No. 21-476

IN THE

Supreme Court of the United States

303 CREATIVE LLC, A LIMITED LIABILITY COMPANY; LORIE SMITH,

Petitioners,

V.

AUBREY ELENIS; CHARLES GARCIA; AJAY MENON; MIGUEL RENE ELIAS; RICHARD LEWIS; KENDRA ANDERSON; SERGIO CORDOVA; JESSICA POCOCK; PHIL WEISER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief *Amici Curiae* of United States Conference of Catholic Bishops, Colorado Catholic Conference, The General Council of the Assemblies of God, The General Conference of Seventh-day Adventists, The Billy Graham Evangelistic Association, and Samaritan's Purse in Support of Petitioners

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The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation whose members are the active Catholic Bishops in the United States. The USCCB provides a framework and a forum for the Bishops to teach Catholic doctrine, set pastoral directions, and develop policy positions on contemporary social issues. As such, the USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, immigration, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the USCCB include the protection of the rights of religious organizations and religious believers under the First Amendment, and the proper development of this Court's jurisprudence in that regard.

The Colorado Catholic Conference (CCC) is the public policy voice of the three Catholic dioceses of Colorado. Basing its mission on the Gospel of Jesus Christ, as particularly expressed in Catholic social teaching and the consistent life ethic, the CCC works with other religious and secular groups in promoting the common good of the people of Colorado, including the promotion of such basic freedoms as religious exercise and speech.

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[1] All parties filed blanket consents to the filing of amicus briefs. No counsel for any party authored any part of this brief and no person or entity other than amicus funded its preparation or submission.

The General Council of the Assemblies of God (USA), together with Assemblies of God congregations around the world, is the world's largest Pentecostal denomination. It has approximately 69 million members and adherents worldwide with nearly 13,000 churches voluntarily affiliated with the cooperative fellowship in the United States. Seventeen colleges and universities are endorsed by the Assemblies of God in the United States. Religious freedom and free speech are critically important to the Assemblies of God and its members. As part of its religious mission, the Assemblies of God actively shares the gospel of Jesus Christ around the world including the gospel's application to the issues of our day. The Assemblies of God cherishes the constitutionally-guaranteed freedom of religion and speech, and it seeks to foster a society in which religious adherents of all faiths may speak and peaceably live out the dictates of their conscience as image-bearers of God.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents more than 154,000 congregations with more than 22 million members worldwide, including 6,300 congregations and more than 1.2 million members in the United States. In the United States, the work of the church is divided between 51 conferences, eight union conferences, the North American Division and finally the General Conference itself. The General Conference has a strong interest in protecting free speech for both itself and its members.

The Billy Graham Evangelistic Association ("BGEA") was founded by Billy Graham in 1950 and, continuing the lifelong work of Billy Graham, exists to

support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ by every effective means available and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square, to cultivate prayer, and to proclaim the Gospel.

Samaritan's Purse is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The charity seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs, and resources for children and families, all in the name of Jesus Christ. Samaritan's Purse's concern arises when the government compels the speech of faith-based organizations, businesses or individuals to express speech wholly contradictory to Christian teachings and the Holy Scriptures, the very Scriptures that are the reason for Samaritan's Purse helping the most vulnerable, including distressed women and children, worldwide.

SUMMARY OF ARGUMENT

When the Court decided *Masterpiece Cakeshop* v. *Colorado Civil Rights Commission*, it did so on free-exercise grounds, focusing on how the Commission applied its law to Masterpiece Cakeshop as compared to other similar public accommodations. 138 S. Ct. 1719, 1732 (2018). It understood at the time that its decision would likely not be decisive in "cases like this in other circumstances" and left room for "further elaboration in the courts." *Id.*

Four years later, the evidence is in. As shown in the Petition for Certiorari, Pet.18, and summarized below, there is profound disagreement among federal and state courts as to how these conflicts involving creative professionals should be resolved. And the uncertainty has been punishing:

> Barronelle Stutzman of Arlene's Flowers faces potential million-dollar-attorney-fee payments and losing all that she has. The Elaine Photography owners paid fines, faced "death threats," and eventually closed their studio.
>
> Oregon officials fined the owners of a cakeshop $135,000 for declining to create same-sex wedding cakes and tried to punish them for talking to the media. The shop eventually closed. Meanwhile, a Kentucky printer litigated for seven years after declining to print shirts promoting a gay pride parade, only to see the state supreme court dismiss the case on a technicality…. And a family farm, ousted from an East Lansing farmer's market for posting its Catholic beliefs about marriage on Facebook, has endured four years of litigation and a recently concluded bench trial without yet

> knowing the scope of its First Amendment rights.

Id. at 31-32 (citations omitted).

Furthermore, the Court's decision did not even provide Jack Phillips with durable relief:

> For the last decade, Jack Phillips has faced lawsuit after lawsuit based on his refusal to create art that violated his conscience. After prevailing before this Court in *Masterpiece Cakeshop*, 138 S. Ct. 1719, he was sued for respectfully declining to create a custom cake celebrating a gender transition. He just lost his trial.

Id. at 31 (citations omitted).

Four years after *Masterpiece Cakeshop* and seven years after *Obergefell*, the parties here and in a myriad of other contexts are still looking for some clarity: What happens when a couple's right to "equal dignity *in the eyes of the law*" comes up against the Court's promise that "*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"? *Obergefell* v. *Hodges*, 576 U.S. 644, 681, 679 (2015) (emphases added).

Amici urge the Court to take this opportunity, in this, its second wedding-vendor case, to provide clarity about how the First Amendment's guarantees apply in this context.

Part I lends credence to Justice Thomas' suggestion in *Masterpiece Cakeshop* that "the freedom of speech could be essential" to resolving a future

wedding-vendor case like this one. 138 S. Ct. at 1748 (Thomas, J., concurring in part and concurring in judgment). As shown below, many of this Court's cases—including many seminal free-speech cases—have involved unconstitutional restrictions on religious speech. One important value the Free Speech Clause serves is to protect minority religious groups from efforts to exclude them from the public square, particularly when it comes to speech on issues of public importance. Another important value of the Free Speech Clause is to protect individuals and groups from being compelled to ascribe to and utter the government's preferred message.

This brief shows how this Court has applied these principles to three sets of cases: conflicts involving Jehovah's Witnesses, instances of viewpoint discrimination involving public schools, and compelled speech cases.

As shown in **Part II**, these values are directly implicated in this case, which concerns both the right to utter religious speech and the right to not be compelled, through speech or conduct, to endorse the government's preferred message. Efforts to date have not resolved the growing number of wedding-vendor cases. More broadly, our culture and our politics have become increasingly polarized, leading to regulations and policies that would force minority voices to choose between violating their conscience or being pushed from the public square.

This case presents the Court with the twofold opportunity to honor its religious speech precedents described in Part I and to speak to the ongoing disputes and emerging issues described in Part II.

For all the reasons set out below, amici urge the Court to uphold 303 Creative's right to control its expressive speech and reverse the decision below in a manner that will relieve the Court of having to hear another iteration of this same case in four years.

ARGUMENT

I. This Court has frequently invoked the Free Speech Clause to protect the rights of religious groups and individuals.

As Justice Thomas indicated in *Masterpiece Cakeshop*, freedom of speech is a natural frame within which to resolve the tensions in this case. Free speech plays a critical role in protecting religious exercise because "freedom of conscience and worship" have "close parallels in the speech provisions of the First Amendment." *Lee* v. *Weisman,* 505 U.S. 577, 591 (1992).

Writing for the Court in *Capitol Square Review & Advisory Board* v. *Pinette*, Justice Scalia elaborated:

> [I]n Anglo–American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

515 U.S. 753, 760 (1995).[2]

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[2] See also Mark W. Cordes, *Religion As Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty*, 38 Sw. L. Rev. 235, 235–36 (2008) ("Although free speech, unlike the Free Exercise and Establishment Clauses, is not intentionally designed to protect religious liberty, as a practical matter it has often done so. In fact, when it comes to protecting a person's or group's right to exercise religion, the Free Speech Clause has

To illustrate Justice Scalia's point, this part focuses on three areas in which this Court has responded to government suppression of religious speech with clear decisions vindicating the freedom of speech: World War II-era cases involving the Jehovah's Witnesses, public school viewpoint-discrimination cases, and compelled speech cases involving religious actors.

The decisions discussed below have become fixed points in the firmament of free-speech jurisprudence because their holdings did not only resolve the controversies at hand; the principles set out therein have helped clarify the limits on government power in other areas as well.

A. Jehovah's Witnesses Cases

One of the most important purposes of the Free Speech Clause is to protect the rights of minority voices to speak on issues of intense debate. As the Court has said,

> *The 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.

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been used much more frequently than the Free Exercise Clause. For reasons to be discussed in this article, that will be even more true in the future."); Mark Tushnet, *The Redundant Free Exercise Clause?,* 33 Loy. U. Chi. L.J. 71 (2001) ("Suppose the Free Exercise Clause were simply ripped out of the Constitution. What would change in contemporary constitutional law?"); Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. Davis L. Rev. 793 (1996).

McCutcheon v. *FEC*, 572 U.S. 185, 187 (2014) (emphasis added). 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." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). As the Court has explained:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. *City of Chicago*, 337 U.S. 1, 4 (1949).

Such disfavored voices often include minority religious groups. One such group is the Jehovah's Witnesses. By 1940, this movement had attracted around 70,000 adherents[3]—as well as a great deal of vitriol.

> The Witnesses' complex and often misunderstood beliefs included the imminent end of the world and the rejection of most forms of authority, whether civil or ecclesiastical. They were perhaps better known in the 1940s for their controversial rejection of any form of flag salute as the forbidden worship of a graven image and for their aggressive and visible

[3] Neil M. Richards, *The "Good War," the Jehovah's Witnesses, and the First Amendment*, 87 Va. L. Rev. 781, 782–83 (2001) (book review).

> practice of "witnessing": going from door to door explaining why their beliefs were superior to those of other denominations in order to attract converts.
>
> Opponents of the Second World War who were perceived by many to be a disloyal sect spreading treasonous ideas, the Witnesses were relentlessly persecuted, subjected to beatings, destruction of their property, boycotts of their businesses, and expulsion of their children from public schools, and in one particularly gruesome case, a forcible castration. In addition, over 4,000 male Witnesses of draft age were imprisoned during the war for violations of the Selective Service Act.

Id. at 783 (citations omitted).

Given the frequency with which "government suppression of speech" was "so commonly … directed" at the Jehovah's Witnesses, it is fitting that the Witnesses have played a prominent role in shaping free-speech jurisprudence.

Between 1938 and 1946, this Court heard an incredible 23 cases involving the Jehovah's Witnesses. *Id.* at 785 and n.17. Though each suit stemmed from impositions on religious exercise, many were brought and decided as free-speech cases. Indeed, virtually all of the critical free speech cases during this era involved Jehovah's Witnesses. *Id.* at 782.[4]

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[4] See also Cordes, 38 Sw. L. Rev. at 237 ("More often than not they won, and in doing so the Jehovah's Witnesses helped to build the foundation of modern free speech jurisprudence."); William Shepard McAninch, *A Catalyst for the Evolution of*

> The Jehovah's Witness cases laid the foundation for the modern law of freedom of speech and religion, beginning with the incorporation of the Free Exercise Clause in *Cantwell* v. *Connecticut*. Other decisions involving the Witnesses identified religious expression and practice as a "preferred freedom" and introduced a now familiar array of protective devices: forbidding the state to regulate speech because of its message, distinguishing between "peaceable" and unpeaceable behavior, requiring a truly "clear and present danger" of public disorder to justify restriction of speech, and demanding that regulation be "narrowly drawn" and precise in its terms.

Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 Wash. U. L.Q. 919, 935 (2004) (citations omitted).

The most famous Jehovah's Witness case from this era is *West Virginia State Board of Education* v. *Barnette*, which struck down a state law that required students to recite the Pledge of Allegiance. 319 U.S. 624, 626 (1943). For the Barnettes, participation in the flag salute violated the prohibition in the Ten Commandments against bowing to graven images, an obligation "superior to that of laws enacted by temporal government." *Id*. at 629.

Constitutional Law: Jehovah's Witnesses in the Supreme Court, 55 U. Cin. L. Rev. 997, 1076 (1987) ("The Jehovah's Witnesses have had a profound impact on the evolution of constitutional law, particularly by expanding the parameters of the protection for speech and religion.").

This Court upheld the Barnettes' right to freedom of conscience on free-speech grounds. Written against the backdrop of World War II, the opinion cautioned against the "[c]ompulsory unification of opinion," which it described as "totalitarian." *Id.* at 641. The Court concluded:

> Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. *It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies*.

Id. at 646 (emphasis added).

The legacy of this Court's Jehovah's Witnesses cases is two-fold. First, the Court succeeded in creating space for the Jehovah's Witnesses within the American experiment, leaving their fortunes and their message's persuasive power free from the whims of elected officials. Second, the principles set out in these cases have been applied elsewhere to protect freedom of speech for minority voices in every conceivable corner of society. *Barnette*, though decided nearly 80 years ago, remains potent today: it has been cited in 36 Supreme Court and 191 Court of Appeals decisions in the twenty-first century.[5]

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[5] Westlaw search (May 31, 2022).

B. Viewpoint Discrimination Cases

This Court has also used the Free Speech Clause to resolve conflicts over religious groups' efforts to access public schools on the same terms as secular groups.[6]

In *Widmar* v. *Vincent*, the Court invalidated on free-speech grounds a state university regulation that prohibited equal access to school facilities by students who sought access "for purposes of religious worship or religious teaching." 454 U.S. 263, 265 (1981). The Court found that the university's "content-based exclusion of religious speech … violates the fundamental principle that a state regulation of speech should be content-neutral." *Id*. at 277.

Between 1990 and 2001, the Court built upon *Widmar* in four cases with essentially the same fact pattern. Each involved a public school, ranging from elementary to a four-year university, which had created a forum for speech—in two cases only for students themselves and in two others for community groups and organizations. In all four cases the Court said, as it had in *Widmar*, that to deny a group access to public property because of the religious content of its speech violates the Free Speech Clause. *Board of Education* v. *Mergens*, 496 U.S. 226 (1990) (citing *Widmar* favorably but decided on statutory grounds (Equal Access Act)); *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (public school district violated church's free-speech rights by denying its request to show film series on school grounds because material "appeared to be church

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[6] See John E. Taylor, *Why Student Religious Speech Is Speech*, 110 W. Va. L. Rev. 223, 224–25 (2007).

related," *id.* at 396-97); *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (public university violated religious student group's free-speech rights by funding all student publications except religious publications); *Good News Club* v. *Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001) (public school district violated Christian children's club's free-speech rights by refusing to let them meet at school after hours "based on its religious nature").[7]

These viewpoint discrimination cases have succeeded in settling this area of the law, creating clear boundaries for public schools and demarking areas of safety and freedom for religious groups seeking to access certain venues in the public square. But the Court's decisions in this area have also given lower courts tools and words with which to address other conflicts.

For example, although *Rosenberger* addressed the rights of a student group at a public university, Chief Judge Tymkovich, writing in dissent in this case, found *Rosenberger*'s reasoning and holding relevant to the present dispute over wedding vendors. He cites *Rosenberger* three times in support of his argument that the Colorado Anti-Discrimination Act constitutes unconstitutional viewpoint discrimination. "[T]he 'government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.'" "The First Amendment thus 'forbid[s] the State to exercise viewpoint discrimination….'"

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[7] The Court's viewpoint discrimination analysis has also protected religious speech outside of the public-school context. See, e.g., *Pinette*, 515 U.S. 753 (cross in public forum).

Cert.App.73a-74a (quoting *Rosenberger*, 515 U.S. at 829).

C. Compelled Speech Cases

Finally, this Court has frequently drawn upon the prohibition on compelled speech articulated in *Barnette* to protect religious speech. Chief Judge Tymkovich's dissent below surveys this Court's compelled speech decisions, many of which involve religious speech. Cert.App.55a-63a.

In *Wooley* v. *Maynard*, 430 U.S. 705 (1977), this Court upheld the right of George Maynard, a Jehovah's Witness, to cover the New Hampshire state motto, "live free or die," on his license plate—a statement that was "directly at odds with [Maynard's] deeply held religious convictions." *Id*. at 708 n.2. The Court found that Maynard's objection presented a classic case of compelled speech:

> Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life … 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."

Id. at 715 (quoting *Barnette*, 319 U.S. at 642)). The Court affirmed that the right to free speech "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." *Id*.

Hurley v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), like *Masterpiece Cakeshop*, challenged an application of a

public accommodations law that compelled individuals to support messages about same-sex relationships that violated their religious convictions.

Hurley unanimously upheld the right of the organizers of Boston's St. Patrick's Day Parade to exclude groups that would undermine the "traditional religious and social values" they wished to express. 515 U.S. at 563. The Court held that applying the public accommodations law would "violate[] 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.

Masterpiece Cakeshop, much like this case, concerned a wedding vendor who uses "his artistic skills to make an expressive statement"—in that case custom wedding cakes. 138 S. Ct. at 1728. Jack Phillips brought a free speech claim based on his right to refuse the "demand" that he "use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation," which was "a message he could not express in a way consistent with his religious beliefs." *Id*.

This Court did not rule on Jack Phillips free speech claim, finding instead that the Commission's actions violated Phillips free exercise rights. *Id*. at 1732. But it described his speech "dilemma" as "particularly understandable." *Id*. Justice Thomas suggested that "the freedom of speech could be essential" to resolving future wedding-vendor cases. *Id*. at 1748 (Thomas, J., concurring in part and concurring in judgment).

Finally, *NIFLA* v. *Becerra*, 138 S. Ct. 2361 (2018), asked whether the state of California could force "medical facilities that object to abortion for religious reasons" to "inform women how they can obtain state-

subsidized abortions." *Id*. at 2380 (Breyer, J., dissenting); *id*. at 2371. The Court held that the state's required notice ran afoul of the "fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id*. at 2371.

Justice Kennedy's concurring opinion (for four Justices) argued that the notice requirement required individuals associated with the licensed facilities "to contradict their most deeply held beliefs" and was thus "a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *Id*. at 2379 (Kennedy, J., concurring).

Of these four cases, *Masterpiece Cakeshop* will likely be least relied on by future courts faced with similar conflicts. This may be inferred from the manner in which Chief Judge Tymkovich treats each in his survey. *Wooley* and *Hurley* receive extensive treatment. Cert.App.55a-59a. Judge Tymkovich demonstrates that *NIFLA* "confirms the First Amendment's antipathy toward government compelled speech" described in *Wooley* and *Hurley*. *Id*. at 59a-60a. But he does not cite *Masterpiece Cakeshop*'s majority opinion at all, despite the important factual connections between it and the others mentioned here. Instead, he cites Justice Gorsuch's concurrence, which frames the case in compelled speech terms. *Id*. at 58a.

Chief Judge's Tymkovich's survey in his dissent from the decision below provides a sound roadmap as it seeks to resolve this dispute in a way that respects and builds upon this Court's decisions in similar cases. Moreover, as these cases involving religious

speakers show, checking "the government's ability to compel speech and silence" is an important way to affirm "the promise of other First Amendment freedoms," including the "freedom to exercise one's religion." *Id*. at 61a.

II. There is a pressing need for the Court to clarify how the compelled speech doctrine applies to wedding-vendor cases and other disputes.

As shown in the Petition for Certiorari, courts are divided on how to apply the compelled speech doctrine in the context of public accommodation cases. But this conflict, as important as it is, is symptomatic of broader trends in our culture. On a wide range of issues—including school choice, COVID vaccine mandates, same-sex marriage, and foster care—people are impatient with "live and let live" solutions.

> In each context, the public discourse is aimed at a winner-take-all outcome, rather than the articulation of foundational, but minimal, principles on which the moral contest will be allowed to proceed.

Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 Stan. L. & Pol'y Rev. 83, 119 (2006).

Reaching a truce on hotly-debated issues of public concern can be challenging, but it should never come at the cost of forsaking such a fundamental value as free speech. This Court's history has shown that the First Amendment's compelled speech doctrine is particularly well suited to the challenge. The Court should do here what it has so often done in the past: apply the Free Speech Clause to protect religious

speech, thereby strengthening liberty not just for the religious but for all society.

A. Courts are divided on how to apply compelled speech doctrine to wedding-vendor cases.

While this Court in *Obergefell* v. *Hodges* declared that "same-sex couples may exercise the fundamental right to marry," 576 U.S. 644, 676 (2015), it also recognized that the understanding of marriage as between one man and one woman "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Id*. at 657.

Amici on both sides of *Obergefell* cautioned that the Court's decision would "have unavoidable and wide-ranging implications for religious liberty." *Id*. at 733 (Thomas, J., dissenting) (citing amici).[8] Justice Thomas predicted that a prominent set of conflicts would concern "individuals … confronted with demands to participate in and endorse civil marriages between same-sex couples." *Id*. at 534.

These cases, sometimes called "wedding-vendor cases," ask whether florists, bakers, wedding planners, and the like have to provide services for

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[8] Years before the Court decided *Obergefell*, many anticipated this conflict. In 2008, a broad spectrum of scholars and practitioners contributed to a volume: SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, ed. Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson (Rowman & Littlefield 2008) (contributions from Chai R. Feldblum, Douglas W. Kmiec, Douglas Laycock, Anthony R. Picarello, Jr., Dr. Charles J. Reid Jr., Marc D. Stern, Jonathan Turley, and Robin Fretwell Wilson).

same-sex weddings though they "deem same-sex marriage to be wrong … based on decent and honorable religious … premises." *Obergefell*, 576 U.S. at 672.[9]

This Court decided its first wedding-vendor case, *Masterpiece Cakeshop*, on free exercise grounds. 138 S. Ct. at 1732. It understood then that other "cases like this" would come, and indeed that has come to pass.

In addition to the case now before the Court, the Petition for Certiorari surveys other wedding-vending cases. Pet.Cert.11-18. Its review illustrates the strikingly different conclusions courts have reached about how to balance the government's interests against religious wedding vendors' First Amendment rights:

> In the Tenth Circuit (Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah),[10] governments can force artists to speak contrary to their faith even when the artist does not discriminate based on status. In Arizona[11] and the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota),[12] governments cannot compel artists to speak contrary to their faith. Meanwhile,

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[9] See also Douglas Laycock, *The Wedding-Vendor Cases*, 41 Harv. J.L. & Pub. Pol'y 49, 53 (2018).

[10] See decision below at Cert.App.1a-103a.

[11] See *Brush & Nib Studio, LC* v. *City of Phoenix*, 448 P.3d 890 (Ariz. 2019).

[12] See *Telescope Media Group* v. *Lucero*, 936 F.3d 740 (8th Cir. 2019).

> artists' work in New Mexico,[13] Oregon,[14] and Washington[15] is not even considered "speech" but is instead labeled as conduct if offered for purchase.

Pet.Cert.18.

Petitioners' opening brief shows the stakes have recently grown higher, as "at least 19 states have adopted Colorado's views and are now using the decision below to argue that officials may use public-accommodation laws to compel artists to speak in violation of their conscience." Pet.Br.9 (citing Mass.Amici.Br. 20, 22, *Carpenter* v. *James*, No. 22-75 (2nd Cir. May 16, 2022)).

Masterpiece Cakeshop signaled that these wedding-vendor cases should 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." *Masterpiece Cakeshop*, 138 S. Ct. at 1732. Justice Thomas remarked at the time that in these "future cases, the freedom of speech could be essential" to protecting the constitutional rights of those whose conscience and religious convictions require that they dissent from participating in ceremonies enjoyed by others exercising their own constitutional rights as defined by this Court. *Id.* at

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[13] See *Elaine Photography, LLC* v. *Willock*, 309 P.3d 53 (N.M. 2013).

[14] See *Klein* v. *Or. Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017).

[15] See *State* v. *Arlene's Flowers, Inc.*, 441 P.3d 1203 (Wash. 2019).

1748 (Thomas, J., concurring in part and concurring in judgment).

The Petition for Certiorari shows not only that the compelled speech issues in this case are common but that courts are split on how to strike the balance that *Masterpiece Cakeshop* called for. These considerations were relevant to the Court's decision on the Petition for Certiorari and they should likewise be considered as the Court decides this compelled speech case on the merits.

B. A strong compelled speech decision could help alleviate increased polarization along religious and political lines.

Finally, a robust compelled speech doctrine could be a powerful tonic in the present cultural moment, where social media, cable news shows, and politics have become especially polarizing. Too often, on a wide range of issues, our cultural discourse has taken on an "all or nothing" character: on issue after issue, there is no allowance for any kind of neutral posture.

To paraphrase this Court's decision in *Obergefell*, it is one thing when this "all or nothing" attitude adheres in private relationships, but it is a different matter "when that sincere, personal opposition becomes enacted law and public policy." 576 U.S. at 672. Unfortunately, however, our politics too often take on this character.

Take, for example, the federal contraception mandate[16] and transgender mandate,[17] both of which stem from regulations promulgated under the Affordable Care Act. In both cases, regulations eliminated any neutral middle ground and sought to coerce employers and professionals into compliance, regardless of their religious or conscience objections.

Both mandates prompted waves of litigation, where attention has mainly focused on claims under the Religious Freedom Restoration Act. But some religious organizations also brought free speech claims. The contraception mandate prohibited religious employers from "interfer[ing] with" or "influencing" its TPA's decision to facilitate contraceptive access, thus restricting speech "based on its religious content, viewpoint, and motivation." Compl.¶347, *Cath. Benefits Ass'n* v. *Sebelius*, 24 F. Supp. 3d 1094 (W.D. Okla. 2014) (Case 5:14-cv-00240). Similarly, the transgender mandate arguably "violates the Free Speech Clause by prohibiting doctors from expressing some points of view and compelling them to express others." Pls.' Mem. for Prelim. Inj. at 30-33, *Religious Sisters of Mercy* v. *Azar*, 513 F. Supp. 3d 1113 (D.N.D. 2021), available at https://becketpdf.s3.amazonaws.com/Sisters-of-Mercy-PI-Motion.pdf.

Finally, as Petitioners note in their opening brief, some public accommodations laws "make political ideology a protected class." Pet.Br.27. Petitioners

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[16] See *Little Sisters of the Poor* v. *Pennsylvania*, 140 S. Ct. 2367 (2020).

[17] See *Religious Sisters of Mercy* v. *Azar*, 513 F. Supp. 3d 1113 (D.N.D. 2021).

rightly warn that the breadth of these laws could allow some jurisdictions to extend this "all or nothing" attitude beyond disputes over sexual identity and morality into broader political disputes.

In this emerging cultural landscape, fraught with heightened sensitivities and incentivized to push for "all or nothing" solutions, protections for free speech seem particularly relevant and important. The compelled speech doctrine in particular seems an important corrective, as it prevents government from "forc[ing] an individual, as part of his daily life … to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715. 705 (1977).

As illustrated above, the Free Speech Clause and the compelled speech doctrine have often been applied by this Court to push back against the excesses of the present moment, to correct government when it intrudes on individual liberties, and to create room for minority voices to breathe. The present case provides an appropriate and especially important opportunity to invoke free-speech protections again to address the ongoing tensions in wedding-vendor cases and in the current cultural context more broadly.

CONCLUSION

For all these reasons, amici urge the Court to reverse the decision below and add to its long history of applying the Free Speech Clause to protect individuals from compelled speech and to provide space in the public square for minority voices.

Respectfully submitted,

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June 2, 2022