granted certiorari, 489 U.S. 1077, 109 S.Ct. 1526, 103 L.Ed.2d 832 (1989).

25 Justice BARRETT makes the surprising claim that "[a] longstanding tenet of our free exercise jurisprudence" that "pre-dates" *Smith* is "that a law burdening religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions." *Ante*, at 1883 (concurring opinion). If there really were such a "longstanding [pre-*Smith*] tenet," one would expect to find cases stating that rule, but Justice BARRETT does not cite even one such case. Instead, she claims to find support by reading between the lines of what the Court said in a footnote in *Sherbert*, 374 U.S. at 401, n. 4, 83 S.Ct. 1790, and a portion of the opinion in *Cantwell v. Connecticut*, 310 U.S. 296, 303–307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)). *Ante*, at 1883. But even a close interlinear reading of those cases yields no evidence of this supposed tenet.

In the *Sherbert* footnote, the Court responded to the dissent's argument that South Carolina law did not recognize any exemptions from the general eligibility requirement for unemployment benefits. 374 U.S. at 419–420, 83 S.Ct. 1790 (HARLAN, J., dissenting). The footnote expressed skepticism about this interpretation of South Carolina law, but it did not suggest that its analysis would have been any different if the dissent's interpretation were correct.

In *Cantwell*, the Court addressed the constitutionality of a state statute that generally prohibited the solicitation of funds for religious purposes unless a public official found in advance that the cause was authentically religious. See 310 U.S. at 300–302, 60 S.Ct. 900. The Court held that the Free Exercise Clause prohibited the State from conditioning permission to solicit funds on an administrative finding about a religious group's authenticity, but the Court did not suggest that a blanket ban on solicitation would have necessarily been sustained. On the contrary, it said that the State was "free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." *Id.*, at 307–308, 60 S.Ct. 900 (emphasis added). And the Court said not one word about "strict scrutiny," a concept that was foreign to Supreme Court case law at that time. See Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1284 (2007) ("Before 1960, what we would now call strict judicial scrutiny ... did not exist").

26 A particularly heartbreaking example was a case in which a judge felt compelled by *Smith* to reverse his previous decision holding the state medical examiner liable for performing the autopsy of a young Hmong man who had been killed in a car accident. The young man's parents were tortured by the thought that the autopsy would prevent their son from entering the afterlife. See *Yang v. Sturner*, 750 F.Supp. 558, 560 (D.R.I. 1990); see also 139 Cong. Rec. 9681 (1993) (remarks of Rep. Edwards). Members of Congress were also informed that veterans' cemeteries had refused to allow burial on weekends even when that was required by the deceased's religion, *id.*, at 9687 (remarks of Rep. Cardin), and that churches were prohibited from conducting services in areas zoned for commercial and industrial uses, *id.*, at 9684 (remarks of Rep. Schumer). In just the first three years after *Smith*, more than 50 cases were decided against religious claimants. 139 Cong. Rec., at 9685 (remarks of Rep. Hoyer); see also *id.*, at 9684 (remarks of Rep. Schumer) ("Smith was a devastating blow to religious freedom").

- 27 Although the First Amendment refers to “Congress,” we have held that the Fourteenth Amendment—which references the entire “State,” not just a legislature—makes the rights protected by the Amendment applicable to the States. *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343 (1934); *Cantwell*, 310 U.S. 296, 60 S.Ct. 900; *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947). And we have long applied that Amendment to actions taken by those responsible for enforcing the law. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) (considering First Amendment claim based on federal agency's decision); *Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (applying First Amendment against a state agency); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) (applying First Amendment against local board of education); see also U. S. Const., Amdt. 14, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” (emphasis added)).
- 28 The phrase “no law” applies to the freedom of speech and the freedom of the press, as well as the right to the free exercise of religion, and there is no reason to believe that its meaning with respect to all these rights is not the same. With respect to the freedom of speech, we have long held that “no law” does not mean that every restriction on what a person may say or write is unconstitutional. See, e.g., *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); see also *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 482, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of ROBERTS, C. J.); *Times Film Corp. v. Chicago*, 365 U.S. 43, 47–49, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961). Many restrictions on what a person could lawfully say or write were well established at the time of the adoption of the First Amendment and have continued to this day. Fraudulent speech, speech integral to criminal conduct, speech soliciting bribes, perjury, speech threatening physical injury, and obscenity are examples. See, e.g., *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190–191, 68 S.Ct. 591, 92 L.Ed. 628 (1948) (fraud); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 69 S.Ct. 684, 93 L.Ed. 834 (1949) (speech integral to criminal conduct); *McCutcheon v. Federal Election Comm’n*, 572 U.S. 185, 191–192, 134 S.Ct. 1434, 188 L.Ed.2d 468 (2014) (plurality opinion) (*quid pro quo* bribes); *United States v. Dunnigan*, 507 U.S. 87, 96–97, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993) (perjury); *Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (threats); *Miller*, 413 U.S. at 23, 93 S.Ct. 2607 (obscenity). The First Amendment has never been thought to have done away with all these rules. Alexander Meiklejohn reconciled this conclusion with the constitutional text: The First Amendment “does not forbid the abridging of speech. But, at the same time, it does forbid the abridging of the freedom of speech.” *Free Speech and Its Relation to Self-Government* 19 (1948) (emphasis deleted). In other words, the Free Speech Clause protects a right that was understood at the time of adoption to have certain defined limits. See *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49, and n. 10, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961). As explained below, the same is true of the Free Exercise Clause. See *infra*, at 1898 – 1903. No one has ever seriously argued that the Free Exercise Clause protects every conceivable religious practice or even every conceivable form of worship, including such things as human sacrifice.
- 29 Whatever the outer boundaries of the term “religion” as used in the First Amendment, there can be no doubt that CSS’s contested policy represents an exercise of “religion.”
- 30 See also N. Bailey, *Universal Etymological English Dictionary* (22d ed. 1770) (Bailey) (“to forbid, to bar, to keep from”); T. Dyche & W. Pardon, *A New General English Dictionary* (14th ed. 1771) (Dyche & Pardon) (“to forbid, bar, hinder, or keep from any thing”); 2 Johnson (6th ed. 1785) (“1. To forbid, to interdict by authority.... 2. To debar; to hinder”); 2 J. Ash, *The New & Complete Dictionary of the English Language* (2d ed. 1795) (Ash) (“To forbid, to interdict by authority; to debar, to hinder”); 2 N. Webster, *An American Dictionary of the English Language* (1828) (Webster) (“1. To forbid; to interdict by authority; ... 2. To hinder; to debar; to prevent; to preclude”); 2 J. Boag, *The Imperial Lexicon of the English Language* 275 (1850) (Boag) (“To forbid; to interdict by authority. To hinder; to debar; to prevent; to preclude”).
- 31 See also Bailey (“to practice”); Dyche & Pardon (“to practice or do a thing often; to employ one's self frequently in the same thing”); 1 Ash (“Practise, use, employment, a task, an act of divine worship”); 2 Johnson (9th ed.

- 1805) (“Practice; outward performance”; “Act of divine worship, whether publick or private”); 1 Webster (“1. Use, practice; ... 2. Practice; performance; as the exercise of religion ... 10. Act of divine worship”); 1 Boag 503 (“Use; practice; ... Practice; performance ... Act of divine worship”).
- 32 See also Dyche & Pardon (“at liberty, that can do or refuse at his pleasure, that is under no restraint”); 1 Ash (“Having liberty,” “unrestrained,” “exempt”); 1 Webster (“1. Being at liberty; not being under necessity or restraint, physical or moral ... 5. Unconstrained; unrestrained; not under compulsion or control”); 1 Boag 567–568 (“Being at liberty; not being under necessity or restraint, physical or moral ... Unconstrained; unrestrained, not under compulsion or control. Permitted; allowed; open; not appropriated. Not obstructed”).
- 33 See, e.g., Del. Declaration of Rights § 3 (1776), in *The Complete Bill of Rights* 15 (N. Cogan ed. 1997) (Cogan) (“That all persons professing the Christian religion ought forever to enjoy *equal rights and privileges* in this state” (emphasis added)); Md. Declaration of Rights, Art. 33 (1776), in *id.*, at 17 (“[A]ll persons professing the christian religion are *equally entitled* to protection in their religious liberty” (emphasis added)); N. Y. Const., Art. XXXVIII (1777), in *id.*, at 26 (“[T]he free Exercise and Enjoyment of religious Profession and Worship, *without Discrimination or Preference*, shall forever hereafter be allowed within this State to all Mankind” (emphasis added)); S. C. Const., Art. VIII, § 1 (1790), in *id.*, at 41 (“The free exercise and enjoyment of religious profession and worship, *without discrimination or preference*, shall, forever hereafter, be allowed within this state to all mankind” (emphasis added)).
- 34 See, e.g., McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990) (McConnell, Origins); McConnell, Free Exercise Revisionism 1109; McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 Wm. & Mary L. Rev. 819 (1998) (McConnell, Freedom From Persecution); Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992) (Hamburger, Religious Exemption); Hamburger, *More Is Less*, 90 Va. L. Rev. 835 (2004) (Hamburger, More Is Less); Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313 (1996); Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245 (1991); Campbell, Note, *A New Approach to Nineteenth Century Religious Exemption Cases*, 63 Stan. L. Rev. 973 (2011) (Campbell, A New Approach); Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. Rev. 591 (1991); Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994); Lombardi, *Nineteenth-Century Free Exercise Jurisprudence and the Challenge of Polygamy: The Relevance of Nineteenth-Century Cases and Commentaries for Contemporary Debates About Free Exercise Exemptions*, 85 Ore. L. Rev. 369 (2006) (Lombardi, Free Exercise); Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence From the First Congress*, 31 Harv. J. L. & Pub. Pol'y 1083 (2008) (Muñoz, Original Meaning); Nestor, Note, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 Harv. J. L. & Pub. Pol'y 971 (2019) (Nestor); M. Nussbaum, *Liberty of Conscience* 120–130 (2008); Walsh, *The First Free Exercise Case*, 73 Geo. Wash. L. Rev. 1 (2004) (Walsh).
- 35 McConnell, Origins 1425 (describing Lord Baltimore's directive to the new Protestant governor and councilors of Maryland to refrain from interfering with the “free exercise” of Christians, particularly Roman Catholics).
- 36 Act Concerning Religion (1649), in Cogan 17; see also McConnell, Origins 1425.
- 37 See Second Charter of Carolina (1665), in Cogan 27–28 (recognizing the right of persons to “freely and quietly have and enjoy ... their Judgments and Consciences, in Matters of Religion” and declaring that “no Person ... shall be in any way molested, punished, disquieted, or called in Question, for any Differences in Opinion, or Practice in Matters of religious Concernments, who do not actually disturb the Civil Peace”); Charter of Delaware, Art. I (1701), in *id.*, at 15 (ensuring “[t]hat no person ... who shall confess and acknowledge One Almighty God ... shall be in any case molested or prejudiced, in his ... person or estate, because of his ... conscientious persuasion or practice, nor ... to do or suffer any other act or thing, contrary to their religious persuasion”); Concession and Agreement of the Lords Proprietors of the Province of New Caesarea, or New-Jersey (1664), in *id.*, at 23 (declaring the right of all persons to “freely and fully have and enjoy ... their Judgments and Consciences in matters of Religion throughout the said Province” and ensuring “[t]hat

no person ... at any Time shall be any ways molested, punished, disquieted or called in question for any Difference in Opinion or Practice in matter of Religious Concernments, who do not actually disturb the civil Peace of the said Province"); Concessions and Agreements of West New-Jersey, ch. XVI (1676), in *id.*, at 24 (providing that "no Person ... shall be any ways upon any pretence whatsoever, called in Question, or in the least punished or hurt, either in Person, Estate, or Privilege, for the sake of his Opinion, Judgment, Faith or Worship towards God in Matters of Religion"); Laws of West New-Jersey, Art. X (1681), *ibid.* ("That Liberty of Conscience in Matters of Faith and Worship towards God, shall be granted to all People within the Province aforesaid; who shall live peaceably and quietly therein"); Fundamental Constitutions for East New-Jersey, Art. XVI (1683), *ibid.* ("All Persons living in the Province who confess and acknowledge the one Almighty and Eternal God, and holds themselves obliged in Conscience to live peaceably and quietly in a civil Society, shall in no way be molested or prejudged for their Religious Perswasions and Exercise in matters of Faith and Worship"); New York Act Declaring ... Rights & Priviledges (1691), in *id.*, at 25 ("That no Person ... shall at any time be any way molested, punished, disturbed, disquieted or called in question for any Difference in Opinion, or matter of Religious Concernment, who do not under that pretence disturb the Civil Peace of the Province"); Charter of Privileges Granted by William Penn (1701), in *id.*, at 31–32 (declaring that "no Person ... who shall confess and acknowledge *One* almighty God ... and profess ... themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced ... because of ... their consciencious [*sic*] Persuasion or Practice, nor ... suffer any other Act or Thing, contrary to their religious Persuasion").

38 See *infra*, at 1901 – 1902, and n. 43; N. J. Const., Art. XVIII (1776), in Cogan 25 ("THAT no Person shall ever within this Colony be deprived of the inestimable Privilege of worshipping Almighty GOD in a Manner agreeable to the Dictates of his own Conscience; nor under any Pretence whatsoever compelled to attend any Place of Worship contrary to his own Faith and Judgment"); N. C. Decl. of Rights § XIX (1776), in *id.*, at 30 ("That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Conscience"); Pa. Const., Declaration of Rights of the Inhabitants of the State of Pa., Art. II (1776), in *id.*, at 32 ("That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought to or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship"); Va. Declaration of Rights, Art. XVI (1776), in *id.*, at 44 ("THAT religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity, towards each other"); see also Vt. Const., ch. 1, § 3 (1777), in *id.*, at 41 ("THAT all Men have a natural and unalienable Right to worship ALMIGHTY GOD according to the Dictates of their own Consciences and Understanding ... and that no Man ought or of Right can be compelled to attend any religious Worship, or erect, or support any Place of Worship, or maintain any Minister contrary to the Dictates of his Conscience; nor can any Man who professes the Protestant Religion, be justly deprived or abridged of any civil Right, as a Citizen, on Account of his religious Sentiment, or peculiar Mode of religious Worship, and that no Authority can, or ought to be vested in, or assumed by any Power whatsoever, that shall in any Case interfere with, or in any Manner control the Rights of Conscience, in the free Exercise of religious Worship").

39 See *McDonald v. Chicago*, 561 U.S. 742, 769, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010); see also Creating the Bill of Rights 281, 282 (H. Veit., K. Bowling, & C. Bickford eds. 1991); 1 A. Kelly, W. Harbison, & H. Belz, *The American Constitution: Its Origins and Development* 110, 118 (7th ed. 1991).

40 See Charter of Rhode Island and Providence Plantations (1663), in Cogan 34 (protecting the free exercise of religion so long as residents "do not Actually disturb the Civil Peace of Our said Colony" and "Behav[e]

themselves Peaceably and Quietly, And not Using This Liberty to Licentiousness and Prophaneness; nor to the Civil Injury, or outward Disturbance of others” (emphasis deleted)).

41 See Second Charter of Carolina (1665), in *id.*, at 27–28 (guaranteeing free exercise to persons “who do not actually disturb the Civil Peace” and who “behav[e] themselves peaceably, and [do] not us[e] this Liberty to Licentiousness, nor to the Civil Injury, or outward Disturbance of others”).

42 New York Act Declaring ... Rights & Priviledges (1691), in *id.*, at 25 (protecting the right to free exercise for all persons “who do not under that pretence disturb the Civil Peace” and who “behav[e] themselves peaceably, quietly, modestly and Religiously, and [do] not us[e] this Liberty to Licentiousness, nor to the civil Injury or outward Disturbance of others”).

43 Del. Declaration of Rights §§ 2–3 (1776), in *id.*, at 15 (“That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under colour of religion, any man *disturb the peace, the happiness or safety of society*” (emphasis added)); Md. Declaration of Rights, Art. 33 (1776), in *id.*, at 17 (“That as it is the duty of every man to worship God in such manner as he thinks most acceptable to him, all persons professing the christian religion are equally entitled to protection in their religious liberty, wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice, unless under colour of religion any man shall *disturb the good order, peace or safety of the state*, or shall *infringe the laws of morality, or injure others*, in their natural, civil or religious rights” (emphasis added)); Mass. Const., pt. I, Art. II (1780), in *id.*, at 20–21 (“It is the right as well as the duty of all men in society, publickly, and at stated seasons, to worship the **SUPREME BEING**, the Great Creator and Preserver of the Universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping **GOD** in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not *disturb the publick peace, or obstruct others in their religious worship*” (emphasis added)); N. H. Const., pt. I, Art. V (1783), in *id.*, at 22–23 (“Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience, ... provided he doth not *disturb the public peace, or disturb others in their religious worship*” (emphasis added)); N. Y. Const., Art. XXXVIII (1777), in *id.*, at 26 (“[T]he free Exercise and Enjoyment of religious Profession and Worship, without Discrimination or Preference, shall forever hereafter be allowed within this State to all Mankind. *Provided*, That the Liberty of Conscience hereby granted, shall not be so construed, as to *excuse Acts of Licentiousness*, or justify Practices inconsistent with *the Peace or Safety of this State*” (some emphasis added)); Charter of Rhode Island and Providence Plantations (1663), in *id.*, at 34 (guaranteeing free exercise for matters that “do not Actually *disturb the Civil Peace* of Our said Colony” so long as persons “[b]ehav[e] themselves *Peaceably and Quietly, And [do] not Us[e] This Liberty to Licentiousness and Prophaneness*; nor to the Civil Injury, or outward Disturbance of others” (some emphasis added)); S. C. Const., Art. VIII, § 1 (1790), in *id.*, at 41 (“The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall, forever hereafter, be allowed within this state to all mankind; provided that the liberty of conscience thereby declared shall not be so construed as to *excuse acts of licentiousness*, or justify practices inconsistent with *the peace or safety of this state*” (emphasis added)).

44 See also 2 Webster (“1. In a *general sense*, a state of quiet or tranquility; freedom from disturbance or agitation.... 2. Freedom from war with a foreign nation; public quiet. 3. Freedom from internal commotion or civil war. 4. Freedom from private quarrels, suits or disturbance. 5. Freedom from agitation or disturbance by the passions, as from fear, terror, anger, anxiety or the like; quietness of mind; tranquillity; calmness; quiet of conscience.... 6. Heavenly rest; the happiness of heaven.... 7. Harmony; concord; a state of reconciliation between parties at variance. 8. Public tranquility; that quiet, order and security which is guaranteed by the laws; as, to keep the *peace*; to break the *peace*”); 2 Ash (“Rest, quiet, respite from war, respite from tumult; reconciliation, an accommodation of differences”).

- 45 See also Bailey (“Freedom from Danger, Custody, Security”); 2 Ash (“Security from danger, freedom from hurt; custody, security from escape”); 2 Webster (“[1.] Freedom from danger or hazard 2. Exemption from hurt, injury or loss.... 3. Preservation from escape; close custody.... 4. Preservation from hurt”).
- 46 4 W. Blackstone, Commentaries on the Laws of England 59 (1769).
- 47 3 *id.*, at 73–74 (1768).
- 48 *Id.*, at 141–142.
- 49 *Id.*, at 164.
- 50 4 *id.*, at 163.
- 51 *Id.*, at 160 (emphasis deleted).
- 52 *Id.*, at 169 (emphasis deleted).
- 53 *Id.*, at 160 (emphasis deleted).
- 54 Some late 18th century and early 19th century dictionaries provided special definitions of the term “peace” as used in the law, and these definitions fit the offenses on Blackstone’s list. See, e.g., 1 Johnson (6th ed. 1785) (“That general security and quiet which the king warrants to his subjects, and of which he therefore avenges the violation; every forcible injury is a breach of the king’s peace” (emphasis deleted)); 5 G. Jacob, Law-Dictionary (1811) (“[P]articularly in law, [‘peace’] intends a quiet behaviour towards the King and his Subjects”); Bailey (defining “peace” in the “*Law Sense*” as “quiet and inoffensive Behaviour towards King and Subject”).
- 55 Such an interpretation would also clash with the way in which the scope of state legislative power was understood. If any violation of the law had been regarded as a breach of public peace or safety, there would have been no need for the lawmaking authority of a state legislature to extend any further, but there is no evidence that state legislative authority was understood that way. New York’s 1777 Constitution demonstrates the point. As noted above, it protected free exercise unless a person invoked that protection to “excuse Acts of Licentiousness, or justify Practices inconsistent with the Peace or Safety of this State.” Art. XXXVIII, in Cogan 26. But the New York Constitution authorized the legislature to enact laws to further broader aims, including “good government, welfare, and prosperity.” Art. XIX, in 5 Federal and State Constitutions 2633 (F. Thorpe ed. 1909). That authority obviously goes well beyond the prohibition of “Practices inconsistent with” the “Peace” and “Safety” (or “Licentiousness”). See McConnell, Freedom from Persecution 835–836. In like manner, State Constitutions and other declarations of rights commonly proclaimed that government should pursue broader goals, such as the promotion of “prosperity” and “happiness.” See Nestor, Table III: Comparing the Provisos to the Scope of Legislative Power (online source archived at www.supremecourt.gov).
- 56 Mayer, The Continental Army, in A Companion to the American Revolution 309 (J. Greene & J. Pole eds. 2000); R. Wright, The Continental Army 153–154, 163 (1983).
- 57 See The Oxford Companion to American Military History 606–608, 611 (J. Chambers ed. 1999).
- 58 See Declaration of Independence ¶ 31 (“[W]e mutually pledge to each other our Lives, our Fortunes and our sacred Honor”); see also P. Maier, American Scripture 152–153 (1997); Boyd, The Declaration of Independence: The Mystery of the Lost Original, 100 Pa. Mag. Hist. & Bio. 438, 445 (1976); L. Montross, The Reluctant Rebels 165 (1970); E. Burnett, The Continental Congress 196–197 (1941). Of the 56 signers of the Declaration of Independence, 9 were taken as prisoners of war; 2 had sons who died; 3 had sons who were taken captive; 9 had their homes destroyed; and 13 saw their homes occupied, confiscated, or damaged. M. Novak, On Two Wings: Humble Faith and Common Sense at the American Founding 157–158 (2002).
- 59 See Barclay, [The Historical Origins of Judicial Religious Exemptions](#), 96 Notre Dame L. Rev. 55, 69–73 (2020); McConnell, Free Exercise Revisionism 1118; Campbell, A New Approach 978, 987; Lombardi, Free Exercise 385; Campbell, [Religious Neutrality in the Early Republic](#), 24 Regent U. L. Rev. 311, 314–315, n. 20 (2012).
- 60 W. Newman & P. Halvorson, Atlas of American Religion 18 (2000).
- 61 *Ibid.*
- 62 The Covenanters originated in Scotland, where they opposed the Stuart kings’ right to rule over the Presbyterian Church. See Emery, [Church and State in the Early Republic: The Covenanters’ Radical Critique](#),

25 J. L. & Religion 487, 488 (2009). They immigrated to the United States and, in the 1790s, organized a branch of the Reformed Presbyterian Church. *Id.*, at 489. Members subscribe to two foundational documents—the Scottish National Covenant of 1638 and the Solemn League and Covenant of 1643—and believe in the supremacy of God over man in both civil and ecclesiastical matters. *Id.*, at 488; see also J. McFeeters, The Covenanters in America: The Voice of Their Testimony on Present Moral Issues 57 (1892).

63 Privileged Communications to Clergymen, 1 Cath. Law. 199, 207–209 (1955).

64 See also Walsh 41; Campbell, A New Approach 992, n. 99; Lombardi, Free Exercise 408, and n. 152.

65 See McFeeters, The Covenanters in America 121–129; *id.*, at 122 (Covenanters “must refuse upon the grounds of honor, conscience, and consistency, to be identified by oath or ballot with such a political system”); *id.*, at 129 (Covenanters “decline to take any responsible part in the administration of civil power”); W. Gibson & A. McLeod, Reformation Principles Exhibited, by the Reformed Presbyterian Church in the United States of America 138 (1807) (“The juror voluntarily places himself upon oath, under the direction of a law which is immoral. The Reformed Presbytery declare this practice inconsistent with their Testimony, and warn Church-members against serving on juries under the direction of the constituted courts of law”).

66 See O’Neill, Early History of the Judiciary of South Carolina, p. xi, in 1 Biographical Sketches of the Bench and Bar of South Carolina (1859); Walsh 41–42 (explaining that South Carolina “dismantled” the “five-member constitutional court” that decided *Willson* and replaced it with a new high court—the South Carolina Court of Appeals—which concurred in the opinion in *Farnandis*).

67 Hamburger, Religious Exemption 928, and n. 56 (quoting the statement of Rep. Boudinot).

68 *Id.*, at 928, and n. 57 (quoting the statement of Rep. Benson).

69 Muñoz, Original Meaning 1115.

70 Several State Constitutions contained both Free Exercise Clause analogs and provisions protecting conscientious objectors, and this has been cited as evidence that the free-exercise analogs did not confer any right to exemptions. See *id.*, at 1118–1119. This argument is unpersuasive for the reasons explained above.

71 The family name was apparently misspelled in the case caption. See Sutton, *Barnette, Frankfurter, and Judicial Review*, 96 Marq. L. Rev. 133, 134 (2012).

72 See also N. Feldman, Scorpions 179 (2010).

73 *Ibid.*

74 *Id.*, at 180.

75 This discussion does not suggest that *Reynolds* should be overruled.

76 “The clear implication was that a ‘direct’ interference would have been unconstitutional.” McConnell, Free Exercise Revisionism 1125.

77 Our strained attempt to square the ministerial exception with *Smith* highlights the tension between the two decisions. *Smith* held that a generally applicable law satisfies the First Amendment if “prohibiting the exercise of religion ... is not the object of the [government action] but merely the incidental effect.” 494 U.S. at 878, 110 S.Ct. 1595. But the ADA’s effect on religion in *Hosanna-Tabor* was “incidental” in the sense in which the term was used in *Smith*. The opinion in *Hosanna-Tabor* tried to distinguish *Smith* as involving only “outward physical acts” instead of “the faith and mission of the church itself.” 565 U.S. at 190, 132 S.Ct. 694. But a prohibition of peyote use surely affected “the faith and mission” of the Native American Church, which regards the ingestion of peyote as a sacrament.

78 Recently, some lower courts have proceeded under yet another approach, which analyzes whether the claims presented are sufficiently similar to those raised in the cases that this Court purported to distinguish in *Smith*. See *Henderson v. McMurray*, 987 F.3d 997, 1006–1007 (C.A.11 2021); see also *Illinois Bible Colleges Assn. v. Anderson*, 870 F.3d 631, 641 (C.A.7 2017).

79 App. 367–369 (Commissioner Figueora testifying that she was appointed by the mayor, reports ultimately to him, and considers herself part of his administration); Phila. Home Rule Charter, Art. IX, ch. 2, § 9–200 (Removal of Appointive Officers).

80 App. 182, 365–366. Apart from the statements made by City officials, other evidence suggested that the City was targeting CSS. For instance, the City changed its justification for the closure of intake to CSS numerous

times. Brief for Petitioners 12–15 (describing six different justifications). And although the City's stated harm was that CSS's process for certifying *new* families was discriminatory, it responded by prohibiting placement with all CSS families, including those already certified. The City's response therefore appears to “proscribe more religious conduct than is necessary to achieve [its] stated ends.” *Lukumi*, 508 U.S. at 538, 113 S.Ct. 2217.

- 81 See, e.g., McConnell, Origins 1409; McConnell, Free Exercise Revisionism 1109; McConnell, Freedom From Persecution 819; Hamburger, Religious Exemption 915; Hamburger, More Is Less 835; Laycock, 7 J. Contemp. Legal Issues 313; Bradley, 20 Hofstra L. Rev. 245; Campbell, A New Approach 973; Kmiec, 59 UMKC L. Rev. 591; Lash, 88 Nw. U. L. Rev. 1106; Lombardi, Free Exercise 369; Muñoz, Original Meaning 1083; Nestor 971; Nussbaum, Liberty of Conscience, at 120–130; Walsh 1.

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EXHIBIT 9

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115 S.Ct. 2338

Supreme Court of the United States

John J. HURLEY and South Boston
Allied War Veterans Council, Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND
BISEXUAL GROUP OF BOSTON, etc., et al.

No. 94-749.

Argued April 25, 1995.

Decided June 19, 1995.

Synopsis

Gay, lesbian, and bisexual descendants of Irish immigrants who were joined together as group to march in St. Patrick's Day parade sued parade's private organizers, alleging that organizers' exclusion of group from parade violated Massachusetts' public accommodation law, which prohibits discrimination on account of, *inter alia*, sexual orientation, in places of public accommodation. After state trial court rendered judgment for plaintiffs, defendants appealed. The Massachusetts Supreme Judicial Court affirmed, 418 Mass. 238, 636 N.E.2d 1293, and certiorari was granted, U.S. , 115 S.Ct. 714, 130 L.Ed.2d 621. The Supreme Court, Justice Souter, held that state courts' application of public accommodation law to essentially require defendants to alter expressive content of their parade violated First Amendment.

Reversed and remanded.

Procedural Posture(s): On Appeal.****2339 Syllabus***

***557** Petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various veterans groups, was authorized by the city of Boston to organize and conduct the St. Patrick's Day-Evacuation Day Parade. The Council refused a place in the 1993 event to respondent GLIB, an organization formed for the purpose of marching in the parade in order to express its members' pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York St. Patrick's Day parade.

GLIB and some of its members filed this suit in state court, alleging that the denial of their application to march violated, *inter alia*, a state law prohibiting discrimination on account of sexual orientation in places of public accommodation. In finding such a violation and ordering the Council to include GLIB in the parade, the trial court, among other things, concluded that the parade had no common theme other than the involvement of the participants, and that, given the Council's lack of selectivity in choosing parade participants and its failure to circumscribe the marchers' messages, the parade lacked any expressive purpose, such that GLIB's inclusion therein would not violate the Council's First Amendment rights. The Supreme Judicial Court of Massachusetts affirmed.

Held: The state courts' application of the Massachusetts public accommodations law to require private citizens who organize a parade to include among the marchers a group imparting a message that the organizers do not wish to convey violates the First Amendment. Pp. 2344-2351.

558** a) Confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the realm of non-expressive conduct, this Court has a constitutional duty to conduct an independent examination of the record as a whole, without deference to those courts, to assure that *2340** their judgment does not constitute a forbidden intrusion on the field of free expression. See, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 729, 11 L.Ed.2d 686. P. 2344.

(b) The selection of contingents to make a parade is entitled to First Amendment protection. Parades such as petitioners' are a form of protected expression because they include marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Cf., *e.g.*, *Gregory v. Chicago*, 394 U.S. 111, 112, 89 S.Ct. 946, 946, 22 L.Ed.2d 134. Moreover, such protection is not limited to a parade's banners and songs, but extends to symbolic acts. See, *e.g.*, *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 642, 63 S.Ct. 1178, 1182, 1187, 87 L.Ed. 1628. Although the Council has been rather lenient in admitting participants to its parade, a private speaker does not forfeit constitutional protection simply by combining multifarious voices, by failing to edit their themes to isolate a specific message as the exclusive subject matter of the speech, or by failing to generate, as an original matter, each item featured in the communication. Thus, petitioners are entitled to protection under the First Amendment. GLIB's participation as a unit

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in the parade was equally expressive, since the organization was formed to celebrate its members' sexual identities and for related purposes. Pp. 2344–2346.

(c) The Massachusetts law does not, as a general matter, violate the First or Fourteenth Amendments. Its provisions are well within a legislature's power to enact when it has reason to believe that a given group is being discriminated against. And the statute does not, on its face, target speech or discriminate on the basis of its content. Pp. 2346–2347.

(d) The state court's application, however, had the effect of declaring the sponsors' speech itself to be the public accommodation. Since every participating parade unit affects the message conveyed by the private organizers, the state courts' peculiar application of the Massachusetts law essentially forced the Council to alter the parade's expressive content and thereby violated the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say. Petitioners' claim to the benefit of this principle is sound, since the Council selects the expressive units of the parade from potential participants and clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another, free from state interference. The constitutional violation is not saved by *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497. The Council is a speaker in its own right; a parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience; and there is no assertion here that some speakers will be destroyed in the absence of *559 the Massachusetts law. Nor has any other legitimate interest been identified in support of applying that law in the way done by the state courts to expressive activity like the parade. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87, 100 S.Ct. 2035, 2044, 64 L.Ed.2d 741, and *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 13, 108 S.Ct. 2225, 2234, 101 L.Ed.2d 1, distinguished. Pp. 2347–2351.

418 Mass. 238, 636 N.E.2d 1293 (1994), reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

Attorneys and Law Firms

Chester Darling, for petitioners.

John Ward, for respondents.

Opinion

Justice SOUTER delivered the opinion of the Court.

The issue in this case is whether Massachusetts may require private citizens who **2341 organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment.

*560 I

March 17 is set aside for two celebrations in South Boston. As early as 1737, some people in Boston observed the feast of the apostle to Ireland, and since 1776 the day has marked the evacuation of royal troops and Loyalists from the city, prompted by the guns captured at Ticonderoga and set up on Dorchester Heights under General Washington's command. Washington himself reportedly drew on the earlier tradition in choosing “St. Patrick” as the response to “Boston,” the password used in the colonial lines on evacuation day. See J. Crimmins, *St. Patrick's Day: Its Celebration in New York and other American Places, 1737–1845*, pp. 15, 19 (1902); see generally 1 H. Commager & R. Morris, *The Spirit of 'Seventy Six*, pp. 138–183 (1958); *The American Book of Days* 262–265 (J. Hatch ed., 3d ed. 1978). Although the General Court of Massachusetts did not officially designate March 17 as Evacuation Day until 1938, see Mass.Gen.Laws § 6:12K (1992), the City Council of Boston had previously sponsored public celebrations of Evacuation Day, including notable commemorations on the centennial in 1876, and on the 125th anniversary in 1901, with its parade, salute, concert, and fireworks display. See *Celebration of the Centennial Anniversary of the Evacuation of Boston by the British Army* (G. Ellis ed. 1876); *Irish–American Gay, Lesbian and Bisexual Group of Boston v. City of Boston et al.*, Civ.Action No. 92–1518A (Super.Ct., Mass., Dec. 15, 1993), reprinted in App. to Pet. for Cert. B1, B8–B9.

The tradition of formal sponsorship by the city came to an end in 1947, however, when Mayor James Michael Curley himself granted authority to organize and conduct the St. Patrick's Day–Evacuation Day Parade to the petitioner South Boston

Allied War Veterans Council, an unincorporated association of individuals elected from various South Boston veterans groups. Every year since that time, the Council has applied for and received a permit for the parade, which at times has included as many as 20,000 marchers and drawn *561 up to 1 million watchers. No other applicant has ever applied for that permit. *Id.*, at B9. Through 1992, the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding.

In 1992, a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together with other supporters to form the respondent organization, GLIB, to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade. *Id.*, at B3; App. 51. Although the Council denied GLIB's application to take part in the 1992 parade, GLIB obtained a state-court order to include its contingent, which marched "uneventfully" among that year's 10,000 participants and 750,000 spectators. App. to Pet. for Cert. B3, and n. 4.

In 1993, after the Council had again refused to admit GLIB to the upcoming parade, the organization and some of its members filed this suit against the Council, the individual petitioner John J. "Wacko" Hurley, and the city of Boston, alleging violations of the State and Federal Constitutions and of the state public accommodations law, which prohibits "any distinction, discrimination or restriction on account of ... sexual orientation ... relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass.Gen.Laws § 272:98 (1992). After finding that "[f]or at least the past 47 years, the Parade has traveled the same basic route along the public streets of South Boston, providing entertainment, amusement, and recreation to participants and spectators alike," App. to Pet. for Cert. B5–B6, the state trial court ruled that the parade fell within the statutory definition of a public accommodation, which includes "any place ... which is open to and accepts or solicits the patronage of the general public" *562 and, without limiting **2342 the generality of this definition, whether or not it be ... (6) a boardwalk or other public highway [or] ... (8) a place of public amusement, recreation, sport, exercise or entertainment," Mass.Gen.Laws § 272:92A (1992). The court found that the Council had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had

occasionally admitted groups who simply showed up at the parade without having submitted an application, and did "not generally inquire into the specific messages or views of each applicant." App. to Pet. for Cert. B8–B9. The court consequently rejected the Council's contention that the parade was "private" (in the sense of being exclusive), holding instead that "the lack of genuine selectivity in choosing participants and sponsors demonstrates that the Parade is a public event." *Id.*, at B6. It found the parade to be "eclectic," containing a wide variety of "patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes," as well as conflicting messages. *Id.*, at B24. While noting that the Council had indeed excluded the Ku Klux Klan and ROAR (an antibusing group), *id.*, at B7, it attributed little significance to these facts, concluding ultimately that "[t]he only common theme among the participants and sponsors is their public involvement in the Parade," *id.*, at B24.

The court rejected the Council's assertion that the exclusion of "groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values," *id.*, at B3, and found the Council's "final position [to be] that GLIB would be excluded because of its values and its message, *i.e.*, its members' sexual orientation," *id.*, at B4, n. 5, citing Tr. of Closing Arg. 43, 51–52 (Nov. 23, 1993). This position, in the court's view, was not only violative of the public accommodations law but "paradoxical" as well, since "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." App. to Pet. for *563 Cert. B24. The court rejected the notion that GLIB's admission would trample on the Council's First Amendment rights since the court understood that constitutional protection of any interest in expressive association would "requir[e] focus on a specific message, theme, or group" absent from the parade. *Ibid.* "Given the [Council's] lack of selectivity in choosing participants and failure to circumscribe the marchers' message," the court found it "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." *Id.*, at B25. It concluded that the parade is "not an exercise of [the Council's] constitutionally protected right of expressive association," but instead "an open recreational event that is subject to the public accommodations law." *Id.*, at B27.

The court held that because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council's right to expressive association was only "incidental" and "no

greater than necessary to accomplish the statute's legitimate purpose" of eradicating discrimination. *Id.*, at B25, citing *Roberts v. United States Jaycees*, 468 U.S. 609, 628–629, 104 S.Ct. 3244, 3255–3256, 82 L.Ed.2d 462 (1984). Accordingly, it ruled that "GLIB is entitled to participate in the Parade on the same terms and conditions as other participants." App. to Pet. for Cert. B27.¹

The Supreme Judicial Court of Massachusetts affirmed, seeing nothing clearly erroneous in the trial judge's findings *564 that GLIB was excluded from the parade based on the sexual orientation of its members, that it was impossible to detect an expressive purpose in the parade, that there was no state action, and that the parade was a public accommodation within the meaning of § 272:92A. *Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston*, 418 Mass. 238, 242–248, 636 N.E.2d 1293, 1295–1298 (1994).² Turning to petitioners' First Amendment claim that application of the public accommodations law to the parade violated their freedom of speech (as distinguished from their right to expressive association, raised in the trial court), the court's majority held that it need not decide on the particular First Amendment theory involved "because, as the [trial] judge found, it is 'impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.' " *Id.*, at 249, 636 N.E.2d, at 1299 (footnote omitted). The defendants had thus failed at the trial level "to demonstrate that the parade truly was an exercise of ... First Amendment rights," *id.*, at 250, 636 N.E.2d, at 1299, citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, n. 5, 104 S.Ct. 3065, 3069, n. 5, 82 L.Ed.2d 221 (1984), and on appeal nothing indicated to the majority of the Supreme Judicial Court that the trial judge's assessment of the evidence on this point was clearly erroneous, 418 Mass., at 250, 636 N.E.2d, at 1299. The court rejected petitioners' further challenge to the law as overbroad, holding that it does not, on its face, regulate speech, does not let public officials examine the content of speech, and would not be interpreted as reaching speech. *Id.*, at 251–252, 636 N.E.2d, at 1300. Finally, the court rejected the challenge that the public accommodations law was unconstitutionally vague, holding that this case did not present an issue of speech and that the law gave persons of *565 ordinary intelligence a reasonable opportunity to know what was prohibited. *Id.*, at 252, 636 N.E.2d, at 1300–1301.

Justice Nolan dissented. In his view, the Council "does not need a narrow or distinct theme or message in its parade for it to be protected under the First Amendment." *Id.*, at 256, 636

N.E.2d, at 1303. First, he wrote, even if the parade had no message at all, GLIB's particular message could not be forced upon it. *Id.*, at 257, 636 N.E.2d, at 1303, citing *Wooley v. Maynard*, 430 U.S. 705, 717, 97 S.Ct. 1428, 1436, 51 L.Ed.2d 752 (1977) (state requirement to display "Live Free or Die" on license plates violates First Amendment). Second, according to Justice Nolan, the trial judge clearly erred in finding the parade devoid of expressive purpose. 418 Mass., at 257, 636 N.E.2d, at 1303. He would have held that the Council, like any expressive association, cannot be barred from excluding applicants who do not share the views the Council wishes to advance. *Id.*, at 257–259, 636 N.E.2d, at 1303–1304, citing *Roberts, supra*. Under either a pure speech or associational theory, the State's purpose of eliminating discrimination on the basis of sexual orientation, according to the dissent, could be achieved by more narrowly drawn means, such as ordering admission of individuals regardless of sexual preference, without taking the further step of prohibiting the Council from editing the views expressed in their parade. 418 Mass., at 256, 258, 636 N.E.2d, at 1302, 1304. In Justice Nolan's opinion, because GLIB's message was separable from the status of its members, such a narrower order would accommodate the State's interest without the likelihood of infringing on the Council's First Amendment rights. Finally, he found clear error in the trial judge's equation of exclusion on the basis of GLIB's message with exclusion on the basis of its members' sexual orientation. To the dissent this appeared false in the light of "overwhelming evidence" that the Council objected to GLIB on account of its message and a dearth of testimony or documentation indicating that sexual orientation was the bar to admission. *566 *Id.*, at 260, 636 N.E.2d, at 1304. The dissent accordingly concluded that the Council had not even violated the State's public accommodations law.

We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment. 513 U.S. 1071, 115 S.Ct. 714, 130 L.Ed.2d 621 (1995). We hold that it does and reverse.

**2344 II

Given the scope of the issues as originally joined in this case, it is worth noting some that have fallen aside in the course of the litigation, before reaching us. Although the Council presents us with a First Amendment claim, respondents do not. Neither do they press a claim that the Council's action has denied them equal protection of the laws in violation

of the Fourteenth Amendment. While the guarantees of free speech and equal protection guard only against encroachment by the government and “erec[t] no shield against merely private conduct,” *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948); see *Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S.Ct. 1029, 1033, 47 L.Ed.2d 196 (1976), respondents originally argued that the Council's conduct was not purely private, but had the character of state action. The trial court's review of the city's involvement led it to find otherwise, however, and although the Supreme Judicial Court did not squarely address the issue, it appears to have affirmed the trial court's decision on that point as well as the others. In any event, respondents have not brought that question up either in a cross-petition for certiorari or in their briefs filed in this Court. When asked at oral argument whether they challenged the conclusion by the Massachusetts' courts that no state action is involved in the parade, respondents' counsel answered that they “do not press that issue here.” Tr. of Oral Arg. 22. In this Court, then, their claim for inclusion in the parade rests solely on the Massachusetts public accommodations law.

*567 There is no corresponding concession from the other side, however, and certainly not to the state courts' characterization of the parade as lacking the element of expression for purposes of the First Amendment. Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984). The “requirement of independent appellate review ... is a rule of federal constitutional law,” *id.*, at 510, 104 S.Ct., at 1965, which does not limit our deference to a trial court on matters of witness credibility, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562 (1989), but which generally requires us to “review the finding of facts by a State court ... where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts,” *Fiske v. Kansas*, 274 U.S. 380, 385–386, 47 S.Ct. 655, 656–657, 71 L.Ed. 1108 (1927). See also *Niemotko v. Maryland*, 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267 (1951); *Jacobellis v. Ohio*, 378 U.S. 184, 189, 84 S.Ct. 1676, 1679, 12 L.Ed.2d 793 (1964) (opinion of Brennan, J.). This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined

by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. See *Bose Corp.*, *supra*, at 503, 104 S.Ct. at 1961. Even where a speech case has originally been tried in a federal court, subject to the provision of *Federal Rule of Civil Procedure 52(a)* that “[f]indings of fact ... shall not be set aside unless clearly erroneous,” we are obliged to make a fresh examination of crucial facts. Hence, in this case, though we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of nonexpressive conduct, our obligation is to “‘make an independent examination *568 of the whole record,’ ... so as to assure ourselves that th[is] judgment does not constitute a forbidden intrusion on the field of free expression.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 729, 11 L.Ed.2d 686 (1964) (footnote omitted), quoting *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963).

III

A

If there were no reason for a group of people to march from here to there except to **2345 reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real “[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration.” S. Davis, *Parades and Power: Street Theatre in Nineteenth–Century Philadelphia* 6 (1986). Hence, we use the word “parade” to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, “if a parade or demonstration receives no media coverage, it may as well not have happened.” *Id.*, at 171. Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches. In *Gregory v. Chicago*, 394 U.S. 111, 112, 89 S.Ct. 946, 947, 22 L.Ed.2d 134 (1969), for example, petitioners had taken part in a procession to express their grievances to the city government, and we held that such a “march, if peaceful and orderly, falls well within the sphere of conduct protected by the First

Amendment.” Similarly, in *Edwards v. South Carolina*, *supra*, 372 U.S., at 235, 83 S.Ct., at 683, where petitioners had joined in a march of protest and pride, carrying placards and singing The Star Spangled Banner, we held that the activities “reflect an exercise of these basic constitutional *569 rights in their most pristine and classic form.” Accord, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 152, 89 S.Ct. 935, 939, 22 L.Ed.2d 162 (1969).

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that “[s]ymbolism is a primitive but effective way of communicating ideas,” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 63 S.Ct. 1178, 1182, 87 L.Ed. 1628 (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), *id.*, at 632, 642, 63 S.Ct., at 1182, 1187, wearing an armband to protest a war, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505–506, 89 S.Ct. 733, 735–736, 21 L.Ed.2d 731 (1969), displaying a red flag, *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), and even “[m]arching, walking or parading” in uniforms displaying the swastika, *National Socialist Party of America v. Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977). As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a “particularized message,” cf. *Spence v. Washington*, 418 U.S. 405, 411, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974) (*per curiam*), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.

Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them. Spectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages (e.g., “England get out of Ireland,” “Say no to drugs”); marching bands and pipers play; floats are pulled along; and the whole show is broadcast over Boston television. See Record, Exh. 84 (video). To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive *570 subject matter of the speech. Nor, under

our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636, 114 S.Ct. 2445, 2456, 129 L.Ed.2d 497 (1994) (“Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection **2346 of the speech and press provisions of the First Amendment”). For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages, which, of course, fall squarely within the core of First Amendment security, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 2840, 41 L.Ed.2d 730 (1974), as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper, see *New York Times*, 376 U.S., at 265–266, 84 S.Ct., at 718–719. The selection of contingents to make a parade is entitled to similar protection.

Respondents’ participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. App. to Pet. for Cert. B3. The organization distributed a fact sheet describing the members’ intentions, App. A51, and the record otherwise corroborates the expressive nature of GLIB’s participation, see Record, Exh. 84 (video); App. A67 (photograph). In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription “Irish American Gay, Lesbian and Bisexual Group of Boston.” GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.

*571 B

The Massachusetts public accommodations law under which respondents brought suit has a venerable history. At common law, innkeepers, smiths, and others who “made profession of a public employment,” were prohibited from refusing, without good reason, to serve a customer. *Lane v. Cotton*, 12 Mod. 472, 484–485, 88 Eng.Rep. 1458, 1464–1465 (K.B.1701) (Holt, C.J.); see *Bell v. Maryland*, 378 U.S. 226, 298, n. 17, 84 S.Ct. 1814, 1853, n. 17, 12 L.Ed.2d 822 (1964) (Goldberg,

J., concurring); *Lombard v. Louisiana*, 373 U.S. 267, 277, 83 S.Ct. 1122, 1127, 10 L.Ed.2d 338 (1963) (Douglas, J., concurring). As one of the 19th-century English judges put it, the rule was that “[t]he innkeeper is not to select his guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants.” *Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng.Rep. 94, 96 (N.P.1835); M. Konvitz & T. Leskes, *A Century of Civil Rights* 160 (1961).

After the Civil War, the Commonwealth of Massachusetts was the first State to codify this principle to ensure access to public accommodations regardless of race. See Act Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts, ch. 277 (May 16, 1865); Konvitz & Leskes, *supra*, at 155–156; Lerman & Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U.Rev.L. & Soc. Change 215, 238 (1978); Fox, *Discrimination and Antidiscrimination in Massachusetts Law*, 44 B.U.L.Rev. 30, 58 (1964). In prohibiting discrimination “in any licensed inn, in any public place of amusement, public conveyance or public meeting,” 1865 Mass. Acts, ch. 277, § 1, the original statute already expanded upon the common law, which had not conferred any right of access to places of public amusement, Lerman & Sanderson, *supra*, at 248. As with many public accommodations statutes across the Nation, the legislature continued to *572 broaden the scope of legislation, to the point that the law today prohibits discrimination on the basis of “race, color, religious creed, national origin, sex, sexual orientation ..., deafness, blindness or any physical or mental disability or ancestry” in “the admission of any person to, or treatment in any place of public accommodation, resort or amusement.” Mass.Gen.Laws § 272:98 (1992). Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments. See, e.g., *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 11–16, 108 S.Ct. 2225, 2233–2236, 101 L.Ed.2d 1 (1988); *Roberts v. United States Jaycees*, 468 U.S., at 624–626, 104 S.Ct., at 3253–3254; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–262, 85 S.Ct. 348, 358–360, 13 L.Ed.2d 258 (1964). Nor is this statute unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on

the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.

C

In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. See App. to Pet. for Cert. B26–B27, and n. 28. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content *573 of their parade. Although the state courts spoke of the parade as a place of public accommodation, see, e.g., 418 Mass., at 247–248, 636 N.E.2d, at 1297–1298, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But 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.

“Since *all* speech inherently involves choices of what to say and what to leave unsaid,” *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11, 106 S.Ct. 903, 909, 89 L.Ed.2d 1 (1986) (plurality opinion) (emphasis in original), one important manifestation of the principle of free speech is that one who chooses to speak may also decide “what not to say,” *id.*, at 16, 106 S.Ct., at 912. Although the State may at times “prescribe what shall be orthodox in commercial advertising” by requiring the dissemination of “purely factual and uncontroversial information,” *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,

471 U.S. 626, 651, 105 S.Ct. 2265, 2281, 85 L.Ed.2d 652 (1985); see *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386–387, 93 S.Ct. 2553, 2559–2560, 37 L.Ed.2d 669 (1973), outside that context it may not compel affirmance of a belief with which the speaker disagrees, see *Barnette*, 319 U.S., at 642, 63 S.Ct., at 1187. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–342, 115 S.Ct. 1511, 1516, 131 L.Ed.2d 426 (1995); *574 *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797–798, 108 S.Ct. 2667, 2678, 101 L.Ed.2d 669 (1988), subject, perhaps, to the permissive law of defamation, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–349, 94 S.Ct. 2997, 3010–3012, 41 L.Ed.2d 789 (1974); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of **2348 all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. See *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

Petitioners' claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another. The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to

unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified *575 social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Respondents argue that any tension between this rule and the Massachusetts law falls short of unconstitutionality, citing the most recent of our cases on the general subject of compelled access for expressive purposes, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). There we reviewed regulations requiring cable operators to set aside channels for designated broadcast signals, and applied only intermediate scrutiny. *Id.*, at 662, 114 S.Ct., at 2469. Respondents contend on this authority that admission of GLIB to the parade would not threaten the core principle of speaker's autonomy because the Council, like a cable operator, is merely “a conduit” for the speech of participants in the parade “rather than itself a speaker.” Brief for Respondents 21. But this metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well. A newspaper, similarly, “is more than a passive receptacle or conduit for news, comment, and advertising,” and we have held that “[t]he choice of material ... and the decisions made as to limitations on the size and content ... and treatment of public issues ...—whether fair or unfair—constitute the exercise of editorial control and judgment” upon which the State can not intrude. *Tornillo*, 418 U.S., at 258, 94 S.Ct., at 2840. Indeed, in *Pacific Gas & Electric*, we invalidated coerced access to the envelope of a private utility's bill and newsletter because the utility “may be forced either to appear to agree with [the intruding leaflet] or to respond.” 475 U.S., at 15, 106 S.Ct., at 911 (plurality opinion) (citation omitted). The plurality made the further point that if “the government *576 [were] freely able to compel ... speakers to propound political messages with which they disagree, ... protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.” *Id.*, at 16, 106 S.Ct., at 912. Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication

advanced, the speaker's right to autonomy over the message is compromised.

In *Turner Broadcasting*, we found this problem absent in the cable context, because “[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume ****2349** that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.” 512 U.S., at 655, 114 S.Ct., at 2465. We stressed that the viewer is frequently apprised of the identity of the broadcaster whose signal is being received via cable and that it is “common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility.” *Ibid.* (citation omitted); see *id.*, at 684, 114 S.Ct., at 2480 (O'CONNOR, J., concurring in part and dissenting in part) (noting that Congress “might ... conceivably obligate cable operators to act as common carriers for some of their channels”).

Parades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow “any identity of viewpoint” between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving ***577** parade. Cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87, 100 S.Ct. 2035, 2044, 64 L.Ed.2d 741 (1980) (owner of shopping mall “can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand”). Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.

An additional distinction between *Turner Broadcasting* and this case points to the fundamental weakness of any attempt to justify the state-court order's limitation on the Council's autonomy as a speaker. A cable is not only a conduit for speech produced by others and selected by cable operators for

transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers. This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed. The Government's interest in *Turner Broadcasting* was not the alteration of speech, but the survival of speakers. In thus identifying an interest going beyond abridgment of speech itself, the defenders of the law at issue in *Turner Broadcasting* addressed the threshold requirement of any review under the Speech Clause, whatever the ultimate level of scrutiny, that a challenged restriction on speech serve a compelling, or at least important, governmental object, see, e.g., *Pacific Gas & Electric*, *supra*, at 19, 106 S.Ct., at 913; *Turner Broadcasting*, *supra*, at 662, 114 S.Ct., at 2469; *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968).

In this case, of course, there is no assertion comparable to the *Turner Broadcasting* claim that some speakers will be destroyed in the absence of the challenged law. True, the size and success of petitioners' parade makes it an enviable vehicle for the dissemination of GLIB's views, but that fact, ***578** without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators. See App. to Pet. for Cert. B9; Brief for Respondents 10 (citing trial court's finding that no other applicant has applied for the permit). Considering that GLIB presumably would have had a fair shot (under neutral criteria developed by the city) at obtaining a parade permit of its own, respondents have not shown that petitioners enjoy the capacity to “silence the voice of competing speakers,” as cable operators do with respect to program providers who wish to reach subscribers, *Turner Broadcasting*, *supra*, at 656, 114 S.Ct., at 2466. Nor has any other legitimate interest been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade.

****2350** The statute, Mass.Gen.Laws § 272:98 (1992), is a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation. On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. When the law is

applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.

It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a *579 speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. Having availed itself of the public thoroughfares "for purposes of assembly [and] communicating thoughts between citizens," the Council is engaged in a use of the streets that has "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.). Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says. See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972); cf. H. Kalven, A Worthy Tradition 6–19 (1988); Fiss, *Free Speech and Social Structure*, 71 *Iowa L.Rev.* 1405, 1408–1409 (1986). The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. See, e.g., *Barnette*, 319 U.S., at 642, 63 S.Ct., at 1187; *Pacific Gas & Electric*, 475 U.S., at 20, 106 S.Ct., at 914. 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.

Far from supporting GLIB, then, *Turner Broadcasting* points to the reasons why the present application of the Massachusetts law can not be sustained. So do the two other principal authorities GLIB has cited. In *PruneYard Shopping*

Center v. Robins, *supra*, to be sure, we *580 sustained a state law requiring the proprietors of shopping malls to allow visitors to solicit signatures on political petitions without a showing that the shopping mall owners would otherwise prevent the beneficiaries of the law from reaching an audience. But we found in that case that the proprietors were running "a business establishment that is open to the public to come and go as they please," that the solicitations would "not likely be identified with those of the owner," and that the proprietors could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." 447 U.S., at 87, 100 S.Ct., at 2044. Also, in *Pacific Gas & Electric*, *supra*, at 12, 106 S.Ct., at 909, we noted that *PruneYard* did not involve "any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets...." The principle **2351 of speaker's autonomy was simply not threatened in that case.

New York State Club Assn. is also instructive by the contrast it provides. There, we turned back a facial challenge to a state antidiscrimination statute on the assumption that the expressive associational character of a dining club with over 400 members could be sufficiently attenuated to permit application of the law even to such a private organization, but we also recognized that the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships. 487 U.S., at 13, 108 S.Ct. at 2234; see also *Roberts*, 468 U.S., at 627, 104 S.Ct. at 3254. In other words, although the association provided public benefits to which a State could ensure equal access, it was also engaged in expressive activity; compelled access to the benefit, which was upheld, did not trespass on the organization's message itself. If we were to analyze this case strictly along those lines, GLIB would lose. Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could *581 nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.

IV

Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to

protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others. Accordingly, the judgment of the Supreme Judicial Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

All Citations

515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487, 63 USLW 4625

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- 1 The court dismissed the public accommodations law claim against the city because it found that the city's actions did not amount to inciting or assisting in the Council's violations of § 272:98. App. to Pet. for Cert. B12–B13. It also dismissed respondents' First and Fourteenth Amendment challenge against the Council for want of state action triggering the proscriptions of those Amendments. *Id.*, at B14–B22. Finally, the court did not reach the state constitutional questions, since respondents had apparently assumed in their arguments that those claims, too, depended for their success upon a finding of state action and because of the court's holding that the public accommodation statutes apply to the parade. *Id.*, at B22.
- 2 Since respondents did not cross-appeal the dismissal of their claims against the city, the Supreme Judicial Court declined to reach those claims. 418 Mass., at 245, n. 12, 636 N.E.2d, at 1297.

EXHIBIT 10

Document received by the CA 5th District Court of Appeal.



JUDGMENT

**Lee (Respondent) v Ashers Baking Company Ltd and
others (Appellants) (Northern Ireland)**
**Reference by the Attorney General for Northern Ireland
of devolution issues to the Supreme Court pursuant to
paragraph 34 of Schedule 10 to the Northern Ireland Act
1998**
**Reference by the Attorney General for Northern Ireland
of devolution issues to the Supreme Court pursuant to
paragraph 34 of Schedule 10 to the Northern Ireland Act
1998 (No 2)**

before

Lady Hale, President
Lord Mance
Lord Kerr
Lord Hodge
Lady Black

JUDGMENT GIVEN ON

10 October 2018

Heard on 1 and 2 May 2018

Attorney General for Northern Ireland

John F Larkin QC
Attorney General for Northern Ireland
(Instructed by Office of the Attorney
General for Northern Ireland)

Ashers Baking Company Ltd and others

David Scoffield QC
Sarah Crowther QC
Professor Christopher McCrudden
(Instructed by Hewitt & Gilpin)

Lee / Equality Commission for Northern Ireland

Robin Allen QC
Sinead Eastwood
(Instructed by The Equality Commission for
Northern Ireland Legal Division)

LADY HALE: (with whom Lord Mance, Lord Kerr, Lord Hodge and Lady Black agree)

1. The substantive question in this case is whether it is unlawful discrimination, either on grounds of sexual orientation, or on grounds of religious belief or political opinion, for a bakery to refuse to supply a cake iced with the message “support gay marriage” because of the sincere religious belief of its owners that gay marriage is inconsistent with Biblical teaching and therefore unacceptable to God. If the *prima facie* answer to either question is “yes”, then questions arise as to the rights of the bakery and its owners to freedom of religion and freedom of expression, under articles 9 and 10 of the European Convention on Human Rights, and what difference, if any, those rights might make to that *prima facie* answer.

2. At first instance in the county court, the district judge held that there was direct discrimination, both on grounds of sexual orientation and on grounds of religious belief or political opinion, and that it was not necessary to read down the relevant legislation to make it compatible with the bakery owners’ rights under articles 9 and 10 of the Convention. The bakery and its owners appealed by way of case stated, raising seven questions, to the Northern Ireland Court of Appeal. The Court of Appeal only found it necessary to answer two questions, holding that there was direct discrimination on grounds of sexual orientation and that it was not necessary to read down the legislation to take account of the bakery owners’ beliefs. The bakery and its owners wish to appeal to this court.

3. The Attorney General for Northern Ireland intervened in the proceedings in the Court of Appeal in order to challenge the validity of the relevant legislation. In Northern Ireland, discrimination in the provision of goods, facilities or services on the ground of religious belief or political opinion is prohibited by the Fair Employment and Treatment (Northern Ireland) Order 1998 (SI 1998/3162 (NI 21)) (“FETO”), made by Her Majesty in Council under the Northern Ireland Act 1974. Discrimination in the provision of goods, facilities or services on grounds of sexual orientation is prohibited by the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SI 2006/439) (“SOR”), made by the Office of the First Minister and deputy First Minister of Northern Ireland under the Equality Act 2006, an Act of the United Kingdom Parliament. The Attorney General for Northern Ireland questions the validity of both of those prohibitions, insofar as they impose civil liability for the refusal to express a political opinion or express a view on a matter of public policy contrary to the religious belief of the person refusing to express that view.

4. However, this court can only answer the substantive questions if it has jurisdiction to entertain them, either by way of an appeal from the Northern Ireland Court of Appeal or by way of a reference made by the Attorney General for Northern Ireland. Issues arise in relation to both.

5. Appeals from the county court to the Court of Appeal are governed by the County Courts (Northern Ireland) Order 1980 (SI 1980/397 (NI 3)) and appeals from the Court of Appeal to this court in civil cases are governed by section 42 of the Judicature (Northern Ireland) Act 1978. Put shortly, article 61(7) of the Order provides that the decision of the Court of Appeal on an appeal by way of case stated shall be final and section 42(6) of the 1978 Act precludes an appeal to this court in such cases; but section 42(6) contains an exception for cases which involve any question as to the validity of a provision made by or under an Act of the Northern Ireland Parliament or Assembly. FETO is such a provision but the SORs, having been made under an Act of the United Kingdom Parliament, are not.

6. Under paragraph 33 of Schedule 10 to the Northern Ireland Act 1998, the Attorney General has power to require any court or tribunal to refer to this court any devolution issue which has arisen in proceedings before it to which he is a party. The Attorney General gave such a notice after judgment had been handed down by the Court of Appeal but before its order had been drawn up. The Court of Appeal declined to make the reference on the ground that the proceedings were at an end. Under paragraph 34 of Schedule 10, the Attorney General also has power to refer to this court any devolution issue which is not the subject of proceedings. Accordingly, by his first reference, he has referred to us the questions outlined in para 3 above. However, by his second reference, he has also referred to us the question whether the Court of Appeal should have made the reference under paragraph 33 when required by him to do so. No problem arises as to the validity of the references under paragraph 34, but the answers given by this court would have no effect upon the outcome of the proceedings in Northern Ireland. The matter may be different, however, if the Court of Appeal should have made the reference but failed to do so, because this raises questions as to validity of that court's decision in the case.

7. For the reasons given in a judgment prepared by Lord Mance we have concluded that this Court does have jurisdiction to determine an appeal brought by the bakery and its owners, as well as the Attorney General's two references. Accordingly we give them permission to appeal as the substantive questions raised are undoubtedly of general public importance, not only in Northern Ireland but also in the rest of the United Kingdom.

8. This judgment is arranged as follows. Part I gives an account of the facts and the outcome of the proceedings so far. Part II discusses the claim for discrimination on grounds of sexual orientation under the SORs. Part III discusses the claim for

discrimination on grounds of political opinion under FETO. Part IV discusses the impact of the Convention rights on such a claim.

I The facts

9. Mr and Mrs McArthur have run a bakery business since 1992. Their son Daniel is now the general manager. They have six shops, a staff of about 65 people, and they also offer their products on-line throughout the UK and the Republic of Ireland. Since 2004, the business has been run through Ashers Baking Company Ltd. The name was derived from Genesis 49:20: “Bread from Asher shall be rich and he shall yield royal dainties”. The McArthurs are Christians, who hold the religious beliefs that:

(a) the only form of full sexual expression which is consistent with Biblical teaching (and therefore acceptable to God) is that between a man and a woman within marriage; and

(b) the only form of marriage consistent with Biblical teaching (and therefore acceptable to God) is that between a man and a woman.

They have sought to run Ashers in accordance with their beliefs, but this, and the biblical connection of the name, has not been advertised or otherwise made known to the public.

10. Mr Lee is a gay man who volunteers with QueerSpace, an organisation for the LGBT community in Belfast. QueerSpace is not a campaigning organisation, but it supports the campaign in Northern Ireland to enable same sex couples to get married. A motion supporting this was narrowly rejected by the Northern Ireland Assembly on 29 April 2014. Mr Lee was invited to attend a private event organised by QueerSpace at Bangor Castle on Friday 17 May 2014 to mark the end of Northern Ireland anti-homophobia week and the political momentum towards same-sex marriage. He decided to take a cake to the party.

11. He had previously bought cakes from Ashers shop in Royal Avenue, Belfast, but he was not personally known to the staff or to Mr and Mrs McArthur. He did not know anything about the McArthurs’ beliefs about marriage and neither they nor their staff knew of his sexual orientation. Ashers offered a “Build-a-Cake” service to customers. Customers could request particular images or inscriptions to be iced onto a cake. There was a leaflet advertising this service, with various examples of what could be done, but no religious or political restrictions were mentioned.

12. On 8 or 9 May 2014, Mr Lee went into the shop and placed an order for a cake to be iced with his design, a coloured picture of cartoon-like characters “Bert and Ernie”, the QueerSpace logo, and the headline “Support Gay Marriage”. Mrs McArthur took the order but raised no objection at the time because she wished to consider how to explain her objection and to spare Mr Lee any embarrassment. Mr Lee paid for the cake. Over the following weekend, the McArthurs decided that they could not in conscience produce a cake with that slogan and so should not fulfil the order. On Monday 12 May 2014, Mrs McArthur telephoned Mr Lee and explained that his order could not be fulfilled because they were a Christian business and could not print the slogan requested. She apologised to Mr Lee and he was later given a full refund and the image was returned to him.

13. The district judge found that, when they refused to carry out the order, the defendants did perceive that Mr Lee was gay and/or associated with others who were gay; but one of the questions raised in the case stated was whether she was correct as a matter of law to make that finding. The Court of Appeal found it unnecessary to answer that question as the District Judge had made no finding that the order was cancelled because Mr Lee was perceived as being gay.

14. Mr Lee made arrangements with another cake provider for a similar cake which he was able to take with him to the party on 17 May. He complained to the Equality Commission for Northern Ireland (“the ECNI”) about the cancellation of his order. The ECNI have supported him in bringing this claim for direct and indirect discrimination on grounds of sexual orientation, religious belief or political opinion. The Court of Appeal expressed some concern that the correspondence between the ECNI and the bakery may have created the impression that the ECNI was not interested in assisting members of the faith community when they found themselves in difficulties as a result of their deeply held religious beliefs (para 106). It is obviously necessary for a body such as the ECNI to offer its services to all people who may need them because of a protected characteristic and not to give the impression of favouring one such characteristic over others.

15. On 19 May 2015, the Presiding District Judge held that refusing to complete the order was direct discrimination on all three grounds. She also held that the legislation (both the SORs and FETO) was compatible with the Convention rights. She made a declaration to that effect and awarded Mr Lee damages in the agreed sum of £500: [2015] NICty 2.

16. The defendants appealed by way of case stated to the Court of Appeal. The Court of Appeal served a devolution notice and a notice of incompatibility upon the Attorney General, who then became a party to the proceedings. On 24 October 2016, the Court of Appeal handed down judgment dismissing the appeal: [2016] NICA 39. It held that this was a case of associative direct discrimination on grounds of sexual

orientation (paras 57 and 58) and that it was not necessary to read down the SORs to take account of the McArthurs' Convention rights (para 72). The court did not therefore decide, although it did discuss, the questions arising under political and religious discrimination (para 72).

17. On 28 October 2016, the Attorney General gave notice to the Court of Appeal requiring it to make a reference to this court. The Court of Appeal, in its separate judgment dealing with an appeal to this court, concluded that he had no power to do so because the proceedings had ended.

18. The principal judgment was sealed and filed on 31 October in the form of an order.

19. Hence there are before this court:

(i) an application by the defendants for permission to appeal against the order of the Court of Appeal dismissing their appeal from the county court;

(ii) a reference by the Attorney General raising the issues relating to the power to make the SORs and the validity of the FETO referred to in para 3 above; and

(iii) a further reference by the Attorney General raising the issue of whether he was entitled to require the Court of Appeal to make a reference to this court on 28 October 2016.

II The sexual orientation claim

20. The SORs were made by the Office of the First Minister and deputy First Minister under powers given to them by section 82(1), (3), (4) and (5) of the Equality Act 2006 (an Act of the UK Parliament). Regulation 3(1) defines direct discrimination thus: "a person (A) discriminates against another person (B) if (a) on grounds of sexual orientation, A treats B less favourably than he treats or would treat other persons; ...". By regulation 2(2), "sexual orientation" means a sexual orientation towards "(a) persons of the same sex; (b) persons of the opposite sex; (c) persons of the same sex and of the opposite sex". By regulation 5(1), "It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services - (a) by refusing or deliberately omitting to provide him with any of them; ..."

21. Regulation 3(1)(b) and (c) provide definitions of indirect discrimination against persons of a particular sexual orientation. The District Judge held that, if she had not reached a finding of direct discrimination, but found that there was indirect discrimination, she would have concluded that there was no justification for it (para 46). She did not however find that there was indirect discrimination, and it is not easy to see how she could have done so. It is now common ground that this is a case of direct discrimination or nothing.

22. The District Judge did *not* find that the bakery refused to fulfil the order because of Mr Lee's actual or perceived sexual orientation. She found that they "cancelled this order because they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs" (para 43). As the Court of Appeal pointed out, she did not take issue with the submission that the bakery would have supplied Mr Lee with a cake without the message "support gay marriage" and that they would also have refused to supply a cake with the message requested to a hetero-sexual customer (para 11). The objection was to the message, not the messenger.

23. Not surprisingly, therefore, Mr Scoffield QC, who appears for the appellants, argues that it was not open to the judge to find that there was direct discrimination on grounds of sexual orientation. The reason for treating Mr Lee less favourably than other would-be customers was not his sexual orientation but the message he wanted to be iced on the cake. Anyone who wanted that message would have been treated in the same way. In *Islington Borough Council v Ladele* [2009] EWCA Civ 1357; [2010] 1 WLR 955, para 29, Lord Neuberger of Abbotsbury MR adopted the words of Elias J in the EAT: "It cannot constitute direct discrimination to treat all employees in precisely the same way". By definition, direct discrimination is treating people differently.

24. Mr Scoffield also criticises the comparator chosen by the District Judge. She compared the treatment of Mr Lee, not with a person of different sexual orientation who wanted the same cake, but with a person of different sexual orientation who wanted a different message: "support hetero-sexual marriage". This, he argues, is inconsistent with regulation 3(1)(a), which requires a comparison with the treatment of other "persons", not messages; and with regulation 3(2), which requires that the relevant circumstances in each case must be the same, or not materially different.

25. The District Judge also considered at length the question of whether the criterion used by the bakery was "indissociable" from the protected characteristic and held that support for same sex marriage was indissociable from sexual orientation (para 42). This is, however, to misunderstand the role that "indissociability" plays in direct discrimination. It comes into play when the express or overt criterion used as the reason for less favourable treatment is not the protected

characteristic itself but some proxy for it. Thus, in the classic case of *James v Eastleigh Borough Council* [1990] 2 AC 751, the criterion used for allowing free entry to the council's swimming pool was not sex but statutory retirement age. There was, however, an exact correspondence between the criterion of statutory retirement age and sex, because the retirement age for women was 60 and the retirement age for men was 65. Hence any woman aged 60 to 64 could enter free but no man aged 60 to 64 could do so. Again, in *Predy v Bull* [2013] UKSC 73; [2013] 1 WLR 3741, letting double-bedded rooms to married couples but not to civil partners was directly discriminatory because marriage was (at that time) indissociable from hetero-sexual orientation. There is no need to consider that question in this case, as the criterion was quite clear. But even if there was, there is no such identity between the criterion and sexual orientation of the customer. People of all sexual orientations, gay, straight or bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation.

26. Against these powerful points, it is argued that this is a case of associative discrimination. In most direct discrimination cases, the argument is that a person has been less favourably treated because of *his own* protected characteristic. Indeed, the Explanatory Memorandum to the Northern Ireland SORs, at para 7.2, states that "The regulations will protect people from direct discrimination, ie where a person treats another person less favourably because of *his* sexual orientation".

27. However, regulation 3(1)(a) is not limited to less favourable treatment on the grounds of the sexual orientation of *that* person (see para 20 above). There is no "his or her" in the definition. This leaves open the possibility that a person may be less favourably treated because of *another person's* sexual orientation. The question is how far that possibility extends.

28. The Court of Appeal held that "this was a case of association with the gay and bisexual community and the protected personal characteristic was the sexual orientation of that community" (para 58). This suggests that the reason for refusing to supply the cake was that Mr Lee was likely to associate with the gay community of which the McArthurs disapproved. But there was no evidence that the bakery had discriminated on that or any other prohibited ground in the past. The evidence was that they both employed and served gay people and treated them in a non-discriminatory way. Nor was there any finding that the reason for refusing to supply the cake was that Mr Lee was thought to associate with gay people. The reason was their religious objection to gay marriage.

29. The classic example of associative discrimination is the case of *Coleman v Attridge Law* (Case C-303/06) [2008] ICR 1128, in the European Court of Justice. The claimant had a disabled son and was treated less favourably than others because her son was disabled. In that case, there was a specific identified person whose

disability, the protected characteristic, was the reason for the less favourable treatment.

30. In *English v Thomas Sanderson Blinds Ltd* [2009] ICR 543, the applicant complained of harassment at work, because he was repeatedly taunted as if he were gay when in fact he was not. The Court of Appeal held, by a majority, that this was harassment “on grounds of” sexual orientation. The fact that he was not in fact gay made no difference. As Sedley LJ put it, at para 38:

“If, as is common ground, tormenting a man who is believed to be gay but is not amounts to unlawful harassment, the distance from there to tormenting a man who is being treated as if he were gay when he is not is barely perceptible. In both cases the man’s sexual orientation, in both cases imaginary, is the basis - that is to say, the ground - of the harassment.”

31. There was, however, a powerful dissenting judgment from Laws LJ, who said this at para 21:

“In my judgment, harassment is perpetrated on grounds of sexual orientation only where some person or person’s actual, perceived, or assumed sexual orientation gives rise to it, that is, is a substantial cause of it. [Counsel’s] case confuses the reason for the conduct complained of with the nature of that conduct. On the facts the reason for the harassment was nothing to do with anyone’s actual, perceived, or assumed sexual orientation. It happened to take the form of ‘homophobic banter’ so called, which was thus the vehicle for teasing or tormenting the claimant.”

32. It is of some interest, although not a guide to interpretation, that the Explanatory Notes to the Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263), which applied in Great Britain, go further than the Memorandum to the Northern Ireland SORs. Para 7.3 states that direct discrimination is “when a person treats another person less favourably on the grounds of his/her sexual orientation, or what is believed to be his/her sexual orientation, or the sexual orientation/perceived sexual orientation of another person with whom they associate”.

33. That is very far from saying that, because the reason for the less favourable treatment has something to do with the sexual orientation of some people, the less favourable treatment is “on grounds of” sexual orientation. There must, in my view,

be a closer connection than that. Nor would I agree with the Court of Appeal that “the benefit from the message or slogan on the cake could only accrue to gay or bisexual people” (para 58). It could also accrue to the benefit of the children, the parents, the families and friends of gay people who wished to show their commitment to one another in marriage, as well as to the wider community who recognise the social benefits which such commitment can bring.

34. This was a case of associative discrimination or it was nothing. It would be unwise in the context of this particular case to attempt to define the closeness of the association which justifies such a finding. Not only did the District Judge not make such a finding in this case, the association would not have been close enough for her to do so. In a nutshell, the objection was to the message and not to any particular person or persons.

35. In reaching the conclusion that there was no discrimination on grounds of sexual orientation in this case, I do not seek to minimise or disparage the very real problem of discrimination against gay people. Nor do I ignore the very full and careful consideration which was given to the development of the law in this area, to which Mr Allen QC drew our attention at considerable length. Everyone, as article 1 of the Universal Declaration of Human Rights put it 70 years ago is “born free and equal in dignity and rights”. Experience has shown that the providers of employment, education, accommodation, goods, facilities and services do not always treat people with equal dignity and respect, especially if they have certain personal characteristics which are now protected by the law. It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person’s race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope.

36. It follows that there is no need to consider whether it is necessary to read down the SORs to take account of the appellants’ Convention rights or indeed to consider whether there was power to make them. The SORs do not, at least in the circumstances of this case, impose civil liability for the refusal to express a political opinion or express a view on a matter of public policy contrary to the religious belief of the person refusing to express that view.

III The political beliefs claim

37. Protection against direct discrimination on grounds of religious belief or political opinion has constitutional status in Northern Ireland. The Government of Ireland Act 1920, which established the Parliaments of Northern and Southern Ireland, prohibited both Parliaments from making any law which prohibited the free

exercise of religion, gave preference, privilege or advantage, or imposed disability or disadvantage on account of religious belief and provided that any such law would be void (section 5). This was to protect the Protestant minority in the South and the Roman Catholic minority in the North. The Northern Ireland Constitution Act 1973 provided that certain types of legislation applicable in Northern Ireland should be void, to the extent that it discriminated against any person or class of persons on the ground of religious belief or political opinion (section 17(1)). This was principally designed for the legislation of the Northern Ireland Assembly, established under the Northern Ireland Assembly Act 1973, but also applied retrospectively to Acts of the Northern Ireland Parliament and prospectively to the power to legislate for Northern Ireland by Order in Council under the Northern Ireland Act 1974, while direct rule was in force (paragraph 1(1)(b) of Schedule 1 to the 1974 Act). This limitation is recognised and expressly preserved in the Northern Ireland Act 1998 (paragraph 21 of Schedule 14 to that Act). The 1998 Act also prohibits the Northern Ireland Assembly, established under that Act, and a Minister or Northern Ireland department, from making any legislation or doing any act which discriminates on the ground of religious belief or political opinion (sections 6(2)(e) and 24(1)(c)).

38. The discrimination thus prohibited is direct. The Northern Ireland Constitution Act 1973 provides that legislation “discriminates against any person or class of persons if it treats that person or that class less favourably in any circumstances than other persons are treated in those circumstances by the law for the time being in force in Northern Ireland” (1973 Act, section 23(1)). The 1998 Act adopts the same definition of a discriminatory law (section 98(4)).

39. FETO was made by Her Majesty under powers conferred by paragraph 1 of Schedule 1 to the Northern Ireland Act 1974, having been approved in draft by both Houses of Parliament. Article 3(1), so far as relevant, defines direct discrimination: “(a) discrimination on the ground of religious belief or political opinion”. By article 28(1), “It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a person who seeks to obtain or use those goods, facilities or services - (a) by refusing or deliberately omitting to provide him with any of them; ...”. Article 3(2) and 3(2A) (as inserted by regulation 4 of the Fair Employment and Treatment Order (Amendment) Regulations (Northern Ireland) 2003 (SR 2003/520) define indirect discrimination on the ground of religious belief or political opinion, but as with the sexual orientation claim, it is not now argued that this is a case of indirect discrimination.

40. Three questions therefore rise on this aspect of the claim:

(i) Did the bakery discriminate against Mr Lee on the grounds of his political opinions by refusing to supply him with a cake iced with this particular message?

(ii) If it did, is FETO invalid, or should it be read down under section 3(1) of the Human Rights Act 1998, as incompatible with the rights of freedom of religion and freedom of expression protected by articles 9 and 10 of the European Convention?

(iii) If the answer to (i) is “yes” and the answer to (ii) is “no”, is FETO invalid under section 17(1) of the Northern Ireland Constitution Act 1974 to the extent that it imposes civil liability for refusing to express a political opinion contrary to the religious belief of the person refusing to express that view?

41. As already mentioned, the Court of Appeal did not find it necessary to answer these questions. The District Judge held that support for gay marriage was a political opinion for this purpose (para 54). There was a political debate going on in Northern Ireland at the time about whether same sex couples should be allowed to marry in Northern Ireland as they are in the rest of the United Kingdom. The Assembly had debated a motion calling for same sex marriage three times over a period of 18 months and had rejected it for a third time only the week before. Political opinion is not defined in the legislation, but in *McKay v Northern Ireland Public Service Alliance* [1994] NI 103, it was defined as “an opinion relating to the policy of government and matters touching the government of the state” (Kelly LJ at p 117) and in *Ryder v Northern Ireland Policing Board* [2007] NICA 43, it was said that “the type of political opinion must be one relating to the conduct of the government of the state or matters of public policy” (Kerr LCJ, at para 15). There is no need for an association with a particular political party or ideology, although no doubt that would also count. I see no reason to doubt that support for gay marriage is indeed a political opinion for this purpose.

42. However, it is not entirely clear on what basis the District Judge upheld this aspect of the claim. She clearly held, in two places, that the reason why the order had not been fulfilled was the McArthurs’ religious belief (paras 43 and 57). Among the arguments presented to her on behalf of Mr Lee was that it was immaterial whether the bakery knew of Mr Lee’s religious belief or political opinion, because “under the 1998 Order, discrimination can take place on the grounds of the discriminator’s religious belief and political opinion” (para 47(7)).

43. Not surprisingly, Mr Scoffield, for the bakery, argues that this cannot be right. The purpose of discrimination law is to protect a person (or a person or persons

with whom he is associated) who has a protected characteristic from being treated less favourably because of that characteristic. The purpose is not to protect people without such a characteristic from being treated less favourably because of the protected characteristic of the alleged discriminator. This was reflected, for example, in section 45(1) of the Equality Act 2006 which made it clear that the discrimination has to be on the ground of the religion or belief of someone other than the alleged discriminator. It is also a well-established principle of equality law that the motive of the alleged discriminator is irrelevant: see, *R (E) v Governing Body of JFS* [2009] UKSC 15; [2010] 2 AC 728, eg at paras 13-20, citing *R v Birmingham City Council, Ex p Equal Opportunities Commission* [1989] AC 1155 and *James v Eastleigh Borough Council* [1990] 2 AC 751.

44. In *In re Northern Ireland Electricity Service's Application* [1987] NI 271, Nicholson J did observe *obiter* that the words of section 16(2) of the Fair Employment (Northern Ireland) Act 1976, which are essentially the same as those in article 3(2)(a) of FETO, were capable of being read widely enough to encompass acts done based on the religious belief or political opinion of the person doing the act. There are similar dicta in *In re O'Neill's Application* [1995] NI 274, at 279-280, and in *Ryder v Northern Ireland Policing Board* [2007] NICA 43, para 11. However, such a reading would be inconsistent with article 3(2)(a) which requires a comparison between the person receiving the less favourable treatment and "other persons": this would not be possible if the treatment were on the grounds of the discriminator's beliefs because everyone would be treated alike. It would also be inconsistent with the definition of indirect discrimination, which requires, in article 3(2)(b)(ii), that the discriminator cannot show that the requirement or condition with which the person to whom it is applied cannot comply is "justifiable irrespective of the religious belief or political opinion of the person to whom it is applied". Another pointer are the exemptions in article 31(3)(a) and (4)(a) for goods, facilities and services provided by a religious denomination or political party, the essential nature of which requires them to be provided only to persons holding or not holding a particular belief or opinion.

45. For all those reasons, of policy, principle and language, in my view the less favourable treatment prohibited by FETO must be on the grounds of religious belief or political opinion of someone other than the person meting out that treatment. To the extent that the District Judge held that the bakery had discriminated unlawfully because of its owners' religious beliefs she was wrong to do so.

46. However, that may not be an entirely fair reading of her judgment. She rejected the submission that the bakery had no reason to know about Mr Lee's political opinions (paras 59, 60). They clearly did know that he supported gay marriage, because of the message he wanted on the cake. "The [McArthurs] disagreed with the religious belief and political opinion held by [Mr Lee] with regard to a change in the law to permit gay marriage and, accordingly, by their refusal to

provide the services sought, treated [him] less favourably contrary to the law” (para 66). It was only if she had been persuaded by the submission that the defendants were not aware of Mr Lee’s religious belief and/or political opinion or the religious belief and political opinions of those with whom he associated, that she would have found that there had been discrimination on the ground of the McArthurs’ own beliefs (para 67). It is unfortunate that she referred to both religious beliefs and political opinions in making these findings, because there appears to have been no evidence of Mr Lee’s religious beliefs. Once a claim based on the McArthurs’ religious beliefs is dismissed, the claim must be made, if at all, on the basis of his political opinion. But those passages do suggest that the District Judge was holding that Mr Lee was treated less favourably because of his political opinion as well as because of the McArthurs’ religious beliefs.

47. It may well be that the answer to this question is the same as the answer to the claim based on sexual orientation. There was no less favourable treatment on this ground because anyone else would have been treated in the same way. The objection was not to Mr Lee because he, or anyone with whom he associated, held a political opinion supporting gay marriage. The objection was to being required to promote the message on the cake. The less favourable treatment was afforded to the message not to the man. It was not as if he were being refused a job, or accommodation, or baked goods in general, because of his political opinion, as for example, was alleged to have happened in *Ryder v Northern Ireland Policing Board*. The evidence was that they were quite prepared to serve him in other ways. The situation is not comparable to people being refused jobs, accommodation or business simply because of their religious faith. It is more akin to a Christian printing business being required to print leaflets promoting an atheist message.

48. However, there is here a much closer association between the political opinions of the man and the message that he wishes to promote, such that it could be argued that they are “indissociable” for the purpose of direct discrimination on the ground of political opinion. This would not always be the case, because the person ordering a particular message may in fact be indifferent to it. But in this case Mr Lee was perceived as holding the opinion in question. It becomes appropriate, therefore, to consider the impact of the McArthurs’ Convention rights upon the meaning and effect of FETO.

IV The Convention Rights

49. The Convention rights to freedom of thought, conscience and religion and freedom of expression are clearly engaged by this case. Article 9(1) provides that “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in

worship, teaching, practice and observance.” Article 9(2) permits limitations on the freedom to manifest one’s religion or beliefs but not on the freedom to hold them. In its first case dealing with article 9, *Kokkinakis v Greece* (1993) 17 EHRR 397, para 31, the European Court of Human Rights expressed the importance of the right in a passage which has been much-cited since:

“As enshrined in article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”

One is free both to believe and not to believe.

50. Furthermore, obliging a person to manifest a belief which he does not hold has been held to be a limitation on his article 9(1) rights. In *Buscarini v San Marino* (1999) 30 EHRR 208, the Grand Chamber held that it was a violation of article 9 to oblige non-believers to swear a Christian oath as a condition of remaining members of Parliament. The court reiterated that freedom of thought, conscience and religion “entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion” (para 34).

51. The Judicial Committee of the Privy Council took the same view in *Commodore of the Royal Bahamas Defence Force v Laramore* [2017] UKPC 13; [2017] 1 WLR 2752. The Board held that a Muslim petty officer had been hindered in the exercise of his constitutional right to freedom of conscience when he was obliged, on pain of disciplinary action, to remain present and doff his cap during Christian prayers at ceremonial parades and at morning and evening colours. This was a sufficiently active participation to hinder the claimant in the enjoyment of his conscientious beliefs. Nor had any justification been shown for it.

52. The freedom not to be obliged to hold or to manifest beliefs that one does not hold is also protected by article 10 of the Convention. Article 10(1) provides that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...”. The right to freedom of expression does not in terms include the right *not* to express an opinion but it has long been held that it does. A recent example in this jurisdiction is *RT*

(Zimbabwe) v Secretary of State for the Home Department [2012] UKSC 38; [2013] 1 AC 152. The issue was whether asylum seekers should be sent back to Zimbabwe where they would face a real risk of persecution if they refused to demonstrate positive support for the then regime in that country. Citing, among other cases, both *Kokkinakis* and *Buscarini*, Lord Dyson held that the principle applied as much to political opinions as it did to religious belief: “Nobody should be forced to have or express a political opinion in which he does not believe” (para 42).

53. The respondent suggests that the jurisprudence in relation to “compelled speech” has been developed principally in the United States as a result of the First Amendment. There is indeed longstanding Supreme Court authority for the proposition that “the right to freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all”: see *Wooley v Maynard* 430 US 705, 714, per Burger CJ, citing *Board of Education v Barnette* (1943) 319 US 624, 633-634. But in the light of *Laramore* and *RT (Zimbabwe)*, and the Strasbourg case law on which they are based, it cannot seriously be suggested that the same principles do not apply in the context of articles 9 and 10 of the Convention.

54. The District Judge did not accept that the defendants were being required to promote and support a campaign for a change in the law to enable same sex marriage (paras 40 and 62). The Court of Appeal, while not deciding the point, appears to have agreed with this: “the fact that a baker provides a cake for a particular team or portrays witches on a Halloween cake does not indicate any support for either” (para 67). These are, in fact, two separate matters: being required to promote a campaign and being associated with it. As to the first, the bakery was required, on pain of liability in damages, to supply a product which actively promoted the cause, a cause in which many believe, but a cause in which the owners most definitely and sincerely did not. As to the second, there is no requirement that the person who is compelled to speak can only complain if he is thought by others to support the message. Mrs McArthur may have been worried that others would see the Ashers logo on the cake box and think that they supported the campaign. But that is by the way: what matters is that by being required to produce the cake they were being required to express a message with which they deeply disagreed.

55. Articles 9 and 10 are, of course, qualified rights which may be limited or restricted in accordance with the law and insofar as this is necessary in a democratic society in pursuit of a legitimate aim. It is, of course, the case that businesses offering services to the public are not entitled to discriminate on certain grounds. The bakery could not refuse to provide a cake - or any other of their products - to Mr Lee because he was a gay man or because he supported gay marriage. But that important fact does not amount to a justification for something completely different - obliging them to supply a cake iced with a message with which they profoundly disagreed. In my view they would be entitled to refuse to do that whatever the

message conveyed by the icing on the cake - support for living in sin, support for a particular political party, support for a particular religious denomination. The fact that this particular message had to do with sexual orientation is irrelevant to the FETO claim.

56. Under section 3(1) of the Human Rights Act 1998, all legislation is, so far as it is possible to do so, to be read and given effect in a way which is compatible with the Convention rights. I have already indicated my doubts about whether this was discrimination against Mr Lee on the grounds of his political opinions, but have acknowledged the possibility that it might be. But in my view, FETO should not be read or given effect in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so.

57. As the courts below reached a different conclusion on this issue, they did not have to consider the position of the company separately from that of Mr and Mrs McArthur. It is the case that in *X v Switzerland* (Application No 7865/77), Decision of 27 February 1979, and in *Kustannus Oy Vapaa Ajattelijä Ab v Finland* (Application No 20471/92), Decision of 15 April 1996, the European Commission of Human Rights held that limited companies could not rely upon article 9(1) to resist paying church taxes. In this case, however, to hold the company liable when the McArthurs are not would effectively negate their convention rights. In holding that the company is not liable, this court is not holding that the company has rights under article 9; rather, it is upholding the rights of the McArthurs under that article.

58. Had the conclusion been otherwise, it would of course have raised the constitutional question referred to us by the Attorney General. In the event, it is not necessary to address that question.

Postscript

59. After the hearing in this case, while this judgment was being prepared, the Supreme Court of the United States handed down judgment in *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* (2018) 138 S Ct 1719. The facts are not the same. A Christian baker refused to create a wedding cake for a gay couple because of his opposition to same sex marriage. There is nothing in the reported facts to suggest that the couple wanted a particular message or decoration on their cake. The Colorado Civil Rights Commission, upheld by the Colorado courts, held that the baker had violated the Colorado law prohibiting businesses which offered sales or services to the public from discrimination based on sexual orientation. The baker complained that this violated his First Amendment rights to freedom of speech and the free exercise of his religion.

60. The majority (Justice Kennedy, with whom Chief Justice Roberts, and Justices Breyer, Alito, Kagan and Gorsuch joined) held that

“the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the state itself would not be a factor in the balance the state sought to reach. ... When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.” (p 1724)

The majority recognised that businesses could not generally refuse to supply products and services for gay weddings; but they acknowledged that the baker saw creating a wedding cake as an expressive statement involving his First Amendment rights; and contrasted the treatment that he had received, which they perceived as hostile, from the favourable treatment given to three bakers who had refused to produce cakes with messages demeaning gay persons and gay marriages.

61. Justices Ginsburg and Sotomayor, in dissent, drew a clear distinction between an objection to the message on the cake and an objection to the customer who wanted the cake. The other bakery cases had been clear examples of an objection to the message rather than an objection to the customer. In their view the objection in this case was to the customer and therefore a violation. Justices Kagan and Breyer, who voted with the majority on the lack of neutrality point, also accepted that the Commission could have based its reasoning on that distinction - the other bakers would have refused to make cakes with the demeaning messages for anyone, whereas this baker had refused to make this cake because it was a gay couple who wanted it. Justices Thomas (with whom Justice Gorsuch joined), on the other hand, considered that to make a cake for a gay wedding was expressive in itself and thus compelling it required strict scrutiny. Justice Gorsuch (with whom Justice Alito joined) would also not have distinguished between a cake with words and a cake without.

62. The important message from the *Masterpiece Bakery* case is that there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer’s characteristics. One can debate which side of the line particular factual scenarios fall. But in our case there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics. So there was no discrimination on grounds of sexual orientation. If and to the extent that there was discrimination on grounds of political opinion, no justification has been shown for the compelled

speech which would be entailed for imposing civil liability for refusing to fulfil the order.

LORD MANCE: (with whom Lady Hale, Lord Kerr, Lord Hodge and Lady Black agree)

63. On behalf of the respondent, Mr Lee, and the notice party, the Commission, Mr Allen submits that no appeal lies against the decision of the Northern Ireland Court of Appeal. The Court of Appeal decided the issues before it on a case stated by the District Judge pursuant to article 61(1) of the County Courts (Northern Ireland) Order 1980. Article 61(1) provides:

“Except where any statutory provision provides that the decision of the county court shall be final, any party dissatisfied with the decision of a county court judge upon any point of law may question that decision by applying to the judge to state a case for the opinion of the Court of Appeal on the point of law involved, and, subject to this article, it shall be the duty of the judge to state the case.”

Article 61(7) of the Order goes on to impose a restriction on an appeal from such a decision. It provides:

“Except as provided by section 41 of the Judicature (Northern Ireland) Act 1978, the decision of the Court of Appeal on any case stated under this article shall be final.”

64. Although not referred to expressly in article 61(1), it is common ground that a further exception to finality exists under section 42(6) of the Judicature (Northern Ireland) Act 1978, which reads:

“No appeal from an order or judgment of the Court of Appeal shall, unless it involves a decision of any question as to the validity of any provision made by or under an Act of the Parliament of Northern Ireland or a Measure of the Northern Ireland Assembly, lie under this section in a case where by any statutory provision, including a provision of this Act, it is expressly provided (whatever form of words is used) that that order or judgment is to be final.”

65. It is also common ground that the Fair Employment and Treatment (Northern Ireland) Order 1998 (“FETO”) falls to be considered as a “Measure of the Northern Ireland Assembly”, but that the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (“SORs”) do not. FETO was made as an Order in Council under powers conferred by section 1(3), read with Schedule 1 paragraph 1, of the Northern Ireland Act 1974. The Assembly, which it was intended would be set up in accordance with the Northern Ireland Assembly Act 1973, was at the time prorogued pending dissolution. Following the Belfast Agreement, the Northern Ireland Act 1998 completed that process of dissolution. By section 95(5), read with Schedule 12 paragraph 3(4), the 1998 Act provided for references to Orders in Council, such as FETO, made under its provisions to be considered as Measures of the Assembly which was then prorogued pending dissolution. SORs in contrast were made under powers in the Equality Act 2006, and there is no basis for regarding them as made “by or under an Act of the Parliament of Northern Ireland or a Measure of the Northern Ireland Assembly” within section 42(6).

66. In these circumstances, it is necessary to consider first whether the proposed appeal “involves a decision of any question as to the validity of any provision” of FETO. Mr Allen, on behalf of Mr Lee and the Commission, relies on FETO as valid. He points out, correctly, that the appellants’ primary case is also that FETO is valid and that their conduct was not in breach of any of its provisions, properly understood. In this connection, the appellants contend that, pursuant to the interpretive obligation contained in section 83 of the Northern Ireland Act 1998 (the Northern Irish homologue of section 3 of the Human Rights Act 1998) FETO can and should, if necessary, be read compatibly with their rights under the European Convention on Human Rights.

67. However, all else failing, the appellants also contend that, if the effect of FETO is that their conduct in the present case was unlawful, then FETO is to that extent invalidated by section 24(1)(a) and/or (c) of the Northern Ireland Act 1998. Section 24 reads:

“(1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act -

(a) is incompatible with any of the Convention rights;

(b) ...

- (c) discriminates against a person or class of person on the ground of religious belief or political opinion; ...”

68. Mr Allen submits that this fall-back submission does not mean that the appeal “involves a decision of any question as to the validity of any provision” of FETO within section 42(6) of the Judicature (Northern Ireland) Act 1978. Further, the wording of that section must, he submits, be understood in context against the background of 1978; it cannot cover such invalidity as may arguably arise pro tanto to the extent of any incompatibility with provisions introduced in 1998.

69. I do not accept those submissions. Statutes are generally “always speaking” and there is no reason why section 42(6) of the 1978 Act should not embrace invalidity arising pro tanto under a subsequent provision such as section 24(1) of the 1998 Act. Further, I consider that, even if a question of invalidity only arises on the prospective appellants’ case if all other aspects of their case fail, that must be sufficient to bring all issues within the scope of an appeal under section 42(6) of the 1978 Act. It is impossible to know whether the other aspects of the appellants’ case fail, so that the question of validity directly arises, without hearing and determining an appeal on them. In response to Mr Allen’s observation that section 42(6) is an exception and should therefore be understood narrowly, I observe that, while that is so, it is also the case that section 42(6) is an exception to an exception introduced by article 61(7) of the County Courts (Northern Ireland) Order 1980 to the general rule that an appeal lies from the Court of Appeal to the Supreme Court. I see no reason to give it other than its ordinary meaning.

70. I also note at this point a submission first raised before the Court of Appeal by the Attorney General as a notice party and intervener. By skeleton argument dated 11 April 2016, supported by the appellants in their skeleton in response dated 18 April 2016, the Attorney General submitted that, if article 28 of FETO has the effect for which Mr Allen submits, it is invalidated pro tanto by section 17 of the Northern Ireland Constitution Act 1973. That section reads:

“(1) Any Measure, any Act of the Parliament of Northern Ireland and any relevant subordinate instrument shall, to the extent that it discriminates against any person or class of persons on the ground of religious belief or political opinion, be void.”

The Court of Appeal, pursuant to Order 120 rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980, issued devolution notices which included this issue. Before the Supreme Court, the Attorney General has by his reference remained the primary protagonist of the same submission. But the appellants, by

their written case as interveners in the reference, have again endorsed the Attorney General's submission regarding section 17. There was therefore before the Court of Appeal and there is before the Supreme Court a question of invalidity, the answer to which could directly affect the appellants' case. Once again, even though invalidity could only arise upon all other submissions failing, that in my opinion is sufficient to enable an appeal in respect of FETO.

71. Having established a right of appeal in respect of FETO, the appellants submit that their proposed appeal in respect of SORs can also be maintained. The issue under FETO is discrimination on grounds of religious belief or political opinion, while the issue under SORs is one discrimination on grounds of sexual orientation. But there is, as the appellants point out, a considerable overlap in the circumstances relevant in this case to these different kinds of discrimination. The appellants therefore submit that, once an appeal is admissible in respect of one claim, then any other claim determined in the same proceedings may be appealed either generally or at least where there is an overlap of the relevant factual circumstances such as here exists. The Court of Appeal rejected this submission in its separate judgment dated 22 December 2016 on the appellants' application for permission to appeal to the Supreme Court [2016] NICA 55. In the further alternative, the appellants now invoke before the Supreme Court section 40(5) of the Constitutional Reform Act 2005, which provides that:

“The [Supreme] Court has power to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment.”

As will appear, it is unnecessary to consider the appellants' case on these points further, in the light of my conclusions with regard to the Attorney General's References, to which I next therefore turn.

72. The Attorney General has power to require or make a reference in circumstances defined by paragraphs 33 and 34 of Schedule 10 to the Northern Ireland Act 1998 (as amended by paragraph 2 of Schedule 7 to the Justice (Northern Ireland) Act 2002 and paragraph 118 of Schedule 9 to the Constitutional Reform Act 2005), as follows:

“33. The Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland or the Advocate General for Scotland may require any court or tribunal to refer to the Supreme Court any devolution issue which has arisen in proceedings before it to which he is or they are a party.

34. The Attorney General, the Advocate General for Northern Ireland, the Attorney General for Northern Ireland or the Advocate General for Scotland may refer to the Supreme Court any devolution issue which is not the subject of proceedings.”

73. The Court of Appeal handed down its judgment on the substantive issues on 24 October 2016. Order 42 rule 8 of the Rules of the Court of Judicature (Northern Ireland) 1980 (SR 1980/346) provides that:

“(1) A judgment of the Court takes effect from the day of its date.

(2) Such a judgment shall be dated as of the day on which it is given, unless the Court orders it to be dated as of some other earlier or later day ...”

Rule 2 of the same Order provides that, unless the court otherwise orders and subject to certain other presently inapplicable exceptions, every judgment shall:

“(a) ... be drawn up and signed by an officer of the appropriate office; and

(b) be sealed and filed by an officer of that office and such officer shall at the time of filing enter such judgment in the record kept for the purpose and the date of filing shall be deemed to be the date of such entry.”

74. The Court of Appeal’s substantive judgment was not drawn up or filed in the form of an order until 31 October 2016. Before this occurred, the Attorney General lodged on 28 October 2016 a notice dated 27 October 2016, purporting to require the Court of Appeal under paragraph 33 of Schedule 10 to the 1998 Act to refer to the Supreme Court issues as to whether, in the light of section 24(1)(a), (c) and (d) of the Northern Ireland Act 1998, there was power to make regulation 5 of SORs and whether, in the light of section 17 of the Northern Ireland Constitution Act 1973, article 28 of FETO was void. The Court of Appeal declined to make such a reference. Its reasons were given in a separate judgment, dated as delivered on 22 December 2016, by which the Court, firstly, refused the appellants permission to appeal in respect of the issues under FETO, held that there was no jurisdiction to permit any appeal in respect of the issues under SORs and, secondly, concluded that the Attorney General’s request for a reference under paragraph 33 came too late,

because “the proceedings ended with the giving of judgment and have not been reopened” (para 10) and that, at the date at which he purported to require a reference, there were “no longer proceedings before it” (para 11).

75. The Attorney General’s response to the Court of Appeal’s rejection of his request under paragraph 33 has been to make two references, dated respectively 31 January 2017 and 27 March 2017 to the Supreme Court under paragraph 34. There are no jurisdictional objections to these references. The reference dated 31 January 2017 raises in abstract form three substantive issues all directly inspired by the main proceedings. The first such issue is whether there was, in the light of sections 24(1)(c), power to make regulation 5 of SORs, insofar as that regulation “imposes civil liability for the refusal to express a political opinion or to express a view on a matter of public policy contrary to the religious belief of the person refusing to express the view”. The second is whether, in the light of section 24(1)(a), there was power to make regulation 5 insofar as it “imposes civil liability for the refusal to express a particular political opinion that is inconsistent with the religious belief of the person refusing to express that opinion”. The third issue (touched on in para 70 above) is whether article 28 of FETO is void, in the light of section 17 of the Northern Ireland Constitution Act 1973, insofar as article 28 “imposes civil liability for the refusal to express a political opinion or to express a view on a matter of public policy contrary to the religious belief of the person refusing to express the view”. The second reference dated 27 March 2017 raises the procedural question whether, in effect, the Attorney General was, under paragraph 33, entitled to require the Court of Appeal to make a reference to the Supreme Court on 28 October 2016.

76. I start with the second reference. The Court of Appeal in its judgment dated 22 December 2016 noted correctly (para 9) that a court can always recall and vary an order before it is perfected (in this case by drawing up, sealing and filing). But the Court of Appeal found support in *Deighton v Cockle* [1912] 1 KB 206 for a conclusion that the proceedings were at an end as from 24 October 2016. The issue in that case was whether, having obtained leave on 28 May 1904 to sign summary judgment (under the old Order XIV), the plaintiff was by the actual signing of judgment, which it did not undertake until 3 July 1905, taking a “proceeding”, so as require a month’s notice to “proceed” to be given in advance. The Court of Appeal held that it was not. Vaughan Williams LJ concluded that the rule requiring a month’s notice to proceed “only applied to proceedings towards judgment” or “interlocutory proceedings”, and “did not apply to proceedings after judgment obtained” or “after an end of the litigation had been arrived at” (pp 209 and 211). Buckley LJ took a similar view, while Kennedy LJ considered that the rule referred to “some proceeding while the matter is still in controversy, or there is still some further step to be taken before judgment is obtained” (p 213).

77. The present context is different. Paragraph 33 confers a power to require a reference of “any devolution issue which has arisen in proceedings” which have not

yet been concluded, while paragraph 34 confers a power to refer “any devolution issue which is not the subject of proceedings”. Appeals are in principle against orders, not judgments. Following the handing down of a judgment, there are frequently contentious issues about the form of order appropriate to give it effect and about other matters such as costs. It is natural to see the proceedings as being on foot, until such matters are resolved, and a final order is issued. The references to the existence or non-existence of relevant proceedings in paragraphs 33 and 34 are readily capable of being understood in a sense whereby such proceedings exist until their finalisation by an order which can be made the subject of an appeal.

78. There is no incongruity in a conclusion that a reference can be required in the light of a judgment handed down, but not yet conclusively formalised. Indeed, there are strong reasons why that should be possible. The need for a reference may only have become obvious as a result of the way in which the judgment handed down has been expressed. The reference will then still serve an important purpose in enabling the Court of Appeal to revise and, if necessary, alter its judgment before it is finally drawn up, sealed and filed. A reference of similar nature is not unfamiliar in the context of the procedure for references by national courts to the Court of Justice of the European Union. The alternative, that the Court of Appeal cannot refer but must formalise its judgment, leaves it open to the Attorney General thereafter to make a reference under paragraph 34, such as his first reference here - but to do so too late to affect the outcome of the proceedings to which the reference in substance relates.

79. It is true that the court has no discretion to refuse to make a reference under paragraph 33, if it applies in a situation such as the present. It could in some cases be regrettable and waste costs, if the Attorney General were to delay requesting a reference until after the hand-down of a judgment. But the legislation should not be construed on the basis that it will be abused or mishandled. The Attorney General can be relied upon to act sensibly, and, if necessary, the court also retains control over costs, which it can exercise whatever the outcome or success of the Attorney General’s reference under paragraph 33.

80. I therefore conclude that the Attorney General’s request to the Court of Appeal to make a reference fell within the terms of paragraph 33, and the Court of Appeal erred in refusing to give effect to it.

81. That means that the Court of Appeal and the parties to the main proceedings were deprived, by misconstruction of paragraph 33 and consequent procedural error, of the benefit of the answers on the substantive issues which the Supreme Court would have given and of the inevitably different judgment which would have followed. So far as concerns article 28 of FETO, the finding of violation in the courts below can, in the light of my conclusions above, be resolved by an appeal.

82. So far as concerns regulation 5 of SORs, the reference sought related to the power to make that regulation. However, as is confirmed by the form of the first reference actually made, the premise to the reference would have been that regulation 5 “imposes civil liability for the refusal to express” a political opinion or view contrary to or inconsistent with “the religious belief of the person refusing to express the view”. The Supreme Court could not have answered the reference which the Attorney General was requiring under paragraph 33, without first considering this premise. In short, the Supreme Court would have had to consider and address the question whether and to what, if any extent, regulation 5 does impose civil liability for conduct such as the appellants’ in refusing to bake the cake.

83. The Supreme Court would thus have arrived then at the conclusions which it has now reached, namely that (contrary to the District Judge’s ruling) regulation 5 does not impose liability for such conduct. It would have been bound to express that conclusion, and, on that basis, to decline to go further into what would have been established to be the hypothetical constitutional issues otherwise raised by the reference. In that light it would also have been impossible for the Court of Appeal to maintain its judgment in the form initially handed down. The Court of Appeal would have been bound to reach the opposite conclusions on the issues of sexual discrimination under regulation 5 of SORs, as well as discrimination under FETO, to those which it did in fact reach.

84. That leads to the question what, if any, recourse is open to the appellants in circumstances where the Court of Appeal’s error in refusing to give effect to the Attorney General’s request under paragraph 33 can now be seen to have led the Court of Appeal to finalise a judgment and order reflecting a result which is the opposite of what should have followed. Does article 61(7) of the County Courts (Northern Ireland) Order 1980, providing that “the decision of the Court of Appeal on any case stated under this article shall be final”, apply, in this context also, to preclude any appeal? The answer in my opinion is that it does not.

85. I start by noting that the present situation does not fall within the scope of the principle applied in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. In *Anisminic* the House was concerned with errors made by an inferior tribunal, the Foreign Compensation Commission. *Anisminic Ltd* was claiming compensation for property sequestered by the Egyptian authorities in 1956. The Commission had ruled against this claim on the ground that an Egyptian company, to which it had sold the sequestered property in 1957, was its “successor in title” for the purposes of a provision requiring any claimant and any successor in title of such claimant to be British. The Foreign Compensation Act 1950 provided that “The determination by the commission of any application made to them under this Act shall not be called in question in any court of law”.

86. The House held that this provision did not preclude judicial review of a determination involving a misconstruction by the commission of the scope of its jurisdiction. Acting in bad faith, making a decision which a tribunal had no power to make, failing to give effect to the requirements of natural justice, taking into account something required to be left out of account and refusing to take into account something required to be taken into account were in this context all mentioned as matters outside the scope of such a finality provision: see p 171C-E per Lord Reid, pp 195B-C and 198F-G per Lord Pearce, p 210E-F per Lord Wilberforce and p 215A per Lord Pearson (agreeing with Lord Reid, Lord Pearce and Lord Wilberforce). In the later authority of *In re Racal Communications Ltd* [1981] AC 374, Lord Diplock said (p 383):

“The break-through made by *Anisminic* ... was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity.”

87. There is however

“no similar presumption that where a decision-making power is conferred by statute upon a court of law, Parliament did not intend to confer upon it power to decide questions of law as well as questions of fact. Whether it did or not and, in the case of inferior courts, what limits are imposed on the kinds of questions of law they are empowered to decide, depends upon the construction of the statute unencumbered by any such presumption. In the case of inferior courts where the decision of the court is made final and conclusive by the statute, this may involve the survival of those subtle distinctions formerly drawn between errors of law which go to jurisdiction and errors of law which do not that did so much to confuse English administrative law before *Anisminic* ...; but upon any application for judicial review of a decision of an inferior court in a matter which involves, as so many do, interrelated questions of law, fact and degree the superior court conducting the review should not be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself the meaning of ordinary words used in the statute to define the question which it has to decide.”

See *In re Racal Communications Ltd*, per Lord Diplock, at p 383.

88. The Northern Ireland Court of Appeal is a superior court, but the underlying question of construction remains, whether the legislature has by article 61(7) of the 1980 Order, set out in para 62 above, excluded any right of appeal in circumstances such as the present. Article 61(1) and (7), read together, provide for the decision of the Court of Appeal on a case stated relating to the correctness of “the decision of a county court judge upon any point of law” to be final. They contemplate the finality of the Court of Appeal’s decision with regard to the correctness of the county court judge’s decision on the point of law raised by the case stated. The finality provision in article 61(7) is therefore focused on the decision on the point of law, not on the regularity of the proceedings leading to it. It would require much clearer words - and they would, clearly, be unusual and surprising words - to conclude that a focused provision like article 61(7) was intended to exclude a challenge to the fairness or regularity of the process by which the Court of Appeal had reached its decision on the point of law. Suppose the Court of Appeal had refused to hear one side, or the situation was one where some apparent bias affected one of its members. This sort of situation cannot have been contemplated by or fall within article 61(7). Likewise, I consider that a failure to admit the Attorney General’s request for a reference and to await its disposition, before ruling on a case stated, constitutes a procedural error, in respect of which an appeal must still be possible, if significant injustice would otherwise follow, notwithstanding the finality provision in article 61(7).

89. Does it matter that, in this case, the error identified consisted in failing to admit the Attorney General’s reference and to await its determination, rather than in giving effect to any application made by the appellants? The appellants had no right to require, or to insist that the Attorney General require, a reference. It can be argued therefore that any error by the Court of Appeal, in failing to make a reference and to await its outcome, is collateral to the litigation between the appellants and Mr Lee and the Commission, and cannot afford the appellants any basis for complaint or appeal. In my view, that would be to take an overly technical view of the issues. The appellants had expressly adopted the Attorney General’s case and submissions during the Court of Appeal proceedings. They and the Attorney General were *ad idem* in arguing that, by one route or another, the complaint made against the appellants was ill-founded. The appellants would have appeared and advanced their supportive position on the reference, had one been made under paragraph 33. They had, in relation to their appeal against the decision of the county court judge on the point of law stated, a direct interest in the content and outcome of the reference, and in its proper handling.

90. In summary, what occurred was an error in the proper conduct of the proceedings, which can now be seen to have precluded the Court of Appeal from deciding the case on a correct basis and from reaching the right outcome. Such an error takes the case outside any provision that “the decision of the Court of Appeal

on any case stated under this article shall be final”. An appeal is therefore competent to the Supreme Court against all aspects of the Court of Appeal’s judgment, including its decision in respect of sexual discrimination under SORs as well as its decision in respect of political opinion or religious belief under FETO. The appellants should be given permission to appeal accordingly in the light of the undoubted importance of the substantive issues; and, in the light of my conclusions on the substantive issues, the Supreme Court can and should allow the appeal in respect of both SORs and FETO.

Document received by the CA 5th District Court of Appeal.

EXHIBIT 11

Document received by the CA 5th District Court of Appeal.

138 S.Ct. 1719
Supreme Court of the United States

MASTERPIECE CAKESHOP,
LTD., et al., Petitioners
v.
COLORADO CIVIL RIGHTS COMMISSION, et al.

No. 16–111.
|
Argued Dec. 5, 2017.
|
Decided June 4, 2018.

Synopsis

Background: Cake shop and its owner sought review of the Colorado Civil Rights Commission's decision and issuance of cease and desist order, in a proceeding arising from shop's refusal to sell a wedding cake to a same-sex couple, requiring shop and owner not to violate Colorado Anti-Discrimination Act (CADA) by discriminating against potential customers because of their sexual orientation. The Colorado Court of Appeals, Taubman, J.,  370 P.3d 272, affirmed. Certiorari was granted.

The Supreme Court, Justice Kennedy, held that Commission did not comply with the Free Exercise Clause's requirement of religious neutrality.

Reversed.

Justice Kagan filed a concurring opinion, in which Justice Breyer joined.

Justice Gorsuch filed a concurring opinion, in which Justice Alito joined.

Justice Thomas filed an opinion concurring in part and concurring in the judgment, in which Justice Gorsuch joined.

Justice Ginsburg filed a dissenting opinion, in which Justice Sotomayor joined.

Procedural Posture(s): Petition for Writ of Certiorari; Review of Administrative Decision.

1720 Syllabus

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See

 *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that he would sell them other baked goods, *e.g.*, birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services ... to the public.” Under CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

Held: The Commission's actions in this case violated the Free Exercise Clause. Pp. 1727 – 1732.

(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical *1721 objections to gay marriage are protected views and in some instances protected forms of expression. See  *Obergefell v. Hodges*, 576 U.S. —, —, 135 S.Ct. 2584, 2594, 192 L.Ed.2d 609. While it is unexceptional that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is

neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay marriages performed in the State and before this Court issued  *United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808, or *Obergefell*. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 1727 – 1729.

(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Another indication of hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of Appeals' brief discussion of this

disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection. Pp. 1728 – 1731.

(c) For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected *1722 citizens and cannot act in a manner that passes judgment upon or presupposes the

illegitimacy of religious beliefs and practices.  *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472. Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members

of the decisionmaking body.”  *Id.*, at 540, 113 S.Ct. 2217. In view of these factors, the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of his religious beliefs. The Commission gave “every appearance,”  *id.*, at 545, 113 S.Ct. 2217, of adjudicating his religious objection based on a negative normative “evaluation of the particular justification”

for his objection and the religious grounds for it,  *id.*, at 537, 113 S.Ct. 2217, but government has no role in expressing or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips' religious objection was not considered with the neutrality required by the Free Exercise Clause. The State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners' comments were inconsistent with that requirement, and the Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. Pp. 1730 – 1732.

 370 P.3d 272, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. KAGAN, J., filed a concurring

opinion, in which BREYER, J., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages

the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a *1724 business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

I

A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his “main goal in life is to be obedient to” Jesus Christ and Christ's “teachings in all aspects of his life.” App. 148. And he seeks to “honor God through his work at Masterpiece Cakeshop.” *Ibid.* One of Phillips' religious beliefs is that “God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman.” *Id.*, at 149. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins

were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for “our wedding.” *Id.*, at 152 (emphasis deleted). They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not “create” wedding cakes for same-sex weddings. *Ibid.* He explained, “I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.” *Ibid.* The couple left the shop without further discussion.

The following day, Craig's mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. *Id.*, at 153. He later explained his belief that “to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into.” *Ibid.* (emphasis deleted).

B

For most of its history, Colorado has prohibited discrimination in places of public *1725 accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed “An Act to Protect All Citizens in Their Civil Rights,” which guaranteed “full and equal enjoyment” of certain public facilities to “all citizens,” “regardless of race, color or previous condition of servitude.” 1885 Colo. Sess. Laws pp. 132–133. A decade later, the General Assembly expanded the requirement to apply to “all other places of public accommodation.” 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of

sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

“It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.” Colo. Rev. Stat. § 24–34–601(2)(a) (2017).

The Act defines “public accommodation” broadly to include any “place of business engaged in any sales to the public and any place offering services ... to the public,” but excludes “a church, synagogue, mosque, or other place that is principally used for religious purposes.” § 24–34–601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission, in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§ 24–34–306, 24–4–105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See § 24–34–306(9). Available remedies include, among other things, orders to cease-and-desist a discriminatory policy, to file regular compliance reports with the Commission, and “to take affirmative action, including the posting of notices setting forth the substantive rights of the public.” § 24–34–605. Colorado law does not permit the Commission to assess money damages or fines. §§ 24–34–306(9), 24–34–605.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in September 2012, shortly after the couple's visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied “full and equal service” at the bakery because of their

sexual orientation, *id.*, at 35, 48, and that it was Phillips’ “standard business practice” not to provide cakes for same-sex weddings, *id.*, at 43.

The Civil Rights Division opened an investigation. The investigator found that “on multiple occasions,” Phillips “turned away potential customers on the basis of their sexual orientation, stating that he *1726 could not create a cake for a same-sex wedding ceremony or reception” because his religious beliefs prohibited it and because the potential customers “were doing something illegal” at that time. *Id.*, at 76. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. *Id.*, at 72. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips’ shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop “had a policy of not selling baked goods to same-sex couples for this type of event.” *Id.*, at 73. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. *Id.*, at 69.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The ALJ first rejected Phillips’ argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that Phillips’ actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a–72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins’ cake would force Phillips to adhere to “an ideological point of view.” *Id.*, at 75a. Applying CADA to the facts at hand, in the ALJ’s view, did not interfere with Phillips’ freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this

Court's precedent in  *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause.  *Id.*, at 879, 110 S.Ct. 1595; App. to Pet. for Cert. 82a–83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. *Id.*, at 57a. The Commission ordered Phillips to "cease and desist from discriminating against ... same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." *Ibid.* It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with ... this Order." *Id.*, at 58a. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken." *Ibid.*

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial *1727 order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage."  *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 283 (2015). The court also rejected the argument that the Commission's order violated the Free Exercise Clause.

Relying on this Court's precedent in  *Smith, supra*, at 879, 110 S.Ct. 1595, the court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" on the ground that following the law would interfere with religious practice or belief.  370 P.3d, at 289. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U.S. —, 137 S.Ct. 2290, 198 L.Ed.2d 723 (2017).

He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.

As this Court observed in  *Obergefell v. Hodges*, 576 U.S. —, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths."

 *Id.*, at —, 135 S.Ct., at 2607. Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See  *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*); see also  *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who

provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

***1728** It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4–7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See  Colo. Const., Art. II, § 31 (2012);  370 P.3d, at 277. At the time of the events in question, this Court had not issued its decisions either in  *United States v. Windsor*, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), or *Obergefell*. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his

sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. See *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Mar. 24, 2015); *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Mar. 24, 2015); *Jack v. Azucar Bakery*, Charge No. P20140069X (Mar. 24, 2015).

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in ***1729** effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One

commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” Tr. 23. A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.” *Id.*, at 30. Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

“I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.” Tr. 11–12.

To describe a man's faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention *1730 those comments, much less express concern with their content. Nor

were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See  *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540–542, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993);  *id.*, at 558, 113 S.Ct. 2217 (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included “wording and images [the baker] deemed derogatory,” *Jack v. Gateaux, Ltd.*, Charge No. P20140071X, at 4; featured “language and images [the baker] deemed hateful,” *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X, at 4; or displayed a message the baker “deemed as discriminatory,” *Jack v. Azucar Bakery*, Charge No. P20140069X, at 4.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell “birthday cakes, shower cakes, [and] cookies and brownies,” App. 152, to gay and lesbian customers as irrelevant.

The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that “[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed” when they refused to create the *1731 requested cakes.  370 P.3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because “the Division found that the bakeries ... refuse[d] the patron's request ... because of the offensive nature of the requested message.” *Ibid*.

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,”  *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See  *Matal v. Tam*, 582 U.S. —, — — —, 137 S.Ct. 1744, 1762–1764, 198 L.Ed.2d 366 (2017) (opinion of ALITO, J.). The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

C

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First

Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In *Church of Lukumi Babalu Aye, supra*, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even “subtle departures from neutrality” on matters of religion.  *Id.*, at 534, 113 S.Ct. 2217. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution “commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.”  *Id.*, at 547, 113 S.Ct. 2217.

Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”  *Id.*, at 540, 113 S.Ct. 2217. In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave “every appearance,”  *id.*, at 545, 113 S.Ct. 2217, of adjudicating Phillips' religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it.  *Id.*, at 537, 113 S.Ct. 2217. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

*1732 While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that

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must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

Justice KAGAN, with whom Justice BREYER joins, concurring.

“[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Ante*, at 1727. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views “neutral and respectful consideration.” *Ante*, at 1729. I join the Court's

opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court's holding.

The Court partly relies on the “disparate consideration of Phillips' case compared to the cases of [three] other bakers” who “objected to a requested cake on the basis of conscience.” *Ante*, at 1730, 1732. In the latter cases, a customer named William Jack sought “cakes with images that conveyed disapproval of same-sex marriage, along with religious text”; the bakers whom he approached refused to make them. *Ante*, at 1730; see *post*, at 1749 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See *ante*, at 1730. And the Court takes especial *1733 note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested “offensive [in] nature.” *Ante*, at 1731 (internal quotation marks omitted). As the Court states, a “principled rationale for the difference in treatment” cannot be “based on the government's own assessment of offensiveness.” *Ibid*.

What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny “the full and equal enjoyment” of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. § 24–34–601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive “the full and equal enjoyment” of public accommodations irrespective of their sexual orientation. *Ibid*. The different outcomes in the Jack cases and the Phillips case could thus have been justified

by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.*

* Justice GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases “would not sell the requested cakes to anyone.” *Post*, at 1735. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. Justice GORSUCH can make the claim only because he does not think a “wedding cake” is the relevant product. As Justice GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a “cake celebrating same-sex marriage.” *Ibid.*; see *post*, at 1735, 1736 – 1737, 1737 – 1738. But that is wrong. The cake requested was not a special “cake celebrating same-sex marriage.” It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See *ante*, at 1724 – 1725 (majority opinion) (recounting that Phillips did not so much as discuss the cake's design before he refused to make it). And contrary to Justice GORSUCH's view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with “religious significance.” *Post*, at 1728. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, n. 5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); *ante*, at 1727. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips' religious beliefs—Colorado could

have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.

I read the Court's opinion as fully consistent with that view. The Court limits its analysis to the *reasoning* of the state agencies (and Court of Appeals)—“quite *1734 apart from whether the [Phillips and Jack] cases should ultimately be distinguished.” *Ante*, at 1727. And the Court itself recognizes the principle that would properly account for a difference in *result* between those cases. Colorado law, the Court says, “can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” *Ante*, at 1728. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State's decisions are not infected by religious hostility or bias. I accordingly concur.

Justice GORSUCH, with whom Justice ALITO joins, concurring.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge.  494 U.S. 872, 878–879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). *Smith* remains controversial in many quarters. Compare McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990), with Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored.  *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious

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beliefs. *Ante*, at 1729 – 1731. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs “offensive.” *Ibid*. That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. See *post*, at 1749 – 1750, and n. 4 (GINSBURG, J., dissenting); *ante*, at 1732 – 1734, and n. (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack's case. He approached three bakers *1735 and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. App. 233, 243, 252. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. *Id.*, at 231, 241, 250. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. *Id.*, at 230, 240, 249. He pointed to Colorado's Anti-Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. See *ibid.*; Colo. Rev. Stat. § 24–34–601(2)(a) (2017). Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. App. 231, 241, 250. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. *Id.*, at 237, 247, 255–256. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. *Id.*, at 230–231, 240, 249. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. *Id.*, at 237, 247, 257. Mr. Jack

appealed to the Colorado Civil Rights Commission, but the Commission summarily denied relief. App. to Pet. for Cert. 326a–331a.

Next, take the undisputed facts of Mr. Phillips's case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. App. 168. Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. *Id.*, at 168–169. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. *Ibid*. Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation. *Id.*, at 166–167 (“I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the customer”). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig's mother. *Id.*, at 38–40, 169. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer, then, would simply mistake the undisputed factual record. See *post*, at 1749, n. 2 (GINSBURG, J., dissenting); *ante*, at 1732 – 1734, and n. (KAGAN, J., concurring)). Nonetheless, the Commission held that Mr. Phillips's conduct violated the Colorado public accommodations law. App. to Pet. for Cert. 56a–58a.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers *knew* their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). *1736 So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell

to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. See, e.g., ALI, Model Penal Code §§ 1.13, 2.02(2)(a)(i) (1985); 1 W. LaFare, Substantive Criminal Law § 5.2(b), pp. 460–463 (3d ed. 2018). Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge. See, e.g., Restatement (Second) of

Torts § 8A (1965);  *Radio Officers v. NLRB*, 347 U.S. 17, 45, 74 S.Ct. 323, 98 L.Ed. 455 (1954).

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from “the offensive nature of the requested message.”  *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282, n. 8 (Colo.App.2015); App. 237, 247, 256; App. to Pet. for Cert. 326a–331a; see also Brief for Respondent Colorado Civil Rights Commission 52 (“Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be ‘offensive’”). Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a “distinction without a difference.” App. to Pet. for Cert. 69a. It concluded instead that an “intent to disfavor” a protected class of persons should be “readily ... presumed” from the knowing failure to serve someone who belongs to that class. *Id.*, at 70a. In its judgment, Mr. Phillips's intentions were “inextricably tied to the sexual orientation of the parties involved” and essentially “irrational.” *Ibid.*

Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's objection is “inextricably tied” to a protected class, then the bakers' objection in Mr. Jack's case must be “inextricably tied” to one as well. For just as cakes celebrating same-sex

weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions simply reduce to this: it *presumed* that Mr. Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that “no *1737 such showing” of actual “animus”—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips's case.

 370 P.3d, at 282.

The Commission cannot have it both ways. The Commission cannot slide up and down the *mens rea* scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack's case), or it is sufficient to “presume” such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. See  *Church of Lukumi Babalu Aye*, 508 U.S., at 543–544, 113 S.Ct. 2217. That is anything but the neutral treatment of religion.

The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of “irrational” or “offensive ... message” that the bakers in the first case refused to endorse. *Ante*, at 1730 – 1731. Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude

discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as “irrational” or “offensive” will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the “proudest boast of our free speech jurisprudence” that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. See  *Matal v. Tam*, 582 U.S. —, —, 137 S.Ct. 1744, 1764, 198 L.Ed.2d 366 (2017) (plurality opinion) (citing  *United States v. Schwimmer*, 279 U.S. 644, 655, 49 S.Ct. 448, 73 L.Ed. 889 (1929) (Holmes, J., dissenting)). Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom. See  *Church of Lukumi Babalu Aye, supra*, at 547, 113 S.Ct. 2217;  *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715–716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981);  *Wisconsin v. Yoder*, 406 U.S. 205, 223–224, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972);  *Cantwell v. Connecticut*, 310 U.S. 296, 308–310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission. It is no answer, for example, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. See *post*, at 1749 – 1750, and n. 4 (GINSBURG, J., dissenting). It is no answer either simply to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake *1738 like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. See *ante*, at 1732 – 1734, and n. (KAGAN, J., concurring). These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional

wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. 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. See  370 P.3d, at 276 (stating that Mr. Craig and Mr. Mullins “requested that Phillips design and create a *cake to celebrate their same-sex wedding*”) (emphasis added). Like “an emblem or flag,” a cake for a same-sex wedding is a symbol that serves as “a short cut from mind to mind,” signifying approval of a specific “system, idea, [or] institution.”  *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack's case the choice to refuse to advance a message they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether “high or petty,” bear no license to declare what is or should be “orthodox” when it comes to religious beliefs,  *id.*, at 642, 63 S.Ct. 1178, or whether an adherent has “correctly perceived” the commands of his religion,  *Thomas, supra*, at 716, 101 S.Ct. 1425. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith. See generally  *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (“[T]he Constitution looks beyond written or spoken words as mediums of expression,” which are “not a condition of constitutional protection”).

The second suggestion fares no better. Suggesting that this case is only about “wedding cakes”—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is *too general*; understanding it as celebrating a same-sex wedding is *too specific*; but regarding it as a generic wedding cake is *just right*. The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in

this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed *1739 them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips's case at "wedding cakes" exactly—and not at, say, "cakes" more generally or "cakes that convey a message regarding same-sex marriage" more specifically? If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials *just right*—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack's case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips's case (a cake that conveys no message regarding same-sex marriage). Of course, under *Smith* a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and *Smith*, it must be applied in a manner that treats religion with neutral respect. That means the government must apply the *same* level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description. To some, all wedding cakes may appear indistinguishable. But to Mr. Phillips that is not the case—his faith teaches him otherwise. And his

religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points "[r]epeatedly and in many different contexts" over many years.  *Smith*, 494 U.S. at 887, 110 S.Ct. 1595. For example, in *Thomas* a faithful Jehovah's Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets.  450 U.S., at 711, 101 S.Ct. 1425. Of course, the line Mr. Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment.  *Id.*, at 714–716, 101 S.Ct. 1425; see also  *United States v. Lee*, 455 U.S. 252, 254–255, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982);  *Smith*, *supra*, at 887, 110 S.Ct. 1595 (collecting authorities). It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding *1740 cake is just like any other—without regard to the religious significance his 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.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order "must be set aside." *Ante*, at 1732. Maybe in some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, "[h]owever later cases raising these or similar concerns are resolved in the future, ... the rulings of the Commission and of the state court that enforced the Commission's order" in *this* case "must be invalidated." *Ibid.* Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and concurring in the judgment.

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips' right to freely exercise his religion. As Justice GORSUCH explains, the Commission treated Phillips' case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips' religion. See *ante*, at 1734 – 1737 (concurring opinion). The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips' religion. See *ante*, at 1728 – 1731. Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. See *ante*, at 1723 – 1724. Specifically, the parties dispute whether Phillips refused to create a *custom* wedding cake for the individual respondents, or whether he refused to sell them *any* wedding cake (including a premade one). But the Colorado Court of Appeals resolved this factual dispute in Phillips' favor. The court described his conduct as a refusal to “design and create a cake to celebrate [a] same-sex wedding.” *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (2015); see also *id.*, at 286 (“designing and selling a wedding cake”); *id.*, at 283 (“refusing to create a wedding cake”). And it noted that the Commission's order required Phillips to sell “‘any product [he] would sell to heterosexual couples,’ ” including custom wedding cakes.

Id., at 286 (emphasis added).

Even after describing his conduct this way, the Court of Appeals concluded that Phillips' conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

*1741 I

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the “freedom of speech.” When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose “incidental burdens” on expression. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). As the Court explains today, public-accommodations laws usually regulate conduct. *Ante*, at 1727 – 1728 (citing *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995)). “[A]s a general matter,” public-accommodations laws do not “target speech” but instead prohibit “the *act* of discriminating against individuals in the provision of publicly available goods, privileges, and services.” *Id.*, at 572, 115 S.Ct. 2338 (emphasis added).

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law “ha[s] the effect of declaring ... speech itself to be the public accommodation,” the First Amendment applies with full force. *Id.*, at 573, 115 S.Ct. 2338; accord, *Boy Scouts of America v. Dale*, 530 U.S. 640, 657–659, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). In *Hurley*, for example, a Massachusetts public-accommodations law prohibited “‘any distinction, discrimination or restriction on account of ... sexual orientation ... relative to the admission of any person to, or treatment in any place of public accommodation.’ ”

515 U.S., at 561, 115 S.Ct. 2338 (quoting Mass. Gen. Laws § 272:98 (1992); ellipsis in original). When this law required the sponsor of a St. Patrick's Day parade to include a parade unit of gay, lesbian, and bisexual Irish–Americans, the Court unanimously held that the law violated the sponsor's right to free speech. Parades are “a form of expression,” this Court explained, and the application of the public-accommodations law “alter [ed] the expressive content” of the parade by forcing the sponsor to add a new unit. 515 U.S., at 568, 572–573, 115 S.Ct. 2338. The addition of that unit compelled the organizer to “bear witness to the fact that some Irish are gay, lesbian, or bisexual”; “suggest ... that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals”; and imply that their

participation “merits celebration.” *Id.*, at 574, 115 S.Ct. 2338. While this Court acknowledged that the unit's exclusion might have been “misguided, or even hurtful,” *ibid.*, it rejected the notion that governments can mandate “thoughts and statements acceptable to some groups or, indeed, all people” as the “antithesis” of free speech, *id.*, at 579, 115 S.Ct. 2338; accord, *Dale, supra*, at 660–661, 120 S.Ct. 2446.

The parade in *Hurley* was an example of what this Court has termed “expressive conduct.” See 515 U.S., at 568–569, 115 S.Ct. 2338. This Court has long held that “the Constitution looks beyond written or spoken words as mediums of expression,” *id.*, at 569, 115 S.Ct. 2338, and that “[s]ymbolism is a primitive but effective way of communicating ideas,” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Thus, a person's “conduct may be ‘sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.’ ” *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American *1742 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.¹

¹ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *Texas v. Johnson*, 491 U.S. 397, 405–406, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *Spence v. Washington*, 418 U.S. 405, 406, 409–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (*per curiam*); *Schacht v. United States*, 398 U.S. 58, 62–63, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505–506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Brown v. Louisiana*, 383 U.S. 131, 141–142, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (opinion of Fortas, J.); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 633–634, 63 S.Ct. 1178,

87 L.Ed. 1628 (1943); *Stromberg v. California*, 283 U.S. 359, 361, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

Of course, conduct does not qualify as protected speech simply because “the person engaging in [it] intends thereby to express an idea.” *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was “intended to be communicative” and, “in context, would reasonably be understood by the viewer to be communicative.” *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). But a “ ‘particularized message’ ” is not required, or else the freedom of speech “would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” *Hurley*, 515 U.S., at 569, 115 S.Ct. 2338.

Once a court concludes that conduct is expressive, the Constitution limits the government's authority to restrict or compel it. “[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say’ ” and “tailor” the content of his message as he sees fit. *Id.*, at 573, 115 S.Ct. 2338 (quoting *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion)). This rule “applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.” *Hurley, supra*, at 573, 115 S.Ct. 2338. And it “makes no difference” whether the government is regulating the “creati[on], distributi [on], or consum[ption]” of the speech. *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792, n. 1, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011).

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palette with a paintbrush and baker's whisk. Behind the counter Phillips

has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece's website. See <http://masterpiececakes.com/wedding-cakes> (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that “a wedding has occurred, a marriage has begun, and the couple should be celebrated.” App. 162.

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, “[w]edding cakes are so packed with symbolism that it is hard to know where to begin.” M. Krondl, *Sweet Invention: A History of Dessert* 321 (2011) (Krondl); see also *ibid.* (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is “so standardised and inevitable a part of getting married that few ever think to question it.” Charsley, *Interpretation and Custom: The Case of the Wedding Cake*, 22 *Man* 93, 95 (1987) *Man* 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See *id.*, at 98. “A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards.” *Ibid.* Although the cake is eventually eaten, that is not its primary purpose. See *id.*, at 95 (“It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings”); *id.*, at 97 (“Nothing is made of the eating itself”); Krondl 320–321 (explaining that wedding cakes have long been described as “inedible”). The cake's purpose is to

mark the beginning of a new marriage and to celebrate the couple.²

2 The Colorado Court of Appeals acknowledged that “a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage,” depending on its “design” and whether it has “written inscriptions.”  *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (2015). But a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes. See Charsley, *Interpretation and Custom: The Case of the Wedding Cake*, 22 *Man* 93, 96 (1987) *Man* 93, 96 (1987). And regardless, the Commission's order does not distinguish between plain wedding cakes and wedding cakes with particular designs or inscriptions; it requires Phillips to make any wedding cake for a same-sex wedding that he would make for an opposite-sex wedding.

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing,  *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), or flying a plain red flag,  *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).³ By ***1744** forcing Phillips to create custom wedding cakes for same-sex weddings, Colorado's public-accommodations law “alter[s] the expressive content” of his message.  *Hurley*, 515 U.S., at 572, 115 S.Ct. 2338. The meaning of expressive conduct, this Court has explained, depends on “the context in which it occur[s].”  *Johnson*, 491 U.S., at 405, 109 S.Ct. 2533. Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are “weddings” and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to “bear witness to [these] fact[s],”

 *Hurley*, 515 U.S., at 574, 115 S.Ct. 2338, or to “affir [m] ... a belief with which [he] disagrees,”  *id.*, at 573, 115 S.Ct. 2338.

3 The dissent faults Phillips for not “submitting ... evidence” that wedding cakes communicate a message. *Post*, at 1748, n. 1 (opinion of GINSBURG, J.). But this requirement finds no support in our precedents. This Court did not insist that the parties submit evidence detailing the expressive nature of parades, flags, or nude dancing. See  *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 568–570, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995);  *Spence*, 418 U.S., at 410–411, 94 S.Ct. 2727;  *Barnes*, 501 U.S., at 565–566, 111 S.Ct. 2456. And we do not need extensive evidence here to conclude that Phillips' artistry is expressive, see  *Hurley*, 515 U.S., at 569, 115 S.Ct. 2338, or that wedding cakes at least communicate the basic fact that “this is a wedding,” see  *id.*, at 573–575, 115 S.Ct. 2338. Nor does it matter that the couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time. See  *id.*, at 569–570, 115 S.Ct. 2338. And by forcing him to provide the cake, Colorado is requiring Phillips to be “intimately connected” with the couple's speech, which is enough to implicate his First Amendment rights. See  *id.*, at 576, 115 S.Ct. 2338.

B

The Colorado Court of Appeals nevertheless concluded that Phillips' conduct was “not sufficiently expressive” to be protected from state compulsion.  370 P.3d, at 283. It noted that a reasonable observer would not view Phillips' conduct as “an endorsement of same-sex marriage,” but rather as mere “compliance” with Colorado's public-accommodations law.  *Id.*, at 286–287 (citing  *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 64–65, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (*FAIR*);  *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515

U.S. 819, 841–842, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995);  *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 76–78, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980)). It also emphasized that Masterpiece could “disassociat[e]” itself from same-sex marriage by posting a “disclaimer” stating that Colorado law “requires it not to discriminate” or that “the provision of its services does not constitute an endorsement.”  370 P.3d, at 288. This reasoning is badly misguided.

1

The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a reasonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it. From the beginning, this Court's compelled-speech precedents have rejected arguments that “would resolve every issue of power in favor of those in authority.”

 *Barnette*, 319 U.S., at 636, 63 S.Ct. 1178. *Hurley*, for example, held that the application of Massachusetts' public-accommodations law “requir[ed] [the organizers] to alter the expressive content of their parade.”  515 U.S., at 572–573, 115 S.Ct. 2338. It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party's speech. See *FAIR*,  *supra*, at 51, 126 S.Ct. 1297 (law school refused to allow military recruiters *1745 on campus);  *Rosenberger*, *supra*, at 822–823, 115 S.Ct. 2510 (public university refused to provide funds to a religious student paper);  *PruneYard*, *supra*, at 77, 100 S.Ct. 2035 (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them to endorse that speech. See *FAIR*,  *supra*, at 63–65, 126 S.Ct. 1297;  *Rosenberger*, *supra*, at 841–842, 115 S.Ct. 2510;  *PruneYard*, *supra*, at 85–88, 100 S.Ct. 2035. But these decisions do not suggest that the government can force

speakers to alter their *own* message. See  *Pacific Gas & Elec.*, 475 U.S., at 12, 106 S.Ct. 903 (“Notably absent from *PruneYard* was any concern that access ... might affect the shopping center owner's exercise of his own right to speak”);  *Hurley*, *supra*, at 580, 115 S.Ct. 2338 (similar).

The Colorado Court of Appeals also noted that Masterpiece is a “for-profit bakery” that “charges its customers.”  370 P.3d, at 287. But this Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech. See  *Pacific Gas & Elec.*, *supra*, at 8, 16, 106 S.Ct. 903 (collecting cases);  *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (deeming it “beyond serious dispute” that “[s]peech ... is protected even though it is carried in a form that is ‘sold’ for profit”). Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over the messages that Masterpiece sends are still more evidence that Phillips' conduct is expressive. See  *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256–258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974);  *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. —, —, 135 S.Ct. 2239, 2251, 192 L.Ed.2d 274 (2015).

2

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as “beg[ging] the core question.”  *Tornillo*, *supra*, at 256, 94 S.Ct. 2831. Because the government cannot compel speech, it also cannot “require speakers to affirm in

one breath that which they deny in the next.”  *Pacific Gas & Elec.*, 475 U.S., at 16, 106 S.Ct. 903; see also  *id.*, at 15, n. 11, 106 S.Ct. 903 (citing  *PruneYard*, 447 U.S., at 99, 100 S.Ct. 2035 (Powell, J., concurring in part and concurring in judgment)). States cannot put individuals to the choice of “be[ing] compelled to affirm someone else's belief” or “be[ing] forced to speak when [they] would prefer to remain silent.”  *Id.*, at 99, 100 S.Ct. 2035.

III

Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law ***1746** withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in *O'Brien*,⁴ that test does not apply unless the government would have punished the conduct regardless of its expressive component. See, e.g.,  *Barnes*, 501 U.S., at 566–572, 111 S.Ct. 2456 (applying *O'Brien* to evaluate the application of a general nudity ban to nude dancing);  *Clark*, 468 U.S., at 293, 104 S.Ct. 3065 (applying *O'Brien* to evaluate the application of a general camping ban to a demonstration in the park). Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand “ ‘the most exacting scrutiny.’ ”  *Johnson*, 491 U.S., at 412, 109 S.Ct. 2533; accord,  *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010).

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“[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”  *United States v.*

O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

The Court of Appeals did not address whether Colorado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from “ ‘denigrat[ing] the dignity’ ” of same-sex couples, “ ‘assert[ing] [their] inferiority,’ ” and subjecting them to “ ‘humiliation, frustration, and embarrassment.’ ”

Brief for Respondents Craig et al. 39 (quoting *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 142, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Goldberg, J., concurring)). These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Johnson, supra*, at 414, 109 S.Ct. 2533. A contrary rule would allow the government to stamp out virtually any speech at will. See *Morse v. Frederick*, 551 U.S. 393, 409, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (“After all, much political and religious speech might be perceived as offensive to some”). As the Court reiterates today, “it is not ... the role of the State or its officials to prescribe what shall be offensive.” *Ante*, at 1731. “ ‘Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.’ ” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); accord, *Johnson, supra*, at 408–409, 109 S.Ct. 2533. If the only reason a public-accommodations law regulates speech is “to produce a society free of ... biases” against the protected groups, that purpose is “decidedly fatal” to the law's constitutionality, “for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.” *Hurley*, 515 U.S., at 578–579, 115 S.Ct. 2338; see also **1747 United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (“Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners,

the general rule is that the right of expression prevails”). “[A] speech burden based on audience reactions is simply government hostility ... in a different guise.” *Matal v. Tam*, 582 U.S. —, —, 137 S.Ct. 1744, 1767, 198 L.Ed.2d 366 (2017) (KENNEDY, J., concurring in part and concurring in judgment).

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, “ ‘I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.’ ” App. 168. It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say “God Hates Fags”—all of which this Court has deemed protected by the First Amendment. See *Hurley, supra*, at 574–575, 115 S.Ct. 2338; *Dale*, 530 U.S., at 644, 120 S.Ct. 2446; *Snyder v. Phelps*, 562 U.S. 443, 448, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). Moreover, it is also hard to see how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about “dignity” and “stigma” did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); conduct a rally on Martin Luther King Jr.'s birthday, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to “ ‘Bury the niggers,’ ” *Brandenburg v. Ohio*, 395 U.S. 444, 446, n. 1, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*).

Nor does the fact that this Court has now decided *Obergefell v. Hodges*, 576 U.S. —, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), somehow diminish Phillips' right to free speech. “It is one thing ... to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted” and unentitled to express a different view. *Id.*, at —, 135 S.Ct., at 2626 (ROBERTS, C.J., dissenting). This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to

disagree about the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” *Id.*, at —, 135 S.Ct., at 2594 (majority opinion). If Phillips' continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected. See *Dale, supra*, at 660, 120 S.Ct. 2446 (“[T]he fact that [the social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view”).

* * *

In *Obergefell*, I warned that the Court's decision would “inevitabl [y] ... come into conflict” with religious liberty, “as individuals ... are confronted with demands to participate in and endorse civil marriages between same-sex couples.”

Id., 576 U.S., at —, 135 S.Ct., at 2638 (dissenting opinion). This case proves that the conflict has *1748 already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing *Obergefell* from being used to “stamp out every vestige of dissent” and “vilify Americans who are unwilling to assent to the new orthodoxy.” *Id.*, at —, 135 S.Ct., at 2642 (ALITO, J., dissenting). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. “[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Ante*, at 1727. “Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” *Ante*, at 1727 – 1728. “[P]urveyors of goods and services who

object to gay marriages for moral and religious reasons [may not] put up signs saying ‘no goods or services will be sold if they will be used for gay marriages.’ ” *Ante*, at 1728 – 1729. Gay persons may be spared from “indignities when they seek goods and services in an open market.” *Ante*, at 1732.¹ I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

¹ As Justice THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. See *ante*, at 1740 (opinion concurring in part and concurring in judgment). Nor could it, consistent with our First Amendment precedents. Justice THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. *Ante*, at 1724 – 1725 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). The record in this case is replete with Jack Phillips' own views on the messages he believes his cakes convey. See *ante*, at 1742 – 1743 (THOMAS, J., concurring in part and concurring in judgment) (describing how Phillips “considers” and “sees” his work). But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 100–101 (1987) Man 93, 100–101 (1987) (no explanation of wedding cakes' symbolism was forthcoming “even amongst those who might be expected to be the experts”); *id.*, at 104–105 (the cake cutting tradition might signify “the bride and groom ... as appropriating the cake” from the bride's parents). And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct. Cf. *ante*, at 1743, n. 2 (THOMAS, J., concurring in part and concurring in judgment);

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc., 515 U.S. 557,

568–579, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (citing previous cases recognizing parades to be expressive);  *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (noting precedents suggesting nude dancing is expressive conduct);  *Spence v. Washington*, 418 U.S. 405, 410, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (observing the Court's decades-long recognition of the symbolism of flags).

The Court concludes that “Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.” *Ante*, at 1731. This conclusion rests on evidence said to show the Colorado Civil Rights Commission’s *1749 (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted “disparate consideration of Phillips’ case compared to the cases of” three other bakers who refused to make cakes requested by William Jack, an *amicus* here. *Ante*, at 1732. The Court also finds hostility in statements made at two public hearings on Phillips’ appeal to the Commission. *Ante*, at 1728 – 1730. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips’ appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

“made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red ‘X’ over the image. On one cake, he requested [on] one side[,] ... ‘God hates sin. Psalm 45:7’ and on the opposite side of the cake ‘Homosexuality is a detestable sin. Leviticus 18:2.’ On the second cake, [the one] with the image of the two groomsmen covered by a red ‘X’ [Jack] requested [these words]: ‘God loves sinners’ and on the other side ‘While we were yet sinners Christ

died for us. Romans 5:8.’ ” App. to Pet. for Cert. 319a; see *id.*, at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery “does not discriminate” and “accept[s] all humans.” *Id.*, at 301a (internal quotation marks omitted). The second bakery owner told Jack he “had done open Bibles and books many times and that they look amazing,” but declined to make the specific cakes Jack described because the baker regarded the messages as “hateful.” *Id.*, at 310a (internal quotation marks omitted). The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message. *Id.*, at 319a.²

- ² The record provides no ideological explanation for the bakeries’ refusals. Cf. *ante*, at 1734 – 1735, 1738, 1739 – 1740 (GORSUCH, J., concurring) (describing Jack’s requests as offensive to the bakers’ “secular” convictions).

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack’s claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. *Id.*, at 297a, 307a, 316a. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Antidiscrimination Act (CADA) protects. See *id.*, at 305a, 314a, 324a. The Commission summarily affirmed the Division’s no-probable-cause finding. See *id.*, at 326a–331a.

*1750 The Court concludes that “the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of [the other bakers’] objections.” *Ante*, at 1730. See also *ante*, at 1736 – 1737 (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack’s requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries’ refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips’

refusal to serve Craig and Mullins: Phillips would *not* sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were denied. Cf. *ante*, at 1735–1736, 1738–1739 (GORSUCH, J., concurring). Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. See *supra*, at 1748. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.³

³ Justice GORSUCH argues that the situations “share all legally salient features.” *Ante*, at 1735 (concurring opinion). But what critically differentiates them is the role the customer’s “statutorily protected trait,” *ibid.*, played in the denial of service. Change Craig and Mullins’ sexual orientation (or sex), and Phillips would have provided the cake. Change Jack’s religion, and the bakers would have been no more willing to comply with his request. The bakers’ objections to Jack’s cakes had nothing to do with “religious opposition to same-sex weddings.” *Ante*, at 1736 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack’s second cake, in particular, where he requested an image of two groomsmen covered by a red “X” and the lines “God loves sinners” and “While we were yet sinners Christ died for us,” the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. See *supra*, at 1749. Phillips did, therefore, discriminate *because of* sexual orientation; the other bakers did not discriminate *because of* religious belief; and the Commission properly found discrimination in one case but not the other. Cf. *ante*, at 1735–1737 (GORSUCH, J., concurring).

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers⁴ was irrelevant to the issue Craig and Mullins’ case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the

other bakeries’ sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer. Cf. *ante*, at 1730.

⁴ But see *ante*, at 1726 (majority opinion) (acknowledging that Phillips refused to sell to a lesbian couple cupcakes for a celebration of their union).

Nor was the Colorado Court of Appeals’ “difference in treatment of these two instances ... based on the government’s own assessment of offensiveness.” *Ante*, at 1731. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the *1751 requested product would literally display. As the Court recognizes, a refusal “to design a special cake with words or images ... might be different from a refusal to sell any cake at all.” *Ante*, at 1723.⁵ The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division’s finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See App. to Pet. for Cert. 20a, n. 8 (“The Division found that the bakeries did not refuse [Jack’s] request because of his creed, but rather because of the offensive nature of the requested message.... [T]here was no evidence that the bakeries based their decisions on [Jack’s] religion ... [whereas Phillips] discriminat[ed] on the basis of sexual orientation.”). I do not read the Court to suggest that the Colorado Legislature’s decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. Cf. *ante*, at 1727–1728. To repeat, the Court affirms that “Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” *Ante*, at 1728.

⁵ The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, “could reasonably be interpreted as being inconsistent as to the question of whether

speech is involved.” *Ante*, at 1730. But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, <http://www.masterpiececakes.com/wedding-cakes> (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see *ante*, at 1737 – 1738 (GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.

II

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins.

The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. See App. to Pet. for Cert. 5a–6a. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case *de novo*. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies,  *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), where the government action that *1752 violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see  *id.*, at 526–528, 113 S.Ct. 2217.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.

All Citations

138 S.Ct. 1719, 201 L.Ed.2d 35, 102 Empl. Prac. Dec. P 46,050, 86 USLW 4335, 18 Cal. Daily Op. Serv. 5293, 2018 Daily Journal D.A.R. 5291, 27 Fla. L. Weekly Fed. S 289

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EXHIBIT 12

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445 F.Supp.3d 1226

United States District Court, D. Colorado.

MASTERPIECE CAKESHOP INCORPORATED, a Colorado corporation; and Jack Phillips, Plaintiffs,

v.

Aubrey ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities; Anthony Aragon, as member of the Colorado Civil Rights Commission, in his official and individual capacities; Miguel “Michael” Rene Elias, as member of the Colorado Civil Rights Commission, in his official and individual capacities; **Carol Fabrizio**, as member of the Colorado Civil Rights Commission, in her official and individual capacities; Charles Garcia, as member of the Colorado Civil Rights Commission, in his official and individual capacities; Rita Lewis, as member of the Colorado Civil Rights Commission, in her official and individual capacities; Jessica Pocock, as member of the Colorado Civil Rights Commission, in her official and individual capacities; Ajay Menon, as member of the Colorado Civil Rights Commission, in his official and individual capacities Cynthia H. Coffman, **Colorado Attorney General**, in her official capacity; and John Hickenlooper, Colorado Governor, in his official capacity, Defendants.

Civil Action No. 18-cv-02074-WYD-STV

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Signed 01/04/2019

Synopsis

Background: Cake shop and its owner brought action against state officials alleging that Colorado Civil Rights Division and Civil Rights Commission violated his First Amendment rights to free exercise of religion and free speech and his Fourteenth Amendment rights to due process and equal protection when Division issued probable cause determination and Commission issued formal complaint alleging that he discriminated against customer because of customer's transgender status. Officials moved to dismiss.

Holdings: The District Court, **Wiley Y. Daniel**, Senior District Judge, held that:

alleged bad faith of Colorado Civil Rights Division and Civil Rights Commission constituted extraordinary circumstance precluding *Younger* abstention;

Pullman abstention was not warranted;

Burford abstention was not warranted;

Colorado River abstention was not warranted;

Director of Colorado Civil Rights Division was entitled to absolute immunity;

Commission members were entitled to absolute immunity;

Eleventh Amendment did not bar suit against Colorado Attorney General;

Eleventh Amendment barred suit against governor; and

owner alleged sufficient injury in fact to establish standing to assert First Amendment claim.

Motion granted in part and denied in part.

Procedural Posture(s): Motion to Dismiss for Lack of Subject Matter Jurisdiction.

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Grant T. Sullivan, Jacquelynn Nichole Rich Fredericks, LeeAnn Morrill, Vincent Edward Morscher, Colorado Attorney General's Office, Denver, CO, for Defendant John Hickenlooper.

ORDER

Wiley Y. Daniel, Senior United States District Judge

*1232 I. INTRODUCTION

On June 4, 2018, the United States Supreme Court held the Colorado Civil Rights Division (“Division”) and the Colorado Civil Rights Commission (“Commission”) treated Jack Phillips, the owner of Masterpiece Cakeshop, Ltd., with hostility “inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion” when the Division and the Commission found that Phillips¹ discriminated against a same-sex couple by refusing to make them a wedding cake. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n* (*Masterpiece I*), — U.S. —, 138 S.Ct. 1719, 1732, 201 L.Ed.2d 35 (2018). The Division’s and the Commission’s “clear and impermissible hostility toward the sincere religious beliefs that motivated [Phillips’] objection” to creating the custom wedding cake manifested itself in two ways. *Id.* at 1729-30. First, Commission members made disparaging comments about Phillips’ faith at public hearings. *Id.* at 1729. And second, the Division and the Commission treated Phillips differently from three other bakeries by allowed those bakeries to refuse a customer’s request to make a cake that would have violated their secular values, while requiring Phillips to produce a cake that would have violated his sacred beliefs. *Id.* at 1730.

Weeks after the Supreme Court announced *Masterpiece I*, the Division issued a new probable cause determination against Phillips, alleging that he discriminated against a different customer because of the customer’s transgender status. (ECF No. 51 (“Complaint”), ¶¶ 211, 216). The Commission also claimed Phillips discriminated against the customer and filed a formal complaint against him. (*Id.* at ¶ 230).

Tired of Colorado’s “continuing efforts to target Phillips” and “unconstitutional bullying,” Phillips filed this suit against Defendants. (*Id.* at ¶ 8). Phillips alleges that the new probable cause determination and formal complaint violate his First Amendment rights to free exercise of religion and free speech and his Fourteenth Amendment rights to due

process and equal protection. Among other remedies, he asks for injunctive relief, declaratory judgment, and monetary compensation.

The Defendants are Aubrey Elenis, the Director of the Division, seven members of the Commission (“Defendant Commissioners”), Cynthia Coffman, the Attorney General of Colorado, and John Hickenlooper, the Governor of Colorado. Director Elenis and the Defendant Commissioners are sued in their official and individual capacities. The Attorney General and the Governor are sued only in their official capacities.

On November 6, 2018, Defendants filed a Motion to Dismiss (“Motion”) pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#). (ECF No. 64). The Motion argues that Phillips’ suit should be dismissed in its entirety on four different abstention grounds. The Motion also argues that various claims should be dismissed because Defendants are immune from suit and Phillips lacks standing. Phillips filed a response and Defendants replied. (ECF Nos. 81, 86). I held a hearing on December 18, 2018 to address the arguments related to Defendants’ Motion (“Motion Hearing”). Based on the allegations in the Complaint and the parties’ oral and written arguments, *1233 the Motion is denied in part and granted in part.

II. FACTUAL BACKGROUND

In this recitation of the alleged facts, I accepted the well-pleaded allegations in the Complaint as true. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). I also drew from the Division’s probable cause determination and the Commission’s formal complaint because they were attached to the Complaint, incorporated into the Complaint by reference, and the parties do not dispute the authenticity of these documents. *See Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) (“Exhibits attached to a complaint are properly treated as part of the pleadings for purposes of ruling on a motion to dismiss.”); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002). And I relied on the relevant portions of the United States Supreme Court’s decision in *Masterpiece I*.

A. How Phillips Operates his Business

Phillips is a cake artist. (Compl. ¶ 83). He started Masterpiece in 1993 as a bakery that designs and creates custom cakes and other baked goods. (*Id.* at ¶¶ 84-86). Masterpiece has

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fashioned all kinds of custom cakes, including those that resemble the Gutenberg Bible, a racecar, a guitar, and a crab boil. (*Id.* at ¶¶ 86).

Phillips reviews every custom cake order Masterpiece receives. (*Id.* at ¶ 130). When potential customers request a custom cake, the employee who answers the call asks about the cake's type, design, and message, and what event the cake is intended to celebrate. (*Id.* at ¶ 131). If Phillips agrees to make the custom cake, he sketches the design on paper, bakes the cake, and sculpts the baked cake into the desired form. (*Id.* at ¶¶ 89-92). Finally, Phillips decorates the cake using painting and sculpting techniques and inscribing words, numbers, or designs. (*Id.* at ¶ 93).

Phillips is not only a cake artist, but a Christian. (*Id.* at ¶ 95). His faith teaches him “whether you eat or drink or whatever you do, do it all for the glory of God.” 1 *Corinthians* 10:31; (Compl. ¶ 97). According to this teaching, and other instructions from the New Testament, Phillips operates Masterpiece as an extension of his religious convictions. (Compl. ¶ 97). Phillips’ faith informs what he will and will not do.

Some of the things that he will do through Masterpiece include hosting Bible studies at the bakery, providing free baked goods to homeless men and women, and closing his business on Sundays to allow himself and his employees to attend religious services. (*Id.* at ¶¶ 100-02). Phillips sells custom cakes to anyone who requests them, regardless of the customer's race, faith, sexual orientation, or gender identity. (*See id.* at ¶¶ 103, 125, 129). Phillips also sells pre-made items, like brownies, cookies, and generic cakes to anyone. (*Id.* at ¶¶ 132-34).

But Phillips will not “create custom cakes that express messages or celebrate events in conflict with his religious beliefs” no matter who requests them. (*Id.* at ¶¶ 107, 124, 128). Phillips has declined to make cakes that “demean LGBT people,” express racist views, celebrate Halloween, promote marijuana and alcohol, support Satan or satanic themes or beliefs, and, most famously, celebrate same-sex marriage. (*See id.* at ¶¶ 111-22). Relevant to this suit, Phillips will not create custom cakes “that express or celebrate messages in conflict with [his] religious beliefs about sex.” (*Id.* at ¶ 127). These beliefs instruct “that sex—the status of being male or female—is given by God, is biologically determined, is not determined by perceptions or feelings, and cannot be chosen or changed.” (*Id.* at ¶ 126).

***1234 B. Other Colorado Bakeries Refuse to Create Custom Cakes**

At some point after 2013, a man named William Jack went to three different Colorado cake shops to request cakes that “conveyed disapproval of same-sex marriage, along with religious text.” *Masterpiece I*, 138 S.Ct. at 1730. Specifically, Jack requested cakes “that looked like Bibles, that bore an image depicting two groomsmen covered with a red ‘X,’ and that included bible verses conveying the religious basis for his opposition to same-sex marriage.” (Compl. ¶¶ 70, 73, 161). The owners of the three bakeries declined to make these cakes because they “objected to those cakes’ messages and would not create them for anyone.” (*Id.* at ¶ 74); *see also Masterpiece I*, 138 S.Ct. at 1730 (explaining why the bakeries declined to make the cakes). Jack then filed discrimination charges against the bakeries, claiming that they discriminated against him based on his religion. (*Id.* at ¶ 75).

The Division investigated his claims, but found there was not probable cause for Jack's discrimination complaints. (*Id.* at ¶ 77). The Division reached this conclusion because the requested cakes included “wording and images [the baker] deemed derogatory, featured language and images [the baker] deemed hateful, and displayed a message the baker deemed as discriminatory.” *Masterpiece I*, 138 S.Ct. at 1730 (internal citations and quotation marks omitted); (Compl. at ¶ 78). The Division also determined that the bakeries would not create the cakes expressing the same message for any other customer, but would create other cakes expressing different messages for people of faith. (Compl. at ¶¶ 79-80). The Commission affirmed these determinations in June 2015. (*Id.* at ¶ 81).

C. Colorado State Courts’ Decisions Leading to *Masterpiece I*

Phillips’ conflict with Colorado originally began in 2012 when he refused a couple's request to make them a custom wedding cake for their same-sex marriage. *Masterpiece I*, 138 S.Ct. at 1725-26. In 2013, the Division found probable cause to believe Phillips discriminated against the couple, and initiated an investigation into Phillips’ conduct. (Compl. ¶ 141). Once the Division completed its 2013 investigation and issued its probable cause determination against Phillips, the Commission filed a formal complaint against Phillips alleging

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that he violated C.R.S. § 24-34-601(2)(a) and assigned the case to an administrative law judge. (*Id.* at ¶ 141-42). The administrative law judge found Phillips violated C.R.S. § 24-34-601(2)(a) when Phillips refused to make a wedding cake for the couple's wedding. (*Id.* at ¶ 143). Phillips appealed this decision to the Commission.

During the Commission's public deliberations on the administrative law judge's decision, two former commissioners made comments, and one former commissioner agreed with comments, “ ‘endors[ing] the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community.’ ” (*Id.* at ¶ 146 (quoting *Masterpiece I*, 138 S.Ct. at 1729)). One commissioner stated “ ‘that Phillips can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state.’ ” (*Id.* at ¶ 147 (quoting *Masterpiece I*, 138 S.Ct. at 1729)). Later, the same commissioner said “ ‘if a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.’ ” (*Id.* at ¶ 151 (quoting *Masterpiece I*, 138 S.Ct. at 1729)). Another commissioner agreed. (*Id.* at ¶ 148). A third commissioner made the following disparaging comments about Phillips' beliefs:

*1235 I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to— to use their religion to hurt others.

(*Id.* at ¶ 152 (quoting *Masterpiece I*, 138 S.Ct. at 1729)).

The Commission affirmed the administrative law judge's decision finding that Phillips had discriminated against the couple. (*Id.* at ¶ 145). The Commission ordered Phillips to (1) stop creating all wedding cakes unless he would create same-sex wedding cakes; (2) reeducate his staff about discrimination; and (3) provide reports to the Division detailing any refusal to make a cake and the reasons why. (*Id.* at ¶ 158).

Phillips appealed this decision to the Colorado Court of Appeals. (*Id.* at ¶ 160). A division of that court affirmed the Commission. (*Id.* at ¶ 162). The Court of Appeals distinguished the Division's decision to not pursue discrimination claims against the other three bakeries from its decision to commence discrimination proceedings against Phillips because “[t]he Division found that the bakeries did not refuse [William Jack's] request because of his creed, but rather because of the offensive nature of the requested message.... Conversely, Masterpiece [Cakeshop] admits that its decision to refuse [a] requested [same-sex] wedding cake was because of its opposition to same-sex marriage.” (*Id.* at ¶ 163) (quoting *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. App. 2015)). Phillips appealed that decision to the Colorado Supreme Court, which denied his petition for writ of certiorari. (*Id.* at ¶ 164). Phillips then appealed the Court of Appeals' decision to the United States Supreme Court. The Supreme Court granted review on June 26, 2017. (*Id.* at ¶ 165).

D. *Masterpiece I* Reverses the Colorado State Courts' Decisions

The United States Supreme Court announced *Masterpiece I* on June 4, 2018. (Compl. ¶ 171). The Court reversed the judgment of the Colorado Court of Appeals because “[t]he Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion.” *Masterpiece I*, 138 S.Ct. at 1732.

The Supreme Court noted the hostility appeared in two ways. First, “[t]hat hostility surfaced at the Commission's formal, public hearings,” where several Commission members made derogatory comments about Phillips' religion. *Id.* at 1729. Second, hostility was evident in “the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.” *Id.* at 1730.

The latter form of hostility appeared when “[t]he Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker” while “the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism.” *Id.* The hostility also bubbled up when “the Division found no violation of [the Colorado Anti-Discrimination Act] in the

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other cases in part because each bakery was willing to sell other products, ..., to the prospective customers” but the “Commission dismissed Phillips’ willingness to sell birthday cakes, shower cakes, *1236 [and] cookies and brownies, to gay and lesbian customers as irrelevant.” *Id.* (internal quotation marks and citations omitted).

The Supreme Court criticized the Colorado Court of Appeals for addressing Phillips’ disparate treatment argument “only in passing and relegat[ing] its complete analysis of the issue to a footnote.” *Id.* The Supreme Court was also critical of the Court of Appeals’ attempt to distinguish the three other bakeries from Phillips based on the Divisions’ finding that the bakeries refused the customer’s request “ ‘because of the offensive nature of the requested message.’ ” *Id.* at 1731 (quoting *Craig*, 370 P.3d at 282 n.8). The Supreme Court said “[t]he Colorado court’s attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips’ religious beliefs.” *Id.*

E. The Background of Phillips’ Complaint

On June 26, 2017, the same day the United States Supreme Court granted Phillips’ writ of certiorari to review the Colorado Court of Appeals’ decision in *Masterpiece I*, Autumn Scardina, an attorney, called Masterpiece to request a cake with a blue exterior and pink interior to celebrate her transition from male to female. (Compl. ¶¶ 184-86). Scardina planned to display the cake at a party for the anniversary of her gender transition. (*Id.* at ¶ 192). Masterpiece declined to make the cake because the cake conveyed a message that conflicted with Phillips’ religious beliefs that gender cannot be changed or chosen. (*Id.* at ¶¶ 187-91).

Phillips alleges that Masterpiece “would not create a custom cake that expresses those messages for any customer, no matter the customer’s protected characteristics.” (*Id.* at ¶ 193). Masterpiece offered to create a different custom cake for Scardina or to sell her any of the pre-made items available for purchase. (*Id.* at ¶ 196). Scardina did not request a different custom cake and did not attempt to purchase any of the pre-made items. (*Id.* at ¶ 197).

About a month after Masterpiece refused to make the cake, the Division informed Phillips that Scardina filed a discrimination charge against him, alleging he violated C.R.S. § 24-34-601(2)(a)’s prohibition against discrimination

because of sex and transgender status by declining to create the blue and pink cake. (*Id.* at ¶¶ 200-01). Scardina’s charge alleged Masterpiece declined “an order for a cake with pink interior and blue exterior, which [she] disclosed was intended for the celebration of [her] transition from male to female.” (*Id.* at ¶ 202 (internal quotation marks omitted)). She further alleged that when she explained she is “a transsexual and that [she] wanted [the] birthday cake to celebrate [her] transition by having a blue exterior and a pink interior, [Masterpiece] told [her] they will not make the cake based on their religious beliefs.” (*Id.* at ¶ 203 (internal quotation marks omitted)). Scardina believed Masterpiece declined to create the cake because she “requested that its color and theme celebrate [her] transition from male to female.” (*Id.* at ¶ 204 (internal quotation marks omitted)).

Phillips responded to the discrimination charge. Phillips stated Masterpiece refused to make the blue and pink cake because the bakery “does not create artistic expression addressing the subject of gender transitions for any customer,” and not because of Scardina’s “sex or gender identity.” (*Id.* at ¶ 206 (internal quotation marks and alterations omitted)). Phillips also claimed that a Masterpiece employee told Scardina that she was “welcome to purchase any of the cake shop’s premade items or obtain a different custom cake,” but Masterpiece “could not fulfill this particular *1237 custom cake request.” (*Id.* at ¶ 208 (internal quotation marks omitted)).

On June 28, 2018, twenty-four days after the Supreme Court announced *Masterpiece I*, the Division issued a probable cause determination finding that there was probable cause to believe Phillips violated C.R.S. § 24-34-601(2)(a) by refusing to make Scardina’s requested cake. (*Id.* at ¶ 211). The Division acknowledged Phillips’ contention that Masterpiece “will not design custom cakes that express ideas or celebrate events at odds with its owner and staff’s religious beliefs.” (ECF No. 51-1 (“Exhibit A”), 1). The Division’s recitation of the parties’ factual allegations indicated Masterpiece refused to make the blue and pink cake only after learning of Scardina’s intention to display the cake at gender transition birthday party. (*Id.* at 2-3).

The Division noted Phillips will not create custom cakes that address “sex changes or gender transitions” or that “support a message that ‘promote[s] the idea that a person’s sex is anything other than an immutable God-given biological reality.’ ” (*Id.* at 3). The Division also acknowledged that

Phillips “refuses to make custom cakes for other expressions that it deems to be objectionable.” (*Id.*).

After reviewing the elements necessary to prove discrimination in violation of C.R.S. § 24-34-601(2)(a), the Division determined there was probable cause to believe Phillips discriminated against Scardina. (*Id.* at 3-4). The Division explained that after Masterpiece learned the blue and pink cake was intended to celebrate Scardina's gender transition, Masterpiece refused to produce the cake because “it will not provide the service of creating cakes that ‘promote the idea that a person's sex is anything other than an immutable God-given biological reality.’ ” (*Id.* at 3). Based on this evidence, the Division found “the refusal to provide service to [Scardina] was based on [her] transgender status.” (*Id.* at 3-4).

On October 2, 2018, the Commission voted to notice Scardina's claim for a hearing and to file a formal complaint against Phillips. (*Id.* at ¶ 228). The Commission could have declined to file a formal complaint, and if it had done so, Scardina could have filed a civil action on her own behalf. (*Id.* at ¶ 229) (citing C.R.S. § 24-34-306(11)). On October 9, 2018, the Commission issued its formal complaint. (ECF No. 51-2 (“Exhibit B”)). The formal complaint stated Scardina told Masterpiece she wanted the cake's design to be “a reflection of the fact that she had transitioned from male to female and that she had come out as transgender on her birthday.” (Exhibit B, ¶ 6; *see id.* at ¶ 7). The Commission recognized that Phillips “cited his religious beliefs as the reason why the bakery would not [fulfill Scardina's order].” (*Id.* at ¶ 9). The Commission then alleged “that Masterpiece denied service to Scardina based on her sexual orientation (transgender status), ... in violation of § 24-34-601(2)(a), C.R.S. (2018).” (*Id.* at ¶ 15). The formal complaint set an administrative hearing for February 4, 2019 to adjudicate Scardina's claims.²

Phillips filed his original complaint on August 14, 2018, after the Division issued its probable cause determination. (ECF No. 1). After Defendants filed a motion to dismiss, and after the Commission filed its formal complaint against Phillips, Phillips filed an amended complaint, which is the operative complaint, on October 23, 2018.

*1238 F. Phillips' Claims Against the Defendants

Phillips asserts four claims against Defendants. First, he alleges Defendants' interpretation and enforcement of C.R.S.

§ 24-34-601(2)(a) violates his First Amendment right to freely exercise his religion. (*See* Compl. ¶¶ 341, 344, 346, 348, 351, 354).

Second, he alleges Defendants' interpretation and enforcement of C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701 violates his First Amendment right to speak freely. (*Id.* at ¶¶ 363-69, 373-74, 377-78, 380-81, 388). He also alleges C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701, facially and as applied to him, are vague and overbroad. (*Id.* at ¶ 389).

Third, Phillips alleges that facially and as applied to him, the vague language in C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701 violates his Fourteenth Amendment right to due process. (*Id.* at ¶ 417). He also alleges that C.R.S. § 24-34-303 violates his due process rights by mandating non-neutral selection criteria for the Commission and C.R.S. § 24-34-306 violates his due process rights by vesting the Commission with significant prosecutorial discretion. (*Id.* at ¶¶ 403-04, 406-09, 415-16).

Finally, Phillips alleges Defendants' interpretation and enforcement of C.R.S. § 24-34-601(2)(a) violates his Fourteenth Amendment right to equal protection because Defendants treat Phillips' “decisions to create speech and their religious exercise differently from those similarly situated to [him].” (*Id.* at ¶¶ 420, 422, 427). Phillips also alleges that C.R.S. § 24-34-303 deprives him of equal protection because the statute requires the Commission to be composed of members chosen through a non-neutral selection criteria. (*Id.* at ¶¶ 424-25).

Phillips requests preliminary and permanent injunctive relief forbidding Defendants from interpreting and enforcing C.R.S. § 24-34-601(2)(a) against him in a way that violates his rights to freedom of religion and free speech, from interpreting and enforcing C.R.S. § 24-34-701 against him in a way that violates his right to free speech, and from enforcing C.R.S. § 24-34-303(1)(b)(I)-(II) and C.R.S. § 24-34-306. (Compl., Prayer for Relief, ¶¶ 1-4).³ Phillips requests a declaration that Defendants violate his First and Fourteenth Amendment rights by enforcing C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701 and his Fourteenth Amendment rights by enforcing C.R.S. § 24-34-303(1)(b)(I)-(II) and C.R.S. § 24-34-306. (*Id.* at ¶¶ 5-8). Phillips also seeks compensatory, punitive, and nominal damages from Director Elenis and the Defendant Commissioners. (*Id.* at ¶¶ 9-11).

III. STANDARD OF REVIEW

When moving to dismiss a case for lack of subject matter jurisdiction under *Fed. R. Civ. P. 12(b)(1)*, the movant may mount either a facial or a factual attack on the complaint. *Holt*, 46 F.3d at 1002. A “facial attack on the complaint’s allegations as to subject matter jurisdiction questions the sufficiency of the complaint.” *Id.* “A facial attack happens when a defendant files a *Rule 12(b)(1)* motion without accompanying evidence.” *Shipula v. Tex. Dep’t of Family Protective Servs.*, 2011 WL 1882521, at *3 (S.D. Tex. May 17, 2011). Defendants facially challenge Phillips’ Complaint. (See, e.g., ECF No. 93, (“Motion Hearing Transcript”), 67:9-12).

*1239 Courts must accept well-pleaded allegations in the complaint as true when reviewing a facial attack, but courts must disregard conclusory allegations. See *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001); *Holt*, 46 F.3d at 1002. A court may also consider documents that are incorporated in the complaint by reference or that are referred to in the complaint, if the documents are central to the complaint and the parties do not dispute their authenticity. See *Deseret Book Co.*, 287 F.3d at 941-42; *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997); *MER, LLC v. Comerica Bank*, 2013 WL 539747, at *1 (D. Colo. Feb. 13, 2013) (reviewing document incorporated into the complaint by reference in *Fed. R. Civ. P. 12(b)(1)* motion to dismiss).

IV. ANALYSIS

Defendants raise four arguments in support of their Motion. First, Defendants argue I should abstain from exercising jurisdiction over Phillips’ claims for equitable relief due to the Commission’s ongoing civil enforcement proceeding against Phillips to adjudicate Scardina’s 2017 discrimination charge. (ECF No. 64 at 10). Second, Director Elenis and the Defendant Commissioners contend they are protected from Phillips’ claims for damages by absolute quasi-prosecutorial immunity, or, in the alternative, by qualified immunity. (*Id.*; see also Mot. Hr’g Trans. at 50:1-16). Third, Attorney General Coffman and Governor Hickenlooper argue Phillips’ claims for equitable relief against them are barred by the Eleventh Amendment due to their non-participation in the ongoing civil enforcement action. (ECF No. 64 at 10). Finally, Defendants argue Phillips lacks standing to challenge C.R.S. § 24-34-701 because he failed to allege that he suffered an injury related to its enforcement. (*Id.*).

A. Abstention

Defendants assert that I should abstain from exercising jurisdiction over Phillips’ claims for equitable relief based on four different abstention doctrines. (ECF No. 64 at 11-19). Defendants argue that mandatory abstention is compelled by *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Defendants argue that discretionary abstention is counseled by *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

1. *Younger v. Harris*

Defendants first argue that I must abstain from Phillips’ claims for equitable relief under the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Alternatively, Defendants request a limited evidentiary hearing if I find that *Younger* does not apply. I conclude that *Younger* does not apply and deny Defendants’ request for an evidentiary hearing.

a. The Bad Faith Exception to *Younger* Applies

Pursuant to the *Younger* abstention doctrine, “[e]ven when a federal court would otherwise have jurisdiction to hear a claim, the court may be obliged to abstain when a federal-court judgment on the claim would interfere with an ongoing state proceeding implicating important state interests.” *D.L. v. Unified Sch. Dist. No. 497*, 392 F.3d 1223, 1227-28 (10th Cir. 2004). “*Younger* abstention remains an extraordinary and narrow exception to the general rule that federal courts have no more right to decline the exercise of jurisdiction which is given, than to usurp that *1240 which is not given.” *Cook v. Harding*, 879 F.3d 1035, 1038 (9th Cir. 2018) (internal quotation marks omitted). Nonetheless, a federal court must abstain from hearing a case pursuant to *Younger* where three conditions are satisfied:

- (1) “there must be ongoing state criminal, civil or administrative proceedings”;

(2) “the state court must offer an adequate forum to hear the federal plaintiff’s claims from the federal lawsuit”; and

(3) “the state proceeding must involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies.”

Taylor v. Jaquez, 126 F.3d 1294, 1297 (10th Cir. 1997); see also *Weitzel v. Div. of Occupational and Prof’l Licensing*, 240 F.3d 871, 875 (10th Cir. 2001). When these conditions are met, *Younger* abstention is non-discretionary absent extraordinary circumstances. See *Amanatullah v. Colo. Bd. of Med. Exam’rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). I assume without deciding that the three prerequisite factors to *Younger* are present and only analyze whether an extraordinary circumstance exists.

A party seeking to avoid *Younger* by relying on an extraordinary circumstance bears a “heavy burden.” *Phelps I*, 59 F.3d at 1066. One extraordinary circumstance occurs when an administrative civil proceeding begins in bad faith or is meant to harass. See *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 435, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982) (“[S]o long as there is no showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain.”); *Phelps v. Hamilton (Phelps I)*, 59 F.3d 1058, 1063-65 (10th Cir. 1995).

The Tenth Circuit considers three factors in determining whether a prosecution began in bad faith or is intended to harass the respondent:

- (1) whether it was frivolous or undertaken with no reasonably objective hope of success, ...
- (2) whether it was motivated by the defendant’s suspect class or in retaliation for the defendant’s exercise of constitutional rights, ...
- and (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified

and oppressive use of multiple prosecutions.

Phelps I, 59 F.3d at 1065 (internal citations and footnotes omitted).

The Supreme Court held in *Masterpiece I* that one element of Colorado’s “clear and impermissible hostility” toward Phillips’ religious beliefs was “the difference in treatment between Phillips’ case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.” *Masterpiece I*, 138 S.Ct. at 1729-30. Recall that the Commission permitted the other three bakeries to refuse to provide custom cakes to a customer because of the bakers’ beliefs that the proposed cake messages were “derogatory,” “hateful,” and “discriminatory,” while the Commission denied the same accommodation to Phillips when he refused to make the cake for a same-sex wedding because of his religious beliefs. *Id.* at 1730. Phillips believes this theme continues to run through this case.

Phillips claims that he refused to process Scardina’s request for a blue and pink cake “because of the messages that the cake would have expressed,” and not because of Scardina’s transgender status. (Compl. ¶ 194). He also alleges that he would not have created this custom cake for anyone, “no matter the customer’s protected characteristics.” (*Id.* at ¶ 193).

*1241 Phillips explained these positions to the Division when he responded to Scardina’s discrimination charge. (*Id.* at ¶¶ 206-08). The Division acknowledged Phillips’ contention that Masterpiece “will not design custom cakes that express ideas or celebrate events at odds with its owner and staff’s religious beliefs,” and recognized that Phillips only declined to make the cake after learning about the purpose of the cake. (Exhibit A at 1-3). The Division also understood that Masterpiece does not create custom cakes that “address the topic of sex-changes or gender transitions” because of Phillips’ religious beliefs. (*Id.* at 3). Nonetheless, the Division’s probable cause determination “ignored Masterpiece Cakeshop’s message-based reason for declining to create the cake.” (Compl. ¶ 216). The Division instead used Phillips’ assertion that Masterpiece will not create cakes “that promote the idea that a person’s sex is anything other than an immutable God-given biological reality,” as evidence “that the refusal to provide service to [Scardina] was based on [her] transgender status.” (Exhibit A at 3-4).

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The Commission's formal complaint repeats that Scardina told Masterpiece she wanted the cake's design to reflect her transition "from male to female and that she had come out as transgender on her birthday." (Exhibit B, ¶ 6; *see id.* at ¶ 7). The complaint also states Masterpiece told Scardina it would not make the cake "because it does not make cakes to celebrate a sex-change" and cited Phillips' "religious beliefs as the reason why the bakery would not do so." (*Id.* at ¶¶ 6, 9).

Consistent with *Masterpiece I*, Phillips alleges Director Elenis and the Defendant Commissioners acted in bad faith and with "animus toward Phillips'[] religious beliefs" because they "disregarded Colorado's practice of allowing other cake artists to decline requests to create custom cakes that express messages they deem objectionable and would not express for anyone." (Compl. ¶¶ 223, 225, 242, 244). This allegation is supported by other allegations in Phillips' Complaint. Specifically, Phillips alleges that the Division and the Commission excused the three other bakeries from baking cakes with messages the bakers deemed offensive, while, in this case, Phillips was not provided with that same excuse even though the Division and the Commission recognized Phillips declined to create the blue and pink cake because of his religious objection to the cake's message.⁴ As explained in *Masterpiece I*, this disparate treatment reveals Director Elenis' and the Defendant Commissioners' hostility towards Phillips, which is sufficient to establish they are pursuing the discrimination charges against Phillips in bad faith, motivated by Phillips' suspect class (his religion).

Defendants dispute this conclusion for two primary reasons. First, Defendants contend Phillips has not alleged unequal treatment because he has failed "to allege that Plaintiffs would not bake a blue and pink cake for *anyone*," while the three other bakeries "responded that [they] would not bake the cake requested by Mr. Jack for *anyone*." (ECF No. 86 at 12). But, Phillips does claim he would have declined the specific cake Scardina requested—a cake designed to celebrate the anniversary of a gender transition—no matter who requested it. (Compl. ¶¶ 191-93; *see id.* ¶¶ 127-28). Defendants' argument to the contrary defines the type of cake requested too generally. *Compare, Masterpiece I*, 138 S. Ct. at 1738-39 (Gorsuch, J., concurring) (explaining the suggestion "that this case is only about 'wedding cakes'—and not a wedding cake celebrating a same-sex *1242 wedding—actually points up the problem"), with *id.* at 1733 n.* (Kagan, J., concurring) (noting the requested cake "was simply a wedding cake").

Scardina did not request just a blue and pink cake. She requested a blue and pink birthday cake that was intended to celebrate her gender transition birthday. (Compl. ¶ 186). Scardina told Masterpiece that the design of the cake was supposed to symbolize the anniversary of her transition from male to female. (*Id.*). Scardina reiterated the intent of the cake's design before the Division by stating she told Masterpiece that she is "a transsexual and that [she] wanted [her] birthday cake to celebrate [her] transition by having a blue exterior and a pink interior." (*Id.* at ¶ 203). Thus, Scardina explicitly, and repeatedly, requested a blue and pink birthday cake to celebrate her transition, and Phillips would have declined to make such a cake for anyone, regardless of the "customer's protected characteristics." (*Id.* at ¶ 193).

This argument fails for an additional reason: neither the Division, in its probable cause determination, nor the Commission, in its formal complaint, made the distinction urged now by Defendants. This omission is especially glaring because *Masterpiece I* denounced the Division's and the Commission's unequal treatment of Phillips just before the Division and the Commission began new proceedings against Phillips. *See Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801, 807 (N.D. Tex. 1991) ("The most significant fact demonstrating the City's bad faith is that all of the seizures at issue in this case were made after the Fifth Circuit's ruling" condemning the seizures in another case.), *aff'd* 970 F.2d 82 (5th Cir. 1992).

Second, Defendants argue Director Elenis and the Defendant Commissioners "assumed jurisdiction over Ms. Scardina's charge nearly a year before *Masterpiece I* ... so Plaintiffs' allegation that the second prosecution was in retaliation for their having successfully challenged the first is wholly conclusory." (ECF No. 86 at 12). While it is true the Division obtained jurisdiction sometime in July 2017, after Scardina filed her discrimination charge, Phillips is not alleging the Division investigated him in bad faith. How could he? Once a discrimination charge is filed, the Division has no choice but to promptly investigate the charge. C.R.S. § 24-34-306(2)(a). Rather, he is alleging the Division and the Commission acted in bad faith when they exercised their discretion to formalize the discrimination charge. After investigating the charge, Director Elenis could have determined there was not probable cause for crediting the allegations of the charge. C.R.S. § 24-34-306(2)(a); 3 C.C.R. 708-1:10.5(C)(1). If the Commission and Director Elenis agreed that no probable cause existed, their jurisdiction over the charge would have

ended and Scardina could have filed her own civil complaint against Phillips. C.R.S. § 24-34-306(11). The decision to pursue the discrimination charge occurred after *Masterpiece I*, and this decision by Director Elenis and the Defendant Commissioners supports the existence of bad faith.

Accordingly, I find abstention is not required by *Younger*.

b. Defendants are not Entitled to an Evidentiary Hearing

Defendants' Motion requested a limited evidentiary hearing on Phillips' bad faith allegations if I found Phillips "establish[ed] a prima facie case of bad faith." (ECF No. 64 at 15). Defendants cited *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995) to support their contention that I have discretion to allow such a hearing "to resolve disputed jurisdiction facts under Rule 12(b)(1)." (ECF No. 64 at 15). But, in *Holt*, the Tenth Circuit discussed the discretion of a trial court to conduct an evidentiary *1243 hearing when the moving party brought a factual challenge to the complaint. 46 F.3d at 1003 ("In the instant case, Defendant's Rule 12(b)(1) motion did not mount a mere facial challenge to the complaint, but instead raised a factual challenge to the existence of subject matter jurisdiction."). The cases *Holt* relies on for this proposition also refer to the trial court's discretion to conduct an evidentiary hearing in the context of a factual attack. See *id.* (citing *Ohio v. Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990) and *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987)). Defendants challenged Phillips' Complaint on its face, and I therefore deny Defendants' request for an evidentiary hearing. *Mapoy v. Wash. Mut. Bank, FA*, 2011 WL 2580655, at *4 (N.D. Cal. June 29, 2011) (denying the plaintiff's "request for an evidentiary hearing to determine whether jurisdiction is proper" when the defendant's Rule 12(b)(1) motion was a facial attack).⁵

2. Railroad Commission of Texas v. Pullman Company

Defendants next argue that I should abstain based on *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

In *Pullman*, the United States Supreme Court wrote that "federal courts ... restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal

judiciary." 312 U.S. at 501, 61 S.Ct. 643 (internal quotation marks omitted). Under the *Pullman* abstention doctrine, a district court should abstain if

- (1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law by the district court would hinder important state law policies.

Lehman v. City of Louisville, 967 F.2d 1474, 1478 (10th Cir. 1992) (citing *Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981)). If one of these requirements is not met, a district court should not abstain from adjudicating the matter. See, e.g., *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) ("Abstaining under *Pullman* constitutes an abuse of discretion when the requirements for *Pullman* abstention are not met."); *Biegenwald v. Fauver*, 882 F.2d 748, 751-54 (3d Cir. 1989) (reversing district court's decision to abstain when only two of the three abstention factors were present); *Vinyard*, 655 F.2d at 1019-20 (noting abstention is inappropriate when state law "is not so unclear as to permit abstention"). Such abstention is "a narrow exception" to the duty of federal courts to adjudicate cases properly before them and "is used only in exceptional circumstances." *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008) (internal quotation marks omitted); *City of Moore v. Atchison, Topeka, & Santa Fe Ry. Co.*, 699 F.2d 507, 510 (10th Cir. 1983) ("[A]bstention is an extraordinary exception to a district court's general duty to decide a controversy properly before it.").

"Courts have been particularly reluctant to abstain in cases involving facial challenges on First Amendment grounds, ... in part because the delay caused by declining to adjudicate the issues could *1244 prolong the chilling effect on speech." *Stout*, 519 F.3d at 1119 (internal citation omitted). "In cases involving a facial challenge to a statute," the threshold question is "whether the statute is 'fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question.'" *City of Houston v. Hill*, 482 U.S. 451, 468, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987) (quoting *Harman v. Forssenius*, 380 U.S. 528, 534-35,

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85 S.Ct. 1177, 14 L.Ed.2d 50 (1965)). “If the statute has no limiting construction, then abstention is improper, even if the statute has never been interpreted by a state tribunal.” *Jones v. Coleman*, 848 F.3d 744, 751 (6th Cir. 2017) (citing *Hill*, 482 U.S. at 469, 107 S.Ct. 2502 and *Harman*, 380 U.S. at 535, 85 S.Ct. 1177).

Defendants argue Phillips’ federal claims present the following uncertain issue of state law: “whether [the Colorado Anti-Discrimination Act’s] prohibition of discrimination in places of public accommodation must be interpreted and enforced in a manner that exempts objections based on religious beliefs.” (ECF No. 64 at 16). Construing this argument to be specifically aimed at Phillips’ as-applied and facial challenges to C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701, I disagree that these sections pose uncertain questions of state law for three reasons.

First, the Colorado Court of Appeals in *Masterpiece I* stated the “[Colorado’s Anti-Discrimination Act] forbids all discrimination based on sexual orientation regardless of its motivation.” *Craig*, 370 P.3d at 291. So Colorado has already interpreted C.R.S. § 24-34-601(2)(a) and C.R.S. § 24-34-701 as not providing an exemption based on religious beliefs. This interpretation forecloses Defendants’ suggestion that these statutes present uncertain issues of state law.

Second, Defendants’ “proposition defies one of the traditional principles of statutory interpretation” which is that “courts must first look at the plain meaning of a statute’s language.” *La. Debating & Literary Ass’n v. City of New Orleans*, 42 F.3d 1483, 1491 (5th Cir. 1995). The language of these sections refutes Defendants’ uncertainty argument because the language is “plain” and the “meaning unambiguous.” *Hill*, 482 U.S. at 468, 107 S.Ct. 2502. Both as applied and on their face, there is nothing in C.R.S. § 24-34-601(2)(a) or C.R.S. § 24-34-701 that could plausibly be interpreted to exempt places of public accommodation based on religious beliefs. In fact, C.R.S. § 24-34-601(1) already exempts “church[es], synagogue[s], mosque[s], or other place[s] that [are] principally used for religious purposes” from the definition of “place of public accommodation.” The Colorado legislature’s decision to exempt these places from the mandates of C.R.S. § 24-34-601(2)(a) indicates that businesses that qualify as places of public accommodation, like Masterpiece, cannot be exempt for religious reasons. *See, e.g., Allstate Life Ins. Co. v. Miller*, 424 F.3d 1113, 1116 n.3 (11th Cir. 2005) (“[W]here the legislature has included certain exceptions ... the doctrine of *expression unis est exclusion*

alterius counsels against judicial recognition of additional exceptions.”).

Finally, Phillips alleges that “Defendants’ interpretation and enforcement of Colo. Rev. Stat. § 24-34-601(2)(a) targets, shows hostility toward, and discriminates against Phillips and Masterpiece Cakeshop because of their religious beliefs and practices.” (Compl. ¶ 344). He also alleges that Defendants treat him adversely because of his religion. (*Id.* at ¶¶ 420, 422). Accepting these allegations as true, any interpretation of these statutes by Colorado’s state courts would be irrelevant. Even if Colorado eventually read C.R.S. § 24-34-601(2)(a) to exempt places of public accommodations for objections based on religious beliefs, that interpretation would not address Phillips’ *1245 allegations that Defendants have already used the statute to target him for his religious beliefs.

Defendants do not contend that Phillips’ due process and equal protection challenges to C.R.S. § 24-34-303 and C.R.S. § 24-24-306 present uncertain issues of state law. In any event, I also find these statutes do not present uncertain issues of state law because they are unambiguous.

In summary, the difficulty with Phillips’ constitutional claims arises “not because of an unclear standard” set forth in the statutes, but because of the application of these standards to Phillips’ factual allegations. *Vinyard*, 655 F.2d at 1020. “Under such circumstances the district court may not abdicate its duty to adjudicate the matter.” *Id.* Accordingly, I find abstention to be inappropriate under *Pullman*.

3. *Burford v. Sun Oil Company*

Defendants next argue abstention under *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) is appropriate because Phillips challenges “an administrative process that provides a uniform and comprehensive method of adjudicating alleged violations of [the Colorado Anti-Discrimination Act].” (ECF No. 64 at 18). *Burford* abstention “arises when a federal district court faces issues that involve complicated state regulatory schemes.” *Lehman*, 967 F.2d at 1478; *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 704-05 (10th Cir. 1988) (*Burford* applies when “state procedures indicate a desire to create special state forums to regulate and adjudicate these issues”). Defendants acknowledged at the Motions Hearing that they believe *Burford* applies uniformly to Phillips’ four constitutional claims. (Mot. Hr’g Trans. at 42:3-9). They do not make distinctions between how

Burford might apply differently to Phillips' free exercise, free speech, due process, or equal protection claims. Absent such distinctions, I find that this case does not involve state law issues that are connected to a complicated state regularly scheme. Instead, Phillips' claims require a determination of whether Defendants' interpretation and enforcement of several Colorado statutes violate his federal constitutional rights. His "claim[s] therefore only ask[] the district court to act within its area of expertise, rather than to invade the province of the State." *Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1112 (10th Cir. 2000); see also 1 State and Local Government Civil Rights Liability § 1:28 n.7 (collecting cases noting *Burford* is distinguishable from federal constitutional cases because of the significant federal questions at stake). Accordingly, I find abstention to be inappropriate under *Burford*.

4. *Colorado River Water Conservation District v. United States*

Finally, Defendants argue abstention under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) is appropriate.

"*Colorado River* abstention is based on the policy of conserving judicial resources in situations involving the contemporaneous exercise of concurrent jurisdictions." *Grimes*, 857 F.2d at 707. To determine whether *Colorado River* applies, "a federal court must first determine whether the state and federal proceedings are parallel." *Fox v. Maulding*, 16 F.3d 1079, 1081 (10th Cir. 1994). "Suits are parallel if substantially the same parties litigate substantially the same issues in different forums." *Id.* (internal quotation marks omitted).

If the proceedings are parallel, courts consider the following "nonexclusive list of factors," *id.* at 1082, in deciding whether the federal court should defer to the state proceedings:

- *1246 1. the possibility that one of the two courts has exercised jurisdiction over property
- 2. the inconvenience from litigating in the federal forum
- 3. the avoidance of piecemeal litigation
- 4. the sequence in which the courts obtained jurisdiction
- 5. the "vexatious or reactive nature" of either case

6. the applicability of federal law

7. the potential for the state-court action to provide an effective remedy for the federal plaintiff

8. the possibility of forum shopping.

Wakaya Perfection, LLC v. Youngevity Int'l, Inc., 910 F.3d 1118, 1121 (10th Cir. 2018) (citing *Fox*, 16 F.3d at 1082); see also *D.A. Osguthorpe Family P'ship v. ASC Utah, Inc.*, 705 F.3d 1223, 1234-35 (10th Cir. 2013).

These factors should be balanced and no single factor is dispositive. *Fox*, 16 F.3d at 1082. Since "only the clearest justifications will warrant dismissal," *Colorado River*, 424 U.S. at 819, 96 S.Ct. 1236, "any doubt should be resolved in favor of exercising federal jurisdiction," *Fox*, 16 F.3d at 1082. See also *Life-Link Int'l, Inc. v. Lalla*, 902 F.2d 1493, 1496 (10th Cir. 1990) ("[N]o factor clearly warrants dismissal, and several factors favor retention. Therefore, the district court should accept jurisdiction and hear this case on the merits.").

Considering the eight factors, I find that Defendants have not overcome the presumption against abstention. This case does not involve property, making the first factor inapplicable. The second factor does not weigh in favor of abstention because Colorado is a convenient forum for the federal suit.

The third factor does not heavily weigh in favor of abstention. Although it is possible that duplicative litigation may result if the Commission's enforcement proceedings continue alongside this litigation, Phillips has already filed a motion for preliminary injunction, which was denied without prejudice, and may be filing another, narrower, motion for preliminary injunction. (See ECF Nos. 57, 90; Mot. Hr'g Trans. at 81:14-22). If Phillips' federal case proceeds, the state case might be stayed, which has the potential to avoid piecemeal litigation.⁶ See *Life-Link Int'l, Inc.*, 902 F.2d at 1496 ("In view of the fact that the state court action has been stayed, there could be no piecemeal litigation or inadequate forum problems if the federal suit is continued."); *Miller Brewing Co. v. ACE U.S. Holdings, Inc.*, 391 F. Supp. 2d 735, 742 (E.D. Wis. 2005) (noting piecemeal litigation factor did not "weigh heavily in the abstention calculus" because if the federal court proceeded the state court case "might be stayed").

The fourth factor does not weigh in favor of abstention. This factor "is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand," and "priority should

not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Although the Division issued its probable cause determination before Phillips filed his Complaint, Phillips only had reason to file his Complaint because the Division issued its probable cause determination. Phillips also filed his original complaint before the *1247 Commission voted to notice the discrimination charge for a hearing.

The fifth factor does not weigh in favor of abstention because Defendants do not contend Phillips’ initiated his case in a vexatious or reactive manner. The sixth factor does not weigh in favor of abstention because federal law is preeminent. The seventh and eighth factors do not weigh in favor of abstention because of Phillips’ allegations of bad faith.

Accordingly, I find abstention to be inappropriate under *Colorado River*.

B. Absolute Immunity

Director Elenis and the Defendant Commissioners contend they are protected from Phillips’ claims for compensatory, punitive, and nominal damages by absolute prosecutorial immunity.⁷ (ECF No. 64 at 20-24; Mot. Hr’g Trans. 50:1-16). Phillips argues these officials exercise more power with less accountability than a state court prosecutor, which disqualifies them from absolute immunity. (ECF No. 81 at 23). He also argues that Colorado has waived absolute immunity for Commissioners who act in bad faith in performing their duties. (*Id.* at 31).

Absolute immunity is a complete bar to a suit for damages. *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *Guttman v. Khalsa*, 446 F.3d 1027, 1033 (10th Cir. 2006) (“Absolute immunity bars suits for money damages for acts made in the exercise of prosecutorial or judicial discretion.”). Absolute immunity is a common-law defense, and the officials seek the shelter of immunity bear the burden of showing that it is justified. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 806, 812, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). “In determining whether particular actions of government officials fit within a common-law tradition of absolute immunity,” courts apply a “functional approach, ... which looks to the nature of the function performed, not the identity of the actor who performed

it.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (internal quotation marks and citations omitted).

It is well-established that prosecutors are “absolutely immune for activities which are ‘intimately associated with the judicial process’ such as initiating and pursuing a criminal prosecution.” *Snell v. Tunnell*, 920 F.2d 673, 686 (10th Cir. 1990) (quoting *Imbler*, 424 U.S. at 430, 96 S.Ct. 984). “Prosecutors,” in the context of absolute immunity, are not only criminal prosecutors, but equally “state attorneys and agency officials who perform functions analogous to those of a prosecutor in initiating and pursuing civil and administrative enforcement proceedings.” *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991). For example, in *Butz v. Economou*, the Supreme Court observed that agency officials vested with the discretion to “initiate administrative proceedings against an individual or corporation” and to decide “whether a proceeding should be brought and what sanctions should be sought” perform functions analogous to a “prosecutor’s decision to initiate or move forward with a criminal prosecution.” 438 U.S. 478, 515, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). To protect this discretion, and to provide agency officials with *1248 “the latitude to perform their tasks absent the threat of” retaliation, “agency officials who initiate and prosecute enforcement proceedings subject to agency adjudication are entitled to absolute immunity.” *Snell*, 920 F.2d at 686-87.

The Tenth Circuit has applied the *Butz* rationale and extended absolute immunity to state administrative or executive officials serving in adjudicative, judicial, or prosecutorial capacities. *See Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1529 (10th Cir. 1996) (extending absolute immunity to municipal hearing officers); *Atiya v. Salt Lake Cnty.*, 988 F.2d 1013, 1017 (10th Cir. 1993) (extending absolute immunity to county administrative review boards); *Russ v. Uppah*, 972 F.2d 300, 303 (10th Cir. 1992) (extending absolute immunity to parole boards); *Horwitz v. Colo. Bd. of Med. Exam’rs*, 822 F.2d 1508, 1515 (10th Cir. 1987) (extending absolute immunity to the Colorado Board of Medical Examiners).

The key factor for “absolute prosecutorial immunity ‘involves a prosecutor’s acts as an advocate before a neutral magistrate.’” *Snell*, 920 F.2d at 693 (quoting *Lerwill v. Joslin*, 712 F.2d 435, 437 (10th Cir. 1983)). Such acts include a prosecutor’s “decisions to prosecute, their investigatory or evidence-gathering actions, their evaluation of evidence, their determination of whether probable cause exists, and

their determination of what information to show the court.” *Nieler v. Bd. of Cty. Comm’rs*, 582 F.3d 1155, 1164 (10th Cir. 2009). On the other hand, “[t]he more distant a function is from the judicial process, the less likely absolute immunity will attach.” *Snell*, 920 F.2d at 687.

Once prosecutorial immunity attaches, it is absolute, and, therefore, applies to cases of malicious or bad faith prosecution, *Imbler*, 424 U.S. at 427, 96 S.Ct. 984, even if it is obvious “to the prosecutor that he is acting unconstitutionally and thus beyond his authority,” *Lerwill*, 712 F.2d at 437-38. See also *Campbell v. Maine*, 787 F.2d 776, 778 (1st Cir. 1986) (stating that there is no bad faith exception to absolute immunity of a prosecutor “so long as the prosecutor is initiating a prosecution or presenting a state’s case”); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (same).

I first address whether Director Elenis is protected by absolute immunity, and then whether the Defendant Commissioners are protected by absolute immunity. I conclude that these defendants are entitled to absolute immunity, and I therefore do not address the parties’ qualified immunity arguments. See, e.g., *Welch v. Saunders*, 2017 WL 1953102, at *2 (D. Colo. May 11, 2017) (“Because the Court concludes that Defendants are entitled to absolute immunity, the Court does not address Defendants’ qualified immunity argument.”). Lastly, I address Phillips’ assertion that Colorado waived absolute immunity for commissioners who act in bad faith.

1. Director Elenis is Protected by Absolute Immunity

Director Elenis is entitled to absolute immunity from Phillips’ damages claims. In *Wilhelm v. Continental Title Company*, the Tenth Circuit held that the director of the Division is entitled to absolute immunity because the director

is required by statute to investigate charges of discrimination, make a finding of probable cause and report to the commission when conciliation efforts fail. Thus, she is in a position in the state administrative process that is similar to that of a judge, hearing officer or prosecutor. It is therefore

logical that she should enjoy immunity in that regard.

720 F.2d 1173, 1178 (10th Cir. 1983); see also *Hamilton v. Boyd*, 2015 WL 7014405, at *9 (D. Colo. Nov. 12, 2015) (citing *Wilhelm* and holding interim director of the *1249 Division was entitled to absolute immunity).

Director Elenis has the same duties as the director did in *Wilhelm*. For example, Director Elenis and her staff “receive, investigate, and make determinations on charges alleging unfair or discriminatory practices.” C.R.S. § 24-34-302(2). Once Director Elenis receives a charge alleging a discriminatory or unfair practice, she must promptly investigate the charge. C.R.S. § 24-34-306(2)(a). Additional responsibilities of Director Elenis initiate upon her determination that probable cause exists for crediting the discrimination charge. C.R.S. §§ 24-34-306(2)(b)(I)-(II), 24-34-306(4), 24-34-306(8) (describing the authority and duty of the director). These powers and responsibilities situate Director Elenis in a position analogous to that of a prosecutor.

Accordingly, I find that Director Elenis is absolutely immune from Phillips’ damages claims.

2. The Defendant Commissioners are Protected by Absolute Immunity

The Defendant Commissioners are also protected by absolute immunity. The Defendant Commissioners rely heavily on *Horwitz v. Colorado Board of Medical Examiners*, 822 F.2d 1508 (10th Cir. 1987) to shoulder their burden to prove their entitlement to absolute immunity.

In *Horwitz*, a medical doctor who had been summarily suspended by the Colorado State Board of Medical Examiners (“Board”) sued the Board members “alleging that he had been subjected to unfounded complaints, summarily suspended from the practice of podiatry in violation of his Fourteenth Amendment due process rights, and defamed and subjected to outrageous conduct.” 822 F.2d at 1510. The Tenth Circuit upheld the trial court’s dismissal of these claims based on the Board members’ absolute immunity. *Id.* at 1515. In reaching this conclusion, the Tenth Circuit observed that the Board members functioned “in the prosecutorial role in that they, among other things, initiate complaints, start hearings, make investigations, take evidence, and issue subpoenas.” *Id.*;

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see *id.* at 1511 (summarizing the judicial and prosecutorial powers of the Board).

The Defendant Commissioners file charges of discrimination, hold hearings, investigate discrimination charges, file complaints requiring the respondent to answer the charges, and issue subpoenas. C.R.S. §§ 24-34-305(1)(d)(I), 24-34-306(1)(b), 24-34-306(4), 24-34-306(8). Thus, like the Board members in *Horwitz*, the Defendant Commissioners act as the functional equivalent of a prosecutor and are entitled to immunity.

Phillips argues that the six factors identified in *Cleavinger v. Saxner*, 474 U.S. 193, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985) to determine whether government officials are shielded by absolute immunity dictate that the Defendant Commissioners are not protected. In *Cleavinger*, the United States Supreme Court, recognized the following factors as relevant: (1) “the need to assure that the individual can perform his functions without harassment or intimidation;” (2) “the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;” (3) “the adversary nature of the process;” (4) “the correctability of error on appeal[.]” (5) “insulation from political influence;” and (6) “the importance of precedent[.]” 474 U.S. at 202, 106 S.Ct. 496 (citing *Butz*, 438 U.S. at 512, 98 S.Ct. 2894). “These factors serve as a lens through which we can examine the relationship between the challenged function and a benchmark function with an establish claim to absolute immunity.” *Mee v. Ortega*, 967 F.2d 423, 426 (10th Cir. 1992).

***1250** I find that the of balance these factors weigh in favor of affording the Defendant Commissioners absolute immunity.⁸ First, it is important to preserve the Defendant Commissioners’ discretion to bring and maintain a charge of discrimination absent the threat of individual liability. As the Seventh Circuit stated, members of the Indiana Civil Rights Commission who “perform quasi-judicial functions are entitled to absolute immunity in order to protect their decision-making function from being impeded by fear of litigation or personal monetary liability.” *Crenshaw v. Baynerd*, 180 F.3d 866, 868 (7th Cir. 1999). Although *Crenshaw* addressed the commissioner’s judicial functions, I find this rationale applies with the same force to the Defendant Commissioners’ prosecutorial functions.

Second, there are safeguards that reduce the need for private damages, the process is adversarial, and errors can be corrected on appeal. See, e.g., C.R.S. §

24-34-306(8) (describing how the hearing is to be conducted); C.R.S. § 24-34-307 (outlining the appeals process from Commission decisions); 3 C.C.R. 708-1:10.8 (explaining hearing procedures); see also *Stanley v. Indiana Civil Rights Comm’n*, 557 F. Supp. 330, 334-35 (N.D. Ind. 1983) (holding Indiana’s civil rights “administrative process has many of the safeguards that the judicial system affords litigants”).

Phillips argues proceedings before the Commission lack the normal checks that constrain the typical judicial process. (ECF No. 81 at 23). For example, he claims that the Defendant Commissioners’ role as “accuser and adjudicator” is problematic. (*Id.*). But in *Horwitz*, the Board members served “as both an inquiry panel and a hearing panel,” in that they undertook investigations into charges of unprofessional conduct of physicians and then made final decisions on the fate of the physician’s license. 822 F.2d at 1509-11. This dual function had no impact on the Tenth Circuit’s conclusion that the Board members were immune. *Id.* at 1515. In fact, the court noted the Board members were entitled to absolute immunity from damages liability because they “performed statutory functions both adjudicatory and prosecutorial in nature.” *Id.* Phillips also claims that the Defendant Commissioners could manipulate the factual record, a worry that is exacerbated because the “findings of the commission as to the facts shall be conclusive [on appeal] if supported by substantial evidence.” C.R.S. § 24-34-307(6). Appellate review of factual findings based on substantial evidence is a common standard of review, and I fail to see how this statutorily prescribed standard eliminates the protections inherent in an appeal.

Although Phillips may claim the Defendant Commissioners have not followed these procedures in past practice, the focus “is not whether a plaintiff was in fact provided with procedural safeguards required ***1251** by law; rather, it is whether sufficient procedural safeguards *existed* in the applicable regulatory framework so that a plaintiff can seek redress through regular channels if they are not complied with.” *Devous v. Campbell*, 1994 WL 7111, at *1 (10th Cir. 1994) (unpublished table opinion) (citing *Horwitz*, 822 F.2d at 1514-15) (emphasis in original).

Third, the Defendant Commissioners are insulated from political influence. Phillips argues this is not the case because two Commission members must be selected to represent the interests of the business community, two must be selected to represent governmental entities, and three must be selected to represent the community at large and of these seven

members, at least four must be “members of groups of people who have been or who might be discriminated against.” C.R.S. § 24-34-303(1)(b)(I)-(1)(b)(II)(A). I disagree that the selection criteria for Commission members exposes them to political pressure. “[T]he insulation-from-political-influence factor does not refer to the independence of the government official from the political or electoral process, but instead to the independence of the government official as a decision-maker.” *Brown v. Griesenauer*, 970 F.2d 431, 439 (8th Cir. 1992).

There are several provisions that insulate the Commission members’ decision-making from political influence. Commission members are appointed by the Governor and confirmed by the Colorado senate. C.R.S. § 24-34-303(1)(b)(I). Once appointed, they may only be removed by the Governor only for “misconduct, incompetence, or neglect of duty,” and therefore do not serve at the pleasure of either the Governor or the senate. C.R.S. § 24-34-303(3). The Commission members must also be politically diverse with “[n]o more than six members affiliated with a major political party and no more than three members affiliated with the same political party.” C.R.S. § 24-34-303(1)(b)(II)(B). Courts have consistently held that these procedures for selecting and removing members of a governmental body insulate its members from political influence. *See, e.g., Dotzel v. Ashbridge*, 438 F.3d 320, 326 (3d Cir. 2006) (board members who were removable by governor only for “reasonable cause” were immune); *Mishler v. Clift*, 191 F.3d 998, 1007 (9th Cir. 1999) (board members selected to four-year term and removable by governor for good cause were immune); *O’Neal v. Miss. Bd. of Nursing*, 113 F.3d 62, 66 (5th Cir. 1997) (same).

Finally, the importance of precedent weighs neither for nor against absolute immunity. There are “two aspects of precedent relevant to this inquiry: internal and external precedent.” *Gunnison Valley Hosp.*, 310 F.3d at 1318. Internal precedent refers to officials looking to their own prior decisions for guidance or that their present decision will be binding precedent for future action. *Id.* External precedent refers to officials looking for precedent from sources other than their own deliberations. *Id.* Phillips argues the Defendant Commissioners ignore both kinds of precedent, evinced by the way he is allegedly being targeted. (*See* ECF No. 81 at 24 (“Colorado believes that it can continue to treat Phillips unequally”); *id.* (“Colorado disregards the Supreme Court—specifically, its finding that the state applies its offensiveness rule to discriminate against Phillips”)).

While Phillips’ argument that the Commission ignores precedent is supported by the allegations in his Complaint, statutory provisions indicate that precedent is, in theory if not in practice, important for the Commission’s decisions. When the Commission files a formal complaint, the complaint must state “the time, place, and nature of the hearing, *the legal authority* *1252 *and jurisdiction under which it is to be held*, and the matters of fact and law asserted.” C.R.S. § 24-34-306(4) (emphasis added). In other words, the Commission is statutorily required to consider its legal authority to pursue a charge of discrimination. If a party appeals a final order of the Commission, the Colorado Court of Appeals obtains jurisdiction and may “grant such temporary relief or restraining order as it deems just and proper,” and may enter “an order enforcing, modifying, and enforcing as so modified or setting aside the order of the commission in whole or in part.” C.R.S. § 24-34-307(3). The supervision by the Court of Appeals conceivably motivates the Commission to follow external precedent, although I appreciate Phillips’ allegations that this motivation has been insufficient. Nonetheless, considering Phillips’ allegations together with the statutory provisions, I find that this factor is neutral.

Accordingly, I find that the Defendant Commissioners are absolutely immune from Phillips’ damages claims.

3. Colorado has not Waived the Commissioners’ Immunity

Colorado has not waived the Defendant Commissioners’ immunity through C.R.S. § 24-34-306(13). This section states that any Commission member “participating in good faith in the making of a complaint or a report or in any investigative or administrative proceeding ... shall be immune from liability in any civil action brought against him” for actions taken while in his or her capacity as a commission member “if such individual was acting in good faith within the scope of his respective capacity.” C.R.S. § 24-34-306(13). Phillips argues this section indicates the Colorado “legislature waived absolute immunity for commissioners and others who act in bad faith in performing their duties.” (ECF No. 81 at 24). I reject Phillips’ argument because the Tenth Circuit rejected a similar argument in *Horwitz*. There, board members were statutorily immune from suit for “ ‘official acts performed in good faith as members of such board.’ ” 822 F.2d at 1516 (quoting the relevant statute). The Tenth Circuit held that the statute did not permit the plaintiff from pursuing damages

claims against the board members because “the immunity claimed by the Board members here is based on common law immunity, ... rather than on any statutory grant.” *Id.*

C. Sovereign Immunity

Attorney General Coffman and Governor Hickenlooper argue Phillips’ claims for prospective relief against them are barred by the Eleventh Amendment. (ECF No. 64 at 27). Phillips argues that the Eleventh Amendment does not bar these claims because Attorney General Coffman is charged with enforcing C.R.S. § 24-34-601(2)(a) and Governor Hickenlooper is responsible for selecting Commission members according to C.R.S. § 24-34-303(1)(b). (ECF No. 81 at 26-28).

The Eleventh Amendment “generally bars suits brought by individuals against state officials acting in their official capacities.” *Harris v. Owens*, 264 F.3d 1282, 1289 (10th Cir. 2001). But Eleventh Amendment immunity is not absolute, and “under *Ex parte Young*, [209 U.S. 123 [28 S.Ct. 441, 52 L.Ed. 714] (1908)], a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief.” *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1166 (10th Cir. 2012). To invoke *Ex parte Young*, a plaintiff must show that they are “(1) suing state officials rather than the state itself, (2) alleging an ongoing violation of federal law, and (3) seeking prospective relief.” *Id.* at 1167. Attorney General *1253 Coffman and Governor Hickenlooper only quarrel with whether Phillips has alleged they are committing an ongoing violation of federal law.

Ex parte Young requires “the state officer against whom a suit is brought [to] have some connection with the enforcement of the act that is in continued violation of federal law.” *Finstuen v. Crutcher*, 496 F.3d 1139, 1151 (10th Cir. 2007) (internal quotation marks omitted). Although a state official need not have a “ ‘special connection’ ” to the allegedly unconstitutional conduct, he or she “must have a particular duty to ‘enforce’ the statute in question and a demonstrated willingness to exercise that duty.” *Prairie Band Potawatomi Nation v. Wagon*, 476 F.3d 818, 828 (10th Cir. 2007) (quoting *Ex parte Young*, 209 U.S. at 157, 28 S.Ct. 441); see also *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013).

I address the sovereign immunity arguments of Attorney General Coffman and Governor Hickenlooper separately.

1. Attorney General Coffman Must Enforce C.R.S. § 24-34-601(2)(a)

Attorney General Coffman argues she is protected by the Eleventh Amendment because she is not involved with enforcing C.R.S. § 24-34-601(2)(a) and has not shown a demonstrated willingness to enforce the statute. (ECF No. 64 at 28). Phillips alleges that she does have authority to enforce this section and may file a discrimination charge herself. (Compl. ¶¶ 23, 46). Phillips also alleges that the enforcement of C.R.S. § 24-34-601(2)(a) is a continual violation of his First Amendment rights to free exercise of religion and free speech and his Fourteenth Amendment rights to due process and equal protection. (See generally *id.* at ¶¶ 340-89, 411, 414, 420-22).

I conclude that Attorney General Coffman has a duty to enforce C.R.S. § 24-34-601(2)(a) and has a demonstrated willingness to exercise that duty against Phillips. At an administrative hearing on a charge of discrimination, “[t]he case in support of the complaint shall be presented at the hearing by one of the commission’s attorneys or agents.” C.R.S. § 24-34-306(8). According to the Commission’s Rules and Regulations, the Commission’s “attorney” is the Attorney General’s office. 3 C.C.R. 708-1:10.8(A)(3) (“The case in support of the complaint shall be presented at the hearing by the attorney general’s office as counsel in support of the complaint, pursuant to § 24-34-306(8).”); 3 C.C.R. 708-1:10.8(B) (“The case in support of the complaint shall be presented at the hearing by the attorney general’s office as counsel in support of the complaint.”). Because the Attorney General must represent the Commission at a hearing in support of the complaint, and the Commission has set Phillips’ case for a hearing (see Exhibit B), I conclude the Attorney General has a duty to enforce C.R.S. § 24-34-601(2)(a).

The Attorney General has also demonstrated a willingness to enforce the statute, which is evident from the current complaint against Phillips and *Masterpiece I*. (See Compl. ¶¶ 142-44; Exhibit B).

Because the Attorney General represents the Commission in proceedings to enforce C.R.S. § 24-34-601(2)(a), and Phillips claims this enforcement is currently violating his

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constitutional rights, Attorney General Coffman is a proper defendant.

2. Governor Hickenlooper Already Selected Commission Members According to C.R.S. § 24-34-303

Governor Hickenlooper argues that he is protected by the Eleventh Amendment because his “past seating of Commissioners according to statutory criteria over which he has no discretion” do not constitute an ongoing violation of constitutional law. *1254 (ECF No. 86 at 15). Phillips alleges “Governor Hickenlooper administers and enforces Colo. Rev. Stat. § 24-34-303 by appointing Commission members” and has appointed each Commission member for the past eight years. (Compl. ¶¶ 294-95).

I conclude that Phillips has failed to sufficiently allege that Governor Hickenlooper is committing an ongoing violation of Phillips’ constitutional rights. I understand Phillips to be making two distinct claims under C.R.S. § 24-34-303. First, he claims this section violates his due-process and equal protection rights by mandating the Commission be composed based on “non-neutral selection criteria and non-neutral representational interests.” (*See id.* at ¶¶ 415, 424). To the extent Governor Hickenlooper appointed Commissioners according to C.R.S. § 24-34-303, these appointments occurred in the past and are not ongoing. Second, Phillips contends the selection criteria is discriminatory and deprives him of due process and equal protection under the law because “the Commission has had—and currently has—members who are hostile to Phillips and Masterpiece Cakeshop, their religious beliefs, and their religious practices.” (*Id.* at ¶¶ 405, 425). The problem with this allegation is that the “ongoing violation of federal law” related to this claim is directed at the Commission members’ alleged hostility towards Phillips. The Complaint does not allege that Governor Hickenlooper intentionally selected the Commission members because of their hostility towards Phillips.⁹ Therefore, any claim by Phillips that the Commission members’ hostility towards him violates his due process and equal protection rights in an ongoing manner is attributable to the individual Commission members and not Governor Hickenlooper.

Accordingly, I find that Governor Hickenlooper is not a proper defendant and should be dismissed from this suit.

D. Standing

Finally, Defendants argue Phillips does not have standing to challenge C.R.S. § 24-34-701 because he has not alleged an injury. (ECF No. 64 at 29-30).

Standing has three elements: (1) “an injury in fact ... which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical;” (2) “a causal connection between the injury and the conduct complained of;” and (3) “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations and quotation marks omitted). The Tenth Circuit has explained that

[i]n the First Amendment context, two types of injuries may confer Article III standing to seek prospective relief. First, a plaintiff generally has standing if he or she alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder. Plaintiffs may have standing even if they have never been prosecuted or actively threatened with prosecution. Second, although allegations of a subjective chill are not adequate, ..., a First Amendment plaintiff who faces a credible threat of future prosecution suffers from an ongoing injury resulting from *1255 the statute's chilling effect on his desire to exercise his First Amendment.

Ward v. Utah, 321 F.3d 1263, 1267 (10th Cir. 2003) (some internal citations and quotation marks omitted); *see also Phelps v. Hamilton (Phelps II)*, 122 F.3d 1309, 1326 (10th Cir. 1997) (“A plaintiff generally has standing only if he or she ‘has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder’”) (quoting *Babbitt v. United Farm Workers Nat’l*

Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)).

C.R.S. § 24-34-701 prohibits places of public accommodation, like Masterpiece, from publishing or displaying any message

- “that is intended or calculated to discriminate or actually discriminates against any ... sexual orientation, ... or against any of the members thereof in the matter of furnishing or neglecting or refusing to furnish to them or any one of them ... any accommodation, right, privilege, advantage, or convenience offered to or enjoyed by the general public[;]” or
- “which states that any of the accommodations ... shall or will be refused, withheld from, or denied to any person or class of persons on account of ... sexual orientation, ... [;]” or
- “that the patronage, custom, presence, ... at such place by any person or class of persons belonging to or purporting to be of any particular ... sexual orientation, ... is unwelcome or objectionable or not acceptable, desired, or solicited.”

Sexual orientation “means an individual's orientation toward ... transgender status or another individual's perception thereof.” C.R.S. § 24-34-301(7).

Phillips would like to post the following statement on Masterpiece's website:

Masterpiece Cakeshop serves all people—no matter who they are or what protected characteristics they have.... But because our religious beliefs guide us in all parts of our lives, we cannot create custom cakes that express messages or celebrate events in conflict with our faith. *For example, because of our belief in the teachings of the Bible and our reliance on those teachings as the only source of ultimate truth, we cannot create custom cakes that through words, designs, symbols, themes, or images express messages that ... celebrate gender transitions, ...*

This list provides examples of some messages that we have declined to express in the past and will decline to express in the future. It is not intended to be exhaustive. Please understand that if we were to express messages that violate our beliefs, we'd be turning our backs on the faith that inspires our lives.

(Compl. ¶ 270 (emphasis added)). Phillips alleges that Defendants forbid him from publishing “any communication indicating that Phillips will not create custom cakes communicating that sex can be changed, that sex can be chosen, or that sex is determined by perceptions or feelings.” (*Id.* at ¶ 278). He also claims that Defendants’ interpretation of C.R.S. § 24-34-701 restricts his “freedom to communicate about the messages that he will not express through his custom cakes and the religious beliefs that compel him not express those messages” and has caused him “to chill his speech on his website and in the media about the messages that he will not express through his custom cakes and the religious beliefs that compel him not to express those messages.” (*Id.* at ¶¶ 280-81).

***1256** I find that Phillips has alleged a sufficient injury to provide him with standing to challenge C.R.S. § 24-34-701. Phillips clearly intends to engage in conduct arguably affected with a constitutional interest, *Ward*, 321 F.3d at 1267, because he alleges that he “wants to communicate in written, electronic, and printed form” the statement “on his website and in the media.” (Compl. ¶ 270).

Next, C.R.S. § 24-34-701 appears to prohibit Phillips from posting the statement on Masterpiece's website. C.R.S. § 24-34-701 prohibits publishing communications that state any accommodation “shall or will be refused, withheld from, or denied to any person or class of persons” because of sexual orientation and Phillips’ statement announces he will not make custom cakes that celebrate gender transitions. Because transgender status is a form of sexual orientation, C.R.S. § 24-34-701 could be interpreted as prohibiting Phillips’ statement.

Finally, the Division's probable cause determination and the Commission's filing of a formal complaint against Phillips establish a credible threat of prosecution under C.R.S. § 24-34-701 if Phillips were to post the statement. (Compl.

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¶¶ 182, 211, 228). The Division used Phillips' declaration that Masterpiece will not create custom cakes "that promote the idea that a person's sex is anything other than an immutable God-given biological reality" to support the conclusion that Masterpiece refused to make the blue and pink cake because of Scardina's transgender status. (Exhibit A at 3-4). Similarly, the Commission found Phillips discriminated against Scardina based on her sexual orientation at the same time it recognized Masterpiece "stated that the bakery would not make the cake as requested by Scardina because it does not make cakes to celebrate a sex-change." (ECF No. 51-2 at ¶ 6). Because the Division and the Commission equate Phillips' actions in declining to make a blue and pink cake to celebrate a transgender birthday with Phillips declining a service because of the customer's sexual orientation in violation of C.R.S. § 24-34-601(2)(a), it is credible that the Division and the Commission will interpret Phillips' statement, which declares his intent to refuse to make cakes that celebrate gender transitions, as a violation of C.R.S. § 24-34-701's prohibition against communicating an intent to refuse a service on account of sexual orientation.

Once Phillips posts the statement on Masterpiece's website, he will arguably have violated C.R.S. § 24-34-701, and the only condition precedent to enforcing the statute is for an individual to file a complaint with the Division or for the Commission to file its own charge alleging discriminatory or unfair practice. C.R.S. § 24-34-306(1)(a)(b). If an individual or the Commission files a complaint, the Division must investigate the charge. C.R.S. § 24-303-306(2)(a). Given the public interest in this case, and Phillips' allegation that Scardina "googled Masterpiece Cakeshop's information and called the shop on the phone" the day the Supreme Court announced that it would hear *Masterpiece I* (Compl. ¶ 184), "it is not difficult to find it likely that a complaint will be filed if the [statement] is posted." 303 *Creative LLC v. Elenis*, 2017 WL 4331065, at *5 (D. Colo. Sept. 1, 2017).

Defendants counter Phillips' standing argument by claiming the statement is anti-discriminatory and does not actually violate C.R.S. § 24-34-701. (ECF No. 64 at 30; ECF No. 86 at 15). When Defendants say the statement is "anti-discriminatory" they only cite to the first sentence of the statement, and therefore it is unclear whether Defendants really believe the entire statement is anti-discriminatory. (ECF No. 64 at 30). Regardless, I find this argument unpersuasive because of how the Division *1257 and the Commission have interpreted C.R.S. § 24-34-601(2)(a) and how they have enforced the statute against Phillips.

Defendants also highlight the caution currently on Masterpiece's website: "Jack [Phillips] cannot create all custom cakes. He cannot create custom cakes that express messages or celebrate events that conflict with his religious beliefs." (ECF No. 64 at 8).¹⁰ The difference between this statement and the statement Phillips wants to post on Masterpiece's website is obvious. The current statement says nothing specific about what kinds of messages Phillips will not convey, while Phillips proposed statement declares that he will not make custom cakes that "through words, designs, symbols, themes, or images express messages that ... celebrate gender transitions." (Compl. ¶ 270). It is this last phrase that is prohibited by C.R.S. § 24-34-701.

Phillips also has standing to challenge C.R.S. § 24-34-701 because he has adequately alleged his speech is being chilled by the credible threat of prosecution. *Ward*, 321 F.3d at 1267. A plaintiff may establish that a statute objectively instills a chilling effect on speech by

- (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so *because* of a credible threat that the statute will be enforced.

Initiative and Referendum Inst. v. Walker, 450 F.3d 1082, 1089 (10th Cir. 2006). The first element is intended to "lend[] concreteness and specificity to the plaintiffs' claims, but it is not "indispensable" because "people have a right to speak for the first time." *Id.*

Phillips has alleged sufficient facts to meet each of these elements. Regarding the first element, there is no evidence Phillips has attempted to post a statement like his proposed statement on his website. But this deficiency is excusable because Phillips' desire to publish the statement is partly the product of recent events. For example, Phillips wants to post the statement because of "Colorado's continuing hostility toward his religious beliefs, *including but not limited to the*

recent probable-cause determination and formal complaint against him.” (Compl. ¶ 267 (emphasis added)). Regarding the second and third elements, Phillips has alleged a specific desire to post the statement, and there is a credible threat the statute will be enforced as previously discussed. (*Id.* ¶¶ 182, 211, 228, 270, 278, 280-81).

The conclusion that Phillips has standing to challenge C.R.S. § 24-34-701 is consistent with Chief Judge Krieger's opinion in *303 Creative LLC v. Elenis*. In *303 Creative LLC*, a Christian graphic designer challenged a provision of C.R.S. § 24-34-601(2)(a) similar to C.R.S. § 24-34-701. 2017 WL 43310654, at *1. The designer challenged this statute because she believed it prevented her from posting the following disclaimer on her website: “These same religious convictions ... prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman.” *Id.* at *3. Chief Judge Krieger concluded that the plaintiff had standing because the disclaimer would *1258 have violated C.R.S. § 24-34-601(2)(a), there was a credible threat of prosecution thereunder, and “the sole impediment to its posting [was] enforcement” of the statute. *Id.* at *5-6.

Accordingly, I find that Phillips has standing to challenge C.R.S. 24-34-701.

V. CONCLUSION

Defendants’ Motion to Dismiss (ECF No. 64) is **DENIED IN PART AND GRANTED IN PART** as detailed in this Order. Accordingly, it is

ORDERED that Defendants’ Motion to Dismiss based on the abstention doctrines under *Younger*, *Pullman*, *Burford*, and *Colorado River* is **DENIED**. It is

FURTHER ORDERED that Attorney General Coffman's Motion to Dismiss the claims against her based on the Eleventh Amendment is **DENIED**. It is

FURTHER ORDERED that Defendants’ Motion to Dismiss Phillips’ challenges to C.R.S. § 24-34-701 for lack of standing is **DENIED**. It is

FURTHER ORDERED that Director Elenis’ and the Defendant Commissioners’ Motion to Dismiss Phillips’ claims against them for compensatory, punitive, and nominal damages is **GRANTED** and those claims are **DISMISSED**. It is

FURTHER ORDERED that Governor Hickenlooper's Motion to Dismiss Phillips’ claims for prospective relief against him based on the Eleventh Amendment is **GRANTED** and he is **DISMISSED**.

All Citations

445 F.Supp.3d 1226

Footnotes

- 1 Unless the context dictates otherwise, “Phillips” refers to Phillips and Masterpiece Cakeshop, Ltd. (“Masterpiece”) collectively.
- 2 An administrative law judge converted this hearing into a commencement hearing on December 21, 2018. (ECF No. 92-1).
- 3 Phillips’ Motion for Preliminary Injunction (ECF No. 57) was denied without prejudice at the Motion Hearing. (ECF No. 90).
- 4 Because I find these allegations to be well-pleaded, I reject Defendants’ argument that Phillips’ bad faith allegations are conclusory. (ECF No. 86 at 9 n.6).
- 5 For this same reason, I denied Defendants’ request to offer a declaration of Director Elenis at the Motion Hearing and sustained Phillips’ objection to Defendants’ offer of proof. (Mot. Hr’g Trans. 88:14-89:9); *Johnson v. Multi-Solutions, Inc.*, 2010 WL 988727, at *2 (D.N.J. Mar. 15, 2010) (finding that motion to dismiss was a facial challenge and denying the defendant's proffered evidence).

- 6 This should not be construed as a comment on the merits of any future motion for preliminary injunction. I simply note that it is possible that piecemeal litigation may be avoided in this case.
- 7 At the Motion Hearing, Defendants clarified that they are claiming entitlement to prosecutorial immunity, and not “quasi-judicial immunity because the State officials -- it’s not alleged in the Complaint that the State officials have adjudicated the state charge against Mr. Phillips and the bakery. Instead, we are focused solely on their – the prosecutorial actions they have taken to date, as well as the Division Director’s.” (Mot. Hr’g Trans. 50:1-7). Therefore, this Order focuses on the immunity of Director Elenis and the Defendant Commissioners as prosecutors.
- 8 Although Phillips only cites these factors as relevant to the Defendant Commissioners’ immunity, to the extent that “[t]hese six factors are to be considered in determining whether to grant absolute immunity,” *Moore v. Gunnison Valley Hosp.*, 310 F.3d 1315, 1317 (10th Cir. 2002), I find the factors weigh in favor of absolute immunity for Director Elenis for the same reasons they weigh in favor of the Defendant Commissioners. Director Elenis should be able to perform her functions without harassment or intimidation. Although the director’s initial determination is not subject to the adversarial process, there are safeguards that reduce the need for private damages and errors can be corrected on appeal. See 3 C.C.R. 708-1:10.6 (appeals process from the director’s determination). The director is insulated from political influence. See, e.g., C.R.S. § 24-34-302(1) (allowing the executive director of the department of regulatory agencies to appoint the director). And the importance of precedent is a neutral factor.
- 9 True, the Complaint alleges “Governor Hickenlooper has appointed many Commission members—including current members—who are openly hostile or opposed to Phillips, his religious beliefs, and his religious practices,” (Compl. ¶ 298), but it cannot be inferred from this allegation, or from anywhere else in the Complaint, that Governor Hickenlooper appointed them because of that alleged hostility.
- 10 I take judicial notice of the statement on Masterpiece’s website. See *O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) (“It is not uncommon for courts to take judicial notice of factual information found on the world wide web.”).

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EXHIBIT 13

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Filed: August 23, 2019

936 F.3d 740

United States Court of Appeals, Eighth Circuit.

TELESCOPE MEDIA GROUP, a Minnesota corporation; Carl Larsen; Angel Larsen, the founders and owners of Telescope Media Group Plaintiffs - Appellants

v.

Rebecca LUCERO, in her official capacity as Commissioner of the Minnesota Department of Human Rights; Keith Ellison, in his official capacity as Attorney General of Minnesota Defendants - Appellees

Foundation for Moral Law; Center for Constitutional Jurisprudence; [Sherif Girgis](#); Cato Institute; 11 Legal Scholars; Ryan T. Anderson, Ph.D.; African-American and Civil Rights Leaders; State of Alabama; State of Arkansas; State of Kansas; State of Louisiana; State of Missouri; State of Nebraska; State of Oklahoma; State of South Carolina; State of Texas; State of West Virginia Amici on Behalf of Appellants American Civil Liberties Union; [American Civil Liberties Union of Minnesota](#); District of Columbia; State of California; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Massachusetts; State of New Jersey; State of New Mexico; State of New York; State of Oregon; State of Pennsylvania; State of Rhode Island; State of Vermont; State of Virginia; State of Washington; Americans United For Separation of Church and State; Anti-Defamation League; Bend the Arc, [A Jewish Partnership for Justice](#); Central Conference of American Rabbis; [Interfaith Alliance Foundation](#); Lambda Legal Defense and Education Fund; Muslim Advocates; National Council of Jewish Women; People for the American Way Foundation; Union for Reform Judaism; Women of Reform Judaism Amici on Behalf of Appellees

No. 17-3352

Submitted: October 16, 2018

Synopsis

Background: Wedding videographers brought pre-enforcement challenge to ban on sexual orientation discrimination in public accommodations and contracting in Minnesota Human Rights Act (MHRA) against state attorney general and Commissioner of Minnesota Human Rights Department (MHRD), alleging that MHRA's requirement that they serve same-sex couples seeking wedding video services violated their First and Fourteenth Amendment rights to free speech, expressive association, free exercise, equal protection, and due process. The United States District Court for the District of Minnesota, [John R. Tunheim](#), Chief Judge, [271 F.Supp.3d 1090](#), dismissed action. Videographers appealed.

Holdings: The Court of Appeals, [Stras](#), Circuit Judge, held that:

videographers suffered injury in fact from ban, as required to have standing to bring action;

videographers had First Amendment right under free speech clause to make videos for only opposite-sex weddings;

Minnesota's interpretation of MHRA to compel videographers to speak favorably about same-sex marriage if they chose to speak favorably about opposite-sex marriage in their videos compelled them to use their own creative skills to speak in way they found morally objectionable in interference with their right under First Amendment to free speech;

Minnesota's interpretation of MHRA operated as content-based regulation of speech;

strict scrutiny, rather than intermediate scrutiny, applied to Minnesota's interpretation of MHRA;

videographers could use their free exercise clause concerns to reinforce their free-speech claim to state hybrid-rights claim;

Minnesota's interpretation of MHRA did not violate videographers' equal protection rights; and

MHRA, as applied to videographers, was not unconstitutionally vague.

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Affirmed in part, reversed in part, and remanded.

[Kelly](#), Circuit Judge, filed opinion concurring in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Codenotes

Unconstitutional as Applied

[Minn. Stat. Ann. § 363A.11\(1\)\(a\)\(1\)](#), [Minn. Stat. Ann. § 363A.17\(3\)](#)

***746** Appeal from United States District Court for the District of Minnesota - Minneapolis

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellants and appeared on the brief was [Jeremy David Tedesco](#), of Scottsdale, AZ. The following attorney(s) also appeared on the appellant brief; [Jonathan Andrew Scruggs](#), of Scottsdale, AZ, [David Andrew Cortman](#), of Scottsdale, AZ, [Kristen Waggoner](#), of Scottsdale, AZ, [Rory Thomas Gray](#), of Lawrenceville, GA, [Jacob P. Warner](#), of Scottsdale, AZ, and [Renee K. Carlson](#), of Saint Paul, MN.

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Before [SHEPHERD](#), [KELLY](#), and [STRAS](#), Circuit Judges.

Opinion

[STRAS](#), Circuit Judge.

***747** Carl and Angel Larsen wish to make wedding videos. Can Minnesota require them to produce videos of same-sex weddings, even if the message would conflict with their own beliefs? The district court concluded that it could and dismissed the Larsens' constitutional challenge to Minnesota's antidiscrimination law. Because the First Amendment allows the Larsens to choose when to speak and what to say, we reverse the dismissal of two of their claims and remand with instructions to consider whether they are entitled to a preliminary injunction.

I.

The Larsens, who own and operate Telescope Media Group, use their “unique skill[s] to identify and tell compelling stories through video,” including commercials, short films, and live-event productions. They exercise creative control over the videos they produce and make “editorial judgments” about “what events to take on, ***748** what video content to

use, what audio content to use, what text to use ..., the order in which to present content, [and] whether to use voiceovers.”

The Larsens “gladly work with all people—regardless of their race, sexual orientation, sex, religious beliefs, or any other classification.” But because they “are Christians who believe that God has called them to use their talents and their company to ... honor God,” the Larsens decline any requests for their services that conflict with their religious beliefs. This includes any that, in their view, “contradict biblical truth; promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman.”

The Larsens now wish to make films that promote their view of marriage as a “sacrificial covenant between one man and one woman.” To do so, they want to begin producing wedding videos, but only of opposite-sex weddings. According to the Larsens, these videos will “capture the background stories of the couples’ love leading to commitment, the [couples’] joy[,] ... the sacredness of their sacrificial vows at the altar, and even the following chapters of the couples’ lives.” The Larsens believe that the videos, which they intend to post and share online, will allow them to reach “a broader audience to achieve maximum cultural impact” and “affect the cultural narrative regarding marriage.”

Minnesota has a different idea.¹ Relying on two provisions of the Minnesota Human Rights Act (“MHRA”), it claims that a decision to produce *any* wedding videos requires the Larsens to make them for everyone, regardless of the Larsens’ beliefs and the message they wish to convey. The first provision states:

It is an unfair discriminatory practice ... to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of ... sexual orientation.

Minn. Stat. § 363A.11, subdiv. 1(a)(1). The second provides:

It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service ... to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's ... sexual orientation ..., unless the alleged refusal or discrimination is because of a legitimate business purpose.

Id. § 363A.17(3).

Minnesota reads these two provisions as requiring the Larsens to produce both opposite-sex- and same-sex-wedding videos, or none at all. According to Minnesota, the Larsens’ duty does not end there. If the Larsens enter the wedding-video business, their videos must depict same- and opposite-sex weddings in an equally “positive” *749 light. Oral Argument at 26:08–27:15. If they do not, Minnesota has made clear that the Larsens will have unlawfully discriminated against prospective customers “because of” their sexual orientation.

The Larsens have sued Minnesota in federal district court seeking injunctive relief preventing Minnesota from enforcing the MHRA against them. Their principal theory is that it is unconstitutional under the Free Speech Clause of the First Amendment to require them to make same-sex-wedding videos. They also raise free-exercise, associational-freedom, equal-protection, and unconstitutional-conditions claims, as well as an argument that the MHRA is unconstitutionally vague.

At this juncture, all that is before us are the allegations of the Larsens’ complaint. Early on, the district court granted Minnesota’s motion to dismiss for failure to state a claim. *See Fed. R. Civ. P. 12(b)(6)*. It also denied the Larsens’ request for a preliminary injunction, but only because it had already decided to dismiss their lawsuit. According to the court, the Larsens’ free-speech claim failed as a matter of law because the MHRA serves an important governmental interest—preventing discrimination—without limiting more speech than necessary to accomplish this goal. It also ruled

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that the MHRA did not violate any of the other constitutional rights identified by the Larsens.

II.

Before addressing the merits, we must determine whether the Larsens have standing. At this stage, we assume the allegations in the complaint are true and view them in the light most favorable to the Larsens. See *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 933 n.4 (8th Cir. 2012).

To have standing, the Larsens must establish (1) an injury in fact; (2) a causal connection between the injury and the challenged law; and (3) that a favorable decision is likely to redress their injury. *Spokeo, Inc. v. Robins*, — U.S. —, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). There is no doubt that the Larsens' allegations satisfy the second and third requirements: any injury would be traceable to the MHRA and would be redressed by a judicial decision enjoining Minnesota from enforcing the law against them. The only real question is whether the Larsens have suffered an injury in fact.

Although a harm must be “actual or imminent, not conjectural or hypothetical,” to constitute an injury in fact, *id.* at 1548 (citation omitted), a plaintiff need not wait for an actual prosecution or enforcement action before challenging a law's constitutionality, see *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). In fact, all a plaintiff must do at the motion-to-dismiss stage is allege “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder.” *Id.* at 159, 134 S.Ct. 2334 (citation omitted); see also *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011) (explaining that even “[s]elf-censorship can ... constitute injury in fact” for a free-speech claim when a plaintiff reasonably decides “to chill his speech in light of the challenged statute”).

The Larsens' constitutional claims meet this test. The Free Speech Clause of the First Amendment covers films, see *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–02, 72 S.Ct. 777, 96 L.Ed. 1098 (1952), so the videos the Larsens intend to make are “affected with a constitutional interest,” *750 *Susan B. Anthony List*, 573 U.S. at 159, 134 S.Ct. 2334 (citation omitted). The Larsens' desire “to engage in a course of conduct” that includes the production of videos means that their other claims are affected with a constitutional

interest too, regardless of the precise legal theory. *Id.* (citation omitted).

Moreover, the Larsens have adequately alleged a “credible threat of enforcement.” *Id.*; cf. Minn. Stat. § 363A.30, subdiv. 4 (establishing criminal penalties for certain violations). If the Larsens enter the wedding-video business and refuse to film same-sex weddings, Minnesota has made clear that it will view their actions as a violation of the MHRA. Indeed, Minnesota has publicly announced that the MHRA requires all private businesses, including photographers, to provide equal services for same- and opposite-sex weddings. It has even employed “testers” to target noncompliant businesses, and it has already pursued a successful enforcement action against a wedding vendor who refused to rent a venue for a same-sex wedding. Minnesota's active enforcement of the MHRA leaves us with little doubt that the Larsens will face legal consequences if they decide to start making wedding videos.²

III.

Having determined that the Larsens have standing, we now address their principal claim, which is that the wedding videos are speech and they have a First Amendment right to make them for only opposite-sex weddings. At this stage, our task is to review the complaint de novo to determine whether it alleges one or more actionable claims. *United States ex rel. Raynor v. Nat'l Rural Utils. Co-op. Fin., Corp.*, 690 F.3d 951, 955 (8th Cir. 2012).

A.

The First Amendment, which applies to the states through the Fourteenth Amendment, prohibits laws “abridging the freedom of speech.” U.S. Const. amend. I. It promotes the free exchange of ideas by allowing people to speak in many forms and convey a variety of messages, including those that “invite dispute” and are “provocative and challenging.” *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). It also prevents the government from “[c]ompelling individuals to mouth support for views they find objectionable.” *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, — U.S. —, 138 S. Ct. 2448, 2463, 201 L.Ed.2d 924 (2018). As the Supreme Court has made clear, “[t]here is no room under our Constitution for a more restrictive” approach because “the alternative would lead to

standardization of ideas ... by legislatures, courts, or dominant political or community groups.” *Terminiello*, 337 U.S. at 4–5, 69 S.Ct. 894.

The Larsens’ videos are a form of speech that is entitled to First Amendment protection. The Supreme Court long ago recognized that “expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.” *Joseph Burstyn*, 343 U.S. at 502, 72 S.Ct. 777; see also *751 *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65–66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). Indeed, “[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas.” *Joseph Burstyn*, 343 U.S. at 501, 72 S.Ct. 777. “They [can] affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.” *Id.*

Although the Larsens do not plan to make feature films, the videos they do wish to produce will convey a message designed to “affect public attitudes and behavior.” *Id.* According to their complaint, they will tell “healthy stories of sacrificial love and commitment between a man and a woman,” depict marriage as a divinely ordained covenant, and oppose the “current cultural narratives about marriage with which [the Larsens] disagree.” By design, they will serve as a “medium for the communication of ideas” about marriage. *Id.*; cf. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, — U.S. —, 138 S. Ct. 1719, 1727, 201 L.Ed.2d 35 (2018) (“[R]eligious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.”). And like the creators of other types of films, such as full-length documentaries, the Larsens will exercise substantial “editorial control and judgment,” *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), including making decisions about the footage and dialogue to include, the order in which to present content, and whether to set parts of the film to music. The videos themselves are, in a word, speech.

The dissent reaches the opposite conclusion, but only by recasting or ignoring the allegations in the Larsens’ complaint,³ which at this stage we must accept as true. See *Miller*, 688 F.3d at 933 n.4. The complaint makes clear that the Larsens’ videos will not just be simple recordings, the product of planting a video camera at the end of the aisle and pressing record. Rather, they intend to shoot, assemble, and edit the

videos with the goal of expressing their own views about the sanctity of marriage. Even if their customers have some say over the finished product, the complaint itself is clear that the Larsens retain ultimate editorial judgment and control.

It also does not make any difference that the Larsens are expressing their views through a for-profit enterprise. See *post* at 774–75. In fact, in holding that motion pictures are protected by the First Amendment, the Supreme Court explicitly rejected the idea that films do not “fall within the First Amendment’s aegis [simply] because” they are often produced by “large-scale business[es] conducted for private profit.” *Joseph Burstyn*, 343 U.S. at 501, 72 S.Ct. 777; see also *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring) (“[T]his Court has repeatedly rejected the notion that a speaker’s profit motive gives the government a freer hand in compelling speech.”). Other commercial *752 and corporate entities, including utility companies and newspapers, have received First Amendment protection too. See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) (collecting cases); *Tornillo*, 418 U.S. at 258, 94 S.Ct. 2831; see also *Citizens United v. FEC*, 558 U.S. 310, 342, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (collecting cases). The reason, the Court has said, is that they “contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster” no less than individuals do. *Pac. Gas*, 475 U.S. at 8, 106 S.Ct. 903 (plurality opinion) (internal quotation marks and citation omitted).

Minnesota’s position is that it is regulating the Larsens’ conduct, not their speech. To be sure, producing a video requires several actions that, individually, might be mere conduct: positioning a camera, setting up microphones, and clicking and dragging files on a computer screen. But what matters for our analysis is that these activities come together to produce finished videos that are “medi[a] for the communication of ideas.” *Joseph Burstyn*, 343 U.S. at 501, 72 S.Ct. 777; see also *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 n.1, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011) (“Whether government regulation applies to creating, distributing, or consuming speech makes no difference.”).

If we were to accept Minnesota’s invitation to evaluate each of the Larsens’ acts individually, then wide swaths of protected speech would be subject to regulation by the government. The government could argue, for example, that painting is not speech because it involves the physical movements of

a brush. Or it could claim that publishing a newspaper is conduct because it depends on the mechanical operation of a printing press. It could even declare that a parade is conduct because it involves walking. Yet there is no question that the government cannot compel an artist to paint, demand that the editors of a newspaper publish a response piece, or require the organizers of a parade to allow everyone to participate. *See, e.g., Tornillo*, 418 U.S. at 256–58, 94 S.Ct. 2831; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 572–73, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). Speech is not conduct just because the government says it is.

B.

Minnesota's interpretation of the MHRA interferes with the Larsens' speech in two overlapping ways. First, it compels the Larsens to speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage. Second, it operates as a content-based regulation of their speech.

The Supreme Court has “held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all.” *Janus*, 138 S. Ct. at 2463 (internal quotation marks and citation omitted). As *Janus* recognized, the latter is perhaps the more sacred of the two rights. *See id.* at 2463–64. After all, the “choice of a speaker not to propound a particular point of view ... is presumed to lie beyond the government's power to control.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 654, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) (citation omitted).

To apply the MHRA to the Larsens in the manner Minnesota threatens is at odds with the “cardinal constitutional command” against compelled speech. *Janus*, 138 S. Ct. at 2463. The Larsens do not want to make videos celebrating same-sex marriage, which they find objectionable. Instead, they wish to actively promote opposite-sex weddings through their videos, *753 which at a minimum will convey a different message than the videos the MHRA would require them to make. Even if the Larsens' desire to selectively speak is “provocative” and “stirs people to anger,” *Terminiello*, 337 U.S. at 4, 69 S.Ct. 894, Minnesota cannot “coerce[them] into betraying their convictions” and promoting “ideas they find objectionable,” *Janus*, 138 S. Ct. at 2464. Compelling speech in this manner, as the Supreme Court made clear in *Janus*, “is always demeaning.” *Id.* This is especially true here, because Minnesota insists that the Larsens *must* be willing to convey

the same “positive” message in their videos about same-sex marriage as they do for opposite-sex marriage.

Minnesota attempts to downplay this injury by pointing out that the MHRA would not require the Larsens to convey any specific message in their videos. Even if the Larsens must be willing to produce “positive” videos about same-sex marriage, Minnesota argues, they need not actually do so unless a customer requests a film with this point of view.

Even aside from its implausibility—for it seems unlikely that any same-sex couple would request a video condemning their marriage—this argument does not get Minnesota far under First Amendment doctrine. The Supreme Court has recognized that the government still compels speech when it passes a law that has the effect of foisting a third party's message on a speaker. In *Hurley*, for example, it held that Massachusetts could not use its public-accommodation law to require the sponsors of a private parade to include a group of gay, lesbian, and bisexual individuals who wished to march while “carrying [their] own banner.” 515 U.S. at 572–73, 115 S.Ct. 2338. The Court explained that compelling the inclusion of others impermissibly “declar[ed] the sponsors' speech itself to be [a] public accommodation” in a way that “alter[ed] the expressive content of their parade.” *Id.*

Similarly, in *Tornillo*, the Supreme Court addressed a Florida statute that required newspapers that published attacks on the “personal character or official record” of political candidates to publish the candidates' responses too, free of cost. 418 U.S. at 244, 94 S.Ct. 2831. Forced inclusion, the Court reasoned, “fail[ed] to clear the barriers of the First Amendment” because it impermissibly “intru[ded] into the function of the editors.” *Id.* at 258, 94 S.Ct. 2831. The lesson from *Tornillo* is that the First Amendment is relevant whenever the government compels speech, regardless of who writes the script.

The MHRA also operates in this case as a content-based regulation of the Larsens' speech, even if, as the Supreme Court has recognized, the MHRA does not, “[o]n its face, ... aim at the suppression of speech.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). A content-based regulation “[m]andate[s] speech that a speaker would not otherwise make” or “exact[s] a penalty on the basis of the content of” speech. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (quoting *Tornillo*, 418 U.S. at 256, 94 S.Ct. 2831). By treating the Larsens' choice to talk about one topic—opposite-sex marriages—as a trigger for compelling

them to talk about a topic they would rather avoid—same-sex marriages—the MHRA does both at once. In fact, by requiring the Larsens to convey “positive” messages about same-sex weddings, it even goes a step further. *Cf. Reed v. Town of Gilbert*, — U.S. —, 135 S. Ct. 2218, 2227, 192 L.Ed.2d 236 (2015) (describing content-based regulations as those that operate based on “the topic discussed or the idea or message expressed”).

*754 The Supreme Court's decision in *Tornillo* highlights the problems with content-based regulations. Even if a regulation that requires speech does not directly “prevent[speakers] from saying anything [they] wish[],” it still exacts a penalty. *Tornillo*, 418 U.S. at 256, 94 S.Ct. 2831 (citation omitted). In *Tornillo*, the penalty threatened to drive “editors [to] conclude that the safe course [was] to avoid controversy” and to simply not “publish[] news or commentary arguably within the reach of the ... statute.” *Id.* at 257, 94 S.Ct. 2831. Here, “the safe course” for the Larsens would be to avoid the wedding-video business altogether. Yet this type of compelled self-censorship, a byproduct of regulating speech based on its content, unquestionably “dampens the vigor and limits the variety of public debate.”⁴ *Id.* (citation omitted).

C.

Laws that compel speech or regulate it based on its content are subject to strict scrutiny, which will require Minnesota, at a minimum, to prove that the application of the MHRA to the Larsens is “narrowly tailored to serve [a] compelling state interest[].” *Reed*, 135 S. Ct. at 2226; *see also, e.g., Dale*, 530 U.S. at 654, 120 S.Ct. 2446 (“[T]he choice of a speaker not to propound a particular point of view ... is presumed to lie beyond the government's power to control.” (citation omitted)); *Hurley*, 515 U.S. at 573, 115 S.Ct. 2338 (“[T]he fundamental rule of protection under the First Amendment[is] that a speaker has the autonomy to choose the content of his own message.”); *cf. Janus*, 138 S. Ct. at 2464 (suggesting that “a law commanding ‘involuntary affirmation’ of objected-to beliefs would require ‘even more immediate and urgent grounds’ than a law demanding silence” (emphasis added) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943))); *Gralike v. Cook*, 191 F.3d 911, 919–20 (8th Cir. 1999) (applying strict scrutiny to a law forcing candidates to speak about term limits). In an as-applied challenge like this one, the focus of the strict-scrutiny

test is on the actual speech being regulated, rather than how the law might affect others who are not before the court. *See Phelps-Roper v. Ricketts*, 867 F.3d 883, 896 (8th Cir. 2017).

1.

The State asserts an interest in ensuring “that all people in Minnesota [are] entitled to full and equal enjoyment of public accommodations and services.” (internal quotation marks and citation omitted). This interest has a substantial constitutional pedigree and, generally speaking, we have no doubt that it is compelling. For example, the Supreme Court has said that antidiscrimination laws typically “are well within the State's ... power to enact when a legislature has reason to believe that a given group is the target of discrimination.” *Hurley*, 515 U.S. at 572, 115 S.Ct. 2338. Indeed, the MHRA itself withstood a constitutional challenge after Minnesota applied it to compel a “large and basically unselective” social club to accept female members. *Roberts*, 468 U.S. at 621–22, 626–27, 104 S.Ct. 3244. And like the dissent, we have little doubt that Minnesota had powerful reasons for extending the MHRA to protect its citizens *755 against sexual-orientation discrimination. *See post* at 764–65.

But that is not the point. Even antidiscrimination laws, as critically important as they are, must yield to the Constitution. And as compelling as the interest in preventing discriminatory conduct may be, speech is treated differently under the First Amendment. *See Hurley*, 515 U.S. at 579, 115 S.Ct. 2338 (“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.”). As the Supreme Court has explained, even if the government may prohibit “the act of discriminating against individuals in the provision of publicly available goods, privileges, and services,” it may not “declar[e] [another's] speech itself to be [a] public accommodation” or grant “protected individuals ... the right to participate in [another's] speech.” *Id.* at 572–73, 115 S.Ct. 2338 (emphasis added).

Hurley is particularly instructive. When Massachusetts forced the organizers of a private parade to include a group that wished “to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals,” *id.* at 560–61, 115 S.Ct. 2338, the Supreme Court concluded that applying the State's public-

accommodation law in this way violated the organizers' freedom of speech, *id.* at 566, 115 S.Ct. 2338. Although antidiscrimination laws are generally constitutional, the Court reasoned, a "peculiar" application that required speakers "to alter the[ir] expressive content" was not. *Id.* at 572–73, 115 S.Ct. 2338 (emphasis added). In short, the Court drew the line exactly where the Larsens ask us to here: to prevent the government from requiring their speech to serve as a public accommodation for others.

Similarly, in *Dale*, the Supreme Court held that the Boy Scouts had the right to expel a gay-rights activist, despite a New Jersey antidiscrimination law that otherwise prohibited the action. 530 U.S. at 644, 120 S.Ct. 2446. The reason, the Court said, was that the Boy Scouts' opposition to homosexuality was expressive and "the forced inclusion of [the activist] would [have] significantly affect[ed] its expression." *Id.* at 650–52, 656, 120 S.Ct. 2446; *see also id.* at 659, 120 S.Ct. 2446 ("[T]he First Amendment prohibits the State from imposing [an inclusion] requirement through the application of its public accommodations law."). Like *Hurley*, *Dale* makes clear that once conduct crosses over to speech or other expression, the government's ability to regulate it is limited.

As these cases demonstrate, regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be. It is a "bedrock principle ... that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1731 ("[I]t is not ... the role of the State or its officials to prescribe what shall be offensive."). After all, the Westboro Baptist Church could carry highly inflammatory signs at military funerals, *see Snyder v. Phelps*, 562 U.S. 443, 448–49, 460–61, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011), the Nazis could march in areas heavily populated by Jewish residents, *see Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam), and an activist could burn the American flag as a form of *756 political protest, *see Johnson*, 491 U.S. at 399, 109 S.Ct. 2533.

The cases relied upon by Minnesota and the dissent are not to the contrary. In *Roberts*, for example, the Supreme Court emphasized that an all-male social club had failed to show that a law requiring the admission of female members "impose[d] any serious burdens on the male members' freedom of

expressive association" or "impede[d] the organization's ability to engage in ... protected activities or to disseminate its preferred views." 468 U.S. at 626–27, 104 S.Ct. 3244; *see also id.* at 627, 104 S.Ct. 3244 (highlighting that the law "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members"). So too in *Hishon v. King & Spalding*, in which the Court emphasized that a law firm "ha[d] not shown how its ability to [exercise its expressive and associational rights] would be inhibited by a requirement that it consider [a woman] for partnership on her merits." 467 U.S. 69, 78, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). The unmistakable message is that antidiscrimination laws can regulate conduct, but not expression.

Indeed, if Minnesota were correct, there is no reason it would have to stop with the Larsens. In theory, it could use the MHRA to require a Muslim tattoo artist to inscribe "My religion is the only true religion" on the body of a Christian if he or she would do the same for a fellow Muslim, or it could demand that an atheist musician perform at an evangelical church service. In fact, if Minnesota were to do what other jurisdictions have done and declare political affiliation or ideology to be a protected characteristic, then it could force a Democratic speechwriter to provide the same services to a Republican, or it could require a professional entertainer to perform at rallies for both the Republican and Democratic candidates for the same office. *See, e.g., D.C. Code § 2-1402.31*; Seattle, Wash., Mun. Code §§ 14.06.010, .020(L), 030(B); *cf. Hurley*, 515 U.S. at 571–72, 115 S.Ct. 2338 (recognizing that states have the power to create additional protected classes).

2.

Even so, Minnesota argues that we should apply intermediate scrutiny based on a theory that, once again, turns on the distinction between conduct and speech. Specifically, when "speech" and "nonspeech" elements are combined in the same course of conduct" and the government seeks to neutrally regulate the non-speech element, intermediate scrutiny applies under the incidental-burden doctrine. *Johnson*, 491 U.S. at 407, 109 S.Ct. 2533 (quoting *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–27, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) (explaining that a regulation must be content-neutral under this doctrine). According to Minnesota, the MHRA only

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incidentally burdens speech because it neutrally regulates “commercial conduct and economic activity” and requires the Larsens to do nothing more than provide “services to customers regardless of their sexual orientation.”

The problem with this theory, even aside from the fact that the MHRA is not content neutral, *see supra* Part III.B, is that Minnesota does not actually seek to regulate non-speech activity, *see Humanitarian Law Project*, 561 U.S. at 26–27, 130 S.Ct. 2705. The “commercial conduct” and “economic activity” to which Minnesota refers is the making of the videos themselves, which, as we have already explained, are speech. Indeed, Minnesota *757 cannot specifically identify *anything* else, meaning that this is just a repackaging of its theory that making the videos is conduct, not speech. *See supra* Part III.A.

Importantly, the fact that Minnesota is not shy about its belief that it can regulate the videos themselves distinguishes this case from other applications of antidiscrimination laws that actually *do* target conduct, which are generally constitutional even when they incidentally affect speech. *Cf. Hurley*, 515 U.S. at 572–73, 115 S.Ct. 2338 (declaring a “peculiar” application of an antidiscrimination law to be unconstitutional). An employment-discrimination law, for example, can unquestionably “require an employer to take down a sign reading ‘White Applicants Only.’” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (F.A.I.R.)*, 547 U.S. 47, 62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). And a public-accommodation law requiring a restaurant to serve people of all races, genders, and sexual orientations will have the incidental effect of requiring servers to speak to customers to take their orders. But these consequences are incidental because the relevant laws target the *activities* of hiring employees and providing food, neither of which typically constitutes speech. Here, by contrast, Minnesota is targeting speech itself.⁵

Minnesota also suggests that a lesser form of scrutiny is appropriate because the Larsens can say that they disapprove of same-sex marriage in some other way. But just like New Hampshire could not “require [drivers] to display the state motto” Live Free or Die on their license plates, *Wooley v. Maynard*, 430 U.S. 705, 717, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), even if they could disavow the motto through “a conspicuous bumper sticker,” *id.* at 722, 97 S.Ct. 1428 (Rehnquist, J., dissenting), so too would a disclaimer here be inadequate. The reason is that the constitutional “protection of a speaker's freedom would be empty” if “the government

could require speakers to affirm in one breath that which they deny in the next.” *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338 (brackets and citation omitted).

To be sure, the Supreme Court has suggested that the opportunity to provide a disclaimer can make a difference when a law requires an otherwise-silent party to provide a forum for the speech of others. One example is *PruneYard Shopping Center v. Robins*, which upheld a requirement compelling the owner of a shopping mall to allow private individuals to distribute political pamphlets on the premises. 447 U.S. 74, 77–78, 88, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). The Court emphasized that the owner could “expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers st[ood].” *Id.* at 87, 100 S.Ct. 2035. “Notably absent,” however, “was any concern that access to [the mall] might affect the shopping center owner's exercise of his own right to speak” or any allegation *758 that the owner “objected to the content of the pamphlets.” *Pac. Gas*, 475 U.S. at 12, 106 S.Ct. 903 (plurality opinion). Here, of course, the Larsens strenuously object to what Minnesota would have them say.

Minnesota's reliance on *F.A.I.R.* is similarly flawed. *F.A.I.R.* was also about the availability of a forum, but this time for legal recruiters. Law schools, which invited and hosted recruiters of all types, objected to hosting the military because of a disagreement with policies that excluded gays and lesbians from serving. *F.A.I.R.*, 547 U.S. at 51–52, 126 S.Ct. 1297. Federal law, however, required the schools to give equal access to military recruiters or risk losing federal funding. *Id.* The schools sued, claiming that they had a First Amendment right to exclude military recruiters from campus. *Id.* at 52–53, 126 S.Ct. 1297. The Supreme Court disagreed, even if the schools had to “send e-mails [and] post notices on bulletin boards on [the recruiters'] behalf”—both “elements of speech.” *Id.* at 61, 126 S.Ct. 1297.

The Supreme Court upheld the law because it did not interfere with the law schools' expression or coopt their speech. Simply hosting recruiters was not speech, according to the Court, so the “accommodation of a military recruiter's message” did not “sufficiently interfere with any message of the school[s].” *Id.* at 64, 126 S.Ct. 1297. Besides, just like the mall owner in *PruneYard*, the schools “remain[ed] free ... to express whatever views they may have [had] on the military's congressionally mandated employment policy.” *Id.* at 60, 126 S.Ct. 1297. Cases like *Hurley*, by contrast,

involved unconstitutionally compelled speech because “the complaining speaker’s own message was affected by the speech it was forced to accommodate.” *Id.* at 63, 126 S.Ct. 1297.

The facts of the case, as pleaded by the Larsens, are much closer to *Hurley* than to *PruneYard* or *F.A.I.R.* Rather than serving as a forum for the speech of others, the Larsens’ videos will carry their “own message.” *Id.* The MHRA interferes with their message by requiring them to say something they otherwise would not. *See id.* at 64, 126 S.Ct. 1297. The Larsens, then, lose “the autonomy to choose the content of [their] own message,” *id.* (quoting *Hurley*, 515 U.S. at 573, 115 S.Ct. 2338), which violates the “cardinal constitutional command” against compelled speech, *Janus*, 138 S. Ct. at 2463.

* * *

Consistent with the Supreme Court’s instruction that antidiscrimination laws “do not, as a general matter, violate the First ... Amendment[],” *Hurley*, 515 U.S. at 572, 115 S.Ct. 2338, our holding leaves intact other applications of the MHRA that do not regulate speech based on its content or otherwise compel an individual to speak. But when, as here, Minnesota seeks to regulate speech itself as a public accommodation, it has gone too far under *Hurley* and its interest must give way to the demands of the First Amendment.

IV.

The district court also ruled that the Larsens could not seek relief on various other constitutional theories. We largely agree that these claims fail. But one—the free-exercise claim—can proceed because it is intertwined with their free-speech claim. Accordingly, the Larsens are free to pursue their so-called “hybrid rights” claim on remand.

A.

The basic premise of the Larsens’ free-exercise claim is that the MHRA, as interpreted by Minnesota, prevents them from freely exercising their religious beliefs. It does so, the Larsens say, because *759 they will have to either show support for same-sex marriage, even though they object to it on religious

grounds, or refrain from making wedding videos at all. This is not a typical free-exercise claim.

Those seeking relief under the Free Exercise Clause of the First Amendment will ordinarily argue that their religion requires them to engage in conduct that the government forbids or forbids certain conduct that the government requires. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (evaluating whether those who practice Santeria could perform animal sacrifice, the religion’s “central element,” even though it was illegal); *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 874, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (deciding whether members of the Native American Church should be allowed to use peyote, a controlled substance, for “sacramental purposes”); *Gillette v. United States*, 401 U.S. 437, 461, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (considering a claim that conscientious objectors should have been able to avoid military conscription during the Vietnam War). If the Larsens’ claim fell into one of those two categories, then we would simply apply the rule that neutral, generally applicable laws that incidentally burden “a particular religious practice” do not have to be “justified by a compelling governmental interest.” *Church of the Lukumi*, 508 U.S. at 531, 113 S.Ct. 2217; *see also Smith*, 494 U.S. at 878–79, 110 S.Ct. 1595 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting *conduct* that the State is free to regulate.” (emphasis added)).

But the Larsens have alleged that the MHRA burdens their religiously motivated *speech*, not their religious *conduct*. So their claim falls into the class of “hybrid situation[s]” in which “the Free Exercise Clause *in conjunction* with other constitutional protections, such as freedom of speech,” can “bar[] application of a neutral, generally applicable law.” *Smith*, 494 U.S. at 881–82, 110 S.Ct. 1595 (emphasis added). Because the Larsens’ free-exercise claim is “[] connected with [their] communicative activity,” in other words, the Larsens may use their “Free Exercise Clause concerns” to “reinforce[]” their free-speech claim. *Id.* at 882, 110 S.Ct. 1595.

Minnesota, the district court, and the dissent seem to think that we can simply ignore the hybrid-rights discussion from *Smith* because it was dicta. For two reasons, it cannot be dismissed so easily. First, we applied the hybrid-rights doctrine post-*Smith* in *Cornerstone Bible Church v. City of Hastings*, which rejected a church’s stand-alone free-exercise

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claim but recognized that the church's other constitutional claims “breathe[d] life back into [its] ‘hybrid rights’ claim.” 948 F.2d 464, 472–73 (8th Cir. 1991). Because this aspect of *Cornerstone Bible Church* resurrected a claim that had been left for dead by the district court, our application of the hybrid-rights theory was part of the holding because it was “essential to the judgment in that case.” *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544, 550 (8th Cir. 1990) (distinguishing between holdings and dicta).

Second, we do not agree with the premise that *Smith*'s analysis of the hybrid-rights doctrine was dicta. *Smith* upheld a “neutral, generally applicable law” that interfered with the sacramental use of peyote. 494 U.S. at 881–82, 110 S.Ct. 1595. To reach this conclusion, however, the Supreme Court had to grapple with a long line of cases that had treated the Free Exercise Clause as a shield against laws burdening religious practices. See *id.* (collecting *760 cases). Rather than overrule these decisions, the Court explained that they involved “hybrid situation[s]” in which a free-exercise challenge was intertwined with another constitutional right. *Id.* at 882, 110 S.Ct. 1595.

This means that *Smith* did more than simply speculate about how to treat a hybrid claim in some hypothetical future case. Rather, it described the operation of an *existing* doctrine, one that it then applied to the parties. See *id.* (highlighting that “[t]here [was] no contention that Oregon's drug law represent[ed] an attempt to regulate ... the communication of religious beliefs” (emphasis added)). Although the claimants did not prevail under the hybrid-rights doctrine in *Smith*, the Court's discussion of it was far from dicta.

Of course, it is not at all clear that the hybrid-rights doctrine will make any real difference in the end. After all, the Larsen's free-speech claim already requires the application of strict scrutiny. As a practical matter, then, the fact that the videos also have religious significance may not move the needle much. But because the Larsens have adequately alleged a hybrid-rights claim in their complaint, the district court must allow them to develop it on remand. See *Cornerstone Bible Church*, 948 F.2d at 473.

B.

The Larsens cannot prevail on any of their remaining claims, beginning with their allegation that the MHRA violates

their associational-freedom rights. Their theory is that the law forces them “to join together and speak with those who wish to express an opposing message about marriage,” which unconstitutionally “impairs their ability to express their views, and only those views.” (internal quotation marks, brackets, and citation omitted).

Although the Larsens call it associational freedom, this is really a disguised free-speech claim. The right to expressive association protects groups from being forced “to accept members [they do] not desire.” *F.A.I.R.*, 547 U.S. at 69, 126 S.Ct. 1297 (citation omitted). But requiring the Larsens to produce same-sex-wedding videos would not force them to accept same-sex couples as “members” of their company or of some other group to which they belong. Rather, they would simply have to “‘associate’ with [same-sex couples] in the sense that they [would need to] interact with them.” *Id.* Standing alone, these interactions would not affect their “ability to advocate public or private viewpoints.” *Dale*, 530 U.S. at 648, 120 S.Ct. 2446. It is only when these interactions require the Larsens to speak in a certain way that the MHRA “impair[s] the[ir] ability ... to express th[eir] views.” *Id.*

Indeed, the Larsens' allegations all but doom their associational-freedom claim. The complaint stresses that the Larsens will “gladly work with all people—regardless of their ... sexual orientation”—as long as the message of any video they are asked to make fits with their religious beliefs. The Larsens' counsel reinforced this point at oral argument, explaining that they would have no problem making other types of videos for gay or lesbian customers. It is clear, then, that serving, speaking to, and otherwise associating with gay and lesbian customers is not the harm they seek to remedy. Their real objection is to the message of the videos themselves, which is just another way of saying that the MHRA violates their free-speech rights.

C.

The Larsens have also brought a claim alleging a violation of the Equal Protection Clause of the Fourteenth Amendment. *761 Their argument begins with the uncontroversial premise that free speech and the free exercise of religion are fundamental constitutional rights. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570–71, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 307, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). The MHRA treats people differently in the exercise of these fundamental rights, they

say, because “[f]ilmmakers who support same-sex marriage are free to create and sell wedding films that align with their views on marriage,” while those who oppose it are not. So this “classification[] affecting fundamental rights” merits strict scrutiny—a standard that the MHRA cannot satisfy. *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988).

The problem with the Larsens’ logic lies in the middle step: the classification that they believe they have identified. The MHRA does not classify anyone based on their views about marriage. Rather, under Minnesota’s interpretation, every wedding-video business must be willing to film both opposite-sex and same-sex weddings. The point, in other words, is that the law applies equally. Cf. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (“The Fourteenth Amendment guarantees equal laws, not equal results.”).

To be sure, the Larsens, and others like them, are unhappy with the MHRA’s requirements, but dissatisfaction with the law is not itself a classification. Cf. *id.* at 271–72, 99 S.Ct. 2282 (explaining that “many [laws] affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law”). Indeed, by the Larsens’ logic, any rule that affects religiously motivated conduct would be subject to strict scrutiny because it would create two groups of people: those who are happy to follow the law and those who are not. But we know from *Smith* that the government has the power to enact neutral, generally applicable laws that burden religious conduct. 494 U.S. at 878–80, 110 S.Ct. 1595. We accordingly reject the Larsens’ attempt to manufacture a legal classification that does not exist.

D.

The Larsens further allege that the MHRA “is vague and allows unbridled discretion.” They focus on Minn. Stat. § 363A.17(3), which forbids discrimination “unless the alleged refusal or discrimination is because of a *legitimate business purpose*.” (Emphasis added). According to the Larsens, this exception creates “uncertainty” about the scope of the law and allows Minnesota to enforce the law however it wishes, including more aggressively against those with whom it disagrees.

The MHRA, as applied to the Larsens, is not unconstitutionally vague. “We consider whether a statute is vague as applied to *the particular facts at issue*, for a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” *Humanitarian Law Project*, 561 U.S. at 18–19, 130 S.Ct. 2705 (emphasis added) (internal quotation marks, brackets, and citation omitted). The allegations in the complaint once again doom the Larsens’ argument, this time because they insist that “the MHRA prohibits them from [creating only opposite-sex-wedding videos]” and that Minnesota has “categorically declared” that their religious objections are not a “legitimate business purpose.” So their argument that they are somehow left in legal limbo rings hollow.

*762 They also cannot explain how the legitimate-business-purpose exception gives unbridled discretion to state officials. The Larsens fail to cite even a single example of discrimination in enforcement of this exception, much less show that Minnesota has a pattern of discriminatory enforcement. Nor is the phrase “legitimate business purpose,” which mirrors language routinely used elsewhere in antidiscrimination law, *see, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) (explaining that an employer may rebut a charge of discrimination by pointing to “some legitimate, nondiscriminatory reason” for a hiring decision), so open-ended “that it authorizes or encourages seriously discriminatory enforcement,” *Humanitarian Law Project*, 561 U.S. at 18, 130 S.Ct. 2705 (citation omitted).

E.

Finally, the Larsens’ complaint also alleges a violation of the unconstitutional-conditions doctrine. They reason that the MHRA “conditions [their] right to promote their religious views about marriage ... on their willingness to forfeit their rights to be free from government-compelled speech, to freely exercise their religion, and to equal protection of the laws.”

This argument is just a replay of their other claims, once again under an ill-fitting legal framework. The unconstitutional-conditions doctrine prevents the government from “deny[ing] a *benefit* to a person” because of “constitutionally protected [activity].” *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (emphasis added). This case, however, involves “direct[]” regulation, not the withholding

of benefits, such as “tax exemptions,” “unemployment benefits,” or “welfare payments.” *Id.* (citation omitted). We accordingly treat this claim for what it is: three miscast, freestanding constitutional claims.

V.

We affirm the district court's judgment in part, reverse it in part, and remand for further proceedings. On remand, the district court must consider in the first instance whether the Larsens are entitled to a preliminary injunction, keeping in mind the principle that, “[w]hen a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.” *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir.2012) (en banc) (citation omitted).

KELLY, Circuit Judge, concurring in part and dissenting in part.

The Larsens want to expand their videography business to provide wedding-video services, but they do not want to supply these services for same-sex weddings. Minnesota has enacted a general antidiscrimination statute that prohibits businesses from discriminating against individuals based on certain protected characteristics, including sexual orientation. The Larsens filed this lawsuit to obtain an exemption that would allow them to deny service to same-sex couples. The court today correctly rejects many of the Larsens’ arguments as to why they are entitled to such an exemption. It nonetheless concludes that the First Amendment's protections for free speech and free exercise of religion likely entitle them to relief. From this holding, I must respectfully dissent.

No court has ever afforded “affirmative constitutional protections” to private discrimination. *763 *Norwood v. Harrison*, 413 U.S. 455, 469–70, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973). Indeed, caselaw has long recognized that generally applicable laws like Minnesota's may limit the First Amendment rights of an individual in his capacity as the owner of a business serving the public. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, — U.S. —, 138 S. Ct. 1719, 1723–24, 201 L.Ed.2d 35 (2018). Although religious and philosophical objections to same-sex marriage are protected by the First Amendment, “such objections do not allow business owners ... to deny protected persons equal access to goods and services under a neutral and generally

applicable public accommodations law.” *Id.* at 1727. That well-established principle should have easily disposed of this case.

Instead, the court tries to recharacterize Minnesota's law as a content-based regulation of speech, asserting that it forces the Larsens to speak and to convey a message with which they disagree. Neither is true. The Larsens remain free to communicate any message they desire—about same-sex marriage or any other topic—or no message at all. What they cannot do is operate a public accommodation that serves customers of one sexual orientation but not others. And make no mistake, that is what today's decision affords them license to do. The Larsens concede that they want to operate a public accommodation that serves only opposite-sex couples. Minnesota's law prohibits that conduct just as it would prohibit any hotel from denying its services to an individual based on race, any store from refusing to sell goods to a person based on religion, or any restaurant from charging higher prices to women than to men. That the service the Larsens want to make available to the public is expressive does not transform Minnesota's law into a content-based regulation, nor should it empower the Larsens to discriminate against prospective customers based on sexual orientation.

I

A

The axiom that places of public accommodation are open to everyone is deeply rooted in the American legal system. Since at least the sixteenth century, the common law recognized that innkeepers and common carriers were obligated to serve all potential customers. *See Lombard v. Louisiana*, 373 U.S. 267, 276–77 & n.6, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963) (Douglas, J., concurring); *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 571, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *Bell v. Maryland*, 378 U.S. 226, 296–99, 84 S.Ct. 1814, 12 L.Ed.2d 822 (1964) (Goldberg, J., concurring). After the Civil War, states began codifying those protections through public accommodations statutes to protect African Americans from discrimination. *Hurley*, 515 U.S. at 571, 115 S.Ct. 2338 (discussing Massachusetts's adoption of the first public accommodations law in 1865); *see also State Public Accommodation Laws*, Nat'l Conf. St. Legislatures, <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> (last

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updated April 8, 2019) (indicating that all but five states have such laws). The federal government followed suit with the Civil Rights Act of 1875 and later the Civil Rights Act of 1964, Title II of which contains the current requirement: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation ... without discrimination or segregation on the ground of race, color, religion, or national origin.” 42 U.S.C. § 2000a(a).

***764** Public accommodations laws enforce the basic and fundamental right to be treated as an equal in American society. Private discrimination “sap[s] the moral fiber of the Nation,” 110 Cong. Rec. 7379 (1964) (statement of Sen. Kennedy), and “mars the atmosphere of a united and classless society in which this Nation rose to greatness,” 110 Cong. Rec. 7399 (1964) (statement of Sen. Magnuson) (quoting President John F. Kennedy, Feb. 28, 1963). Title II and laws like it “send[] a clear message to ... places of public accommodations” that they may not deny historically disadvantaged groups the “equally effective and meaningful opportunity to benefit from all aspects of life in America.” 135 Cong. Rec. 8506 (1989) (statement of Sen. Harkin) (discussing the Americans with Disabilities Act).

In that vein, Minnesota enacted the Minnesota Human Rights Act (MHRA) more than 130 years ago. The MHRA originally provided that all persons “of every race and color” shall be “entitled to the full and equal enjoyment of” public accommodations within the state. An Act To Protect All Citizens in Their Civil and Legal Rights, ch. 224, sec. 1, 1885 Minn. Laws 295, 296. Like other states, Minnesota eventually broadened the scope of the law’s protections to cover a wider swath of businesses and a larger number of protected classes. See U.S. Jaycees v. McClure, 305 N.W.2d 764, 766–68 (Minn. 1981) (discussing the law’s history). The current law defines a place of public accommodation as “a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public.” Minn. Stat. § 363A.03 subd. 34 (2018).

The current MHRA contains two antidiscrimination provisions at issue here. The Public Accommodations Provision prohibits denying anyone the “full and equal enjoyment” of the goods or services of a place of public accommodation because of “race, color, creed, religion,

disability, national origin, marital status, sexual orientation, or sex.” Id. § 363A.11 subd. 1(a)(1). The Business Discrimination Provision makes it an “unfair discriminatory practice” for a business “to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person’s race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.” Id. § 363A.17(3).

Minnesota’s decision to add sexual orientation to the list of protected characteristics was driven by substantial evidence of sexual-orientation discrimination, particularly in rural areas. In April 1990, Minnesota Governor Rudy Perpich appointed a task force to determine whether gay and lesbian Minnesotans were suffering from discrimination and to make policy recommendations. See Report of the Governor’s Task Force on Lesbian and Gay Minnesotans (Mar. 22, 1991) [hereinafter Task Force Report], J.A. 325–461. The task force heard forty hours of public and private testimony on a range of issues affecting gay and lesbian communities in various parts of the state. Id., J.A. 330. It concluded that there remains “substantial societal hostility” toward homosexuality, which is “damaging to gay men and lesbians and ultimately ... society as a whole.” Id. Discrimination is “wide-spread,” but it is “perhaps worse” in the state’s rural areas, where there is greater evidence that gays and lesbians fear losing their jobs and housing on account of sexual orientation. Id., J.A. 333. The task force noted that “an ***765** underlying theme” to all of its public hearings and briefings “was the need to add gays and lesbians as a protected class under the Minnesota Human Rights Act” to combat the “considerable discrimination” faced by those individuals. Id., J.A. 332. In particular, the task force highlighted the need to include protections for public accommodations because “[s]everal people testified that they had been denied motel or hotel rooms when the inn-keepers discovered they were gay, remarking, ‘We don’t want your kind here.’ ” Id.

This evidence is consistent with the well-documented history of discrimination against gays and lesbians in this country. “[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral.” Lawrence v. Texas, 539 U.S. 558, 571, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Homosexuality was treated as an illness for much of the twentieth century, and until recently, same-sex intimacy was criminalized by many states. Obergefell v. Hodges, — U.S. —, 135 S. Ct. 2584, 2596, 192 L.Ed.2d 609 (2015); see also Lawrence, 539 U.S. at 578, 123 S.Ct. 2472. “Gays and

lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.” [Obergefell](#), 135 S. Ct. at 2596.

It was in light of this history that Minnesota amended the MHRA to prohibit various forms of discrimination based on sexual orientation. The amendments sought to ensure that “sexual orientation cannot be used to deny some Minnesotans the basic rights to a place to live, employment and other public accommodations which should be enjoyed by all citizens.” Letter from Hubert H. Humphrey III, Att’y Gen., to Hon. Alan Spear, Chair, Senate Judiciary Comm. (Mar. 1, 1993) [hereinafter Humphrey Letter], J.A. 477. As relevant here, the law added sexual orientation to the list of protected characteristics included in the Public Accommodations Provision and the Business Discrimination Provision, [see](#) Act of April 2, 1993, ch. 22, sec. 10, 1993 Minn. Laws 121, 131–32; [id.](#) sec. 15, 1993 Minn. Laws at 140, thereby recognizing that “the right to public accommodations, public services and freedom from personal harm, should be guaranteed to all,” Humphrey Letter, J.A. 478.

Minnesota is not alone in making sexual orientation a protected characteristic or in prohibiting sexual-orientation discrimination in places of public accommodation. Approximately half the states in the Union, along with the District of Columbia, provide similar protections.⁶ In the remaining *766 states, more than 100 local jurisdictions have adopted laws or ordinances prohibiting discrimination on the basis of sexual orientation in places of public accommodation. [See](#) Br. of Amici Curiae Massachusetts et al. 3a–8a. In all, more than half of all Americans live in a jurisdiction that prohibits this type of discrimination. [See id.](#) at 9–10 & n.6.

Numerous religious groups supported the inclusion of sexual orientation as a protected characteristic under the MHRA. [See, e.g.,](#) Joint Religious Legislative Coal., [JRLC Position on Human Rights with Regard to Sexual Orientation](#) (Mar. 4, 1993), J.A. 463–71; Statement from James D. Habiger, Exec. Dir., Minn. Catholic Conference (Mar. 1, 1993), J.A. 473–75; [Task Force Report](#), J.A. 376–86 (excerpting endorsements from forty-seven religious denominations or institutions). To accommodate religious views, the legislature added a broad exemption to the MHRA for religious nonprofits. As originally enacted, the amendment provided that nothing within the MHRA

prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from:

- (1) limiting admission to or giving preference to persons of the same religion or denomination; or
- (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities. This clause shall not apply to secular business activities engaged in by the religious association, religious corporation, or religious society, the conduct of which is unrelated to the religious and educational purposes for which it is organized.

Act of April 2, 1993, ch. 22, sec. 6, 1993 Minn. Laws at 125–26 (now codified at [Minn. Stat. § 363A.26](#)). When Minnesota amended its laws in 2013 to authorize same-sex marriages, it added a third paragraph to the exception:

- (3) taking any action with respect to the provision of goods, services, facilities, or accommodations directly related to the solemnization or celebration of a civil marriage that is in violation of its religious beliefs.

Act of May 14, 2013, ch. 74, sec. 1, 2013 Minn. Laws 1 (now codified at [Minn. Stat. § 363A.26](#)). The 1993 amendments also exempted from the Public Accommodations Provision

employees or volunteers of a nonpublic service organization whose primary function is providing occasional services to minors, such as youth sports organizations, scouting organizations, boys’ or girls’ clubs, programs providing friends, counselors, or role models for minors, youth theater, dance, music or artistic organizations, agricultural organizations for minors, and other youth organizations, with respect

to qualifications based on sexual orientation.

Act of April 2, 1993, ch. 22, sec. 5, 1993 Minn. Laws at 125 (now codified at [Minn. Stat. § 363A.24 subdiv. 1](#)).

B

The Larsens have sincere views about marriage rooted in their deeply held religious beliefs. They are “Christians who *767 base their beliefs on the Bible.” Am. Compl. ¶ 21. In particular, the Larsens “disagree with the view and message that same-sex marriage is morally equivalent to the historic, biblically-orthodox definition of marriage as between one man and one woman.” *Id.* ¶ 116. Their religious and philosophical objections to same-sex marriage are entitled to respect, and “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.” [Hernandez v. Comm’r](#), 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989). “For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.” [Lawrence](#), 539 U.S. at 571, 123 S.Ct. 2472. The First Amendment undoubtedly protects the Larsens’ ability to “advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.” [Obergefell](#), 135 S. Ct. at 2607.

But this case is not about the Larsens’ rights as individual citizens to worship freely or to speak openly about their faith or political views. It is about their rights as owners of Telescope Media Group (TMG), a Minnesota for-profit corporation. TMG provides a variety of video and media production services to the public, including short films and commercials. TMG does not currently make wedding videos, but the Larsens want to expand TMG to include this service. The Larsens aver that they “desire to use their unique storytelling and promotional talents to convey messages that promote aspects of their sincerely-held religious beliefs.” Am. Compl. ¶ 93. To that end, the Larsens want to offer wedding-video services, but they do not want to provide those services to same-sex couples.

The Larsens concede that, by offering wedding-video services to the general public, TMG qualifies as a place of public

accommodation under the MHRA’s definition. *Id.* ¶ 81. As a for-profit corporation, it falls outside the exemptions included in the law for religious and secular nonprofits. [See Minn. Stat. §§ 363A.24 subdiv. 1, 363A.26](#). The Public Accommodations Provision therefore prohibits TMG from denying anyone the “full and equal enjoyment” of its services based on sexual orientation, [id.](#) § 363A.11 subdiv. 1(a)(1), and the Business Discrimination Provision prohibits it from discriminating in terms of a contract based on a person’s sexual orientation unless it is because of a legitimate business purpose, [id.](#) § 363A.17(3). Minnesota has issued guidance stating that these provisions mean that “a business that provides wedding services ... may not deny services to a same-sex couple based on their sexual orientation.” Am. Compl. ¶ 61.

The Larsens also express a desire to create a website that includes the following disclaimer against providing services to same-sex weddings: “Because of TMG’s owners’ religious beliefs and expressive purposes, it cannot make films promoting any conception of marriage that contradicts its religious beliefs that marriage is between one man and one woman, including films celebrating same-sex marriages.” *Id.* ¶ 158. They also intend to require every couple that uses their services to sign a contract that requires TMG to publicly promote the couple’s wedding video on TMG’s website and social media. Thus, if required to provide wedding-video services for all couples, the Larsens assert that their own contract would force them to promote a pro-same-sex-marriage viewpoint that they do not endorse.

The Larsens brought this lawsuit seeking to enjoin application of the MHRA as to TMG, thus providing them an exemption *768 from the Public Accommodations Provision and Business Discrimination Provision. They assert causes of action under the First Amendment’s protections for free speech, expressive association, and the free exercise of religion, as well as under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

II

Before addressing the Larsens’ various claims, it is necessary to say a few words about the justiciability of their allegations. Both standing and ripeness are limitations on our judicial power “and must be considered even if not raised by the parties.” [Minn. Citizens Concerned for Life v. FEC](#), 113 F.3d 129, 131 n.5 (8th Cir. 1997); [see 281 Care Comm. v. Arneson](#), 766 F.3d 774, 780 (8th Cir. 2014). “To decide ripeness,

courts consider: ‘(1) the hardship to the plaintiff caused by delayed review; (2) the extent to which judicial intervention would interfere with administrative action; and (3) whether the court would benefit from further factual development.’ ” [Missourians for Fiscal Accountability v. Klahr](#), 830 F.3d 789, 796–97 (8th Cir. 2016) (quoting [Nat’l Right to Life Political Action Comm. v. Connor](#), 323 F.3d 684, 692–93 (8th Cir. 2003)). “The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention.” [Parrish v. Dayton](#), 761 F.3d 873, 875 (8th Cir. 2014) (cleaned up). Similarly, to have standing to bring a pre-enforcement First Amendment challenge to a statute that provides criminal penalties, there must be a “a credible threat of present or future prosecution.” [Minn. Citizens](#), 113 F.3d at 131 (quoting [N.H. Right to Life Political Action Comm. v. Gardner](#), 99 F.3d 8, 13 (1st Cir. 1996)).

Whether the Larsens’ claims are justiciable at this juncture hinges on whether their intended course of conduct is arguably proscribed by the MHRA. [Susan B. Anthony List v. Driehaus](#), 573 U.S. 149, 162, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). To violate either of the MHRA provisions at issue here, a business must do two things. First, it must treat a person differently than it would treat someone else—either by denying the person the “full and equal enjoyment” of its goods and services or by engaging in one of several forms of business discrimination. Second, that difference in treatment must be “because of” one of the protected characteristics enumerated in the MHRA. As applied to the Larsens and TMG, whether their business model violates this test depends on exactly what “service” they generally provide to the public and whether they are denying that service because of a protected characteristic. For example, a bakery that does not make cakes does not violate the MHRA by declining to bake a wedding cake for a same-sex couple, because it is not treating that couple differently than it would anyone else.

Because we are at the pleading stage, our only guidance about how to define TMG’s service comes from the complaint. See [Ashcroft v. Iqbal](#), 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” (quoting [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007))). TMG currently offers “a wide variety of video and media production related services to the public,” but it does not offer wedding-video services. Am. Compl. ¶ 80. So, if a same-sex couple approached the Larsens today seeking a wedding video, the

Larsens’ refusal to serve them would not violate the MHRA because the Larsens do not currently make that service *769 available to the public. But the complaint alleges that the Larsens want to expand TMG to offer “wedding-related services,” [id.](#) ¶ 139, specifically the creation of “wedding videos,” [id.](#) ¶¶ 136, 138, 254. A couple seeking this service would pay the Larsens to film their wedding and produce a video of the event. [Id.](#) ¶¶ 131–33, 147. The Larsens are “the master[s] of [their] own complaint,” so we must accept that this is the service that they want TMG to provide. [In re SuperValu, Inc.](#), 925 F.3d 955, 965 (8th Cir. 2019).

With this understanding, there is little doubt that offering to film weddings of heterosexual couples but refusing to film weddings of homosexual couples—purely because they are homosexual—would violate both the Public Accommodations Provision and the Business Discrimination Provision of the MHRA. The Larsens concede as much in their complaint, alleging that they want to expand TMG to offer wedding-video services to only opposite-sex couples but that “the MHRA prohibits them from doing so.” Am. Compl. ¶ 160.

The court’s opinion attempts to cast some doubt about whether the plain text of the MHRA would require TMG to provide wedding-video services for same-sex weddings if it offers those services to heterosexual couples. The implication is that the MHRA would only proscribe the Larsens’ conduct because “Minnesota reads” the law that way. [Supra](#) at 748–49. For their part, the Larsens argue that they “would not create a film celebrating same-sex marriage no matter who requested it.” This argument appears to be premised on the idea that the service that TMG would provide is not “wedding videos”—which is how it is phrased in the complaint—but “opposite-sex wedding videos.” So long as the Larsens are willing to offer *that* service to anyone, the argument goes, they do not violate the law.

This argument fails. Under the MHRA, a business cannot define its services in such a way as to incorporate a discriminatory characteristic. The Larsens cannot define their service as “opposite-sex wedding videos” any more than a hotel can recast its services as “whites-only lodgings.” That is because the MHRA does not merely prohibit TMG from treating customers differently based on the *customer’s* sexual orientation. It prohibits “deny[ing] *any person* the full and equal enjoyment” of its services “because of ... sexual orientation,” [Minn. Stat. § 363A.11 subdiv. 1\(a\)\(1\)](#) (emphasis added), or discriminating in business “because of a *person’s*

... sexual orientation,” *id.* § 363A.17(3) (emphasis added). In a nutshell, if the reason for treating a customer differently is because of sexual orientation, race, or another protected characteristic, that differential treatment is prohibited. See Abdull v. Lovaas Inst. for Early Intervention Midwest, 819 F.3d 430, 433–34 (8th Cir. 2016) (reading Minn. Stat. § 363A.11 to require the plaintiff to demonstrate that the protected characteristic “‘more likely than not motivated’ the defendant”).

To conclude otherwise would redefine discrimination to no longer encompass a host of actions universally understood to be discriminatory. If a white store owner refuses to sell goods to a white patron because the patron entered the store accompanied by someone of another race, that is still discrimination “because of” race. See Bob Jones Univ. v. United States, 461 U.S. 574, 605, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) (“[D]ecisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination.”). If a male basketball coach is retaliated against for complaining about unequal funding for the girls’ basketball team, that retaliation is “on the basis of sex.” *770 Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 176–77, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). Likewise, regardless of who asks TMG to create the wedding video, if the Larsens refuse to provide the service because of the sexual orientation of the video’s subjects, that is discrimination “because of” sexual orientation.

Moreover, it is well established that some protected characteristics are so intertwined with particular conduct that discrimination against the conduct becomes discrimination against the protected class. Christian Legal Soc’y Chapter v. Martinez, 561 U.S. 661, 688–89, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010); see also Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”). The Supreme Court has repeatedly connected certain conduct with sexual orientation as a protected characteristic. Christian Legal, 561 U.S. at 689, 130 S.Ct. 2971; see Lawrence, 539 U.S. at 575, 123 S.Ct. 2472 (“When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination both in the public and in the private spheres.” (emphases added)); Romer v. Evans, 517 U.S. 620, 624, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (characterizing a Colorado constitutional amendment prohibiting antidiscrimination laws from including protections for “homosexual, lesbian

or bisexual orientation, *conduct, practices or relationships*” as discriminating against homosexual persons as a class (emphasis added)). Same-sex marriage has been described as a fundamental expression of an individual’s sexual orientation. See Obergefell, 135 S. Ct. at 2604 (holding that laws prohibiting same-sex marriage “impos[e] [a] disability on gays and lesbians”); United States v. Windsor, 570 U.S. 744, 775, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) (“DOMA singles out a *class of persons* deemed by a State entitled to recognition and protection to enhance their own liberty.” (emphasis added)).

Accordingly, intentionally refusing to provide services for a wedding because it involves a same-sex couple *is* prohibited sexual-orientation discrimination under the MHRA. The Larsens have made clear that they would refuse service to *any* same-sex wedding and that the only reason that they would do so would be “because of” the sexual orientation of the couple involved. That conduct is clearly prohibited by the MHRA, as the Larsens acknowledge in their complaint and as the court recognizes in its rejection of their vagueness challenge. See *supra* at 761 (“The allegations in the complaint ... doom the Larsens’ argument ... because they insist that ‘the MHRA prohibits them from [creating only opposite-sex-wedding videos]’” (alteration in original)).

The MHRA also requires that the services offered to same-sex couples be the same as those offered to opposite-sex couples. The Business Discrimination Provision prohibits a business from “discriminat[ing] in the basic terms, conditions, or performance of the contract” because of a person’s sexual orientation or other protected characteristic. Minn. Stat. § 363A.17(3). Thus, TMG cannot avoid violating the MHRA by providing other types of non-wedding services to gay and lesbian clients, nor can it provide services to same-sex couples that are inferior to those that it provides to heterosexual couples. Courts have long rejected the notion that the provision of “separate but equal” services is anything but discrimination by another name. Brown v. Bd. of Ed., 347 U.S. 483, 495, 74 S.Ct. 686, 98 L.Ed. 873 (1954); see also Katzenbach v. McClung, 379 U.S. 294, 296–99, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (concluding that a restaurant that provided “a take-out service for Negroes” *771 but “refused to serve Negroes in its dining accommodations” violated Title II’s public accommodations provision). Otherwise, public accommodations laws would be completely ineffective at “vindicat[ing] the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.” Heart of Atlanta Motel, Inc.

[v. United States](#), 379 U.S. 241, 250, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964).

I recognize that the complaint alleges that the *reason* for the Larsens' differential treatment of same-sex couples is not because of prejudice against homosexuals, but because they disagree with the message that a video of a same-sex marriage would convey. But that does not make their intended conduct nondiscriminatory under the law. They want TMG to offer different services to customers based on sexual orientation, running afoul of the MHRA. Whatever the Larsens' motivations, the premise of this lawsuit is that TMG would violate the MHRA if it engages in the conduct described in the complaint.

In its First Amendment analysis, the court focuses on a question that is not before us today: whether the MHRA could be applied to require a business to express a specific message to which it objects, such as writing a racial slur on a cake or tattooing a religious message on someone's skin. It is not at all clear that a business violates the MHRA by refusing to express such a message if that is not a service that it would provide to a different type of customer. See [Masterpiece Cakeshop](#), 138 S. Ct. at 1733 (Kagan, J., concurring) (suggesting that a baker who refuses to inscribe a cake with a message that he “would not have made for any customer” does not engage in unlawful discrimination based on a protected characteristic). At oral argument, Minnesota represented that it would not view such a denial of service as violating the MHRA because it is not discrimination “because of” protected status. Oral Arg. at 31:15–31:42. If such a case were to arise, further factual development would be necessary to understand the exact scope of the business's services and the precise nature of the refusal of service. See [Masterpiece Cakeshop](#), 138 S. Ct. at 1723 (“If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.”). Such factual development could only occur in the context of a live controversy in which Minnesota was actually attempting to enforce the MHRA. We need not decide whether application of the MHRA to such a circumstance would comport with the Constitution because the Larsens concede that they want to deny their services to *all* same-sex weddings regardless of what particular messages the same-sex couples want to express in their videos.

Because the Larsens aver that they want to offer wedding-video services only to couples of one sexual orientation and not others, they have standing, and this case is ripe for judicial decision. Accepting the complaint's allegations as true, no “further factual development” is needed to determine whether the Larsens could be prosecuted for violating the MHRA. [Iowa League of Cities v. EPA](#), 711 F.3d 844, 867 (8th Cir. 2013) (quoting [Pub. Water Supply Dist. No. 10 v. City of Peculiar](#), 345 F.3d 570, 573 (8th Cir. 2003)). The only issue before us is a question of law: whether the Constitution compels Minnesota to exempt TMG from the MHRA's provisions.

III

It is well established that videos are a form of speech protected by the First *772 Amendment. See [Joseph Burstyn, Inc. v. Wilson](#), 343 U.S. 495, 502, 72 S.Ct. 777, 96 L.Ed. 1098 (1952). But the First Amendment's right of free speech is “not unlimited.” [District of Columbia v. Heller](#), 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); see [Roberts v. U.S. Jaycees](#), 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); [Joseph Burstyn](#), 343 U.S. at 502, 72 S.Ct. 777. “[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.” [Sorrell v. IMS Health Inc.](#), 564 U.S. 552, 567, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011). Such restrictions on speech are valid, “provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” [Ward v. Rock Against Racism](#), 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (cleaned up).

A

Courts draw a clear line “between content-based and content-neutral regulations of speech.” [Nat'l Inst. of Family & Life Advocates v. Becerra](#) (NIFLA), — U.S. —, 138 S. Ct. 2361, 2371, 201 L.Ed.2d 835 (2018). “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” [Reed v. Town of Gilbert](#), — U.S. —, 135 S. Ct. 2218, 2227, 192 L.Ed.2d 236 (2015). A content-based law “‘on its face’ draws distinctions based on the message a speaker conveys,” *id.* (quoting [Sorrell](#),

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564 U.S. at 566, 131 S.Ct. 2653), or has the purpose of suppressing speech “because of disagreement with the message it conveys,” Sorrell, 564 U.S. at 566, 131 S.Ct. 2653 (quoting Ward, 491 U.S. at 791, 109 S.Ct. 2746). Regulations that “target speech based on its communicative content ... are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” Reed, 135 S. Ct. at 2226. Similarly, when the government compels an individual to engage in speech the individual otherwise would find objectionable, this ordinarily constitutes a content-based regulation triggering strict scrutiny. NIFLA, 138 S. Ct. at 2371; see also Janus v. AFSCME, — U.S. —, 138 S. Ct. 2448, 2463–64, 201 L.Ed.2d 924 (2018).

By contrast, a law is content neutral if it “serves purposes unrelated to the content of expression ... even if it has an incidental effect on some speakers or messages but not others.” Ward, 491 U.S. at 791, 109 S.Ct. 2746. “Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’” Id. (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). A content-neutral regulation is subject to intermediate scrutiny, meaning it must merely be “narrowly tailored to serve a significant governmental interest.” Packingham v. North Carolina, — U.S. —, 137 S. Ct. 1730, 1736, 198 L.Ed.2d 273 (2017) (quoting McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 2534, 189 L.Ed.2d 502 (2014)). In general, statutes “directed at commerce or conduct” do not violate the First Amendment, even if they impose “incidental burdens” on speech or inherently expressive conduct. Sorrell, 564 U.S. at 567, 131 S.Ct. 2653.

1

The MHRA neither compels speech nor targets speech based on its content. In fact, the law says nothing about speech at *773 all. The Public Accommodations Provision prohibits “deny[ing]” individuals the full and equal enjoyment of goods and services, Minn. Stat. § 363A.11 subd. 1(a)(1); the Business Accommodation Provision speaks of “refus[ing] to do business with” or “discriminat[ing]” against persons based on a protected characteristic, id. § 363A.17(3). Neither provision “on its face” regulates speech or draws distinctions based on a speaker’s message. Reed, 135 S. Ct. at 2227; see supra at 761 (“The MHRA does not classify anyone based on their views about marriage.”). Instead, the law

“regulates conduct, not speech.” Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 60, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). “It affects what [businesses] must *do*—afford equal [treatment] to [customers]—not what they may or may not *say*.” Id.

The Supreme Court has repeatedly reaffirmed the view that laws targeting discrimination “do[] not, on [their] face, target speech or discriminate on the basis of its content.” Hurley, 515 U.S. at 572, 115 S.Ct. 2338. Indeed, it has done so specifically regarding the MHRA’s Public Accommodations Provision. More than thirty years ago, the Supreme Court rejected an expressive association claim brought by the U.S. Jaycees nonprofit, which sought to exclude women members but was prevented from doing so by operation of the MHRA. The Court held that, “[o]n its face, the Minnesota Act does not aim at the suppression of speech, does not distinguish between prohibited and permitted activity on the basis of viewpoint, and does not license enforcement authorities to administer the statute on the basis of such constitutionally impermissible criteria.” Roberts, 468 U.S. at 623, 104 S.Ct. 3244. There is also no evidence that Minnesota enacted the MHRA to support or suppress any particular message; the MHRA’s goals are “unrelated to the suppression of expression.” Id. at 624, 104 S.Ct. 3244. Applying Roberts, the MHRA is a content-neutral statute and subject to intermediate scrutiny.

2

Dismissing Roberts, the court today concludes that the MHRA operates as a content-based regulation of speech. By the court’s logic, because the MHRA prohibits the Larsens from operating their public accommodation to provide only services to opposite-sex couples, it “compel[s] them to talk about a topic they would rather avoid—same-sex marriages.”⁷ Supra at 753. The court attempts to analogize the MHRA to the statute challenged in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 244, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), a law that required newspapers to print a free reply to any candidate “assailed” by the paper. But that analogy fails from the start. That a law regulating the *content* of a *newspaper* was deemed a content-based regulation of speech has no bearing on whether a law regulating *discrimination* in places of *public accommodation* also so qualifies.

The court’s opinion relies extensively on Hurley, which dealt with application of Massachusetts’s public accommodations

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law to a privately organized parade. But the court's discussion of [Hurley](#) omits a few crucial details. In [Hurley](#), the Supreme *774 Court made clear that a public accommodations law “does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.” [Hurley](#), 515 U.S. at 572, 115 S.Ct. 2338. Citing [Roberts](#), the Court also stated that public accommodations laws “are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.” [Id.](#) Of course, if public accommodations laws were content-based regulations of speech, they would not “as a general matter” be constitutional. Instead, they would be “presumptively unconstitutional.” [Reed](#), 135 S. Ct. at 2226.

The Supreme Court ultimately concluded that applying the public accommodations law to the parade in [Hurley](#) did not withstand constitutional scrutiny. But it did so because Massachusetts was attempting to apply the law “in a peculiar way.” 515 U.S. at 572, 115 S.Ct. 2338. A parade is, by definition, an expressive association. [Id.](#) at 568, 115 S.Ct. 2338. That a parade's participants “are making some sort of collective point, not just to each other but to bystanders along the way,” is what distinguishes a parade from a mere stroll down the street. [Id.](#) The issue in [Hurley](#) was not whether gay and lesbian individuals could march in the parade—they were welcome to do so—but whether a particular gay and lesbian organization would be permitted to march in the parade with a banner that organizers felt contravened the parade's message. Applying the statute to require the parade sponsors to allow the banner made a public accommodation out of “the sponsors’ speech itself,” [id.](#) at 573, 115 S.Ct. 2338, and treated the sponsors’ exclusion of the message as discrimination against a class. By applying the law in a way that “alter[ed] the expressive content of their parade,” Massachusetts violated the parade sponsors’ autonomy as speakers. [Id.](#) at 572–73, 115 S.Ct. 2338.

[Hurley](#) thus stands for the proposition that a facially neutral law may be subject to strict scrutiny if it is *applied* in a way that materially burdens the speaker's “autonomy to choose the content of *his own* message.” [Id.](#) at 573, 115 S.Ct. 2338 (emphasis added). In [Boy Scouts of America v. Dale](#), the Supreme Court similarly applied strict scrutiny to a facially neutral New Jersey antidiscrimination statute that required the Boy Scouts to retain a gay scoutmaster because doing so

“would significantly burden the organization's right to oppose or disfavor homosexual conduct,” 530 U.S. 640, 659, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000), which was one of “the ideas that the organization sought to express,” [id.](#) at 657, 120 S.Ct. 2446. In cases where the law's application did not significantly impair the ability of the speaker to convey his chosen message—such as when the expressive association's basic goals are unrelated to the desired exclusion—the Court has found no First Amendment violation. For example, in [Roberts](#), the Supreme Court declined to hold the MHRA invalid because “the Jaycees ... failed to demonstrate that the Act imposes any serious burdens on the male members’ freedom of expressive association.” 468 U.S. at 626, 104 S.Ct. 3244; accord [Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte](#), 481 U.S. 537, 548, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987) (“[T]he evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes.”). In each case finding a compelled-speech violation, the violation *775 “resulted from the fact that the complaining speaker's *own message* was affected by the speech it was forced to accommodate.” [Rumsfeld](#), 547 U.S. at 63, 126 S.Ct. 1297 (emphasis added).

Here, taking the complaint as true, the Larsens cannot show that viewers of TMG's wedding videos would be likely to understand them to be expressions of *the Larsens’* “particularized message” about marriage. [Texas v. Johnson](#), 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting [Spence v. Washington](#), 418 U.S. 405, 411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (per curiam)). The complaint alleges that the Larsens want to be for-profit wedding videographers, not independent filmmakers. Although an artistic endeavor, wedding videos—like other expressive wedding services—do not primarily reflect the views of the videographer, but of the couple getting married. See [Masterpiece Cakeshop](#), 138 S. Ct. at 1750 (Ginsburg, J., dissenting) (“When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings”). “[TMG] sells its expressive services to the public. It may be that [TMG] expresses its clients’ messages in its [videos], but only because it is hired to do so.” [Elane Photography, LLC v. Willock](#), 309 P.3d 53, 66 (N.M. 2013).

The Larsens acknowledge as much in their complaint: “When an engaged couple asks the Larsens to help them celebrate their marriage, the Larsens want to tell a story of *their* love

and commitment” Am. Compl. ¶ 131 (emphasis added). Although the Larsens may exercise editorial control over TMG’s services, it is still ultimately the couple’s story that is being told, not that of the Larsens. “[R]easonable observers would not perceive [the Larsens’] provision of ... services for a same-sex wedding ceremony as an endorsement of same-sex marriage.” Gifford v. McCarthy, 137 A.D.3d 30, 42, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016). By selling its services to the public, TMG “functions, in essence, as a conduit for the speech of others,” necessarily subordinating the Larsens’ own messages to those of their customers. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 629, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). For better or worse, “[o]nce [TMG] enters the marketplace of commerce ... it loses the complete control over its [speech] that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.” Roberts, 468 U.S. at 636, 104 S.Ct. 3244 (O’Connor, J., concurring). Whereas the application of Massachusetts’s law in Hurley improperly transformed the parade sponsors’ speech into a public accommodation, here it is the Larsens who are affirmatively declaring their speech to be a public accommodation by selling their videography services on the open market.

Admittedly, the Larsens take great pains to portray themselves more like independent artists telling their own story than messengers acting on behalf of others. At oral argument, their counsel compared them to “Steven Spielberg, edit[ing] the film[s] to express messages” consistent with their personal and religious views. Oral Arg. at 0:00–1:05. But Steven Spielberg is not a public accommodation; he does not make his filmmaking services generally “available to the public.” Minn. Stat. § 363A.03 subd. 34. He is thus free to use his talents as he pleases without regard for laws like the MHRA. If the Larsens truly were artists speaking their own message, then TMG similarly would not qualify as a place of public accommodation and this entire lawsuit would be unnecessary.

Therefore, just because the Larsens want to sell services that are in some *776 manner “expressive” does not mean that Minnesota’s content-neutral regulation of those services suddenly becomes content based. “[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949). After all, “[i]t is possible to find some kernel of expression in almost every activity a person

undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” City of Dallas v. Stanglin, 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). Conduct does not become protected speech simply because “the person engaging in the conduct intends thereby to express an idea.” United States v. O’Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Likewise, a regulation of conduct does not become a regulation of content just because there are “incidental” effects on expression. Sorrell, 564 U.S. at 567, 131 S.Ct. 2653. That is true even if one of the incidental effects of regulating conduct is the compulsion of speech. Rumsfeld, 547 U.S. at 62, 126 S.Ct. 1297. Laws with such incidental effects are “simply not the same as” laws that require individuals to advocate a particular, government-sanctioned message, such as “forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto ‘Live Free or Die.’” Id. Laws with merely incidental effects on expression are subject to intermediate scrutiny. See O’Brien, 391 U.S. at 376–77, 88 S.Ct. 1673.

The court’s opinion warns, supra at 752, that applying intermediate scrutiny to the MHRA would invite government regulation of “wide swaths of protected speech.” Hardly. A law telling an independent artist what pictures to paint or a newspaper what articles to publish would still be subject to strict scrutiny. See Rumsfeld, 547 U.S. at 62, 126 S.Ct. 1297. But an independent artist who chooses what to paint and then sells the finished product is not the same as a boardwalk cartoonist who offers his services to any passing beachgoer. If the cartoonist refuses to paint the portrait of an interracial couple or a woman in a hijab, the state’s regulation of that expressive *conduct* via a content-neutral statute does not trigger strict scrutiny. O’Brien, 391 U.S. at 376–77, 88 S.Ct. 1673; see Roberts, 468 U.S. at 634, 104 S.Ct. 3244 (O’Connor, J., concurring) (“The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State.”). The Larsens are free to use their talents to create independent films about marriage that express any message they choose, and they are free to sell those films to the public. But if they offer wedding-video *services* to the public, they must abide by public accommodations laws like the MHRA.

Because the MHRA is content neutral and is not being applied in a manner that substantially burdens the Larsens’ right

to express their own message, it is subject to intermediate scrutiny.

B

Although intermediate scrutiny is the applicable standard, the MHRA would survive even strict scrutiny. To satisfy intermediate scrutiny, the MHRA must be narrowly tailored to serve governmental interests that are merely “significant,” [Packingham](#), 137 S. Ct. at 1736, as opposed to “compelling,” *777 [Reed](#), 135 S. Ct. at 2226. Even if the MHRA is held to the higher standard of strict scrutiny, the Supreme Court has already told us that it is constitutional.

In general, public accommodations laws further compelling state interests of eradicating discrimination and ensuring residents have equal access to publicly available goods and services. [Roberts](#), 468 U.S. at 623, 104 S.Ct. 3244; see also [Boy Scouts of Am.](#), 530 U.S. at 657, 120 S.Ct. 2446; [Bd. of Dirs. of Rotary Int'l](#), 481 U.S. at 549, 107 S.Ct. 1940. “[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent[,] ... [and] such practices are entitled to no constitutional protection.” [Roberts](#), 468 U.S. at 628, 104 S.Ct. 3244. Specifically, in [Roberts](#), the Supreme Court held that the MHRA serves “Minnesota’s compelling interest in eradicating discrimination against its female citizens,” [id.](#) at 623, 104 S.Ct. 3244, which it characterized as a “compelling state interest[] of the highest order,” [id.](#) at 624, 104 S.Ct. 3244.

If eradicating discrimination based on race or sex is a compelling state interest, then so is Minnesota’s interest in eradicating discrimination based on sexual orientation. Minnesota’s decision to extend the MHRA’s protections to cover sexual orientation was driven by considerable evidence of discrimination against the state’s gays and lesbians. [Task Force Report](#), J.A. 332. The task force that precipitated the law’s amendment specifically identified the need to protect against sexual-orientation discrimination in places of public accommodation due to evidence that gays and lesbians were being denied access to goods and services. [Id.](#) It also noted that discrimination appeared more prevalent in the state’s rural areas. [Id.](#), J.A. 333.

The Larsens argue that no compelling interest is served by applying the MHRA to TMG because plenty of

other businesses are happy to provide wedding-video services to same-sex couples. The argument that victims of discrimination are free to go elsewhere carries little force. Antidiscrimination laws like Title II and the MHRA were not passed to ensure that members of historically discriminated groups had access to *some* places of public accommodation. They were passed to guarantee equal access to *all* goods and services otherwise available to the public. “Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.” [Heart of Atlanta Motel](#), 379 U.S. at 292, 85 S.Ct. 348 (Goldberg, J., concurring) (quoting [S. Rep. No. 88-872](#), at 16 (1964), as reprinted in 1964 U.S.C.C.A.N. 2355, 2370). Even accepting the premise of the Larsens’ argument, applying the MHRA to wedding-related services across Minnesota would still further the state’s compelling interest in eradicating sexual-orientation discrimination in Minnesota’s rural areas. Although many alternative wedding venues and services may be available in larger cities, the same may not be true in small towns. The pain of discrimination is undoubtedly more severe when it comes from the only videography service in the area.

The court’s opinion asserts that while regulating discriminatory conduct may be a compelling state interest, regulating the content of the Larsens’ speech is not. [Supra](#) at 754–56. But the MHRA regulates only discriminatory conduct; the sole reason that the Larsens’ expression is even tangentially affected by the law is because the Larsens make their speech available as a service for other members of the public *778 to hire. When the government requires those services to be available to everyone, it is not forcing them to speak. Likewise, it is not an abridgment of the Larsens’ freedom of speech to prohibit them from posting messages on TMG’s website stating that they do not serve same-sex weddings. [Rumsfeld](#), 547 U.S. at 62, 126 S.Ct. 1297 (“Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.”).

The MHRA is also narrowly tailored to serve the state’s interest in eradicating discrimination. Again, it targets only conduct, not speech. The MHRA “therefore ‘responds precisely to the substantive problem which legitimately concerns’ the State and abridges no more speech or

associational freedom than is necessary to accomplish that purpose.” Roberts, 468 U.S. at 629, 104 S.Ct. 3244 (quoting Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 810, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). Thus, the MHRA survives any level of scrutiny, and the district court properly dismissed the Larsens’ free speech claim.

IV

The Larsens’ free exercise claim fares no better than their free speech claim. The First Amendment, as applied to the states through the Fourteenth, prevents states from passing laws that prohibit the free exercise of religion. Cantwell v. Connecticut, 310 U.S. 296, 303–04, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). Accordingly, neither the federal government nor the states may dictate religious beliefs. Id.

But although the “freedom to believe” is absolute, the “freedom to act” is not. Cantwell, 310 U.S. at 303–04, 60 S.Ct. 900. “Conduct remains subject to regulation for the protection of society.” Id. at 304, 60 S.Ct. 900. “[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.” Smith, 494 U.S. at 879, 110 S.Ct. 1595 (cleaned up). “[I]f prohibiting the exercise of religion ... is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” Id. at 878, 110 S.Ct. 1595. “When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.” United States v. Lee, 455 U.S. 252, 261, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982).

Just as the MHRA does not target speech, neither does it target religion. The Public Accommodations Provision and the Business Discrimination Provision make no facial reference to religious practice, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), and do not “single out the religious for disfavored treatment,” Trinity Lutheran Church of Columbia, Inc. v. Comer, — U.S. —, 137

S. Ct. 2012, 2020, 198 L.Ed.2d 551 (2017). Likewise, the object of the MHRA is not “to infringe upon or restrict practices because of their religious motivation,” Church of the Lukumi Babalu Aye, 508 U.S. at 533, 113 S.Ct. 2217, but to “combat discrimination, regardless of the motivation. Indeed, the law incorporates carefully-crafted exceptions for places of religious worship and secular nonprofits. The MHRA therefore qualifies as “a neutral, generally applicable regulatory law” that does not trigger heightened scrutiny. Smith, 494 U.S. at 880, 110 S.Ct. 1595; see Masterpiece Cakeshop, 138 S. Ct. at 1727.

The Larsens argue that the MHRA is not neutral because the Business Discrimination Provision’s “legitimate business purpose” exception is vague and allows the state to arbitrarily provide individualized exemptions to non-religious businesses. This argument fails. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court explained that a difference in treatment based on a “legitimate, nondiscriminatory reason” is not prohibited discrimination at all. Courts are familiar with this standard, and there is no indication that it has proved difficult to administer. The complaint contains no plausible allegation that Minnesota has actually applied this exception in an unequal fashion to target religious individuals.

The Larsens also argue that the MHRA should be subject to heightened scrutiny because, even if facially neutral, the law “substantially burdens” their religious exercise. But the Supreme Court rejected that argument in Smith, holding that “an across-the-board criminal prohibition on a particular form of conduct” need not be justified by a compelling government interest just because it applies in some cases to religious conduct. 494 U.S. at 884–85, 110 S.Ct. 1595. Regardless, courts have consistently rejected the argument that compliance with antidiscrimination statutes imposes a substantial burden on religion, see, e.g., Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 n.5, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (dismissing as “patently frivolous” the argument that Title II of the Civil Rights Act of 1964 violated respondents’ right to free exercise), and have repeatedly held that public accommodations laws satisfy strict scrutiny, see Roberts, 468 U.S. at 623, 104 S.Ct. 3244.

The court today allows the Larsens’ free exercise claim to move forward, on the theory that it is intertwined with their free speech claim. This theory derives from dicta in Smith that suggested that a neutral, generally applicable law may

be subject to heightened scrutiny under the Free Exercise Clause when the claim operates “in conjunction with other constitutional protections, such as freedom of speech and of the press,” thereby creating a “hybrid situation.” 494 U.S. at 881–82, 110 S.Ct. 1595. Contrary to the court's assertion today, *supra* at 759–60, we have never endorsed the hybrid-rights doctrine, nor have we ever articulated a framework for analyzing such claims. In a single sentence of *Cornerstone Bible Church v. City of Hastings*, we noted the *possibility* that such a claim could exist based on *Smith*'s dicta but remanded to the district court to “consider” whether such a claim was viable in the first instance. 948 F.2d 464, 473 (8th Cir. 1991). But even if the court is right that this was a “holding,” we need not resolve the viability of the theory in this case because the Larsens do not have a valid free speech claim.

None of the Larsens' remaining claims are viable, as the court explains, *supra* at 760–62. Accordingly, I would affirm the judgment of the district court dismissing their complaint for failure to state a claim upon which relief can be granted.

V

By ruling that, under the Larsens' allegations, the MHRA is subject to and fails strict scrutiny, the court carves out an exception of staggering breadth. Under its *780 logic, any time that a state's regulation of discriminatory conduct requires a person to provide services that “express” something that they dislike, the law is invalid. That ruling cannot be easily limited. Innumerable companies and individuals sell products and services that are in some shape or form expressive. The court provides no way to distinguish whether its holding applies to all, or only some, of those industries. It might be easy to conclude that some services are sufficiently similar to videography as to warrant the same treatment as the Larsens get today—photography, for example, or other forms of visual art. But what about bakers, fashion designers, florists, graphic designers, tattoo artists, calligraphers, jewelers, chefs, tailors, or musicians? Are all of those businesses allowed to refuse service to gays and lesbians whenever doing so would conflict with the business owner's personal religious or philosophical beliefs? What about more traditional public accommodations, like hotels? Can an inn-keeper deny a same-sex couple access to the honeymoon suite because handing over the keys

would “express” an endorsement of their marriage? *See Task Force Report*, J.A. 332 (recounting precisely this form of discrimination). To these questions the court gives us no answers. Today's opinion invites a flood of litigation that will require courts to grapple with difficult questions about whether this or that service is sufficiently creative or expressive to merit a similar exemption.

The court's opinion is similarly not limited based on the fact that sexual orientation happens to be the protected characteristic at issue in this case. Its logic would apply with equal force to any business that desires to treat customers differently based on any protected characteristic, including sex, race, religion, or disability. And what may start in the wedding business—“we don't do interracial weddings,” “we don't film Jewish ceremonies,” and so on—likely will not end there. Nothing stops a business owner from using today's decision to justify new forms of discrimination tomorrow. In this country's long and difficult journey to combat all forms of discrimination, the court's ruling represents a major step backward.

It is unremarkable that the Constitution and the laws of the various states “can, and in some instances must,” protect same-sex couples in the exercise of their civil rights. *Masterpiece Cakeshop*, 138 S. Ct. at 1727. Minnesota has chosen to do so through the MHRA's Public Accommodations and Business Discrimination Provisions. Like all antidiscrimination laws, the MHRA targets conduct, not speech or ideas. The Supreme Court has already held that the MHRA is constitutional, in the process rejecting many of the same arguments that the court adopts today. Just recently, it reaffirmed that, although “religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” *Id.* The Supreme Court is free to revise or overturn its precedents; we are not. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 772 (8th Cir. 2015). Rather than disturb bedrock principles of law, I would affirm the district court's order in full.

All Citations

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Footnotes

- 1 We use the term “Minnesota” to refer collectively to the Commissioner of the Minnesota Department of Human Rights and the Attorney General of Minnesota, who are the named defendants in this case. See generally *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The district court ruled, over the Attorney General's objection, that the Attorney General had enough of a connection to the enforcement of the Minnesota Human Rights Act that the Larsens could seek an injunction against him. We agree that the connection here is “strong enough” to make the Attorney General a “proper defendant.” *281 Care Comm. v. Arneson*, 638 F.3d 621, 632–33 (8th Cir. 2011) (applying *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441).
- 2 Treating it as an independent claim, the district court separately concluded that the Larsens lacked standing to argue that the MHRA may eventually require them to post all of their wedding videos online, not just the ones that are consistent with their views on marriage. Our take is different. This allegation is simply an example of one of the harms that the Larsens may eventually suffer if they are required to make both opposite-sex- and same-sex-wedding videos. Developing individual allegations like this one will be a part of proving the Larsens' First Amendment claim.
- 3 The dissent is a moving target. At certain points, it seems to assume that the Larsens' speech is protected, at least in some form. See *post* at 771–72; *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (“[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First amendment freedoms.”). At others, the dissent suggests that the videos are not speech at all, primarily because the Larsens are telling someone else's story as part of a for-profit service. See *post* at 774–76. The dissent's scattershot approach may be due to the fact that neither of these theories (or any of its others) finds support in Supreme Court precedent or opinions of this court.
- 4 The allegations here may well be more troubling from a First Amendment perspective than the facts of *Tornillo*. In that case, all the newspaper had to do was reproduce verbatim an opinion piece written by someone else. See *Tornillo*, 418 U.S. at 244, 94 S.Ct. 2831. The MHRA, in contrast, would require the Larsens to use their own creative skills to speak in a way they find morally objectionable.
- 5 In fact, Minnesota's position intrudes on the Larsens' speech in yet another way. In its view, the MHRA would not allow the Larsens to even advertise what they have in mind for their wedding videos. The district court upheld this limitation on the theory that “telling potential customers that a business will discriminate ... is part of the act of ... discrimination itself.”
This analysis, however, rests on a faulty premise. If creating videos were conduct that Minnesota could regulate, then the State could invoke the incidental-burden doctrine to forbid the Larsens from advertising their intent to engage in discriminatory conduct. See *F.A.I.R.*, 547 U.S. at 62, 126 S.Ct. 1297. But in this case, Minnesota cannot compel the Larsens to speak, so it cannot force them to remain silent either. See *Wooley*, 430 U.S. at 714, 97 S.Ct. 1428.
- 6 See Cal. Civ. Code § 51(b) (West 2016); Colo. Rev. Stat. Ann. § 24-34-601(2)(a) (West 2014); Conn. Gen. Stat. Ann. § 46a-81d(a) (West 2012); Del. Code Ann. tit. 6, § 4504(a)(1) (West 2018); D.C. Code Ann. § 2-1402.31(a)(1) (West 2012); Haw. Rev. Stat. Ann. § 489-3 (West 2019); 775 Ill. Comp. Stat. Ann. 5/1-103(Q), 5-102(A) (West 2019); Iowa Code Ann. § 216.7(1) (West 2019); Me. Rev. Stat. Ann. tit. 5, § 4591 (2005); Md. Code Ann., State Gov't § 20-304 (West 2014); Mass. Gen. Laws Ann. ch. 272, § 98 (West 2016); Nev. Rev. Stat. Ann. § 651.070 (West 2011); N.H. Rev. Stat. Ann. § 354-A:17 (2018); N.J. Stat. Ann. § 10:5-12(f)(1) (West 2018); N.M. Stat. Ann. § 28-1-7(F) (West 2019); N.Y. Civ. Rights Law § 40-c(2) (McKinney 2019); Or. Rev. Stat. Ann. § 659A.403 (West 2016); 11 R.I. Gen. Laws Ann. § 11-24-2 (West 2001); Vt. Stat. Ann. tit. 9, § 4502(a) (West 2015); Wash. Rev. Code Ann. § 49.60.215 (West 2019); Wis. Stat. Ann. § 106.52(3)(a)(1) (West 2016). At least two other states interpret laws prohibiting sex discrimination as also prohibiting sexual-orientation discrimination. See *Interpretive Statement on Meaning of “Sex” in Elliott-Larsen Civil Rights Act*, Mich. C.R. Commission (May 21, 2018), https://www.michigan.gov/documents/mdcr/MCRC_interpretive_statement_on_Sex_05212018_625067_7.pdf; *Guidance on Discrimination on the Basis of Sex*, 280

of Sex Under the Pennsylvania Human Relations Act, Penn. Hum. Rel. Commission (Aug. 2, 2018), [https://www.phrc.pa.gov/About-Us/Publications/Documents/General Publications/APPROVED Sex Discrimination Guidance PHRA.pdf](https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf).

- 7 The idea that the Larsens “would rather avoid” talking about same-sex marriage is belied by their own allegations. The complaint asserts that the Larsens want to expand TMG into the wedding-video business precisely to “affect the cultural narrative regarding marriage.” Am. Compl. ¶ 137. To that end, they desire to create a website and promotional materials that affirmatively state that TMG will not make films celebrating same-sex marriages. *Id.* ¶¶ 157–58.

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