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MASTERING MASTERPIECE

Kristen K. Waggoner[+]

I. INTRODUCTION

Religious freedom ensures that every person has the right to explore life's deepest questions and to live out their religious convictions in public life. Free speech similarly ensures that all have the liberty to express their views and pursue truth without fear of government punishment. Free exercise of religion and free speech are durable rights that do not turn on cultural popularity or

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political power; these freedoms enable us to coexist peacefully with each other despite deep differences. Yet these freedoms are being sorely tested today by government efforts to suppress the rights of creative professionals—painters, filmmakers, printers, and many others—who in recent years found themselves out of step with novel government orthodoxies on marriage and sexuality.

The United States Supreme Court considered these foundational freedoms in three critical cases in its last term: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* ("*Masterpiece I*");[1] *National Institute of Family & Life Advocates v. Becerra*;[2] and *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.[3]

Masterpiece I considered whether the government may lawfully force an artist's hand (and mind) to create art against the artist's conscience.[4] *NIFLA* asked whether the government may compel religious prolife advocates—pregnancy centers, no less—to promote other groups' abortion services.[5] And *Janus* asked whether the government may compel a non-union public employee to subsidize his agency's union when that employee opposed many of the union's positions.[6]

The objecting speakers in each case were protected, building on a legacy of First Amendment precedents. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[7] established that the government must act neutrally when considering a religious claimant's complaint. *West Virginia State Board of Education v. Barnette*[8] forbade the state from forcing religious students to salute the American flag (even in the midst of World War II, when patriotism was at its apogee) because to do so was contrary to their faith and consciences. *Miami Herald Publishing Company v. Tornillo*[9] forbade the state from forcing a newspaper to publish a third party's article. *Wooley v. Maynard*[10] forbade the state from forcing an individual to display a government message he disagreed with on his license plate. *Pacific Gas & Electric Co. v. Public Utilities Commission of California*[11] forbade the state from forcing a utility company to send third-party messages in its billing letters. And *Hurley v. Irish-American*

1. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). This Supreme Court case is denoted Masterpiece I while a second case, Masterpiece II, is underway in the United States District Court for the District of Colorado.
2. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).
3. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2361 (2018).
4. *Masterpiece I*, 138 S. Ct. at 1723.
5. Nat'l Inst. of Family & Life Advocates, 138 S. Ct. at 2379.
6. Janus, 138 S. Ct. at 2486.
7. Church of the Lukumi Babalu Aye, Inv. v. City of Hialeah, 508 U.S. 520 (1993).
8. W. Va. State Bd. of Educ. V. Barnette, 319 U.S. 624, 631, 641 (1943).
9. Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241, 243, 258 (1974).
10. Wooley v. Maynard, 430 U.S. 705, 706, 717 (1977).
11. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 4 (1986).

Gay, Lesbian and Bisexual Group of Boston[12] forbade the state from forcing parade organizers to allow an unwanted message in their parade.

This article reviews in Section II the genesis of *Masterpiece I* and its application of well-established religious freedom principles to protect artist Jack Phillips' free exercise rights. Section III turns to *NIFLA* and *Janus* to explain how the strict proscriptions against compelled speech may work in tandem with religious freedom to protect creative professionals' rights of conscience. And Section VI discusses how creative professional cases currently in litigation will likely benefit from the holdings in *Masterpiece I*, *NIFLA*, and *Janus.* And Section V concludes by highlighting *Washington v. Arlene's Flowers*,[13] a First Amendment case seeking review by the United States Supreme Court.

The conclusion is that everyone's freedom is respected when the government protects religious freedom and free speech and assiduously avoids compelling anyone to speak a message or celebrate an event that violates their core convictions.

II. A MASTERPIECE OF STATE HOSTILITY TO RELIGION: DISPARAGING RELIGION AND DEPLOYING DOUBLE STANDARDS

The artist who wields a painter's brush or sculptor's knife should not have the government force his hand (or mind) to create against his conscience. Yet cake artist Jack Phillips used both tools when he created custom cakes to celebrate marriage, and Colorado brought to bear all the power of the state in an effort to force Phillips to create a cake celebrating same-sex marriage, which he could not, in good conscience, do.

Artists by their very nature bring intellectual diversity and creativity to our culture, and creative expression is at the core of First Amendment freedom: "The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed . . . . [T]hese judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority."[14]

A. Phillips' Art

Jack Phillips would not have created a cake celebrating same-sex marriage for anyone, regardless of their sexual orientation, because the message of celebrating same-sex marriage conflicted with his Christian belief that God created marriage to be a sacred union between one man and one woman, a union

12. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 559 (1995).

13. Washington v. Arlene's Flowers, 389 P.3d 543 (Wash. 2017).

14. United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 818 (2000).

that represents Christ and His Church.[15] In so doing, Phillips acted consistently with his faith, as he has since founding Masterpiece Cakeshop in 1993.[16] Phillips carefully chose Masterpiece's name: it would not be just a bakery, but an art gallery of cakes. With this in mind, Phillips created a Masterpiece logo depicting an artist's paint palate with a paintbrush and whisk.[17]

Phillips approaches cake design as an art form. He first sketches his concept for the cake—a process he often repeats.[18] The sketch is then translated to sculpture, where he paints elaborate designs, expanding on his themes through the form and style of the cake's decorations.[19] He masterfully employs the arts of sculpture and painting to create unique works celebrating marriage, with each being crafted specifically for a particular wedding couple.[20] Indeed, historically the wedding cake developed "not as an integral part of a[] meal but as a festive or celebratory" component of the newlyweds' union.[21] In modern Western culture, the wedding cake has become the iconic centerpiece of the celebration—a "veritable institution . . . a rite without confirmation."[22] The tradition is rooted in Victorian England and became engrained in our society after the Civil War so that today '"[w]edding cakes are . . . packed with symbolism.'"[23] The modern wedding cake is a "highly distinctive structure" and serves as a "marker" to signify that a wedding has occurred and a marriage has begun.[24] The cutting and sharing of the cake is typically the first joint act of the marital union[25] and is a powerful symbol that this celebration is a wedding celebration and no other.[26] Phillips' work delivers this artistic celebration of marriage powerfully:

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15. Joint Appendix at 157, 166–67, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16–111).

16. *Id.* at 157.

17. *Id.* at 160.

18. *Id.* at 161

19. *Id.* at 162

20. *Id.* at 161–62.

21. SIMON R. CHARSLEY, WEDDING CAKES AND CULTURAL HISTORY 46 (1992).

22. William Woys Weaver, *Foreword* to CHARSLEY *supra* note 21; *see also* CHARSLEY *supra* note 21 at 121; WENDY A. WOLOSON, REFINED TASTES: SUGAR, CONFECTIONERY, AND CONSUMERS IN NINETEENTH-CENTURY AMERICA 168 (2002).

23. *Masterpiece I*, 138 S. Ct. 1719, 1743 (2018) (Thomas, J., and Gorsuch, J., concurring) (quoting M. KRONDL, SWEET INVENTION: A HISTORY OF DESSERT 321 (2011)).

24. Charsley, *supra* note 21, at 121; *see also* Brief for Cake Artists as Amici Curiae in Support of Neither Party at 7–16, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

25. Charsley, *supra* note 21, at 123; CLAIRE STEWART, AS LONG AS WE BOTH SHALL EAT 137 (2017).

26. Charsley, supra note 21, at 123.

B. Phillips' Faith

At the Cakeshop, Phillips hosts Bible studies, provides free baked goods and drinks to homeless individuals, and closes on Sundays to permit his employees and himself to attend religious services.[27]

But the religious tenet central to this case is that marriage is sacred to Phillips, as it is to so many others "who live by their religions."[28] Specifically, Phillips holds to the foundational Christian belief that marriage is "the union of one man

27. Order at 4–5, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n,138 S. Ct. 1719 (2018) (No. 18-2074).

28. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

and one woman."[29] When a man and a woman wed, it signifies that the "two [have] become one flesh" and no one should separate "what God has joined together."[30] These tenets are common to many religions and particularly to the Abrahamic faiths: Judaism, Islam, and Christianity.[31]

Regardless of whether Phillips' wedding clients plan an overtly religious event, he believes that all weddings are sacred and create an inherently religious relationship.[32] Because weddings and marriage have such religious significance to Phillips, it would be sacrilegious for him to apply his art to express an idea about marriage that sharply conflicts with his religious beliefs.[33] Thus, he will not design custom cakes that celebrate any form of marriage other than between one man and one woman.[34]

Phillips' exercise of conscience is governed by what the Bible teaches—he will not create cakes that express messages that violate his faith.[35] When someone proposes a cake that conveys a message contrary to biblical teaching, Phillips will not create it no matter who asks for it. Consistent with that stance, he has declined to create cakes celebrating Halloween; expressing anti-family themes, such as celebrating a divorce; which contain hateful, vulgar, or profane messages (such as a cake disparaging gays and lesbians); or which promote atheism, racism, or indecency.[36]

Phillips' objections turn on what message is conveyed, not who happens to buy or request Phillips' artwork. This is clear since Phillips *sells* his premade artwork to anyone for use at any occasion.[37] Likewise, Phillips also *creates* his custom artwork for anyone, regardless of his or her status.[38] For both his premade and custom works, Phillips serves everyone, but he does not communicate every message through his art.

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29. Joint Appendix at 157, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) (quoting Mark 10:6-9).

30. *Id.* at 157–58.

31. Helen M. Alvaré, *The Moral Reasoning of Family Law: The Case of Same-Sex Marriage*, 38 LOY. U. CHI. L.J. 349, 364, 367–69 (2007).

32. Joint Appendix at 166–67, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

33. *Id.* at 157–59; *see* Ephesians 4:29; Ephesians 5:1–14; 1 Timothy 5:22; 1 Corinthians 10:1–22; 2 Corinthians 6:14–18.

34. Joint Appendix at 159, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

35. *Id.*; *see also* Kristen Waggoner, *Supreme Court's Same-Sex Wedding Cake Decision—A Significant Victory for Freedom*, FOXNEWS.COM (June 4, 2018), https://www.foxnews.com/opinion/supreme-courts-same-sex-wedding-cake-decision-a-significant-victory-for-freedom.

36. Joint Appendix at 165, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

37. *Id.* at 164.

38. *Id.* at 166–67.

C. Phillips' Conscience is Put to the Test

The test of Phillips' conscience came in July 2012 (before Colorado recognized same-sex marriage), when Charlie Craig, David Mullins, and Craig's mother visited Masterpiece Cakeshop.[39] The two men were browsing a photo album of Phillips' custom-design work[40] when Phillips met them at his consultation table.[41] But when they told Phillips that they wanted him to create a cake for their wedding, Phillips politely declined, explaining that he did not design wedding cakes for same-sex marriages, while emphasizing that he was happy to sell them anything in the store or make custom items for other occasions.[42]

Soon the issue gained visibility in local and social media, with consequences including protests outside of the shop, boycotts of Masterpiece,[43] and another cake artist crafting the men a wedding cake for free.[44] The cake they said they planned to request from Phillips and ultimately had designed for their wedding reception was a multi-tiered, rainbow-layered wedding cake.[45] Given the rainbow's role as the preeminent gay pride symbol, Craig and Mullins's wedding cake unequivocally celebrated same-sex marriage.

D. The Legal Battle Begins: Compulsion Versus Conscience

Craig and Mullins then filed charges with the Colorado Civil Rights Division, which enforces the Colorado Anti-Discrimination Act ("CADA"),[46] alleging that Phillips engaged in sexual-orientation discrimination.[47] Shortly thereafter, the Division issued a probable-cause determination against Phillips,[48] stating that there was a CADA violation.[49] A formal complaint and administrative law

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39. *Id.* at 168.

40. *Id.* at 89.

41. *Id.* at 168.

42. *Id.*

43. Kelsey Whipple, *Masterpiece Cakeshop: Yelp Removes Negative Comments, while Supporters Create Facebook Group*, WESTWORLD.COM (July 31, 2012), https://www.westword.com/restaurants/masterpiece-cakeshop-yelp-removes-negative-comments-while-supporters-create-facebook-group-5746438.

44. Joint Appendix at 184–85, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

45. *Id.* at 175–76.

46. Colo. Rev. Stat. Ann. § 24-34-601 (2014).

47. Joint Appendix at 47–52, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

48. *Id.* at 69–86.

49. *Id.* at 69.

judge ("ALJ") hearing ensued.[50] Craig and Mullins intervened and the parties filed cross-motions for summary judgment.[51] Phillips lost.[52]

Phillips appealed the ALJ decision to the seven-member Colorado Civil Rights Commission—Commissioners who, at public meetings on the matter, broadcast their hostility toward Phillips' faith.[53]

One said 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.'"[54] Another echoed, "[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."[55] Yet another Commissioner said:

> 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.[56]

These statements were embedded in the record, as "[n]o commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here."[57]

The Commission subsequently ordered Phillips to design wedding cakes to celebrate same-sex marriages if he created cakes that celebrate opposite-sex marriages; to reeducate his staff on CADA; and to report quarterly to the Commission each of his artistic decisions to decline creating a cake.[58] Phillips—forced by the state to choose between his conscience or compelled performance of his art—had to stop designing wedding cakes. The consequent 40 percent loss of business revenue led to him losing most of his employees, and the prospective brides and grooms in the community lost access to a well-regarded, sought-after cake artist.[59]

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50. *Id.* at 87–100.

51. *Id.* at 102–48.

52. Appendix to Pet. for a Writ of Certiorari at 61a-91a, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

53. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729 (2018).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1721. As of this writing, the statements remain on record.

58. Appendix to Pet. for a Writ of Certiorari at 56a–58a, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

59. Blair Miller, *Masterpiece Cakeshop Owner Says He's Lost 40% of Business, Welcomes SCOTUS Hearing*, THE DENVER CHANNEL (Jun. 26, 2017 12:25 PM),

E. Appeal to the Courts: Will Phillips' Conscience be Protected?

An appeal to the Colorado Court of Appeals followed.[60] Although that court recognized that Phillips declined Craig and Mullins's request "'because of' [his] opposition to same-sex marriage, not because of [his] opposition to their sexual orientation,"[61] it said that CADA requires no "showing of 'animus'" against individuals[62] and held that Phillips violated the statute.[63] It rejected Phillips' free-speech defense,[64] saying that Phillips "does not convey a message supporting same-sex marriages merely by abiding by the law"[65] because "a reasonable observer would understand that [his] compliance with the law is not a reflection of [his] own beliefs."[66]

The appellate court analyzed and rejected Phillips' free-exercise arguments under *Employment Division, Department of Human Resources of Oregon v. Smith*,[67] which holds that incidental burdens on religious exercise from a facially neutral and generally applicable law need only satisfy the rational basis test, and affirmed the Commission's decision on all counts.[68] The Colorado Supreme Court declined review, but the United States Supreme Court granted Phillips' petition for writ of certiorari on June 26, 2017.[69]

F. Appeal to the United States Supreme Court

The Supreme Court reversed the Colorado appellate court in a 7-2 opinion authored by Justice Kennedy—who earlier authored the opinion striking down the federal Defense of Marriage Act in *United States v. Windsor*[70] and the opinion creating legal recognition of same-sex marriage in *Obergefell v. Hodges*.[71] Where Kennedy had recognized in *Obergefell* that many believed marriage to be "by its nature a gender-differentiated union of man and woman"

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https://www.thedenverchannel.com/news/politics/masterpiece-cakeshop-owner-says-hes-lost-40-of-business-welcomes-scotus-hearing.

60. Appendix to Pet. for a Writ of Certiorari at 1a–53a, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

61. *Id.* at 12a–13a.

62. *Id.* at 18a.

63. *Id.* at 21a–22a.

64. *Id.* at 28a–36a.

65. *Id.* at 30a.

66. *Id.* at 31a.

67. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990).

68. Appendix to Pet. for a Writ of Certiorari at 1a–53a, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

69. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, SCOTUSBLOG (Jun. 4, 2018), https://www.scotusblog.com/case-files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/.

70. United States v. Windsor, 570 U.S. 744, 775 (2013).

71. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

which belief "has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world,"[72] in *Masterpiece I* the Court employed the Free Exercise Clause to protect not only those *beliefs* about marriage, but the *exercise* of those beliefs.[73]

G. Applying Lukumi: *Religious Claimants are Entitled to a Hearing Untainted by Hostility*

Masterpiece I expanded on the principles found in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which had struck down a city ordinance that targeted religious animal sacrifices because that law was neither generally applicable nor neutral to religion.[74] Applying *Lukumi*'s principles, the *Masterpiece I* Court held that, even if CADA were facially neutral and generally applicable, it was not applied neutrally, but rather with hostility toward religion. The *Masterpiece I* Court said that under *Lukumi*, "[f]actors 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.'"[75] The state must be neutral toward religion[76] and "even 'subtle departures from neutrality'" violate the Constitution.[77] Whether the law could force Phillips to design a custom cake in violation of his faith "needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor."[78]

The Commission failed that standard: The "attempt to account for the difference in treatment [contrasting Phillips' case to three other cake artist cases] elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs."[79] And the Constitution prohibits the state from acting "in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."[80]

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72. *Id.* at 2594.

73. *Masterpiece I*, 138 S. Ct. 1719, 1732 (2018).

74. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 527–28 (1993).

75. *Masterpiece I*, 138 S. Ct. at 1731 (quoting *Lukumi*, 508 U.S. at 540). Notably, in *Lukumi* only Justices Kennedy and Stevens probed the legislative history of the offending ordinance to discern hostility, *Lukumi*, 508 U.S. at 540–42 (plurality), while in *Masterpiece I* seven Justices examined these "factors relevant to the assessment of governmental neutrality." *Masterpiece I* ,138 S. Ct. at 1722.

76. *Id.* at 1723–24.

77. *Id.* at 1731.

78. *Id.* at 1724.

79. *Id.* at 1731.

80. *Id.*

The Court also condemned the Commissioners' hostile statements. Declaring that the First Amendment protects religious beliefs rejecting same-sex marriage,[81] the Court held that equating religious views to racism or the hatred which drove the holocaust is to "disparage . . . religion"; that deeming religious objections as "despicable . . . rhetoric" denigrates religion by characterizing one's faith as "something insubstantial and even insincere," and by leveling such language at Phillips, the Commission had abandoned the "responsibility of fair and neutral enforcement" the Constitution demands.[82]

The Court's forceful condemnation of the disparaging allusion to Jim Crow laws was well founded. No rational connection exists between systematic, class-based invidious racial discrimination and the conscientious affirmation of marriage between one man and one woman. Racial discrimination is rooted in purported state interests of preserving "racial integrity" and "prevent[ing] 'the corruption of blood'" to avoid creating '"a mongrel breed of citizens'" and endorsing the "doctrine of White Supremacy."[83] Racial discrimination "implicates unique historical, constitutional, and institutional concerns"[84] and is '"odious in all aspects.'"[85] Stopping systematic, class-based racial discrimination was a direct and intended outcome of the Fourteenth Amendment.[86]

In contrast, affirming marriage as being a unique conjugal union between one man and one woman is not a class-based position: Phillips serves all people; racists do not. Affirming marriage between a man and a woman is a view that "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."[87] And religious and philosophical objections to the contemporary government orthodoxy of same-sex marriage are properly protected under the First Amendment.[88]

H. The Commission's Double Standard

The lack of neutrality evidenced by the Commissioners' verbal disparagement was sufficient in itself to invalidate their decision, as was the inconsistent application of CADA—particularly with respect to three cake artists who were

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81. *Id.* at 1727.

82. *Id.* at 1729.

83. Loving v. Virginia, 388 U.S. 1, 7 (1967) (quoting Naim v. Naim, 197 Va. 80, 90 (1955)).

84. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

85. *Id.* at 868 (quoting Rose v Mitchell, 443 U.S. 545, 555 (1979)); *see generally*, Amicus Curiae Brief of Ryan T. Anderson, Ph.D., and African-American and Civil Rights Leaders in Support of Petitioners, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 2017 WL 4004529 *9–10 (U.S. 2017).

86. *Loving*, 388 U.S. at 9.

87. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015); *see generally*, Alvaré, *supra* note 31, at 349–51.

88. *Masterpiece I*, 138 S. Ct. at 1727.

allowed to decline a request to create cakes expressing a religiously motivated message opposing same-sex marriage.[89]

This was a crucial point: where the Commission acted to suppress Mr. Phillips' conscientious objection to using his art to *celebrate* same-sex marriage, it excused the three other bakers who conscientiously objected to the religious customer's request to create cakes *denigrating* same-sex marriage. The Court observed that "[a] principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness" and pointed to *Barnette's* prohibition of government orthodoxies.[90] Justices Thomas and Gorsuch agreed, saying that if such disparate consideration were permitted, it "would allow the government to stamp out virtually any speech at will."[91] Justice Gorsuch further wrote that the two situations shared "all legally salient features," noting that in both cases the cake artists "refused service intending only to honor a personal conviction," knowing that "their conduct promised the effect of leaving a customer in a protected class unserved."[92]

In both situations, 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)."[93] For the three cake designers who refused to criticize same-sex marriage, the lower court heavily weighted their willingness to serve people of all faiths.[94] But for Phillips, his willingness to serve customers of all sexual orientations was summarily dismissed as a "distinction without a difference."[95]

The Commission had tried to justify its disparate consideration by saying that the proposed denigrating cakes included images and text, while the celebrating cake did not and was thus less worthy of First Amendment protection.[96] Justices Thomas and Alito responded: "To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in [the religious customer's] case while penalizing Mr. Phillips—is irrational," they said.[97] The court continued, "[l]ike 'an emblem or flag,' a cake for a same-

89. *Id*. at 1730–31.

90. *Id*. at 1731.

91. *Id*. at 1746 (Thomas, J., and Gorsuch, J., concurring in part and concurring in the judgment).

92. *Id*. at 1735 (Gorsuch, J., and Alito, J., concurring).

93. *Id.*

94. Appendix to Pet. for a Writ of Certiorari at 1a–53a, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

95. *Masterpiece I*, 138 S. Ct. at 1736 (Thomas, J., and Gorsuch, J., concurring in part and concurring in the judgment).

96. *Id*. at 1738 (Gorsuch, J., and Alito, J., concurring).

97. *Id.*

sex wedding is a symbol that serves as 'a short cut from mind to mind,' signifying approval of a specific 'system, idea, [or] institution.'"[98]

Moreover, the appellate court regarded criticism of same-sex marriage as offensive, while refusing to recognize that support for same-sex marriage is also offensive to some.[99] These inconsistencies revealed that the court had entered the forbidden ground of applying a government orthodoxy of what is "offensive" to justify regulating matters of speech and religion.[100]

But there is more: the appellate court told Phillips (1) that his custom wedding cakes do not communicate anything, (2) that even if they did, the expression was not his but his clients, and (3) that no one would attribute meaning to his cakes beyond the fact that he was following CADA's dictates.[101] Yet the appellate court readily accepted that these cakes opposing same-sex marriage would communicate the bakers' message (not just the client's message) and that the three bakers could refuse to express a particular message.[102]

The two *Masterpiece I* dissenters tried to excuse the disparate consideration by saying that 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."[103] But that ignores record evidence that Phillips would

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98. *Id*. (quoting W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 632 (1943)). It is immaterial for constitutional purposes that Phillips writes, paints, and sculpts with edible materials like icing and fondant rather than ink and clay. The court has even stated, "'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 790 (2011) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

99. Appendix to Pet. for a Writ of Certiorari at 20a n.8, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111); Joint Appendix at 225–58, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (No. 16-111).

100. *See* Matal v. Tam, 137 S. Ct. 1744, 1763–64 (2017) (plurality opinion). The Court in *Matal* struck down a federal trademark law prohibiting the registration of trademarks that disparaged persons or groups. At issue was a music group's attempt to trademark the name "The Slants," a derogatory term referring to Asians that was intentionally chosen by the group to push back on cultural opprobrium directed at Asians. *Id.* at 1754. The Court expressly rejected the argument that the "Government has an interest in preventing speech expressing ideas that offend" because that would "strike[ ] at the heart of the First Amendment." *Id.* at 1764.

101. Appendix to Pet. for a Writ of Certiorari at 29a–31a, Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111). Justice Thomas responded directly to the "just following the law" defense, saying that that "argument would justify any law that compelled protected speech," and relied on Barnette to say that the Court already rejected any analysis of compelled speech that '"would resolve every issue of power in favor of those in authority.'" *Masterpiece I*, 138 S. Ct. at 1744 (Thomas, J., concurring) (quoting *Barnette*, 319 U.S. at 636).

102. Appendix to Pet. for a Writ of Certiorari at 20a n.8, *Masterpiece Cakeshop*, 138 S. Ct. (No. 16-111).

103. *Masterpiece I*, 138 S. Ct. at 1750 (Ginsburg, J., and Sotomayor, J., dissenting). The dissenters disregarded the record evidence showing that Phillips would not sell such a cake to anyone because of the message—a point countered by Justice Gorsuch: "Mr. Phillips testified

not have designed a wedding cake celebrating same-sex marriage for anyone, regardless of their sexual orientation.[104] The claim also reveals the grave inconsistency in judging such cases, where a person's sexual *conduct* is presumed dispositive of status-based discrimination, while religious exercise is severed from status—even when exercising one's faith is done despite the threat (and often, the reality) of state prosecution, catastrophic financial consequences, and community opprobrium.

Justice Gorsuch directly addressed that point: "Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips' objection is 'inextricably tied' to a protected class, then the bakers' objection in [the religious customer's] case must be 'inextricably tied' to one as well."[105] He further noted that "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."[106] Thus, in "both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic."[107]

While the *Masterpiece I* court did not rule on Phillips' free speech claims to protect his conscience, the Court observed that the case was "an instructive example . . . of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning."[108] And recognizing the expressive, communicative nature of custom wedding cakes will aid in applying free speech analysis in future cases—particularly under the compelled speech doctrine discussed *infra*.

I. Masterpiece I: *A Demand for Neutrality in Hearing Free Exercise Clause Claims*

Opponents of conscience rights have tried to cast *Masterpiece I* as a narrow decision that turned on strong evidence of religious hostility and disparate consideration. This has led to some critics arguing that the case was little more than a matter of etiquette—had the Commission been more polite toward Phillips and the Commissioners kept their opinions to themselves, the apparent

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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. ("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 1735 (Gorsuch, J., and Alito, J., concurring).

104. Mullins v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 280 (Colo. Ct. App. 2015).

105. *Masterpiece I*, 138 S. Ct. at 1736 (Gorsuch, J., and Alito, J., concurring)

106. *Id.*

107. *Id.*

108. *Id*. at 1723.

hostility would have been cloaked and the decision would have survived.[109] Indeed, the Commission seemingly saw *Masterpiece I* as strictly limited to its facts, as evidenced by it advancing another discrimination claim against Phillips less than a month after losing *Masterpiece I*—this time after Phillips declined to create a custom cake celebrating a "gender transition" from male to female.[110]

This continued antagonism is startling, as the 7-2 *Masterpiece I* decision pointedly said that religious objectors are "entitled to a neutral decisionmaker who [will] give full and fair consideration to his religious objection as he [seeks] to assert it in all of the circumstances in which this case [is] presented, considered, and decided."[111] Thus, neither verbal disparagement nor disparate consideration of religion are permitted when a Free Exercise Clause claim is considered.

But even if government actors manage to refrain from disparaging religion and use a plausibly even-handed treatment process so as to avoid *Masterpiece I*, attempting to coerce creative professionals to create runs squarely into the compelled speech doctrine as discussed in Section III, *infra*.

Despite *Masterpiece I* and the compelled speech doctrine, the printer toner was barely dry on the *Masterpiece I* opinion when *Masterpiece II* arose. And *Masterpiece II* illustrates that the Commission remains focused on suppressing Phillips' religion and his speech.

J. The Commission Unrepentant: Masterpiece II

The same day that the Supreme Court granted review in *Masterpiece I*, *Masterpiece II* was conceived: A transgender lawyer telephoned Mr. Phillips to order a cake that would be blue on the outside and pink on the inside, which the lawyer said would celebrate the lawyer's gender transition from a man to a woman.[112] Months later, the lawyer called again, this time asking Phillips to create a "birthday" cake for Satan.[113] Phillips declined both requests because the message sought was contrary to his religious convictions.[114] Such "testing" requests were coming with disturbing frequency to Masterpiece Cakeshop,

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109. *See generally* Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 Harv. L. Rev. 133 (2018).

110. *Id.* at 149; *see also* James Anderson, *Colorado baker: No cake for gender transition celebration*, ASSOCIATED PRESS, (Aug. 15, 2018), https://apnews.com/f561dd94839744cca86996cfef508e83; Masterpiece Cakeshop, Inc. v. Elenis, No. 18-cv-02074 (D. Colo. Oct. 23, 2018).

111. *Masterpiece I*, 138 S. Ct. at 1732.

112. Order Den. Mot. to Dismiss, Masterpiece Cakeshop, Inc. v. Elenis, No. 18-cv-02074 (D. Colo. Jan. 4, 2019) (ECF No. 94).

113. Am. Compl. at 3, Masterpiece Cakeshop, Inc. v. Elenis, No. 18-cv-02074 (D. Colo. Oct. 23, 2018) (ECF No. 51). The call was received from the lawyer's cellphone, from which Phillips believes the caller, who did not identify himself, was the lawyer. *Id.*

114. *Id.*

including other requests for Satan-honoring cakes (one to be adorned with a working sex toy, another would be decorated with the satanic pentagram symbol).[115] But Phillips consistently declined to communicate messages that violated his conscience.

Predictably, the lawyer filed a CADA complaint against Phillips for declining to create the gender transition cake, and the Division again found "probable cause" that Phillips violated CADA by discriminating against the lawyer's transgender status, which is protected with CADA's definition of sexual orientation.[116] At this juncture, Phillips had little choice but to go to federal court to resist the Commission's persistent and ongoing hostility to his faith.

Unsurprisingly, the Commission moved to dismiss the federal case and took the position that it should be able to prosecute Phillips with a free hand, saying that *Younger v. Harris*[117] compelled the federal court to abstain lest it interfere with an ongoing state proceeding which implicated important state interests.[118]

But the court refused to abstain. Even assuming that the predicates for non-discretionary *Younger* abstention existed, there was an "extraordinary circumstance" in that the Commission was advancing its charges in bad faith.[119] The court pointed out that Phillips had declined the blue and pink cake specifically "'because of the messages that the cake would have expressed,' and not because of [the lawyer's claimed] transgender status."[120] This demonstrated bad faith because the Commission had "permitted . . . 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 declined to create a cake conveying a given message.[121]

The failure to treat message-based conscientious objection consistently among the artists was "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."[122] In

115. *Id.* at 4.

116. Order Den. Mot. to Dismiss at 13, Masterpiece Cakeshop, Inc. v. Elenis, No. 18-cv-02074 (D. Colo. Jan. 4, 2019) (ECF No. 94). Colorado law includes transgender status within its definition of "sexual orientation." Colo. Rev. Stat. Ann. § 24-34-301 (2014).

117. Younger v. Harris, 401 U.S. 37, 41 (1971).

118. State Officials' Rule 12(b)(1) Mot. to Dismiss at 10–13, Masterpiece Cakeshop, Inc. v. Elenis, No. 18-cv-02074 (D. Colo. Oct. 10, 2018) (ECF No. 43).

119. Order Den. Mot. to Dismiss at 18, Masterpiece Cakeshop, Inc. v. Elenis, No. 18-cv-02074 (D. Colo. Jan 4, 2019) (ECF No. 94).

120. *Id.* at 19.

121. *Id.*

122. *Id.* at 22.

light of this bad faith, the federal court declined to abstain and denied the motion to dismiss.[123]

As the above sequence of events shows, Colorado is again acting "inconsistent[ly] with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[124] Yet the Free Exercise Clause is but the first protection for the right of people to live consistent with their faith. A second layer of protection is found in the Free Speech Clause, particularly under the compelled speech doctrine—a doctrine which has protected free speech from being silenced by forces ranging from extraordinary societal pressures to overbearing applications of public accommodation laws.

III. THE COMPELLED SPEECH DOCTRINE GUARDS FREE SPEECH AGAINST OVERT AND COVERT GOVERNMENT COMPULSION

Creative professional cases squarely raise compelled speech issues, and the constraints of the compelled speech doctrine apply regardless of whether the government acted with the required constitutional neutrality in considering a religious conscience claim. And the compelled speech doctrine protects free speech that is being suppressed by misuse of public accommodation laws, as established over twenty years ago in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston.*[125]

In *Hurley*, the Court held that parade organizers could not be compelled to include a contingent marching under a banner that said "Irish American Gay, Lesbian and Bisexual Group of Boston."[126] The organizers had no objection to gays, lesbians, or bisexuals marching in their parade individually, but did object to communicating a *message* that they did not want to convey through their parade.[127]

Hurley established that the state cannot use public-accommodation laws to force individuals to convey a message they disagree with. This is specifically applied to the context where the speakers—(the parade organizers in *Hurley*)—rejected an access request of someone based on the message to be communicated, not on the requestor's protected characteristics.

Notably, *Hurley* made clear that the compelled speech doctrine applies to the commercial marketplace: "the fundamental rule . . . that a speaker has the autonomy to choose the content of his own message" is "enjoyed by business

123. *Id.* at 52–53.

124. *Masterpiece I*, 138 S. Ct. 1719, 1732 (2018).

125. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 581 (1995); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 656–59 (2000) (rejecting compelled association where individual's views clashed with moral views of organization).

126. *Hurley*, 515 U.S. at 570.

127. *Id.* at 572.

corporations generally,"[128] including for-profit speakers that collaborate with others on the "items[s] featured in the[ir] communication[s]."[129] As the Court explained, the compelled speech doctrine applied because the state used the statute "in a peculiar way," "produc[ing] an order essentially requiring [a group] to alter the expressive content" of its speech.[130]

The compelled speech doctrine "protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[131] It forbids the government from forcing citizens (or businesses) to express messages to which they object, and from punishing them for declining to convey such messages.[132] And that prohibition applies when public accommodation laws are used to deny creative professionals their right "to choose the content of [their] own message,"[133] and decide "what merits celebration,"[134] even if the state or some individuals deem those choices "misguided, or even hurtful."[135]

A. NIFLA: *Applying the Compelled Speech Doctrine Today*

Two 2018 cases, *NIFLA v. Becerra*[136] and *Janus v. AFSCME*[137] help illustrate how the compelled speech doctrine would serve to protect creative professionals against government-compelled speech. In *NIFLA*, the Court considered California's regulation of pregnancy care centers that support and encourage pregnant women to carry their babies to term, reflecting the centers' religious objection to abortion.[138] Under the law, licensed pregnancy care centers were obligated to provide information about state-subsidized abortion, while unlicensed pregnancy care centers were required to disclose their unlicensed status.[139]

The Court held that the licensed facility regulation was content-based, which typically triggers strict scrutiny—although in this instance the Court held that it

128. *Id.* at 573–74.

129. *Id.* at 570.

130. *Id.* at 572–73.

131. Wooley v. Maynard, 430 U.S. 705, 715 (1977).

132. *See, e.g.*, Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795–801 (1988) (forbidding the state from requiring paid commercial fundraisers to disclose the percentage of money that they give to their clients); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 4–9 (1986) (plurality opinion) (forbidding the state from requiring a business to include a third party's expression in its billing envelope); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 254–58 (1974) (forbidding the state from requiring a newspaper to publish a third party's article).

133. *Hurley*, 515 U.S. at 573.

134. *Id*. at 574.

135. *Id*.

136. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

137. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

138. Nat'l Inst. of Family & Life Advocates, 138 S. Ct. at 2371.

139. *Id.* at 2368.

even failed intermediate scrutiny.[140] And it struck down the unlicensed facility regulation without deciding the relevant standard because the regulation could not even satisfy the more deferential test in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[141] noting that it was "not sufficiently drawn" to meet the asserted state interest of informing low-income women about abortion.[142]

NIFLA points out that a law is not content-neutral if it "compel[s] individuals to speak a particular message" and therefore "alte[rs] the content" of someone's speech.[143] That is just what public accommodation laws force creative professionals to do: "alter the content" of speech by compelling them to speak a message they disagree with (thus violating their consciences) as did the Commission in ordering Phillips to create cakes celebrating same-sex weddings if he created cakes celebrating biblical marriage.

NIFLA further informs the issues surrounding creative professionals and their rights of conscience. When the Ninth Circuit Court of Appeals attempted to diminish the First Amendment protections for licensed professionals and thereby favor pro-abortion speech, it was met with a sharp rebuke from the Supreme Court: "[W]hen the government polices the content of professional speech, it can fail to 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'"[144] The Court continued:

> Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *and the people lose when the government is the one deciding which ideas should prevail*.[145]

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140. *Id.* at 2371. The court found that the "licensed notice is a content-based regulation of speech," and that as "a general matter, 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.* (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015)).

141. Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 638 (1985).

142. Nat'l Inst. of Family & Life Advocates, 138 S. Ct. at 2375.

143. *Id.* at 2371 (internal quotations omitted). *See also* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 572–73 (1995) (including unwanted message altered content of parade organizers' speech).

144. *Id.* at 2374 (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014)).

145. *Id.* at 2374–75 (citation omitted) (emphasis added).

Thus, the Court is "reluctant to mark off new categories of speech for diminished constitutional protection" and "especially reluctant to 'exemp[t] a category of speech from the normal prohibition on content-based restrictions.'"[146] As Justice Kennedy recognized, it is a "serious threat" when the state "compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these."[147]

B. Janus: *The Added Injury of Compelling Speech*

In *Janus*, the Court held that Illinois' collection of agency fees for unions from nonmember public employees was unconstitutional.[148] As the Court put it, "[w]e simply draw the line at allowing the government to . . . require all employees to support the union irrespective of whether they share its views."[149] *Janus* draws a wide boundary around the compelled speech doctrine: the agency fees paid by nonmembers were limited to costs for collective bargaining efforts and other nonpolitical work by the union, and not for the union's political advocacy.[150] Moreover, agency fees raised a question of subsidy, and not directly compelling speech or association. Yet this was nonetheless problematic.[151] The Court found, "[c]ompelling 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."[152]

In contrast, "Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth."[153] The consequences of governmental restriction of free speech are perilous, for "[w]henever 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."[154] Worse, "additional damage is done" when speech is compelled because "individuals are coerced into betraying their convictions."[155] And "[f]orcing free and independent individuals to endorse

146. *Id.* at 2372.

147. *Id*. at 2379 (Kennedy, J., concurring).

148. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478 (2018). Although strict scrutiny might have been merited in this case, the Court did not decide the question but rather held that the forced subsidy failed even under the lesser "exacting scrutiny" applied to agency fees in Knox v. Serv. Emps., 567 U.S. 298 (2012) and Harris v. Quinn, 134 S. Ct. 2618 (2014). *Id.* at 2465.

149. *Id.* at 2478.

150. *Id.* at 2461.

151. *Id.* at 2465.

152. *Id.* at 2463.

153. *Id.* at 2464 (internal citations omitted).

154. *Id.*

155. *Id.*

ideas they find objectionable" requires "even more immediate and urgent grounds than a law demanding silence."[156]

Bringing this back to the matter at hand, the parallel with the *Masterpiece* cases and *Janus* is striking. One could argue that no one forced Jack Phillips to become a cake artist. But it is also unlikely that the municipal workers were forced to their labors by press gangs. And of course, there are valid governmental interests in access to public accommodations and in maintaining functional labor relations among unions, management, and workers.

But as *Hurley* held, applying public accommodation laws in peculiar ways to coerce speech is unconstitutional: there is no valid state interest to justify the "additional injury" of individuals being forced to speak against their conscientious convictions, be they a bureaucrat or a baker—especially when *Janus* condemned subsidizing unwanted speech, while in the creative professional cases they are being compelled to use their own artistic talent to create their own speech.[157]

Perhaps the case is coming where some wayward state agency, bent on putting its finger on one side of some controversy, manages to guard its tongue, avoid email and paper trails, disguise unequal application of the law to similar conscientious objectors, and closely cabin its covert hostility toward religion, such that it appears neutral to the outside world while it slyly seeks to compel an American farmer, florist, printer, doctor, painter or filmmaker to speak against their conscience. But when that happens, the compelled speech doctrine provides a sound bulwark against such an attack.

IV. *MASTERPIECE I*, *NIFLA*, AND *JANUS* ARE WELL TIMED TO AID THE CREATIVE PROFESSIONALS CURRENTLY LITIGATING TO DEFEND THEIR CONSCIENCES

While Colorado has become a hotbed of religious hostility, similar state hostility and disparate consideration have been exposed throughout the United States, as exemplified in *Telescope Media*, *Brush and Nib* and *Buck v. Gordon*.

A. Telescope Media

These three Supreme Court cases are already reinvigorating freedom of conscience jurisprudence in the lower courts. In *Telescope Media Group v. Lucero*,[158] the United States Court of Appeals for the Eighth Circuit reversed in part the district court's dismissal of a First Amendment challenge to the Minnesota Human Rights Act ("MHRA") brought by filmmakers Carl and

156. *Id*. (internal quotations omitted).

157. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 580–81 (1995).

158. Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).

Angel Larsen:[159] "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."[160]

The United States District Court for the District of Minnesota rejected a First Amendment challenge to the Minnesota Human Rights Act brought by filmmakers Carl and Angel Larsen.[161] As Christians, the Larsens place Christ at the center of their lives. And much like Phillips' reasoned selection of "Masterpiece" as his Cakeshop's name, the Larsens chose "Telescope Media" because they sought to magnify God and our culture's understanding of God through their filmmaking.[162] Their films tell a story about their clients, helping author and shape the story's plot and narrative; selecting just the right location and spending long hours to edit the film to maximize its message and to honor God.[163]

And like Phillips and Stutzman, the Larsens work with anyone, but cannot communicate all messages. The Larsens want to and would bring their talents to market, working with betrothed men and women to promote their religious beliefs about marriage.[164] But Minnesota officials gave them a choice: if you deliver your message about marriage through commissioned wedding films, you must also deliver the government's contrary message through your commissioned wedding films. Fail to do so, and you risk criminal penalties including steep fines and even jail time.[165] Given that reality, the Larsens have forgone expressing their views on marriage through their filmmaking.[166]

Ironically, if the Larsens had been pro-gay filmmakers seeking to influence the culture on same-sex marriage in the years before *Obergefell*, no law would have compelled them to present only the government's message affirming man-woman marriage. But today the Minnesota Human Rights Act compels a filmmaker seeking to influence the culture on a view of marriage held by millions, grounded in over 2,000 years of history, and held by all of the Abrahamic faiths to present the contrary message affirming same-sex marriage.

Although the Larsens raised a First Amendment compelled speech claim, the district court rejected it, finding that Minnesota may force them to produce films celebrating same-sex weddings if they do any work celebrating biblical

159. *Id.* at 762.

160. *Id.* at 747.

161. Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1128 (D. Minn. 2017).

162. *Id.* at 1099.

163. Id. at 1099–1100.

164. Id. at 1100.

165. *Id.* at 1098 n.4. Penalties include triple compensatory damages, punitive damages up to $25,000, and misdemeanor criminal penalties that carry up to a 90-day jail sentence.

166. *Id.* at 1105.

weddings.[167] The district court even *affirmed* differential treatment of decisions to decline service: decisions grounded in secular "legitimate business purpose[s]" are permissible,[168] but a conscientious objection grounded in religious belief in marriage between a man and a woman is not. Thus, in Minnesota some creative professionals could decline work if they opposed the requested message, while professionals relying upon religious motivations would be subject to the penalties. *Masterpiece I* forbids such a result.[169]

The Eighth Circuit had no difficulty seeing that "videos are a form of speech that is entitled to First Amendment protection" and "a significant medium for the communication of ideas."[170] The court cited to *Masterpiece I* to say that the commercial context of the videos was irrelevant to the First Amendment inquiry.[171] And the court readily rejected Minnesota's defense that it only regulated the conduct of producing the videos, pointing out that such a position would justify censoring painting by regulating the conduct of moving a paint brush, or the contents of a newspaper by regulating the conduct of setting print.[172]

Applying the MHRA to the Larsens' video production violated their free speech in two ways: it compelled them to speak favorably on a topic (same-sex marriage) that they did not wish to speak about, and it operated as a presumptively unconstitutional content-based regulation.[173] Both are "at odds with the 'cardinal constitutional command' against compelled speech."[174] Just because the Larsens "wish to actively promote opposite-sex weddings through their videos," Minnesota "cannot 'coerce[them] into betraying their convictions'" or to promote "'ideas they find objectionable,'" which "is always demeaning."[175] The MHRA operated as a content-based regulation in the Larsens' case, even though it did not facially address speech.[176] A regulation is content-based when it mandates speech "that a speaker would not otherwise make" or "exacts a penalty on the basis of the content of speech."[177] Minnesota crossed both these lines, which subjected the MHRA to strict scrutiny.[178]

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167. *Id.* at 1115–16.

168. Minn. Stat. § 363A.17, subd.3 (2019); *see also* Plaintiff-Appellants' Suppl. Br. at 10–11, Telescope Media Group v. Lindsey, No. 17-3352 (8th Cir. Jul. 25, 2018).

169. *Masterpiece I*, 138 S. Ct. 1719, 1732 (2018).

170. Telescope Media v. Lucero, 936 F.3d 740, 750–51 (8th Cir. 2019).

171. *Id.* at 751 (citing *Masterpiece I*, 138 S. Ct. at 1745).

172. *Id.* at 752.

173. *Id.*

174. *Id.* (quoting Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2463 (2018).

175. *Id.* at 753 (quoting *Janus*, 138 S. Ct. at 2464).

176. *Id.*

177. *Id.* (internal quotations and citations omitted).

178. *Id.*

Minnesota asserted a compelling state interest in ending "sexual-orientation discrimination."[179] But that did not save the state, said the Court, because "[e]ven antidiscrimination laws, as critically important as they are, must yield to the Constitution."[180] While the state is free to regulate conduct, 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."[181] Put simply, "regulating speech because it is discriminatory or offensive is not a compelling state interest," even if the speech may be "hurtful."[182]

The Eighth Circuit also held that the Larsens' religious freedom claim could proceed based on hybrid rights theory, defined in *Employment Division, Department of Human Resources of Oregon v. Smith*[183] as the Free Exercise Clause operating "*in conjunction* with other constitutional protections, such as freedom of speech."[184] Because the Larsens' speech was an exercise of their faith, the court invoked the hybrid-rights doctrine and applied strict scrutiny.[185]

In sum, the Eighth Circuit drew from *NIFLA*, *Janus*, *Masterpiece I*, and their antecedents to shield against an attempt to use a public accommodation law to compel speech. Such laws may regulate conduct, but if they are peculiarly applied to regulate speech, their reach is limited by the First Amendment. The Supreme Court stated, "'[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.'"[186]

B. Brush and Nib

Barely three weeks after *Telescope Media* was decided, the Arizona Supreme Court decided *Brush and Nib Studio, LC v. City of Phoenix*.[187] In Phoenix, Arizona two Christian artists—a painter and a calligrapher—are being coerced to produce art—wedding vows, wedding invitations, and wedding signs—celebrating same-sex weddings.[188] The artists—Joanna Duka and Breanna Koski—challenged the ordinance under article 2, section 6 free speech provision of the Arizona Constitution and Arizona's Free Exercise of Religion Act ("FERA"), A.R.S. § 41-1493.01. The state supreme court explained:

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179. *Id.* at 754–55.

180. *Id.* at 755.

181. *Id.* (quoting Hurley v. Irish-American Gay, 515 U.S. 557, 579 (1995)).

182. *Id.*

183. Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

184. *Id.* at 881–82 (emphasis added).

185. *Id.*

186. *Telescope Media*, 936 F.3d at 750 (quoting Terminiello v. Chicago, 337 U.S. 1, 4–5 (1949)).

187. Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019).

188. *Id.* at 895–96.

> 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.[189]

This holds true even where the artists' "beliefs about same-sex marriage may seem old fashioned, or even offensive to some."[190] "[T]he 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."[191] Then, citing to *Barnette*, the court said that 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 the things that touch the heart of the existing order."[192]

Duka and Koski are Christians who will not create "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."[193] It is their belief that "only a man and a woman can be joined in marriage."[194] To be sure, "they will create custom artwork for, and sell pre-made artwork to, any customers regardless of their sexual orientation," but they cannot convey a message celebrating a marriage other than between one man and one woman.[195]

The city argued that its law merely regulated conduct and that only intermediate scrutiny applied, but the court squarely rejected that argument: "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.'"[196] Because the custom invitations created by Duka and Koski contained hand-drawn words, images, and calligraphy, the court found that they were "pure speech," and that the effort to compel them merited strict scrutiny.[197]

Although Arizona's constitutional free speech protection offers a broader shield than the First Amendment does, the court relied on long-settled federal First Amendment jurisprudence to "conclusively resolve[] Plaintiffs' claim"

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189. *Id.* at 895.

190. *Id.* at 896.

191. *Id.*

192. *Id.* (quoting Education v. Barnette, 319 U.S. 624, 641–42 (1943)).

193. *Id.* at 898 (internal quotations omitted).

194. *Id.*

195. *Id.*

196. Id. at 905 (quoting Coleman v. City of Mesa, 284 P.3d 863, 872 (Ariz. 2012)) (holding that tattoos were protected "pure speech.").

197. *Id.* at 908.

under the compelled speech doctrine.[198] As the court pointed out, "'[c]ompelling individuals to mouth support for views they find objectionable violates' the 'cardinal constitutional command' that individuals have autonomy over their speech."[199] And when the "State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines" the whole point of free speech protection and "is always demeaning."[200]

Nonetheless, the city (just like Colorado in *Masterpiece I* and Minnesota in *Telescope Media*) argued that declining to provide custom services to celebrate same-sex marriage was merely a proxy for status-based discrimination. Not so, the court said: "The fact that Plaintiffs' message-based refusal primarily impacts customers with certain sexual orientations does not deprive Plaintiffs of First Amendment protection."[201] That standard was set long ago in *Hurley*.[202] Because the artists acted based on *message*, not *status*, they were entitled to constitutional protection.[203]

All this brought strict scrutiny to bear on the city's ordinance, against which the city argued that eliminating discrimination was a compelling state interest. But in *Hurley*, "the Supreme Court rejected any suggestion that a public accommodations law could justify compelling speech."[204] Simply put, the government may not declare another's speech itself to be a public accommodation or grant "protected individuals . . . the right to participate in [another's] speech."[205]

The court also considered the religious freedom claim, noting that Duka and Koski sought 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."[206] The claim was brought under Arizona's FERA, which is a statute that resurrected pre-*Smith* strict scrutiny analysis for religious freedom claims.

The court began its FERA analysis by holding that the ordinance imposed a substantial burden on the artists' exercise of their faith. "[T]he coercion the Ordinance places on Plaintiffs to abandon their religious belief is unmistakable," said the Court.[207] There was virtually no option given, "[o]n one hand, they can

198. *Id.* at 903.

199. *Id.* at 905 (quoting Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2361, 2463 (2018).

200. *Id.* (quoting *Janus*, 138 S. Ct. at 2464).

201. *Id.* at 910.

202. *Id.* (citing Hurley v. Irish-American Gay, 515 U.S. 557, 572–76 (1995)).

203. *Id.* (citing *Hurley*, 515 U.S. at 580–81).

204. *Id.* at 915.

205. *Id.* (citing *Hurley*, 515 U.S. at 572–73) (internal quotation omitted).

206. *Id.* at 917.

207. *Id.* at 920.

choose to forsake their religious convictions and create wedding invitations celebrating same-sex marriage."[208] But on the other hand, if they stay true to their faith, the city could order each of them to jail for six months for "every *day* Duka and Koski [violate] the Ordinance."[209] Even if they avoided jail, they faced "a possible fine of $2,500," and "for a continuing violation, the fine could be tens of thousands of dollars."[210] If that were not enough for a substantial burden, the city had "authority under the Ordinance's nuisance provision to simply shut down Duka and Koski's business altogether."[211]

The court brushed aside the City's argument that protecting the artists' religious freedom would enable other businesses to discriminate at will using the guise of religion.[212] These "slippery slope" arguments were properly rejected in *Hobby Lobby*, and such speculative arguments carry no weight.[213]

Far more important was the fact that "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.'"[214] It made no difference that the expression was created for profit, as FERA does not distinguish between non-profit and for-profit entities.[215]

At bottom, the Arizona Supreme Court concluded that "[f]reedom of speech and religion requires tolerance of different beliefs and points of view."[216] Such "tolerance of another's beliefs and point of view is indispensable to the survival and growth of our democracy."[217] When the court enforces and protects these rights, it "preserves 'individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.'"[218] The state may freely "promote all sorts of conduct in place of harmful behavior," said the court, but "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."[219] With that,

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208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 924.
213. *Id.* (discussing religious exemption from mandatory provision of abortifacients and certain medical procedures in Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014)).
214. *Id.* at 925.
215. *Id.*
216. *Id.* at 926.
217. *Id.*
218. *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637(1943)).
219. *Id.* (quoting Hurley v. Irish-American Gay, 515 U.S. 557, 579 (1995)).

the court held that the creation and sale of custom wedding invitations by Brush & Nib's artists was beyond the reach of the city ordinance.[220]

C. Buck v. Gordon

Shortly after the *Brush & Nib* decision, a federal district court in Michigan upheld the right of a faith-based adoption and foster placement agency to "continue to do th[at] work and still profess and promote the traditional Catholic belief that marriage as ordained by God is for one man and one woman."[221] The state of Michigan contracted with religious and non-religious agencies to serve approximately 13,000 children in the foster and adoption system.[222] All eligible children were tracked in a state-maintained database, and the agencies used that database to place eligible children with adoptive or foster parents who have been licensed by the state.[223] The state contracted with agencies to evaluate and certify prospective parents as eligible to adopt or foster a child, but an agency could decline any such assignment, and it would be passed on to another provider.[224]

St. Vincent Charities contracted with the state and would place children with same-sex couples certified by other agencies: its sole religious objection was to accepting referrals to evaluate and certify same-sex or unmarried couples as prospective parents.[225] All agencies were allowed to decline a referral, so long as they responded promptly.[226]

In 2015, Michigan passed a law to ensure that religious agencies could serve without yielding their religious beliefs, and the state initially defended the law against an ACLU lawsuit intended to strike the statute down and drive out agencies like St. Vincent's.[227] But in 2018, a newly elected state attorney general reversed the state's position and settled the lawsuit, agreeing to force religious organizations to certify same-sex couples in violation of their religious scruples.[228] And the Attorney General was openly hostile toward religious agencies, saying that the "only purpose" of the 2015 law was "discriminatory animus" and labeling those who supported the law (including St. Vincent's) as "'hate mongers' who disliked gay people more than they cared about children."[229]

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220. *Id.*
221. Buck v. Gordon, 2019 U.S. Dist. LEXIS 165196, at *2 (W.D. Mich. Sept. 26, 2019).
222. *Id.* at *6.
223. *Id.* at *7.
224. *Id.* at *9–10.
225. *Id.* at *11.
226. *Id.* at *12–14.
227. *Id.* at *15–16.
228. *Id.* at *20–21.
229. *Id.* at *2.

St. Vincent's and others brought suit to challenge the settlement agreement, prevailing when the court applied strict scrutiny under *Lukumi* because there was ample evidence of "religious targeting," including the Attorney General making the 2015 law a campaign issue, insisting that the law only furthered "discriminatory animus" and labeling St. Vincent's religious beliefs as "hate."[230]

That brings us back to *Masterpiece I*. The Attorney General asked to be dismissed from the case because she was "simply the State's chief legal counsel, [and] is not responsible for Michigan's change in policy."[231] But the court refused, saying that the Attorney General was "at the very heart of the case" and that her rhetoric of hate and discriminatory animus raised "a strong inference of a hostility toward a religious viewpoint."[232] In particular, the Attorney General's pivotal role in moving the state from defending to attacking St. Vincent's faith-based objection was strong evidence that she targeted St. Vincent because of "its religious belief."[233]

As the court summarized the case, St. Vincent's placed children as required by the state contracts, including with same-sex couples who were certified by other agencies.[234] But "[w]hat St. Vincent has not done and will not do is give up its traditional Catholic belief that marriage as instituted by God is for one man and one woman," and thus it could not certify same-sex or unmarried couples as eligible to adopt or foster.[235] The state's hostility toward that act of religious conscience required strict scrutiny, and the district court issued a preliminary injunction to prevent the state from coercing St. Vincent to act against its faith.[236]

St. Vincent is not alone in dealing with these issues, as another case is gaining national attention because Washington state officials are disregarding the Supreme Court's recent guidance on religious neutrality and compelled speech.

V. *WASHINGTON V. ARLENE'S FLOWERS*: THE FLOWERING OF RELIGIOUS CONSCIENCE

In *Washington v. Arlene's Flowers*,[237] florist and shop owner Barronelle Stutzman had served a gay customer, Robert Ingersoll, for nine years, helping him celebrate myriad occasions. But when Robert sought Ms. Stutzman's talents to custom design arrangements to celebrate his wedding, she gently explained that she could not help celebrate his wedding "because of her

230. *Id.* at *33–34.
231. *Id.* at *46.
232. *Id* at *46–47.
233. *Id.* at *47 (citing *Masterpiece I*,138 S. Ct. 1719, 1729–31 (2018)).
234. *Id.* at *49–50.
235. *Id.* at *50.
236. *Id.* at 50–51.
237. State of Wash. v. Arlene's Flowers, Inc., 389 P.3d 543, 549 (Wash. 2017).

relationship with Jesus Christ," and referred him to other florists in whose skills she had confidence.[238]

The Washington Attorney General, after learning about Ms. Stutzman's religious conflict through media reports (and absent any complaint from Mr. Ingersoll) sent a legal demand letter threatening to sue Ms. Stutzman, employed a heretofore unknown theory to bring a state consumer protection act against her, and sued Ms. Stutzman in her personal and corporate capacities.[239] Not long after, Ingersoll also brought suit, represented by the ACLU.[240]

The case worked its way to the Supreme Court of Washington, which affirmed the lower courts' opinion that Stutzman had discriminated on the basis of sexual orientation and upheld the judgment against her in her personal capacity for damages, attorneys' fees, and costs.[241] Stutzman then appealed to the United States Supreme Court, which shortly after deciding *Masterpiece I* granted *certiorari*, vacated the state court ruling, and remanded the case for consideration in light of *Masterpiece I*. On remand, the Washington Supreme Court excused the Attorney General's overt hostility toward Stutzman's religious beliefs by cabining *Masterpiece I* to forbid *only* hostility by "adjudicatory bodies."[242] Having sidestepped the neutrality requirements, it said that *Janus* and *NIFLA* were "outside the scope of the remand" and thus irrelevant to the analysis because they did not specifically address the application of public accommodation statutes.[243] Washington's highest court then reinstated much of its prior opinion almost verbatim.[244]

Like the Colorado Commissioners, Washington officials have disparaged Ms. Stutzman's faith, with the Attorney General also employing the odious race analogy to demean Ms. Stutzman, saying that "[w]e can't go back to the 1960s and lunch counters."[245] He openly attacked Ms. Stutzman's faith in his briefing, scoffing that some who share her "Southern Baptist faith for decades offered a purportedly 'reasoned religious distinction' for race discrimination."[246] And Washington delved into disparate consideration, initiating aggressive, novel litigation against Stutzman by suing in her personal and corporate capacities—

238. Supplemental Brief of Petitioners at 2, Arlene's Flowers, Inc. v. State of Wash., (2018) 138 S. Ct. 2671 (No. 17-108) (internal quotations omitted).

239. *Id.; see also* State of Wash. v. Arlene's Flowers, 389 P.3d at 550.

240. State of Wash. v. Arlene's Flowers, 389 P.3d at 550.

241. *Id.* at 568.

242. State of Wash. v. Arlene's Flowers, Inc., 441 P.3d 1203, 1214 (Wash. 2019).

243. *Id.* at 1217 n.5.

244. *See generally* State of Wash. v. Arlene's Flowers, Inc., 441 P.3d 1203 (Wash. 2019).

245. Brief of Appellants at 24, State of Wash. v. Arlene's Flowers, Inc., No. 91615-2 (Wash. Nov. 13, 2018).

246. Respondent's Brief in Opposition at 20 n.6, Arlene's Flowers, Inc. v. State of Wash., 138 S. Ct. 2671 (2018) (No. 17-108), 2017 WL 4805387at *19.

yet all but ignoring an astounding instance of anti-Christian discrimination in Seattle's aptly named Bedlam Coffee store.

There, the gay coffee shop owner profanely attacked a group of Christian customers in October 2017. After learning that the customers had distributed flyers advocating their religious views on life on nearby public areas, Bedlam's owner denied them service, repeatedly ordered them to "shut up," and angrily yelled: "Leave, all of you! Tell all your f—-ing friends, 'Don't f—-ing come here!'"[247] And the owner profanely expressed a desire to engage in homosexual behavior with his partner in public, and with Jesus Christ.[248] The official response? Unlike the Attorney General's aggressive legal attack on Ms. Stutzman, the Commission sent only an "educational" letter which carried no legal weight to Bedlam's owner, and to which he did not respond.[249]

Washington further mirrored Colorado's errors: where in *Masterpiece I* a Commissioner said that Phillips could "believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state,'"[250] in *Arlene's Flowers* the Attorney General said that "Ms. Stutzman is free to hold her religious beliefs about marriage, but she is not entitled to invoke them" in running her business.[251] And he explained that he sued Ms. Stutzman in her personal capacity because she made decisions for her business based on "her personal belief 'that marriage is a union of a man and a woman.'"[252] This sends a chilling message to creative professionals acting on their own religious beliefs: living out their faith in the marketplace may lead to professional hardship and personal financial ruin.

On September 11, 2019, Ms. Stutzman again petitioned the United States Supreme Court to hear her case, pointing out that the Washington Supreme Court's holding that her custom wedding designs are not artistic expression is unsupportable. The state court disregarded *Hurley*'s admonition that governments cannot use public accommodation laws to compel speech. And it spurned the Supreme Court's admonition that government officials must act neutrally toward religion. As *Buck* illustrated, that applies to a state attorney general, not just appointed commissioners sitting on "adjudicatory bodies."

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247. Abolish Human Abortion, *Angry Homosexual Kicks Christian Customers out of Coffee Shop*, FACEBOOK (Oct. 1, 2017), https://www.facebook.com/AbolishHumanAbortion/videos/1584181761647832/.

248. *Id.*

249. Supplemental Brief of Respondent at 5, Arlene's Flowers v. State of Wash., 138 S. Ct. 2671 (2018) (No. 17-108).

250. *Masterpiece I*, 138 S. Ct. 1719, 1729 (2018).

251. Reply in Supp. of Ingersoll and Freed's Mot. for Partial Summ. J. at 14, State of Wash. v. Arlene's Flowers, Inc., No 13-2-00871-5 (Dec. 15, 2014).

252. State's Resp. to Defs.' Mot. for Partial Summ. J. on Claims Against Barronelle Stutzman in Her Personal Capacity at 3, State of Wash. v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Nov. 12, 2013).

Stutzman's wedding art is protected First Amendment expression. Floral design as an art form is documented in antiquity, and modern universities continue to teach "the art of floral design."[253] The components of floral art are all but indistinguishable from painting: a florist must choose and display shape, shade, geometry, and color.[254] Stutzman deploys these principles to "express[], in abstract form, her vision of the couple's unique personalities, style, and what they want their ceremony to be."[255] The Washington Supreme Court's failure to recognize this as speech not only conflicts with numerous cases that followed *Hurley*'s admonition that "the Constitution looks beyond written or spoken words as mediums of expression,"[256] but leads to absurdity: Van Gogh's "Vase with Red Poppies," depicting a few poppies in pottery, would enjoy First Amendment protection while Stutzman's far more intricate, artistic celebration of a wedding with actual flowers would not.[257]

The facts of *Arlene's Flowers* invite analysis under both the religious neutrality doctrine and compelled speech principles. It would be a grave injustice to allow this case to end with a different outcome than the courts have reached in *Masterpiece I, NIFLA, Janus, Telescope Media*, and *Brush & Nib*.

VI. CONCLUSION

This is scarcely an exhaustive list of such cases but illustrates the breadth and depth of the chill. Given that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,"[258] these cases demonstrate that the Supreme Court must be vigilant to enforce long-established constitutional obligations so that creative professionals having religious objections to some messages or events are treated equally, have their faith respected through a truly neutral hearing process, and not be compelled to speak or create expression contrary to their beliefs.

The core of the question is conscience, and conscience cuts a broad swath through our culture. The next case may be a Democrat cake artist declining to create a cake for President Trump's second inauguration because he created such a cake for President Obama;[259] a Mormon filmmaker declining to do a

253. Pet. for a Writ of Cert. at 16–17, Arlene's Flowers, Inc. v. Wash., 138 S. Ct. 2671 (No. 17-108) (citing Norah Hunter, *The Art of Floral Design* 30 (2d ed. 2000)).

254. *Id.* at 17.

255. *Id.* at 34.

256. Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

257. Pet. for a Writ of Cert. at 40, Arlene's Flowers, Inc. v. State of Wash., 138 S. Ct. 2671 (No. 17-108).

258. Elrod v. Burns, 427 U.S. 347, 373 (1976).

259. Boy Scouts of Am. v. Dale, 530 U.S 640, 656 n.2 (2000) (noting that the District of Columbia and other jurisdictions include political ideology as a protected class).

promotional video for Scientologists; or a Muslim painter who declines to paint the Stations of the Cross within a Roman Catholic cathedral.

The creative professionals will serve all customers, but the very nature of the artistic endeavor is that no artist will ever be able to promote all messages through their works. Were this not so, then the creative professional becomes an automaton, with no more investment in his or her art than Orwell's Winston Smith was invested in the truth of the news articles that he was told to rewrite to suit the Party's "truth" of the moment.

But America is not Oceana: as *Barnette* famously put it, "[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."[260]

As the Court has said, "*[t]he whole point* of the First Amendment is to protect individual speech that the majority might prefer to restrict, or that legislators or judges might not view as useful to the democratic process."[261] Indeed, "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[262]

Ironically, today it is not a pernicious idea that is suppressed, but rather the idea that marriage is uniquely between one man and one woman. That idea was recognized by our highest Court as "the foundation of the family and of society, without which there would be neither civilization nor progress."[263]

When the government begins suppressing ideas, courts must step in to protect the debates which ultimately sort out truth. As the Court said in *NIFLA*, "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[264] And if it happens that the thought is brought to market via an artist's hand wielding a painter's brush and a baker's whisk, the thought is no less protected by the First Amendment.

Civil liberties travel together. When powerful public figures of our age proclaim that "speech is violence,"[265] or that '"[y]ou cannot be civil'" with political adversaries,[266] it is time for free speech advocates to reject the siren

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260. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

261. McCutcheon v. FEC, 572 U.S. 185, 187 (2014) (emphasis added).

262. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).

263. Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

264. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2375 (2018) (internal quotations omitted).

265. Pamela B. Paresky, *When is Speech Violence and What's the Real Harm?*, PSYCHOLOGYTODAY.COM (Aug. 4, 2017), https://www.psychologytoday.com/us/blog/happiness-and-the-pursuit-leadership/201708/when-is-speech-violence-and-what-s-the-real-harm.

266. Rachel Ventresca, *Clinton: 'You Cannot be Civil with a Political Party that wants to Destroy what you Stand for'*, CNN.COM (Oct. 9, 2018), https://www.cnn.com/2018/10/09/politics/hillary-clinton-civility-congress-cnntv/index.html.

calls of censorship or coercion, and renew their commitment to protecting freedom for all, so that good ideas can succeed and bad ideas can fail—in plain view of the public, and without the government silencing one speaker or coercing another.

If we all lose when the government decides which ideas prevail, then we all win when free speech and the free exercise of religion protects the debates which lead to truth.