IS A CAKE WORTH A THOUSAND WORDS? *MASTERPIECE CAKESHOP* AND THE IMPACT OF ANTIDISCRIMINATION LAWS ON THE MARKETPLACE OF IDEAS

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All laws discriminate. Some discriminate in ways that are innocuous (like driving on the right side of the road). Others result in discrimination that is invidious (like segregation laws). And still others, like public accommodations laws, are meant to preclude discrimination against certain groups of individuals. Such antidiscrimination laws also discriminate, but they generally do so against offensive or undesirable conduct, which is unprotected under the Constitution. But what happens when antidiscrimination laws are applied to the expression of individuals or for-profit businesses? In particular, what happens when a state attempts to require a for-profit business to design and create expressive works that foster or promote a message with which the business and its owners disagree? At that point, antidiscrimination laws collide with the Supreme Court's laissez-faire approach to the marketplace of ideas, which eschews virtually all governmental regulation of free speech. Laws meant to preclude offensive and discriminatory conduct run into a constitutional provision meant to protect "offensive" and "even hurtful" speech.

Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Comm'n, *requires the United States Supreme Court to consider this intersection of antidiscrimination laws and the broad protection afforded speakers under the First Amendment. As the scope of public accommodations laws has grown—in terms of both the types of entities classified as public accommodations and the number of groups protected from discrimination—the possibility for conflict with First Amendment speech rights has increased. In several high profile cases across the country, states have sought to apply their antidiscrimination laws to bakers, photographers, and florists who, based on their sincerely held religious beliefs, declined to create custom wedding cakes, wedding*

albums, and floral arrangements for same-sex weddings. The lower courts considering these cases have denied that the First Amendment safeguards the creative and expressive works of for-profit businesses from public accommodations laws for two primary reasons: (1) expressive businesses do not engage in speech when they offer their services to the public and (2) the Court's compelled speech cases, such as Hurley *and* Rumsfeld*, do not require courts to exempt such businesses from antidiscrimination laws.*

This article contends that the lower courts are wrong on both counts. The First Amendment is not limited to verbal speech or particular mediums of expression. Ornately decorated wedding cakes readily fit within the Court's broad view of protected expression, being designed to convey the importance and beauty of the event. Under Wooley*, this is true even if the message is viewed as the speech of the couple (and not that of the bakery) because the First Amendment protects the right of businesses and individuals "to refuse to foster . . . an idea they find morally objectionable." Moreover, the lower courts misinterpret the Supreme Court's compelled speech and expressive association cases.* Hurley *establishes that public accommodations laws must yield to the First Amendment when they are applied in such a way as to violate a speaker's "autonomy to choose the content of his own message." The Court's expressive association cases confirm this result, drawing on* Hurley *to conclude that antidiscrimination laws cannot force an expressive association or a speaker to propound a view with which it disagrees. As a result, this article argues that because the expression of for-profit businesses falls within the marketplace of ideas, the First Amendment prevents the government from forcing expressive businesses to choose between engaging in expression with which they disagree, or remaining silent, thereby foregoing the opportunity to convey their desired message.*

INTRODUCTION

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the United States Supreme Court recognized the "venerable history" of public accommodations laws.[1] Under the common law, "innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer."[2] An English judge writing in the early 1800s described the rule as follows: "[t]he innkeeper is not to select his

1. 515 U.S. 557, 571 (1995).
2. *Id*. (quoting Lane v. Cotton, 12 Mod. 472, 484–85 (K.B. 1701 (Holt, C.J.)).

guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants."[3] Such public servants were under a general duty to serve would-be customers, but the common law did not specify a list of particular groups protected or the particular businesses that qualified as a public accommodation.[4]

Over time and especially in the wake of the Civil War, the general common law rules proved inadequate to combat discriminatory exclusion from places of public accommodation. Given that the Court determined "the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations,"[5] states began "enacting detailed statutory schemes" to deal with the ongoing problems.[6] Building on the common law, states began enumerating both "the persons or entities subject to a duty not to discriminate" and "the groups or persons within their ambit of protection."[7] For example, the Colorado Antidiscrimination Act (CADA) defines "place of public accommodation" to mean "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public," including restaurants and hotels, sporting and recreational facilities, transportation, barber shops, swimming pools, gymnasiums, educational institutions, public parks, museums, and libraries.[8] CADA also sets out a list of traits that cannot serve as the basis for discrimination, including traits that have received heightened protection under the Equal Protection Clause (race, color, sex, natural origin, and ancestry)[9] as well as several that have not (disability, creed, sexual orientation, and marital status).[10] By enumerating the places subject to the law as well as the individuals

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3. Rex v. Ivens, 7 Car. & P. 213, 219 (N.P. 1835).

4. *See* Romer v. Evans, 517 U.S. 620, 627 (1996).

5. *Id.* at 628; *see* Civil Rights Cases, 109 U.S. 3, 25 (1883).

6. *Romer*, 517 U.S. at 628; *see Hurley* 515 U.S. at 571 (noting that Massachusetts "was the first State to codify this principle to ensure access to public accommodations regardless of race").

7. *Romer*, 517 U.S. at 628.

8. COLO. REV. STAT. ANN. § 24-34-601(1) (West 2014).

9. *See, e.g.,* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135 (1994) (sex*);* Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy); McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964) (race); Oyama v. California, 332 U.S. 633, 647 (1948) (ancestry).

10. COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2014).

or groups protected, states "make the duty not to discriminate concrete and . . . provide guidance for those who must comply."[11]

The Supreme Court recognized that states have the power to enact such antidiscrimination laws and that these provisions "do not, as a general matter, violate the First or Fourteenth Amendments."[12] This is not surprising given that public accommodations laws focus on discriminatory conduct, namely "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds."[13] But as *Hurley* notes, if such laws are applied in an "unusual" way—by "target[ing] speech or discriminat[ing] on the basis of its content"—First Amendment protections might be triggered.[14] Moreover, as states have expanded the definition of "public accommodation" and the groups who are protected from discrimination, "the potential for conflict between state public accommodations laws and the First Amendment rights of [businesses] and organization has increased."[15] Of course, if there is an actual conflict between state law and the First Amendment, the Supremacy Clause resolves that conflict in favor of the First Amendment.[16]

As a result, the central question regarding the speech claim of Masterpiece Cakeshop, Inc. (Masterpiece)[17] is whether CADA "abridges expression that the First Amendment was meant to protect."[18] If CADA does, then the First Amendment shields Masterpiece's expressive decisions, and the Court should reverse the Colorado Court of Appeals. If not, then Masterpiece must look to its other constitutional claims for relief. Apparently recognizing that public accommodations laws must yield to the First Amendment, the courts in *Craig v. Masterpiece Cakeshop, Inc.*,[19] *Elane Photography, LLC v. Willock*,[20] and *State of Washington v. Arlene's Flowers, Inc.*[21]

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11. *Romer*, 517 U.S. at 628.

12. *Hurley*, 515 U.S. at 572.

13. *Id*.

14. *Id*. at 573 (explaining that "the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation").

15. Boy Scouts of America v. Dale, 530 U.S. 640, 657 (2000).

16. U.S. CONST., Art. VI ("This Constitution . . . shall be the supreme Law of the Land . . . .").

17. *Masterpiece Cakeshop* also requires the Court to consider important free exercise issues, but those claims are beyond the scope of this article.

18. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).

19. 370 P.3d 272 (Co. Ct. App. 2015).

20. 309 P.3d 53 (N.M. 2013).

21. 389 P.3d 543 (Wash. 2017).

focus on a different question: whether places of public accommodation have First Amendment speech rights when providing goods or services to the public. The lower courts answer in the negative. Although recognizing that businesses retain some free speech rights,[22] *Masterpiece Cakeshop* denies that a "for-profit bakery [that] charges its customers for its goods and services" can challenge public accommodations laws on First Amendment grounds.[23] Similarly, in *Elane Photography*, the New Mexico Supreme Court concludes that the photography studio cannot claim the protection of the First Amendment because it is a for-profit business: "The reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work."[24] The price of admission into the commercial market is the forfeiture of First Amendment protection in direct dealings with customers: "The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation."[25]

The problem is that these courts, like the lower court in *Bellotti*, "posed the wrong question," asking "to what extent [for-profit public accommodations] have First Amendment rights."[26] Instead, the courts should have analyzed the "critical consideration[]" in *Bellotti*, which was whether "the State sought to abridge speech that the First Amendment is designed to protect."[27] When dealing with businesses that design, create, or disseminate expression (such as custom wedding cakes, wedding albums, floral arrangements, newspapers, speeches, paintings, and music), this article contends that the answer is unequivocally "yes." Because the underlying expression would be protected if done by a natural person or a business that did not offer its services to the public,[28] states cannot use their public accommodations laws to restrict the speech of businesses that are open to the public. As the New Mexico court acknowledges, if Elane Photography did not offer its services to the public, the State could not

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22. *Masterpiece Cakeshop*, 370 P.3d at 287 ("We do not suggest that Masterpiece's status as a for-profit bakery strips it of its First Amendment speech protections.").

23. *Id*.

24. *Elane Photography*, 309 P.3d at 66.

25. *Id*. at 65.

26. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978).

27. Pacific Gas and Elec. Co. v. Pub. Utilities Comm'n of California, 475 U.S. 1, 8 (1986) (plurality opinion).

28. *See Bellotti*, 435 U.S. at 777 ("If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.").

force the studio to photograph a same-sex wedding ceremony: "If Elane Photography took photographs on its own time . . . or if it was hired by certain clients but did not offer its services to the general public, the law would not apply to Elane Photography's choice of whom to photograph or not."[29]

Likewise, assuming an individual had the requisite artistic skill to design, create, and decorate a custom wedding cake, the government could not require the person to do so given the "fundamental rule" under the First Amendment that "a speaker has the autonomy to choose the content of his own message."[30] Yet this rule safeguards individuals as well as for-profit businesses.[31] As a result, when applied to the expressive activity of for-profit businesses, public accommodations laws may deprive those businesses of their First Amendment right.[32] Such is the case in *Masterpiece Cakeshop*, which is pending before the Supreme Court. CADA forces Masterpiece either to convey a message with which it disagrees (by designing and creating a wedding cake for a same-sex wedding) or to remain silent and forego sending its desired message (in support of opposite-sex marriage). Thus, this article concludes that CADA, as applied to Masterpiece's custom designs and creations, violates the Court's admonition that the government cannot compel speakers "to foster . . . an idea they find morally objectionable."[33]

Towards this end, the first section of the article explores the tension between the broad protection afforded expression under the First Amendment and the lower courts' argument that public accommodations laws do not violate free speech principles. Specifically, this section contends that the Court has adopted a laissez-faire approach to the marketplace of ideas, severely restricting the government's ability to regulate expression. The Court's hands-off approach to speech activity makes it all the more difficult for states to apply their public accommodations laws to the expression of for-profit

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29. *Elane Photography*, 309 P.3d at 66.

30. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston 515 U.S. 557, 573 (1995).

31. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010) ("The Court has recognized that First Amendment protection extends to corporations.").

32. *See*, *e.g.*, Dept. of Fair Employment and Housing v. Miller, 2018 WL 747835 at *1 (Cal. Super. Feb. 5, 2018) ("The State asks this court to compel Miller to use her talents to design and create a cake she has not yet conceived with the knowledge that her work will be displayed in celebration of a marital union her religion forbids. For this court to force such compliance would do violence to the essentials of Free Speech guaranteed under the First Amendment.").

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

business. The first section then sets out the lower courts' reasons for concluding that bakers, photographers, and florists remain subject to such antidiscrimination laws even when creating artistic works.

Section two explores three problems with the lower courts' analysis. First, Masterpiece's custom cakes and Elane Photography's photographs are forms of expression safeguarded by the First Amendment. Furthermore, even if a reasonable observer would attribute the underlying message to the couple being married, the First Amendment shields the for-profit business's decision not to foster or promote that message. Thus, whether viewed as creating their own message or merely disseminating the views of a third party, expressive businesses are entitled to First Amendment protection. Second, the lower courts' attempt to distinguish *Hurley* and the Court's other compelled speech cases is unavailing. *Hurley* and its progeny demonstrate that, when applied to speech activity, public accommodations laws can violate a business's right to decide what to say as well as what not to say.[34] Third, the Court's expressive association cases confirm that public accommodations laws must yield to protected speech activity when those laws "interfere with the [speaker's] choice not to propound a point of view contrary to its beliefs."[35] When applying antidiscrimination laws to expressive associations or to businesses that create expressive works, the government "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."[36]

The third section explains why the lower court's reliance on *Rumsfeld* is misplaced.[37] Drawing on *Rumsfeld*, the Colorado court contends that CADA does not violate Masterpiece's First Amendment rights because "a reasonable observer would understand that [its] compliance with the law is not a reflection of its own beliefs."[38] There are two main problems with this interpretation. First, unlike the bakery here, "the schools [we]re not speaking."[39] As a result, *Rumsfeld* is inapposite because the government did not compel the law schools

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34. *See* Riley v. Nat'l Fed. Of the Blind of North Carolina, Inc., 487 U.S. 781, 796–97 (1988) (holding that a speaker has the right to determine "both what to say and what *not* to say").

35. Boy Scouts of America v. Dale, 530 U.S. 640, 654 (2000).

36. *Hurley*, 515 U.S. at 579 (quoted in *Dale*, 530 U.S. at 661).

37. Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47 (2006).

38. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 286 (2015).

39. *Rumsfeld*, 547 U.S. at 64.

to speak. Second, the lower court's proposed rule—that compliance with a general law mandating speech does not trench on a speaker's First Amendment rights because an observer would not attribute the speech to the speaker—is inconsistent with the compelled speech doctrine developed in *West Virginia State Board of Education v. Barnette*, *Wooley*, *Pacific Gas*, *Riley*, and *Tornillo*, and, therefore, should be rejected.

I. THE GROWING FRICTION BETWEEN PUBLIC ACCOMMODATIONS LAWS AND THE FIRST AMENDMENT

The free speech issue embedded in *Masterpiece Cakeshop* is important regardless of one's view on same-sex marriage (or any other controversial social topic). A speaker who agrees with the majority is not in need of the solicitude of the First Amendment—at least until the majority changes and the speaker's views are no longer in vogue. If the government can require a business to engage in expression on one side of an issue, a different set of officials can force speech in favor of the other side. Under the lower courts' reasoning, if a public accommodations law protected "political affiliation," a Republican speech writer could be required to write speeches for Democrat candidates (provided that the writer accepted commissions from Republican candidates).[40] Similarly, if the law protected "veteran status," a sculptor who was opposed to war could be forced to carve a statute of a soldier or a cannon. And the list goes on.

Thus, determining whether the First Amendment applies to for-profit businesses that decline the invitation to design or create expression with which they disagree has important theoretical consequences relating to the scope of ideas protected in the marketplace, as well as practical ones on the businesses that may be forced to express views that contravene their sincerely held religious beliefs. To determine whether the First Amendment should limit the application of public accommodations laws, one must understand the scope of First Amendment protection generally and the lower courts' argument that public accommodations laws are not subject to free speech challenges.

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40. *See* Eugene Volokh, *Amicus Curiae Brief, Elane Photography, LLC v. Willock*, 8 NYU JL & Liberty 116, 127 (2013) (providing examples to explain the effect of the lower court's reasoning).

A. Overview of the Supreme Court's Laissez-Faire Policy toward Free Speech

Although the First Amendment states only that "Congress shall make no law . . . abridging the freedom of speech,"[41] the Court has long held that it also prevents the government from compelling speech: "the right of freedom of thought protected by the First Amendment against state action, includes both the right to speak freely and the right to refrain from speaking."[42] This is not surprising given that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[43] Compelled expression "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."[44] To ensure a robust marketplace of ideas in which "individual freedom of mind" can flourish, the courts are tasked with protecting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[45] Consequently, "as a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,"[46] and "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."[47]

This view that the government generally cannot prevent someone from speaking or remaining silent underscores the broad protection afforded First Amendment speech rights by the Roberts Court. From *Citizens United v. Fed. Elec. Comm'n*[48] to *United States v. Alvarez*[49] to *Snyder v. Phelps*[50] and *Brown v. Entm't Merch. Assoc.*,[51] the Roberts

41. U.S. CONST., Amend. 1.

42. Wooley v. Maynard, 430 U.S. 705, 714 (1977); *see also* Riley v. Nat'l Fed. of the Blind of North Carolina, Inc., 487 U.S. 781, 796–97 (1988) ("[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

43. *Wooley*, 430 U.S. at 714 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

44. *Barnette*, 319 U.S. at 642.

45. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

46. *Ashcroft v. Am. Civil Liberties Union,* 535 U.S. 564, 573 (2002) (internal quotation marks omitted).

47. *Barnette*, 319 U.S. at 642.

48. *See generally* 558 U.S. 310 (2010).

49. *See generally* 567 U.S. 709 (2012).

50. *See generally* 562 U.S. 443 (2011).

51. *See generally* 564 U.S. 786 (2011).

Court cannot seem to find a speech restriction that it can tolerate. Precluding the government from interfering in the marketplace of ideas, though, traces its origins to the founding: "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."[52] The Founders concluded that freedom of speech—although frequently controversial and messy[53]—was necessary to restrict the government's ability to control or dictate expressive activity: "The choice 'between the dangers of suppressing information, and the dangers of its misuse if it is freely available' is one that 'the First Amendment makes for us.'"[54] Consequently, the Court has refused to adopt a balancing test for content-based restrictions. Such a test would be "startling and dangerous,"[55] giving the government the ability to limit, ban, or compel speech any time a court determined that the government's interest was important enough to outweigh a certain form of expression.[56] The Court's hands-off approach to free speech, therefore, protects an individual's "freedom of mind" by providing for extremely broad protection of expression.

That the Court has retained a laissez-faire approach to First Amendment speech issues may seem counterintuitive given the Court's rejection of *Lochner*'s laissez-faire economics,[57] which

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52. United States v. Stevens, 559 U.S. 460, 470 (2015).

53. As *Cohen* instructs, courts cannot set aside that calculus when free speech leads to "verbal tumult, discord, and even offensive utterances." Cohen v. Cal., 403 U.S. 15, 24–25 (1971). Because the Free Speech safeguards "fundamental societal values[,] . . . 'so long as the means are peaceful, the communication need not meet standards of acceptability.'" *Id.* at 25 (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

54. Sorrell v. IMS Health Inc., 564 U.S. 552, 578 (2011) (quoting Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)).

55. *Stevens*, 559 U.S. at 470.

56. Applying this principle to the Stolen Valor Act, the *Alvarez* Court refused to adopt an exception from First Amendment protection for false statements, recognizing that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." United States v. Alvarez, 567 U.S. 709, 718 (2012); *New York Times Co. v. Sullivan,* 376 U.S. 254, 271 (1964) ("Th[e] erroneous statement is inevitable in free debate.").

57. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 861 (1992) (citing Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)) (explaining that *Lochner* "imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of laissez-faire").

dominated its pre-1937 commerce clause decisions.[58] In its pre-*NLRB v. Jones & Laughlin Steel Corporation*[59] cases, the Court sought "to keep government interference [with the economy] to a minimum."[60] As the economic realities of the Great Depression spurred on New Deal legislation, the Court determined that the United States Constitution simply did not mandate a particular form of economic theory: "No more than the Fourteenth Amendment, the Commerce Clause 'does not enact Mr. Herbert Spencer's Social Statics . . . [or] embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.'"[61] Consequently, the Court concluded that the government had far greater authority to regulate economic matters in particular and social conditions more generally than the *Lochner* era suggested: "the laissez-faire concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls."[62]

Although the Court ultimately rejected the laissez-faire view of economics—which was supposed to "lead to optimum decision making under the guidance of"[63] Adam Smith's "invisible hand"[64]— the idea that government should abstain from interfering with individual liberty manifested itself in the Court's nascent First Amendment speech jurisprudence. While denying that the Constitution adopts a particular economic theory,[65] Justice Holmes considered an unrestricted marketplace of ideas as the best—and constitutionally

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58. *See*, *e.g.*, United States v. Lopez, 514 U.S. 549, 606 (1995) (Souter, J., dissenting) ("The fulcrums of judicial review in [the *Lochner* cases] were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them.").

59. *See generally*, 301 U.S. 1 (1937).

60. United States v. Morrison, 529 U.S. 598, 644 (2000) (Souter, J., dissenting).

61. C & A Carbone, Inc. v. Town of Clarkson, 511 U.S. 383, 424–25 (1994) (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)).

62. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 396 (1940) (explaining that "Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of laissez-faire").

63. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting).

64. ADAM SMITH, WEALTH OF NATIONS 572 (Edwin Cannan ed., 1776).

65. *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

mandated—way to promote truth and to advance self-government:[66] "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[67] Whereas economic legislation was determined to require only rational basis review, the post-1937 Court refused to apply the same standard to First Amendment activity: "[F]reedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds."[68] The First Amendment required that the government take a hands-off approach to speech activity, severely curtailing the government's ability to regulate or to dictate the content and form of a speaker's expression: "The very purpose of a Bill of Rights was to withdraw certain subjects"—namely, those implicating "free speech, a free press, freedom of worship and assembly"—"from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials."[69] In this way, "[t]he First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference."[70] But this just is a laissez-faire approach to the marketplace of ideas.[71]

The Supreme Court ensures broad First Amendment protection by "demand[ing] that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality."[72] This general rule applies to all but a few, narrowly defined categories of content-based restrictions that receive no protection under the First Amendment. These unprotected categories of speech include only those "historic and traditional categories [of expression] long familiar to the bar."[73] The Court has

66. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stating that "those who won our independence" found that freedom of speech is "indispensable to the discovery and spread of political truth").

67. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

68. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

69. *Id*. at 638.

70. Knox v. Serv. Empls. Intern. Union, Loc. 1000, 132 S.Ct. 2277, 2288 (2012) (quoting New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 208 (2008)).

71. *See*, *e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 161 (1973) (Douglas, J., concurring) (arguing that television and radio "are included in the concept of 'press' as used in the First Amendment and therefore are entitled to live under the laissez-faire regime which the First Amendment sanctions").

72. *Ashcroft v. Am. Civ. Liberties Union,* 542 U.S. 656, 660 (2004) (citations omitted).

73. *United States v. Stevens,* 559 U.S. 460, 468 (2010) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment)).

recognized that certain types of expression fall outside the scope of the First Amendment: incitement to imminent lawless action,[74] obscenity,[75] defamation,[76] speech integral to criminal conduct,[77] fighting words,[78] child pornography,[79] fraud,[80] true threats,[81] and, under limited circumstances, speech presenting a grave and imminent threat that the government has the authority to prevent.[82] Because these "well-defined and narrowly limited classes of speech"[83] are not safeguarded by the Constitution, "the prevention and punishment of [such speech has] never been thought to raise any Constitutional problem."[84]

Beyond these historically grounded categories of unprotected speech, the Court has been reluctant to find additional forms of expression that the government can regulate, denying any "freewheeling authority to declare new categories of speech outside

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74. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969*)* (finding that States can "forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

75. *See* Miller v. California, 413 U.S. 15, 36 (1973) (affirming that "obscene material is not protected by the First Amendment").

76. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (limiting liability for speech on a public concern that allegedly defames a private figure); New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (imposing an actual malice standard on defamatory speech involving public figures).

77. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (rejecting that "the constitutional freedom of speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute").

78. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (upholding a statute that was "narrowly drawn and limited to define and punish . . . the use in a public place of words likely to cause a breach of peace").

79. *See* New York v. Ferber, 458 U.S. 747, 747 (1982) (upholding a statute that prohibited "persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance").

80. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976) (finding that a State could regulate commercial speech that is fraudulent).

81. *See* Watts v. United States, 394 U.S. 705, 707–08 (1969) (finding a statute that required the government to prove a "true 'threat'" to be "constitutional on its face").

82. *See* Near v. Minnesota ex rel. Olson, 283 U.S. 697, 718–722 (1931) (describing the challenges in establishing a restriction under this category); New York Times Co. v. United States, 403 U.S. 713 (1971) (recognizing the difficulty in establishing a restriction under this category*).*

83. United States v. Stevens, 559 U.S. 460, 468 (2015) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572 (1942)).

84. *Chaplinsky,* 315 U.S. at 571–72.

the scope of the First Amendment."[85] The Court has found that commercial speech—speech that proposes a commercial transaction—is subject to diminished protection.[86] If commercial advertising is false, inherently misleading, or about illegal activity, the government can regulate and even ban the speech.[87] If not, then the government can regulate the speech only if it satisfies a form of intermediate scrutiny.[88] Yet even when dealing with commercial speech, the Court recognizes "the informational function of advertising"[89] and, consequently, precludes the government from acting paternalistically: "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."[90]

Although there might be "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in [the Court's] case law,"[91] the government has the burden to provide "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[92] Thus, to regulate the creative works of public accommodations that offer their services to the public, the government would have to either (1) demonstrate that the expression of for-profit businesses constitutes a new category of unprotected speech or (2) show that particular businesses do not engage in expression.

As discussed below, the lower courts have adopted the latter approach. Given the limited number of exceptions to protected speech,

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85. *Stevens,* 559 U.S. at 472.

86. *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 562–63 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

87. *Id*. at 563–64.

88. *Id*. at 564; Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010) (noting that *Central Hudson* "held that restrictions on nonmisleading commercial speech regarding lawful activity must withstand intermediate scrutiny").

89. *Central Hudson*, 447 U.S. at 563.

90. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). See also Sorrell v. IMS Health Inc., 564 U.S. 522, 577 (2011) (explaining that "the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech") (quoting Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002)); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996) (Stevens, J., concurring) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

91. United States v. Stevens, 559 U.S. 460, 472 (2010).

92. Brown v. Entmt. Merch. Ass'n., 131 S.Ct. 2729, 2734 (2011).

the Court's refusal to adopt a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits,"[93] and the protection afforded corporate speech generally,[94] the government would have great difficulty establishing that public accommodations never engaged in expression. *Masterpiece Cakeshop* seems to acknowledge as much, while *Elane Photography* might be read as adopting a categorical exclusion.[95] But convincing the Court that a business's creative and artistic work does not constitute expression poses its own challenges given the Court's commitment to precluding governmental interference with the marketplace of ideas.

After all, the marketplace includes a wide range of expression to promote at least three distinct (albeit related) interests: (1) the right of a speaker to control the content of its message; (2) the right of listeners to receive information; and (3) the promotion of democratic self-government. First, as described above, the right of free speech is rooted in the "freedom of mind" of the individual,[96] which includes the right "to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[97] This innate right of the person gives rise to "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to

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93. *Stevens,* 559 U.S. at 470.

94. *See*, *e.g.*, Pac. Gas & Elec. Co., v. Pub. Util. Comm'n of Ca., 475 U.S. 1, 8 (1986) (plurality opinion) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978): "The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment was meant to foster.").

95. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d at 272, 288 (2015) ("We recognize that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated."). In *Elane Photography v. Willock*, the New Mexico court suggests that a public accommodation that sells "artistic and creative work" can never claim the protection of the First Amendment in relation to public accommodations laws that force the business to produce expression for individuals covered under the NMHRA: "the NMHRA applies not to Elane Photography's photographs but to its business operation, and in particular, its business decision not to offer its services to protected classes of people." 309 P.3d 53, 68 (2013). "While photography may be expressive, the operation of a photography business is not." *Id*.

96. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

97. *Id*. at 715. *See also* Knox v. Serv. Emps. Int'l Union, Loc. 1000, 132 S.Ct. 2277, 2288 (2012) ("The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.").

choose the content of his own message."[98] Shielding the content choices of the individual—what is said as well as what is not—is important because otherwise the government could censor speech, dictating what words or ideas can (or cannot) be introduced into the marketplace: "[G]overnments might soon seize upon the censorship of particular words [or ideas] as a convenient guise for banning the expression of unpopular views."[99]

Second, while safeguarding the right of the speaker to convey its desired message free from governmental interference, the First Amendment also "'serves significant societal interests' wholly apart from the speaker's interest in self-expression."[100] In particular, the Free Speech Clause guards the right of a listener to receive information: "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."[101] The government cannot "abridge speech that the First Amendment is designed to protect" because "such prohibitions limit[] the range of information and ideas to which the public is exposed."[102]

Moreover, as *Bellotti* and *Sorrell v. IMS Health Inc.* demonstrate, this right of the listener does not depend on the nature of the speaker (whether a for-profit business or a natural person). The marketplace of ideas includes the commercial realm as well as the political and social spheres: "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."[103] As a result, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[104] Corporate expression receives First Amendment

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98. Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995).

99. Cohen v. California, 403 U.S. 15, 26 (1971).

100. Pac. Gas & Elec. Co., v. Pub. Util. Comm'n of Ca., 475 U.S. 1, 8 (1986) (plurality opinion) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

101. *Pac. Gas. & Elec.,* 475 U.S. at 8.

102. *Id*.

103. Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011).

104. *Bellotti*, 435 U.S. at 777. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating subjects about which persons may speak and the speakers who may address a public issue." *Id*. at 784–85; Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352 (2009) ("There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.").

protection because "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster."[105] Thus, the "general rule, that the speaker has the right to tailor the speech, . . . [is] enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers."[106]

Permitting the government either to restrict speech on certain issues or to compel a government-approved orthodoxy impermissibly "limit[s] the range of information and ideas to which the public is exposed."[107] The First Amendment allows the participants in the marketplace of ideas to judge the importance or worth of the information conveyed free from governmental control: "[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented."[108] By prohibiting the government from interfering with expressive activity, the free flow of information is preserved, and individuals can determine their own views on political, cultural, and social issues. Accordingly, the laissez-faire approach to the marketplace of ideas is predicated on the view that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[109]

Third, the Court's steadfast refusal to allow governmental interference with the marketplace of ideas also is predicated on its concern with preserving our system of government: "Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy."[110] Safeguarding the freedom of mind of the speaker and the right of the listener to receive information has instrumental value: it preserves and promotes representative self-government. As the Court explained in *Knox*, "[o]ur cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment."[111]

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105. *Pac. Gas,* 475 U.S. at 8. (plurality opinion); *Citizens United*, 558 U.S. at 342 (confirming that "First Amendment protection extends to corporations").

106. Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 573–74 (1995).

107. *Pac. Gas*, 475 U.S. at 8 (plurality opinion).

108. *Sorrell*, 564 U.S. at 579.

109. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

110. Cox v. Louisiana, 379 U.S. 536, 552 (1965).

111. Knox v. Serv. Emps. Int'l Union, Loc. 1000, 132 S. Ct. 2277, 2288 (2012).

Political speech is at the heart of First Amendment protection because it is integral to our system of government, which impacts numerous social and economic issues: "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."[112] The government is largely precluded from regulating the marketplace of ideas to ensure free and open discussion on public issues generally and political issues in particular: "[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish."[113] As *Cohen v. California* recognizes, the "constitutional right of free expression is powerful medicine" in our "diverse and populous" society.[114] The First Amendment provides broad speech protection for all individuals, associations, and businesses to:

> remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[115]

B. The Cases Taking Public Accommodations Laws to Trump the First Amendment Rights of For-Profit Businesses that Engage in Expression

Given that public accommodations laws are creatures of state law, any conflict between a state's antidiscrimination law and the First

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112. Brown v. Hartlage, 456 U.S. 45, 52 (1982).

113. Buckley v. Valeo, 424 U.S. 1, 93 n. 127 (1976). *See also* Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940) ("[The First Amendment] embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

114. 403 U.S. 15, 24 (1971).

115. *Id*.

Amendment must be resolved in favor of the speakers.[116] As discussed above, the Court has broadly interpreted the protection afforded expression under the First Amendment, thereby increasing the possibility that an antidiscrimination law might interfere with the expressive activity of a for-profit business. The lower courts in *Masterpiece Cakeshop*, *Elane Photography*, and *Arlene's Flowers*, therefore, confront the same threshold question: are items created for a wedding (whether wedding cakes, photo albums, or floral arrangements) an "'expression' protected by the First Amendment"?[117]

These courts reach the same conclusion—that these items are "not 'speech' in a literal sense"[118] and do not constitute "expressive conduct"—based on very similar facts.[119] In each case, a same-sex couple approached the for-profit business about providing something for their wedding. In each case, the owners of the businesses declined based on their religious beliefs[120] and the couple initiated legal proceedings against the businesses under state public accommodations laws.[121]

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116. *See* U.S. CONST. art. VI ("This Constitution . . . shall be the supreme Law of the Land.").

117. State v. Arlene's Flowers, Inc., 389 P.3d 543, 556 (Wash. 2017). *See also* Craig v. Masterpiece Cakeshop, 309 P.3d 272, 285 (2015) (stating that the threshold question in this case was whether "the conduct in question is sufficiently expressive so as to trigger First Amendment protections"); Elane Photography v. Willock, 309 P.3d 53, 64 (2013) (where Elane Photography argued requiring it to photograph same-sex wedding couples "unconstitutionally compelled it to 'create and engage in expression'").

118. *Arlene's Flowers,* 389 P.3d at 557. See also Ma*sterpiece Cakeshop*, 309 P.3d at 283 (refuting that Masterpiece had been compelled to convey a celebratory message and finding the conduct not "sufficiently expressive to warrant First Amendment Protections"); *Elane Photography*, 309 P.3d at 64–65 (finding that requiring Elane Photography to photograph same-sex weddings was not "compel[ing] speech in the manner of the laws" challenged in prior cases).

119. *Arlene's Flowers,* 389 P.3d at 567.

120. *See*, *e.g.*, *Arlene's Flowers*, 389 P.3d at 549 (noting the refusal was based off the owners "religious beliefs, specifically, because of 'her relationship with Jesus Christ'"); *Elane Photography*, 309 P.3d 53, 59–60 (2013) (noting that Elane Photography's owner stated that she "is personally opposed to same-sex marriage and will not photograph any image or event that violates her religious beliefs"); *Masterpiece Cakeshop,* 370 P.3d at 283 (2015) (stating that Masterpiece objected to making the wedding cake because doing so would "conflict with its religious beliefs").

121. *See*, *e.g.*, *Arelene's Flowers*, 389 P.3d at 543 (stating that the "[s]ame-sex couple filed separate action against the owner and corporation"); *Elane Photography*, 309 P.3d at 60 (stating that "Willock filed a discrimination complaint against Elane Photography with the New Mexico Human Rights Commission for discriminating against her based on her sexual orientation"); *Masterpiece Cakeshop,* 370 P.3d at 283

The lower courts also share the view that businesses cannot invoke the protection of the First Amendment even when they offer to the public services that involve artistry, designing, and creativity: "The reality is that because [the photography studio] is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work."[122] The key distinction for the lower courts is the fact that the businesses offer their services for a fee to the general public, thereby bringing the business within the purview of the public accommodations laws while undermining the expressive nature of the underlying conduct:

> If a commercial photography business believes that the NMHRA stifles its creativity, it can remain in business, but it can cease to offer its services to the public at large. Elane Photography's choice to offer its services to the public is a business decision, not a decision about its freedom of speech.[123]

Of course, the courts need to explain why the Supreme Court's First Amendment precedents do not shield the creative works of the for-profit businesses, and the Colorado Court of Appeals and the Supreme Court of Washington do that in a slightly different way than the New Mexico Supreme Court in *Elane Photography*. Consequently, the following summaries consider *Masterpiece Cakeshop* and *Arlene's Flowers* together before turning to *Elane Photography*.

1. Craig v. Masterpiece Cakeshop, Inc. and State of Washington v. Arlene's Flowers, Inc.

The Colorado Court of Appeals and the Washington Supreme Court advance the same general arguments. To avoid repetition, this section focuses on *Masterpiece Cakeshop*, the case currently pending

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(2015) (stating that Craig and Mullins "filed charges of discrimination with the Colorado Civil Rights Division").

122. *Elane Photography*, 309 P.3d at 66; *see also Arlene's Flowers*, 389 P.3d at 559–60 (rejecting the florist's request for a "'narrow' exception" from Washington's antidiscrimination law for expressive "'businesses, such as newspapers, publicists, speechwriters, photographers, and other artists, that create expression'") (citation omitted); *Masterpiece Cakeshop*, 370 P.3d at 285 (explaining that a government order compelling expressive conduct was not necessarily unconstitutional).

123. *Elane Photography*, 309 P.3d at 67; *Arlene's Flowers*, 389 P.3d at 558 (quoting *Elane Photography* for the proposition that "antidiscrimination law applies not to defendant's photographs but to 'its business decision not to offer its services to protected classes of people'").

before the Supreme Court.[124] As discussed above, CADA prohibits "any place of business engaged in any sales to the public"[125] from discriminating based on, among other things, "sexual orientation."[126] In July 2012, Charlie Craig and David Mullins went to Masterpiece for a custom wedding cake to celebrate their upcoming same-sex wedding.[127] During their meeting, the owner, Jack C. Phillips, informed them that Mr. Phillips "does not create wedding cakes for same-sex weddings because of his religious beliefs."[128] Subsequently, Craig and Mullins filed discrimination charges with the Colorado Civil Rights Division, alleging a violation of CADA.[129] The Division found probable cause to credit the allegations, and Craig and Mullins filed a formal complaint with the Office of Administrative Courts.[130] The Administrative Law Judge concluded that Masterpiece violated CADA, and the Commission affirmed.[131] The Commission's order required Masterpiece to take remedial action (including staff training and modifying the company's policies) and to file quarterly compliance reports for two years detailing the remedial measures and explaining whether and why any customers were denied service.[132] Under the Commission's order, Masterpiece was required to "sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner."[133] Masterpiece then appealed to the Colorado Court of Appeals.

On appeal, Masterpiece argued "that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission's order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs."[134] The Colorado court rejected this claim, applying

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124. On July 14, 2017, Arlene's Flowers filed a certiorari petition with the United States Supreme Court, asking the Court to combine the case with *Masterpiece Cakeshop*. *See* Petition for Writ of Certiorari to the Supreme Court of Washington, *Arlene's Flowers,* 389 P.3d 543 (No. 17-108).

125. COLO. REV. STAT. ANN. § 24-34-601(1) (West 2014).

126. COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2014).

127. *Masterpiece Cakeshop,* 370 P.3d at 276.

128. *Id*.

129. *Id*. at 277.

130. *Id.*

131. *Id*.

132. *Id*.

133. *Id*. at 286.

134. *Id.* at 283; *see also Arlene's Flowers*, 389 P.3d at 556 ("Stutzman contends that her floral arrangements are artistic expression . . . and that the WLAD impermissibly compels her to speak in favor of same-sex marriage.").

the test for expressive conduct without deciding whether the wedding cake itself constituted protected expression.[135] According to the court, a reasonable observer does not take a wedding cake to send a celebratory message, and even if it did, the viewer would attribute the message to the customer, not the bakery.[136]

The court invoked *Rumsfeld* to support its claim that the bakery "does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally."[137] The law schools in *Rumsfeld* challenged the Solomon Amendment's requirement that the schools treat military and non-military recruiters alike, arguing that this requirement "compelled them to send 'the message that they see nothing wrong with the military's policies [regarding gays in the military], when they do.'"[138] The Colorado Court of Appeals correctly noted that *Rumsfeld* rejected this argument but, instead of analyzing the Court's reasoning, relied on *Rumsfeld*'s observation "that students 'can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so.'"[139] Based on this quote, the Colorado court concluded that "because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, . . . a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs."[140]

Although recognizing that Masterpiece retained some level of First Amendment speech protection, the Colorado court determined that the for-profit nature of its business further reduced the likelihood that a reasonable observer would take the creation of a wedding cake to be an endorsement of same-sex marriage.[141] In the process of reaching this conclusion, the court distinguished *Hurley*. Unlike a parade, a custom cake is not inherently expressive, and observers would not attribute a wedding cake's message to the person who created it.[142] In fact, the court determined that an observer "would

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135. *Masterpiece Cakeshop*, 370 P.3d at 285; *Arlene's Flowers*, 389 P.3d at 557 (applying the Court's test for expressive conduct).

136. *Masterpiece Cakeshop*, 370 P.3d at 286.

137. *Id.*; *see also Arlene's Flowers*, 389 P.3d at 557 (analogizing to *Rumsfeld* to support the claim that "[t]he decision to either provide or refuse to provide flowers for a wedding does not inherently express a message about the wedding").

138. *Masterpiece Cakeshop*, 370 P.3d at 286.

139. *Id.*

140. *Id.*

141. *Id.* at 287.

142. *Id.*

have no way of deciphering whether the bakery's conduct took place because of its views on same-sex marriage or for some other reason."[143] While the court indicated that under certain circumstances a wedding cake might "convey a particularized message celebrating same-sex marriage" such that "First Amendment speech protections may be implicated," the court declined to reach the issue because the parties did not discuss "the wedding cake's design or any possible written inscriptions."[144]

Furthermore, the court took solace in the fact that CADA did "not preclude Masterpiece from expressing its views on same-sex marriage—including its religious opposition to it—and the bakery remains free to disassociate itself from its customers' viewpoints."[145] Specifically, Masterpiece could post a disclaimer online or in its store. Although CADA precludes Masterpiece from stating its desired position (that it does not want to provide custom cakes for same-sex weddings), CADA allows Masterpiece to inform its customers either that providing services should not be viewed as an endorsement or approval of the conduct CADA protects or that CADA mandates that Masterpiece not discriminate based on sexual orientation and other listed characteristics.[146] Thus, the court concluded that CADA did not violate the First Amendment because it did not require the bakery to engage in expressive conduct protected by the First Amendment.[147]

2. Elane Photography, LLC v. Willock

Like CADA, the New Mexico Human Rights Act (NMHRA) prohibits public accommodations from discriminating against people based on, among other things, their sexual orientation.[148] Elane Photography is a photography studio that offers its services, including

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143. *Id.*; *see also Arlene's Flowers*, 389 P.3d at 557 (noting that "an outside observer may be left to wonder whether a wedding was declined for one of at least three reasons: a religious objection, insufficient staff, or insufficient stock").

144. *Masterpiece Cakeshop*, 370 P.3d at 288; *see also Arlene's Flowers*, 389 P.3d at 549 (noting that the customer "did not have a chance to specify what kind of flowers or floral arrangements he was seeking").

145. *Id.*

146. *Id.*

147. *Id.; see also Arlene's Flowers*, 389 P.3d at 559 (concluding that the florist's "conduct—whether it is characterized as creating floral arrangements, providing floral arrangement services for opposite-sex weddings, or denying those services for same-sex weddings—is not like the inherently expressive conduct at issue in" the Court's expressive conduct cases).

148. N.M. STAT. ANN. § 28-1-7 (West 2003).

wedding photographs, to the public.[149] Although the New Mexico court recognized that Elane Photography retains its First Amendment speech rights "to express their religious or political beliefs,"[150] the court held that the studio could not refuse to photograph a same-sex wedding ceremony if it photographs opposite-sex weddings.[151] Thus, when Vanessa Willock approached Elane Photography about photographing her commitment ceremony and the studio declined, the court concluded that Elane Photography violated the NMHRA.

In particular, the New Mexico court rejected the studio's claim—that forcing it to photograph same-sex weddings "unconstitutionally compels it to 'create and engage in expression' that sends a positive message about same-sex marriage not shared by its owner"[152] for two reasons. First, NMHRA does not require Elane Photography to carry a government-mandated message. In *Wooley* and *Barnette*, the plaintiffs were required to "speak the government's message,"[153] respect for the flag in *Barnette* and the New Hampshire motto ("Live Free or Die") in *Wooley*. Both cases held that the government cannot "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."[154] The NMHRA, however, did not require the studio "to recite or display any message."[155] In fact, the NMHRA "does not even require Elane Photography to take photographs. [It] only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation."[156]

The court relied on *Rumsfeld* to support its conclusion, focusing on *Rumsfeld*'s statement that the law schools' speech was "only 'compelled' if, and to the extent, the school provide[d] such speech for other recruiters."[157] Having opened its recruiting process to non-military recruiters, the Solomon Amendment required the schools to provide the same access to the military. But the Solomon Amendment did not impose "a Government-mandated pledge or motto that the

149. Elane Photography, LLC v. Willock, 309 P.3d 53, 58 (N.M. 2013).

150. *Id*. at 59.

151. *Id*. at 65.

152. *Id*. at 63.

153. Rumsfeld v. Forum for Academic and Inst. Rights, Inc., 547 U.S. 47, 63 (2006).

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

155. *Elane Photography*, 309 P.3d at 64.

156. *Id*.

157. *Rumsfeld*, 547 U.S. at 62.

school [had to] endorse."[158] Similarly, under the NMHRA, Elane Photography was not required to affirm any particular belief; rather, it simply was "compelled to take photographs of same-sex weddings only to the extent that it would provide the same services to a heterosexual couple."[159]

Second, the NMHRA did not force Elane Photography to accommodate the message of the same-sex couple who was getting married. The court relied heavily on the fact that the "Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation."[160] In *Hurley* and *Dale*, the Supreme Court decided that public accommodations laws violated the free speech rights of parade organizers and the expressive association rights of the Boy Scouts, respectively, but these were "free-speech events" and not "ordinary public accommodations[s]."[161] This distinction is critical for the New Mexico court. Unlike the application of the public accommodations laws in *Hurley* and *Dale*, which sought to regulate the content of the speaker's expression, the NMHRA "does not . . . regulate the content of the photographs that Elane Photography produces."[162] Instead, the NMHRA simply regulates services that are offered to the public generally, and it makes no difference that "those services include artistic and creative work."[163] Just as the law schools had to provide information for all recruiters (or stop opening their facilities to recruiters), the studio must "perform the same services for a same-sex couple as it would for an opposite-sex couple" (or stop offering its wedding services to the public).[164]

The New Mexico court contends that the Supreme Court's other compelled speech cases support this conclusion. In *Tornillo* and *Pacific Gas*, the Court struck down right of access requirements that interfered with the speaker's own message, not a message-for-hire as in *Elane Photography*. Florida's right-of-reply statute vested control over the "choice of material to go into a newspaper, . . . and treatment of public issues and public officials" in the state instead of the editors, deterring criticism of candidates and, in the process, chilling political

158. *Id.*
159. *Elane Photography*, 309 P.3d at 65.
160. *Id.*
161. *Id.* at 66.
162. *Id.*
163. *Id.*
164. *Id.*

speech.[165] In *Pacific Gas*, the government required the utility company to include the message of a third party whose views were at odds with the company's interests. Such a requirement violated the First Amendment because it "forced [the company] either to appear to agree with TURN's views or to respond," even though Pacific Gas may have preferred to remain silent.[166] The New Mexico court distinguished these cases from the NMHRA, which does not force the studio to publish the names and addresses of its rivals or to otherwise compromise its beliefs. On this view, the NMHRA merely requires the for-profit business to serve all customers protected under the NMHRA if it provides such services to others who are not: "The government has not interfered with Elane Photography's editorial judgment; the only choice regulated is Elane Photography's choice of clients."[167] If Elane Photography does not want to serve particular clients, "it can remain in business, but it can cease to offer its services to the public at large. Elane Photography's choice to offer its services to the public is a business decision, not a decision about its freedom of speech."[168] Moreover, consistent with *Masterpiece Cakeshop* and *Arlene's Flowers*, the court noted that a reasonable observer would not take the studio's photographing a same-sex wedding to constitute an endorsement of the wedding or same-sex marriage generally. The for-hire nature of its business is supposed to mitigate any threat that an observer would attribute the couple's views to the photography studio.[169] Thus, the New Mexico court concluded that the NMHRA does not violate the photography studio's free speech rights.

II. THE COURT'S COMPELLED SPEECH AND EXPRESSIVE ASSOCIATION CASES PROHIBIT STATES FROM APPLYING THEIR PUBLIC ACCOMMODATIONS LAWS IN A WAY THAT INTERFERES WITH A BUSINESS'S EXPRESSION.

The courts in *Masterpiece Cakeshop*, *Elane Photography*, and *Arlene's Flowers* take the central First Amendment question to be whether the public accommodations are engaged in expressive

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165. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974).

166. Pac. Gas & Elec. Co. v Pub. Util. Comm'n of Cal., 475 U.S. 1, 15 (1986).

167. *Elane Photography*, 309 P.3d at 67.

168. *Id*.

169. *Id*. at 69–70 ("It is well known . . . that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom.").

conduct,[170] not whether their artistic and creative works are themselves expression subject to First Amendment protection. A careful examination of the Court's First Amendment cases, though, reveals that (1) protected expression includes a wide range of visual and non-verbal works, including custom wedding cakes, and (2) for the marketplace of ideas to function properly, the government can neither interfere with a speaker's own message nor force her to be a courier for the message of others.

Under *Hurley* and *Wooley*, a state cannot apply its public accommodations law to the expression of for-profit businesses that offer their services to the public.[171] The government has extensive authority to restrict discriminatory conduct, but the First Amendment limits that power when the object of regulation is discriminatory or offensive speech. Moreover, the Court's expressive association cases confirm this result, recognizing that "[t]he First Amendment protects expression, be it of the popular variety or not."[172]

A. The First Amendment Protects a Wide Array of Expression, Including Custom Wedding Cakes, and Prevents the Government from Conscripting Businesses to Foster the Messages of Third Parties Even If the Businesses Are Not Conveying Their Own Message

A threshold question in *Masterpiece Cakeshop* is whether custom wedding cakes constitute artistic expression that falls within the broad contours of the First Amendment. Many people probably have never considered the First Amendment status of wedding cakes, wedding albums, or floral arrangements, associating protected speech with verbal forms of expression, such as books, articles, banners, slogans, and songs. But "the Constitution looks beyond written or spoken words as mediums of expression"[173] and encompasses artistic

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170. *See*, *e.g.*, Craig v. Masterpiece Cakeshop, Inc., 309 P.3d 272, 286 (2015) ("[T]he threshold question in cases involving expressive conduct—or as here, compelled expressive conduct—is whether the conduct in question is sufficiently expressive so as to trigger First Amendment protections.").

171. Dept. of Fair Employment and Housing v. Miller, 2018 WL 747835 at *1 (Cal. Super. Feb. 5, 2018) ("The right of freedom of speech under the First Amendment outweighs the State's interest in ensuring a freely accessible marketplace. . . . No public commentator in the marketplace of ideas may be forced by law to publish any opinion with which he disagrees in the name of equal access.").

172. Boy Scouts of America v. Dale, 530 U.S. 640, 660 (2000).

173. Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995); *see also Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952)

expression through, among other things, "pictures, films, paintings, drawings, and engravings."[174] As the Court explained in *Citizens United*:

> The First Amendment underwrites the freedom to experiment and *to create* in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.[175]

Thus, a painter who is paid to create a painting of an elaborate wedding cake—with candles, flowers, patterns, and colors that capture the beauty and sacred nature of the wedding—qualifies for protection under the First Amendment. But if the painting of a cake is protected, why not the actual cake, which is meant to capture and convey the same celebratory message? Is there a difference between the painting of the cake and the actual cake that should make a constitutional difference? Does the cake constitute the expression of the cake artist, the customer, or both? As it turns out, wedding cakes and other non-verbal forms of expression fit comfortably within the category of protected speech, and therefore, qualify for shelter under the First Amendment regardless whether the message is that of the for-profit business or its customer.

1. Masterpiece's Custom Wedding Cakes Are Forms of Expression Protected by the Free Speech Clause.

Under the Court's laissez-faire approach to the First Amendment, there is no basis for giving the painting of a cake First Amendment

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(confirming that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the method of communication used).

174. Kaplan v. California, 413 U.S. 115, 119 (1973); *see also* Schad v. Mount Ephraim, 452 U.S. 61, 65 (1981) (stating "[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee").

175. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 372 (2009) (quoting McConnell v. Fed. Elec. Comm'n, 540 U.S. 93, 341 (2003) (Kennedy, J., concurring)) (emphasis added).

protection and withholding it from the custom cake itself.[176] Both artistic forms involve design, creativity, skill, and self-expression, which, as the Tenth Circuit has noted, is "the animating principle behind pure-speech protection."[177] Both require the artist to plan the layout (including the shape and design of the various tiers), sketch the subject beforehand (possibly several times to capture the event properly), paint elaborate designs and decorations on the cake, and capture the lighting that best highlights those designs and decorations (either in the painting or through the placement of candles on the actual cake).[178] While the painter uses paints and canvas, the cake artist uses edible materials like icing and fondant.[179] But the differences in materials and the medium do not change the expressive nature and artistry of the work: "'[T]he basic principles of freedom of speech . . . do not vary' when a new and different medium of communication appears."[180] That the First Amendment shields all expressive mediums of communication makes sense given that the government cannot substitute its judgment for that of the artist as to the value or worth of art: "[E]sthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a

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176. Cressman v. Thompson, 798 F.3d 938, 952 (10th Cir. 2015) (recognizing that "[t]he concept of pure speech is fairly capacious" and includes works with an "expressive character").

177. *Id*. at 952–53.

178. *See*, *e.g.*, *The Essential Guide to Cake Decorating* at 5 (2001) (stating that "Antonin Carême, one of the most renowned chefs of recent centuries, memorably remarked that there are five fine arts—sculpture, painting, poetry, music, and architecture—and that the confectioner is the only artist to have mastered four of the five"); White v. City of Sparks, 500 F.3d 953, 956 (9th Cir. 2007) ("A painting may express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica*, or may express the artist's vision of movement and color, as with 'the unquestionably shielded painting of Jackson Pollock.' . . . So long as it is an artist's self-expression, a painting will be protected under the First Amendment. . . .") (quoting *Hurley*, 515 U.S. at 569).

179. Dept. of Fair Employment and Housing v. Miller, 2018 WL 747835 at *2 (Cal. Super. Feb. 5, 2018) ("Miller is a creative artist and participates in every part of the custom cake design and creation process.").

180. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)). Consistent with this principle, the federal Courts of Appeal have concluded that protected artistic expression includes tattooing (Buehrle v. City of Key West, 813 F.3d 973, 976 (11th Cir. 2015)); custom-painted clothing (Mastrovincenzo v. City of New York, 435 F.3d 78, 96 (2d Cir. 2006)); and stained glass windows (Piarowski v. Illinois Cmty. Coll. Dist. 515, 759 F.2d 625, 628 (7th Cir. 1985)).

majority."[181] Consequently, the First Amendment guards even abstract works like the "painting[s] of Jackson Pollock," the atonal "music of Arnold Schöenberg," and the nonsensical "verse of Lewis Carroll."[182]

Visual expression, such as wedding cakes, photo albums, video games, and paintings, is protected even when it is created as part of a commercial enterprise. For example, in *United States v. Stevens*, the Court struck down a federal statute that "criminalize[d] the commercial creation, sale, or possession of certain depictions of animal cruelty," which depictions included videos and photographs in magazines.[183] Similarly, in *Brown v. Entm't Merch. Ass'n*, the Court confirmed "that video games qualify for First Amendment protection."[184] Thus, contrary to the lower courts' claim, a business that "sells its expressive services to the public" does not lose its right to object to compelled speech.[185] The same is true where, as in the context of public accommodations laws, the government seeks to force a business to accept a fee and to create the paid-for expression: "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."[186] After all, the professional fundraisers in *Riley* were paid a fee for their speech activity (the solicitation of funds for charities), yet the Court concluded North Carolina could not require them to disclose to potential donors the percentage of funds that were collected during the last year and remitted to the charity, saying "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[187]

Nor can Masterpiece's custom cakes be deprived of First Amendment protection because they involve nonverbal expression.

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181. United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818 (2000). *See also Citizens United*, 558 U.S. at 372 (stating that "[s]ome members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course. . . . Those choices and assessments, however, are not for the Government to make.").

182. *Hurley*, 515 U.S. at 569.

183. 559 U.S. 460, 464, 481 (2010).

184. 564 U.S. at 790.

185. Elane Photography, LLC v. Willock, 309 P.3d 53, 66 (N.M. 2013).

186. *Hurley*, 515 U.S. at 576; Riley v. Nat'l Fed. of the Blind of North Carolina, Inc., 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech [and constitutes] a content-based regulation of speech.").

187. *Riley*, 487 U.S. at 796–97.

Like the flag salute in *Barnette*, Masterpiece's creations represent more than the conduct of baking and decorating the cake (or placing one's hand over one's heart). Both convey a message—about the institution of marriage or one's pledge to our nation and its flag, which is why the Court struck down he compulsory flag salute. To hold otherwise would have required the Court "to say that a Bill of Rights which guards the individual's right to speak his own mind, left open to public authorities to compel him to utter what is not in his mind."[188] The infringement on the freedom of thought and mind is violated to the same extent whether the compelled speech consists of images or words with which one disagrees. For example, in *Hurley*, if GLIB had sought to carry a large rainbow banner (without any words) instead of a banner that said "Irish American Gay, Lesbian and Bisexual Group of Boston,"[189] the outcome would have been the same. Compelling the parade organizers to allow either form of expression 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."[190] Likewise, the Court would have reached the same decision in *Wooley* if New Hampshire had required the Maynards to display "a picture of Patrick Henry, who famously said, 'Give me liberty or give me death,'" because "the 'First Amendment right to avoid becoming the courier' for speech that one does not want to disseminate applies as much when the speech is visual as when it is verbal."[191]

What the lower courts apparently overlook is that wedding cakes are an important symbol of marriage and for many a central part of a marriage celebration. Such symbols are "a primitive but effective way of communicating ideas."[192] A wedding cake, like other emblems, is used "to symbolize some system, idea, institution, or personality" and

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188. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943); *Hurley*, 515 U.S. at 569 ("The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression.").

189. 515 U.S. at 570.

190. *Id*. at 573.

191. Eugene Volokh, "Amicus Curiae Brief: *Elane Photography, LLC v. Willock*," 8 N.Y.U. J.L. & Liberty 116, 123–24 (2013) (quoting Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

192. *Barnette*, 319 U.S. at 632; *Wedding Cake*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016) ("a usually elaborately decorated and tiered cake made for the celebration of a wedding").

serve as "a short cut from mind to mind."[193] As a symbol of marriage, a wedding cake promotes the importance of the event and celebrates a new union between two people.[194]

Furthermore, even assuming that the message conveyed by a wedding cake "is not wholly articulate," *Hurley* instructs that a custom cake for a same-sex wedding suggests, at a minimum, that a same-sex union should be celebrated and possibly (in the wake of *Obergefell*) the "view that people of their sexual orientation[] have as much claim to unqualified social acceptance as heterosexuals" who are married.[195] Masterpiece may not believe that same-sex weddings should be celebrated because such unions are contrary to its owner's religious beliefs or, like the parade organizers in *Hurley*, it "may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing" not to create a wedding cake for a same-sex couple's marriage ceremony.[196] "[W]hatever the reason," though, under the First Amendment "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[197] Accordingly, public accommodations laws that are applied to the expression of businesses violate the "individual freedom of mind" that the First Amendment was meant to guard.[198]

Instead of considering whether CADA violates the "freedom of mind" of for-profit businesses and their owners, the Colorado court relies on features of expression that are not relevant under the Court's free speech precedents. In particular, the lower court considers two things: (1) whether "Masterpiece conveys a particularized message celebrating same-sex marriage," and (2) "whether the likelihood is great that a reasonable observer would both understand the message

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193. *Barnette*, 319 U.S. at 632. In this regard, wedding cakes are very similar to government-sponsored monuments. Both are commissioned because someone (the couple or the government) "wishes to convey some thought or instill some feeling in those who see the structure." Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009).

194. *See* Kaahumanu v. Hawaii, 682 F.3d 789, 799 (9th Cir. 2012) ("The core of the message in a wedding is a celebration of marriage and the uniting of two people. . . ."); Dept. of Fair Employment and Housing v. Miller, 2018 WL 747835 at *3 (Cal. Super. Feb. 5, 2018) ("A wedding cake is not just a cake in a Free Speech analysis. It is an artistic expression by the person making it that is to be used traditionally as a centerpiece in the celebration of a marriage.").

195. *Hurley*, 515 U.S. at 574.

196. *Id.* at 574–75.

197. *Id.* at 575.

198. *Barnette*, 319 U.S. at 637.

and attribute that message to Masterpiece."[199] The lower court concluded that Masterpiece did not convey a specific message regarding same-sex marriage, and consequently, did not qualify for protection under the First Amendment. The First Amendment, however, does not have a "particularized message" requirement. As *Hurley* demonstrates, the First Amendment protects expressive activity even though a speaker does *not* convey a particularized message: "A [] speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[200] The parade organizers in *Hurley* were "rather lenient in admitting participants,"[201] but they still were protected by the First Amendment because "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll."[202]

In this way, custom wedding cakes and other expressive works are similar to monuments. Just like a monument in a park, a custom wedding cake may have written text on it, which "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways."[203] Of course, many ornate cakes and monuments may include no words, and "the effect of [those] that do not contain text is likely to be even more variable."[204] Yet expressive businesses, like governmental groups, have "the choice . . . not to propound a particular point of view,"[205] which means they can exclude viewpoints that conflict with their vision of "what merits celebration."[206]

2. The First Amendment Protects the Right of Masterpiece Not to Foster a Message with which It Disagrees Even If the Underlying Message Is that of the Paying Customer and Not the Business.

The lower courts also contend that public accommodations laws do not infringe the speech rights of for-profit businesses because to the

199. Craig v. Masterpiece Cakeshop, 370 P.3d 272, 286 (Colo. App. 2015).
200. *Hurley*, 515 U.S. at 569.
201. *Id*. at 558.
202. *Id*. at 569 (quoting Spence v. Washington, 418 U.S. 405, 411 (1974)).
203. Pleasant Grove City v. Summum, 555 U.S. 460, 474 (2009).
204. *Id*.
205. *Hurley*, 515 U.S. at 575.
206. *Id*. at 574.

extent a wedding cake sends a celebratory message about same-sex message, "that message is more likely to be attributed to the customer than to Masterpiece."[207] The New Mexico court advances the same point: "It may be that Elane Photography expresses its clients' messages in its photographs, but only because it is hired to do so."[208] Yet the First Amendment shields more than just a speaker's desired message; it also ensures that a speaker cannot be conscripted to serve as a courier for another's message.[209] That is, the marketplace of ideas is also corrupted when the government forces a speaker to "foster"[210] a message with which it disagrees—even when a reasonable observer knows that the message belongs to a third party and not the speaker. In *Wooley*, the State of New Hampshire could not require the Maynards to display "Live Free or Die" on the license plate affixed to their car.[211] The slogan was "the State's ideological message,"[212] and the Maynards simply served as "the courier for such message."[213] In his dissent, Justice Rehnquist (like the lower courts in *Masterpiece Cakeshop* and *Elane Photography*) argued that there was no First Amendment violation because the Maynards were not compelled to engage in any type of protected expression: "The State has not forced [the Maynards] to 'say' anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button or promoting a political candidate or waving a flag as a symbolic gesture."[214] The majority disagreed. Even though the Maynards were not speaking themselves, the Free Speech Clause precluded the State's using them to facilitate the government's chosen message: "The First Amendment 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."[215]

Under *Wooley*, then, "fostering an idea" does not require a speaker to adopt that idea as her own;[216] rather, all that is necessary is for the

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207. Craig v. Masterpiece Cakeshop, 370 P.3d 272, 286 (Colo. App. 2015).
208. Elane Photography, LLC v. Willock, 309 P.3d 53, 66 (N.M. 2013).
209. Wooley v. Maynard, 430 U.S. 705, 717 (1977).
210. *Id*. at 715.
211. *Id*.
212. *Id*.
213. *Id*. at 717.
214. *Id*. at 720 (Rehnquist, J., dissenting).
215. *Id*. at 715.
216. In his dissent, Justice Rehnquist acknowledges that the majority's "fostering" requirement is much broader than conditioning First Amendment protection on an "affirmation of belief." *Id*. at 721 (Rehnquist, J., dissenting). Justice Rehnquist

government to require an individual to help disseminate the message.[217] The government impermissibly interferes with the marketplace of ideas when it forces someone to advance another's message[218] because it "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."[219] Thus, if a business objects to fostering the message of another,[220] the First Amendment safeguards that person's decision: "A system which secures the right to

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contends that a taxpayer, who was taxed to pay for the erection and maintenance of a series of billboards stating "Live Free or Die," would be "instruments" in the government's communication and would "foster" the government's message. *Id*. (Rehnquist, J., dissenting). This example "would not fall within the ambit of Barnette" under Justice Rehnquist's view, though, because "[f]or First Amendment principles to be implicated, the State must place the citizen in the position of either appearing to, or actually 'asserting as true' the message." *Id*. (Rehnquist, J., dissenting). In rejecting Justice Rehnquist's interpretation, the majority explained that the First Amendment precludes the government's requiring individuals "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id*. at 715. Although the First Amendment may not protect a taxpayer who objects to the government's using tax revenues to promote its desired message, *Wooley* would protect the individual whom the government forces to design and build the "Live Free or Die" billboards—even if the individual was in the business of making billboards and the billboards stated that New Hampshire sponsored the message. For the majority, requiring speakers to foster another's message "'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*. (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

217. *See*, *e.g.*, *Foster*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016) ("to promote the growth or development of: encourage" and "to help (something) grow or develop"); *Foster*, OXFORD ENGLISH DICTIONARY (2nd ed. 1989) ("[e]ncourage the development of (something, especially something desirable).

218. Dept. of Fair Employment and Housing v. Miller, 2018 WL 747835 at *3 (Cal. Super. Feb. 5, 2018) (declining to apply a California public accommodations law to a baker because doing so would "compel Miller against her will and religion to allow her artistic expression in celebration of marriage to be co-opted to promote the message desired by same-sex marital partners, and with which Miller disagrees").

219. *Barnette*, 319 U.S. at 642.

220. If nothing else, a wedding cake conveys a basic fact—that the event is a wedding or that the couple is getting married. But the First Amendment proscribes compelled statements of fact as well as ideological messages. *See* Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 797–98 (1988) (explaining that "compelled statements of 'fact,'" just liked compelled statements of opinion, "burden[] protected speech"). Thus, even if a wedding cake does not convey a specific message about same-sex marriage, the government cannot force a cake artist to attest to the fact of the marriage.

proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."[221]

As *Tornillo* and *Pacific Gas* demonstrate, to hold otherwise would not only infringe on the business's "individual freedom of mind"[222] but also stultify discourse on issues of public import.[223] In both cases, the Court upheld the right of corporations to refuse to carry the messages of third parties even though the public knew that the businesses were being required to do so.[224] Under the right-of-reply statute in *Tornillo*, if a newspaper criticized a candidate or her record, the candidate could force the newspaper to publish a reply of equal length and prominence.[225] The Florida law infringed on the newspaper's free speech rights by forcing it to open up its paper to speakers with opposing viewpoints: "[T]he newspaper's expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper's facilities to spread their own message."[226] Rather than promote free discussion, the right-of-reply law "penalized the newspaper's own expression,"[227] which, in turn, deterred newspapers from speaking out in the first instance: "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy."[228] Given this chilling effect on expression, the *Tornillo* court concluded that "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'"[229]

Applying the reasoning in *Tornillo*, the plurality in *Pacific Gas* upheld the utility company's right not to carry the message of a third party in its newsletter—even when the message was expressly identified as that of the third party and not that of the company. According to the plurality, such "[c]ompelled access . . . both penalizes the expression of particular points of view and forces speakers to alter

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221. *Wooley*, 430 U.S. at 714.

222. *Barnette*, 319 U.S. at 637.

223. *Wooley*, 430 U.S. at 714 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

224. Miami Herald Publ'g Co. v. Tornillo 418 U.S. 241, 256 (1974); Pac. Gas & Elec. Co. v Pub. Util. Comm'n of Cal., 475 U.S. 1, 9–11 (1986).

225. *Tornillo*, 418 U.S. at 244.

226. *Pac. Gas*, 475 U.S. at 10 (discussing the scope and holding of *Tornillo*).

227. *Id*.

228. *Tornillo*, 418 U.S. at 257.

229. *Id*. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

their speech to conform with an agenda they do not set."[230] Pacific Gas's newsletter, *Progress*, included a range of topics "from energy-saving tips to stories about wildlife conservation, and from billing information to recipes."[231] But having spoken on specific topics, Pacific Gas was required to disseminate TURN's desired message, thereby fostering a message with which the company disagreed. Pacific Gas, therefore, was in the same position as the newspaper in *Tornillo*—the government "interfered with [the utility's] 'editorial control and judgment' by forcing [it] to tailor its speech to an opponent's agenda, and to respond to [TURN's] arguments where the [utility] might prefer to be silent."[232] Because "the State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold," the Commission's order violated the First Amendment.[233]

Under *Tornillo* and *Pacific Gas*, a speaker cannot be "required to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response to" the mandated message.[234] Thus, even if the celebratory messages conveyed by a wedding cake or a photo album are the messages of the newly married couple, the state cannot use its public accommodations laws to force a bakery or a photography studio to foster those messages. But *Masterpiece Cakeshop* and *Elane Photography* do just that.[235] Consider the bakery's predicament when told that it must either design and create wedding cakes for same-sex couples or stop making wedding cakes altogether. Masterpiece had sought to promote (and promoted) a view of traditional marriage through its wedding cakes,

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230. *Pac. Gas*, 475 U.S. at 9 (plurality opinion).

231. *Id*. at 8.

232. *Id*. at 10 (discussing *Tornillo*).

233. *Id*. at 11. *See also* PruneYard Shopping Ctr. v Robins, 447 U.S. 74, 100 (1980) (Powell, J., concurring) ("Thus, the right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner.").

234. *Pac. Gas*, 475 U.S. at 11 n.7 (explaining why the right-of-reply statute and the Commission's order contravened the First Amendment).

235. In *Masterpiece Cakeshop*, Mr. Craig and Mr. Mullins apparently wanted Masterpiece to create "a rainbow-layered [wedding] cake" for their wedding celebration. Mark Meredith and Will C. Holden, *Cake Shop Says Business Booming*, FOX 31 DENVER, July 30, 2012, http://kdvr.com/2012/07/30/denver-cake-shop-refuses-service-to-gay-couple/. Given that a rainbow has become a prominent symbol of gay pride, Masterpiece could view the desired cake to express support for same-sex marriage. *See* KATHERINE MCFARLAND BRUCE, PRIDE PARADES: HOW A PARADE CHANGED THE WORLD 170 (2016) (explaining that "cultural symbols like the rainbow flag" are "associate[ed] with the LGBT community").

whether or not the message was that of the bakery or of the opposite-sex couples getting married. CADA forced Masterpiece to allow same-sex couples, "with whom [Masterpiece] disagreed, to use the [bakery's] facilities to spread their own message."[236] That is, under the lower court's analysis, Masterpiece (like the newspaper in *Tornillo*) was told that it must use its facilities to create a cake that expressed the same-sex couple's desired message: "[T]o the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece."[237] There allegedly was no constitutional violation because (1) Masterpiece was not conveying its own message and (2) CADA "does not preclude Masterpiece from expressing its views on same-sex marriage—including its religious opposition to it."[238] According to the Colorado court, Masterpiece could either post a carefully crafted disclaimer explaining that "the provision of its services does not constitute an endorsement or approval of conduct protected by CADA"[239] or limit its own expressive activity by ceasing to design and sell wedding cakes to opposite-sex couples: "[CADA] includes a requirement that Masterpiece sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner."[240]

The problem is that the lower court's analysis "begs the core question" in the same way that the candidate's argument did in *Tornillo*.[241] The Colorado court contends that CADA "does not amount to a restriction of [Masterpiece's] right to speak because 'the statute in question here has not prevented the [bakery] from saying anything it wished.'"[242] As *Tornillo* instructs, though, whether a speaker might be able to convey its desired message in some other way is not the issue; rather, "[c]ompelling editors [or cake artists] to publish [or foster] that which 'reason tells them should not be published' [or promoted] is what is at issue in this case."[243] CADA does that, requiring Masterpiece "to carry speech with which it disagree[s]."[244] Under the lower court's holding, Masterpiece must foster through its

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236. *Pac. Gas*, 475 U.S. at 10.

237. Craig v. Masterpiece Cakeshop, 370 P.3d 272, 286 (Colo. App. 2015).

238. *Id*. at 288.

239. *Id*.

240. *Id*. at 286.

241. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974).

242. *Id*. (citation omitted).

243. *Id*.

244. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 11 n. 7 (1986) (plurality opinion).

design and artistry a celebratory message regarding same-sex marriage even though that message is directly opposed to its sincerely held religious beliefs. As a result of this forced association, Masterpiece "may be forced either to appear to agree with [the same-sex couple's] views or to respond," and "[t]his pressure to respond 'is particularly apparent when," as in *Masterpiece Cakeshop*, "the owner has taken a position opposed to the view being expressed" through his artistic creations.[245] CADA therefore violates the First Amendment by putting Masterpiece in the position where it "might well feel compelled to reply."[246]

The lower court's other proposed solution of having Masterpiece stop making custom wedding cakes fares no better. The government cannot compel an individual or a for-profit business to "limit its own speech in response to" the expressive activity of others whom the government wants to support or promote.[247] The limitation on Masterpiece's expression manifests itself in at least two ways. First, as noted above, to comply with CADA, the lower court states that Masterpiece must design and create wedding cakes for same-sex couples if it wants to create such cakes for heterosexual couples: "[CADA] includes a requirement that Masterpiece sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner."[248] Based on his religious beliefs, Mr. Phillips "believes . . . that he would displease God by creating cakes for same-sex marriages" and therefore "[does] not make wedding cakes for same-sex weddings. . . ."[249] As a result, to comport with CADA and his religious beliefs, Mr. Phillips must stop designing and creating wedding cakes for heterosexual couples. If the lower court's analysis is upheld, Masterpiece will be forced to "contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views."[250] Confronted with this possibility,

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245. *Id*. at 15–16 (quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 (1980)).

246. *Pac. Gas*, 475 U.S. at 11 n.7.

247. *Id*.

248. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 286 (Colo. App. 2015).

249. *Id*. at 276–77.

250. *Pac. Gas*, 475 U.S. at 14. For example, if Masterpiece designs a custom cake for a Christmas celebration, the lower court's reasoning would require it to design a Halloween cake for a Wiccan or a pagan. After all, CADA prevents public accommodations from discriminating based on "creed" as well as "sexual orientation." COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2014). Yet Mr. Phillips refuses to "design cakes that celebrate Halloween" because participating in the celebration of such an event would be "at odds with his religious beliefs." Brief for Petitioners at 19,

Masterpiece "'might well conclude' that, under these circumstances, 'the safe course is to avoid controversy,' thereby reducing the free flow of information and ideas that the First Amendment seeks to promote."[251] The First Amendment prevents the government from chilling speech in this way, through the application of public accommodations laws or otherwise.[252]

Second, CADA also restricts Masterpiece's expression because it prevents the bakery from conveying its desired message in support of heterosexual marriage through a disclaimer posted in the store or online. Given his religious beliefs, Mr. Phillips does not approve of same-sex marriage and does not believe that his expression should be used to help celebrate such a union.[253] As the lower court recognizes, though, CADA does not permit Masterpiece to convey this message regarding same-sex marriage: "We recognize that section 24-34-601(2)(a) of CADA prohibits Masterpiece from displaying or disseminating a notice stating that it will refuse to provide its services based on a customer's desire to engage in same-sex marriage or indicating that those engaging in same-sex marriage are unwelcome at the bakery."[254] The court suggests that Masterpiece could "post[] a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA."[255] This disclaimer, though, neither conveys Masterpiece's desired message nor removes the need to

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Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 2017 U.S. LEXIS 6437 (2017) (No. 16-111). Thus, under the lower court's order, Masterpiece may be required "to help disseminate hostile views" on a range of issues and, consequently, stop its expression on all of those topics or events. *Pac. Gas*, 475 U.S. at 14.

251. *Pac. Gas*, 475 U.S. at 14 (quoting Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974)).

252. *See* United States v. Alvarez, 567 U.S. 709, 723 (noting that the Court cannot permit the government to "chill" speech "if free speech, thought, and discourse are to remain a foundation of our freedom").

253. *See Pac. Gas*, 475 U.S. at 15 n.12 (explaining that a state is not "free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views").

254. *Masterpiece Cakeshop*, 370 P.3d at 288. The second half of this quote mischaracterizes Masterpiece's position. As the lower court notes earlier in its opinion, Mr. Phillips expressly told Mr. Craig and Mr. Mullins "that he would be happy to make and sell them any other baked goods." *Id*. at 276. Accordingly, Masterpiece's desired message is not that same-sex couples are not welcome in the bakery but that given his religious views, Mr. Phillips will not create a custom wedding cake for the wedding. And CADA precludes this desired message.

255. *Id*. at 288.

respond.[256] And even if Masterpiece wants to reply, CADA impermissibly limits Masterpiece's expression. Masterpiece cannot express its actual position on same-sex marriage, being limited to posting a diluted message that describes the effect of CADA (e.g., "CADA requires [Masterpiece] not to discriminate on the basis of sexual orientation and other protected characteristics"[257]) instead of its own views.

When applied to expression, therefore, CADA violates a business's "right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents."[258] Applying public accommodations laws to the expression of for-profit businesses (whether the underlying message is that of the entity creating the expression or of the person paying the business to create it) favors the speech of those covered by such laws by requiring businesses either to help disseminate a message with which they disagree or to cease using their art and skill to express their own views. Stated differently, CADA violates the First Amendment because it "identifies a favored speaker 'based on the identity of the interests that [the speaker] may represent' and forces the speaker's opponent . . . to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of the disfavored speaker."[259]

B. Hurley Precludes States from Using Public Accommodations Laws to Force For-Profit Businesses to Engage in Speech with which They Disagree Or to Remain Silent, Thereby Giving Up Their Right to Communicate Their Desired Message

To avoid the conclusion that public accommodations laws unconstitutionally interfere with the expression of for-profit businesses, the lower courts unsuccessfully try to distinguish the Court's compelled speech cases. Toward this end, *Masterpiece*

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256. *See Pac. Gas*, 475 U.S. at 15 n.11 (plurality opinion): "The presence of a disclaimer on TURN's messages does not suffice to eliminate the impermissible pressure on appellant to respond to TURN's speech. The disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant. It does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN's message."

257. *Masterpiece Cakeshop*, 370 P.3d at 288.

258. *Pac. Gas*, 475 U.S. at 14 (quoting Buckley v. Valeo, 424 U.S. 1, 49 n.55 (1976)).

259. *Pac. Gas*, 475 U.S. at 15 (quoting Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784).

Cakeshop and *Elane Photography* make much of *Hurley*'s statement that public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments."[260] The reason for this is straightforward. On their face, public accommodations laws typically focus "on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds."[261] In the wedding context, for example, public accommodations laws apply to hotels that rent rooms to family members and guests, banquet halls that host wedding receptions, a restaurant that serves the wedding party at the rehearsal dinner, limousines that drive the wedding party to and from the scheduled events, a caterer that provides the food at the reception, and the airline that flies the couple to their honeymoon destination.

But *Hurley* makes clear that antidiscrimination laws may be "applied in a peculiar way"—i.e., applied to the expressive content of a group or business—and that First Amendment protections are triggered under such circumstances.[262] If application of a public accommodations law "target[s] speech" or "discriminate[s] on the basis of its content," then "the statute ha[s] the effect of declaring the sponsors' speech itself to be the public accommodation."[263] As *Hurley* instructs, using public accommodations laws in this way "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[264]

The facts in *Hurley* and *Masterpiece Cakeshop* highlight the different ways public accommodations laws can be applied: to a business's conduct and to its expression. The disagreement between GLIB and the parade organizers did not involve "the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade."[265] No members of GLIB alleged that the parade organizers excluded homosexual individuals from marching as part of an approved parade group, and the organizers disclaimed any such intent to exclude.[266] Similarly, Masterpiece denied any "intent to exclude homosexuals as such,"[267] declining the request to make a

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260. Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 572 (1995).

261. *Id.*

262. *Id.*

263. *Id.* at 572–73.

264. *Id.* at 573.

265. *Id.* at 572.

266. *Id.*

267. *Id.*

wedding cake for a same-sex marriage but stating that the bakery "would be happy to make and sell [the couple] any other baked goods."[268]

The problem in *Hurley* arose only when GLIB sought to participate in the parade organizers' speech activity by marching in the parade under its own banner.[269] Applying the Massachusetts law to the selection of participants forced the parade organizers "to alter the expressive content of their parade" and transferred authority over the message conveyed to "all those protected by the law who wished to join in with some expressive demonstration of their own."[270] Because the parade was expressive, the parade organizers had the right "to choose the content of [their] own message" and to "decide 'what not to say.'"[271]

Given that "*all* speech inherently involves choices of what to say and what to leave unsaid," the Court's holding is not restricted to parades.[272] Rather, the First Amendment shelters all forms of expression, including (as discussed above) wedding cakes, photographs, speeches, paintings, and music.[273] When public accommodations laws are applied to "the sponsors' speech itself," they violate the "fundamental rule" that the government cannot control "the choice of a speaker not to propound a particular point of view."[274] The government "may not burden the speech of others in order to tilt public debate in a preferred direction."[275] And this is true even if the

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268. Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 276 (Colo. App. 2015); Elane Photography v. Willock, 309 P.3d 53, 61 (N.M. 2013) (noting that the photography studio stated that "it would have taken portrait photographs and performed other services for same-sex customers, so long as they did not request photographs that involved or endorsed same-sex weddings"); Washington v. Arlene's Flowers, Inc., 389 P.3d 543, 550 (Wash. 2017) (stating that the flower shop "has served gay and lesbian customers in the past for other, non-wedding-related flower orders").

269. *Hurley*, 515 U.S. at 572.

270. *Id*. at 572–73.

271. *Id*. (quoting Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal., 475 U.S. 1, 16 (1986) (plurality opinion)).

272. *Pac. Gas*, 475 U.S. at 11 (plurality opinion) (emphasis in original).

273. *Hurley*, 515 U.S. at 569 (explaining that "the Constitution looks beyond written or spoken words as mediums of expression" to include "symbolism"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) (confirming that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" with the method of communication used).

274. *Hurley*, 515 U.S. at 573, 575.

275. Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011).

speaker expresses views that might "stir people to action," "move them to tears," or "inflict great pain."[276]

The Colorado Court of Appeals did the same thing that the lower court did in *Hurley*—treated the bakery's expression as the public accommodation. Specifically, the court targeted Masterpiece's speech activity. In ordering Masterpiece to either create wedding cakes for same-sex couples or stop making wedding cakes altogether, the lower court infringed the bakery's right "to choose the content of [its] own message" as well as its right to "decide 'what not to say.'"[277] The court impermissibly required Masterpiece to "becom[e] the courier for . . . a message" with which it disagrees and undermined its right to "refuse to foster . . . an idea [it] find[s] morally objectionable."[278]

In so doing, the court disregarded *Obergefell*'s assurance that, given the "ongoing dialogue" surrounding same-sex marriage, "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."[279] Masterpiece and Elane Photography sought to do just that—witness to their religious convictions by not condoning same-sex marriage in and through their expressive works: "Elane Photography explains that it 'did not want to convey through [Huguenin]'s pictures the story of an event celebrating an understanding of marriage that conflicts with [the owners' religious] beliefs.'"[280] The parade organizers in *Hurley* did likewise, "clearly decid[ing] to exclude a message it did not like from the communication it chose to make," which was "enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."[281]

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276. Snyder v. Phelps, 562 U.S. 443, 460–61 (2011). *See also* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Hurley*, 515 U.S. at 574 (confirming that the First Amendment protects expressive activities that private citizens—or the government—might think "are misguided, or even hurtful").

277. *Hurley*, 515 U.S. at 573 (citation omitted).

278. Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977).

279. Obergefell v. Hodges, 135 S. Ct. 2584, 2597, 2607 (2015).

280. Elane Photography v. Willock, 309 P.3d 53, 61 (N.M. 2013) (internal punctuation omitted); Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. App. 2015) ("Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission's order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs.").

281. *Hurley*, 515 U.S. at 574.

If upheld, the lower court's order will empower states to "compel affirmance of a belief with which the speaker disagrees," whenever the speaker is a public accommodation.[282] A Christian baker will be required to design and produce a wedding cake for a same-sex ceremony, a Jewish choreographer will have to stage a dramatic Easter performance, a Catholic singer will be required to perform at a marriage of two divorcees, and a Muslim who operates an advertising agency will be unable to refuse to create a campaign for a liquor company. States also will be able to dictate the content of expressive works by writers, painters, musicians, and photographers. Yet requiring any of these businesses to convey messages with which they disagree "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,"[283] including control through the noble guise of a public accommodations law.

The lower courts' attempts to distinguish *Hurley* are unavailing. *Masterpiece Cakeshop* and *Elane Photography* focus primarily on two features of *Hurley*: (1) the "inherent expressiveness" of parades as compared to the lack of expressiveness in operating a for-profit business[284] and (2) *Hurley*'s conclusion "that spectators would likely attribute each marcher's message to the parade organizers as a whole," whereas observers would not attribute the wedding cake's message to the bakery.[285]

With respect to the first distinction, the "inherent expressiveness" of a parade was not dispositive in *Hurley*.[286] *Hurley* and the other compelled speech cases focus on the rights of the speaker, not on creating a taxonomy of types of expression. *Hurley* mandates First Amendment protection whenever the state "violates the fundamental rule . . . that a speaker has the autonomy to choose the content of his own message,"[287] i.e., whenever the state attempts to "restrict [a speaker's] speech to certain topics or views or to force [a speaker] to

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282. *Id*. at 573.

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

284. *See Masterpiece Cakeshop*, 370 P.3d at 287 ("Central to the Court's conclusion was the 'inherent expressiveness of marching to make a point.'"); *Elane Photography*, 309 P.3d at 68 ("While photography may be expressive, the operation of a photography business is not.").

285. *Masterpiece Cakeshop*, 370 P.3d at 287.

286. *Hurley*, 515 U.S. at 568.

287. *Id*. at 573. *See also id*. at 580 (quoting Pac. Gas & Electric, 475 U.S. at 12) (explain that in *PruneYard* "[t]he principle of speaker's autonomy was simply not threatened" because "'the owner did not even allege that he objected to the content of the pamphlets'").

respond to views that others may hold."[288] Baking may not be inherently expressive. Doughnuts, bagels, cookies, and breads usually are made for people to eat, just as people may march for no other reason than "to reach a destination."[289] But when someone asks a cake artist to design and decorate a cake for a specific occasion (such as a wedding), the cake is meant to do more than give attendees something to eat; it celebrates and promotes the importance of the event. Accordingly, some baking *is* expressive, just like some marching is, and the government cannot use public accommodations laws to force businesses to create such expressive works for government-preferred customers.

In the photography context, for instance, who the client is goes a long way towards determining the content of the work, namely, which events will be captured or whose portrait will be taken.[290] Even if a picture is not worth 1,000 words, it says a lot—about a person, a location, or an event. Clients rely on the photographer to use her creativity and judgment with respect to, among other things, the framing of the scene or portrait, lighting, background, positioning, color, exposure, saturation, editing, and cropping to properly capture the personality and beauty of a person or the dignity and celebratory nature of an event.[291] Applying antidiscrimination laws to require a photographer to create such expressive works (like a wedding album) impermissibly infringes on a photographer's "right . . . to hold a point of view different from the majority"[292] and enlists her to disseminate a government-mandated message. To avoid this threat to the marketplace of ideas, the First Amendment shields all forms of expression, not just those that are "inherently expressive."

The lower court's second attempt to distinguish *Hurley*—based on a reasonable observer's sense of who is speaking—conflicts with the

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288. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 11 (1986) (plurality opinion).

289. *Hurley*, 515 U.S. at 568.

290. *See* Regan v. Time, Inc., 468 U.S. 641, 648 (1984) (striking down part of a statute that prohibited photographic reproductions of currency and recognizing that "the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers").

291. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) (determining that photographs constitute protected expression for copyright purposes because they are the culmination of the photographer's various creative decisions); Schrock v. Learning Curve Intern., Inc., 586 F.3d 513, 519 (7th Cir. 2009) (concluding that photographs qualified as expression under copyright law given the "artistic and technical choices" of the photographer).

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

Court's compelled speech precedents in three distinct ways. First, the Colorado court never mentions, let alone tries to reconcile its interpretation with, *Hurley*'s "fundamental rule" that "a speaker has the autonomy to choose the content of his own message."[293] This autonomy is inconsistent with predicating First Amendment protection on a reasonable observer. The Colorado court concluded that creating a wedding cake was not expressive conduct, in part because "[t]he public has no way of knowing the reasons supporting Masterpiece's decision to serve or decline to serve a same-sex couple."[294] Similarly, in *Arlene's Flowers*, the Washington Supreme Court emphasized that "an outside observer may be left to wonder whether a wedding was declined for one of at least three reasons: a religious objection, insufficient staff, or insufficient stock."[295]

As *Hurley* explains, though, a speaker is entitled to First Amendment protection "whatever the reason" may be why the speaker does not want "to propound a particular point of view, and that choice"—to speak or to remain silent on an issue—"is presumed to lie beyond the government's power to control."[296] The First Amendment shields the speaker's decision, not a third party's interpretation of that decision. In fact, *Hurley* confirms that the First Amendment safeguards expression from governmental control even when an observer *may not* be able to discern a specific meaning of or reason for the speech activity: "a narrow, succinctly articulable message is not a condition of constitutional protection."[297] The expressive nature of Jackson Pollock's paintings, Arnold Schöenberg's music, and Lewis Carroll's verse was not predicated on a reasonable observer's ability to identify the reasons each person created his works or to articulate a particularized message of those works.[298] The First Amendment embraces the artistic and creative content of the author regardless of the audience's interpretation.

Moreover, the Supreme Court cases on which the Colorado court relies to support its contention that observers must "understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a celebratory message about same-sex marriage" are readily

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293. *Hurley*, 515 U.S. at 573 (emphasizing that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'").

294. Craig v. Masterpiece Cakeshop, 370 P.3d 272, 287 (Colo. App. 2015).

295. State of Washington v. Arlene's Flowers, Inc., 389 P.3d 543, 557 (2017).

296. *Hurley*, 515 U.S. at 575.

297. *Id.* at 569.

298. *Id.*

distinguishable.[299] The Colorado court cites *Rosenberger* and *PruneYard* for the proposition that the First Amendment does not apply when "observers [are] not likely to attribute speakers' message to" the University of Virginia or the owner of the shopping center, respectively.[300] These cases offer no support for the lower court's holding in the context of expressive public accommodations, such as Masterpiece because neither the University of Virginia nor the mall owner engaged in speech activity. In *Rosenberger*, the Court determined that the University had created a limited forum "to encourage a diversity of views from private speakers" and had "taken steps to ensure the distinction" between "the private speech of students" and "the University's own favored message."[301] Because the students were speaking (and not the University), the University could not discriminate based on the religious viewpoint of the student group.

Similarly, the Court concluded that "[t]he principle of speaker's autonomy was simply not threatened in" *PruneYard* and *Turner Broadcasting*.[302] Unlike Masterpiece and Elane Photography, which expressly stated their opposition to creating expression that celebrated same-sex marriage, in *PruneYard* there was no "concern that access to this [public] area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets."[303] Likewise, the cable operator in *Turner Broadcasting* served as "a conduit for broadcaster signals" instead of a speaker.[304] In fact, the Court noted that broadcasters frequently "disclaim[ed] any identity of viewpoint between the management and the speakers who use the broadcast facility," reinforcing the fact that the cable operator was not engaged in speech activity.[305] Accordingly, because the University, the mall owner, and cable operator were not engaged in speech activity, their "right to autonomy over the message" was not implicated, let alone compromised.[306]

Second, having a reasonable observer determine whether a business can claim the protection of the First Amendment is

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299. *Masterpiece Cakeshop*, 370 P.3d at 287.

300. *Id.*

301. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

302. *Hurley*, 515 U.S. at 580.

303. Pac. Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 12 (1986) (plurality opinion).

304. Turner Broad., Inc., v. FCC, 512 U.S. 622, 655 (1994).

305. *Id.*

306. *Hurley*, 515 U.S. at 576.

inconsistent with *Pacific Gas*. Under *Pacific Gas*, a speaker retains the right not to carry someone else's speech even when a reasonable observer knows that the message does not belong to the speaker.[307] TURN, the organization that was granted access to the unused space in the utility company's envelopes, was required to include a disclaimer stating that it was expressing only its own views. The plurality still found a First Amendment violation because "[t]he disclaimer serves only to avoid giving readers the mistaken impression that TURN's words are really those of appellant."[308] The disclaimer did "nothing to reduce the risk that [Pacific Gas] will be forced to respond when there is strong disagreement with the substance of TURN's message."[309]

Pacific Gas, therefore, establishes an important corollary to the general rule that a speaker has the right to speak or to refrain from speaking: if compelled speech might force a speaker to respond to the unwanted message, the First Amendment is violated regardless of to whom an observer would attribute the message. The fact that an observer might misattribute the message increases the chance that a business may need to respond to the compelled speech to ensure that its message is not misunderstood or distorted.[310] For example, if, as the Colorado court contends, CADA requires Masterpiece to design and create wedding cakes for same-sex couples and observers will not be able to determine the bakery's views,[311] Masterpiece "may be forced to respond" to ensure that its sincerely held religious beliefs regarding marriage are not confused with its customers' views. And "[t]his pressure to respond 'is particularly apparent when the owner has taken a position opposed to the view being expressed on his

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307. PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 100 (1980) (Powell, J. concurring) ("[T]he right to control one's own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner." (cited in *Pac. Gas*, 475 U.S. at 12 (plurality opinion)).

308. *Pac. Gas*, 475 U.S. at 12 (plurality opinion).

309. *Id*. at 15 n.11 (plurality opinion); *see id*. at 11 (plurality opinion) ("[T]he State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold."); *id*. at 18 (stating that "[s]uch forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent").

310. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 577 (1995) (recognizing the threat of misattribution "[w]ithout deciding on the precise significance of the likelihood of misattribution").

311. Craig v. Masterpiece Cakeshop, 370 P.3d 272, 287 (2015).

property.'"[312] Masterpiece's opposition to celebrating same-sex weddings through its custom cakes is well-known. If Masterpiece is compelled to go against its sincerely held religious beliefs, the need to respond may increase, which is yet another reason why the First Amendment shields public accommodations from having to respond to unwanted or inconsistent messages.[313]

If a for-profit business does not want to speak or respond, the court below offers the business an alternative: stop offering its creative works to anyone who wants to get married.[314] On this view, silence cures the CADA violation. The problem is that compelled silence is unconstitutional: "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[315] Speech prohibitions, like speech compulsions, constitute content-based regulations of speech and are unconstitutional for the same reason: they prevent a speaker from determining the content of its desired message.[316] To the extent CADA requires Masterpiece to cease certain expression, it is unconstitutional.

Third, recognizing that for-profit businesses receive the protection of the First Amendment does not "undermine all of the protections provided by antidiscrimination laws."[317] Such a dire prediction is unsupported by both the Court's precedents and the history of litigation over public accommodations laws. To qualify for First Amendment protection, a public accommodation must (1) offer goods or services involving expression or expressive activity, (2) engage in expression that an antidiscrimination law interferes with (or wish to refrain from sending a message mandated by the law), and (3) be willing to lose business from the specific customers who are refused

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312. *Pac. Gas*, 475 U.S. at 14–15 (plurality opinion) (quoting *PruneYard*, 447 U.S. at 100 (Powell, J., concurring)).

313. *See Pac. Gas*, 475 U.S. at 11 ("[T]he State is not free either to restrict appellant's speech to certain topics or views or to force appellant to respond to views that others may hold."); *id*. at 18 (stating that "[s]uch forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent").

314. *Masterpiece Cakeshop*, 370 P.3d at 286 (stating that, under CADA, Masterpiece must "sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner").

315. Riley v. Nat'l Fed. of the Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988).

316. *Hurley*, 515 U.S. at 573; Wooley v. Maynard, 430 U.S. 705, 714 (1977).

317. Elane Photography, LLC v. Willock, 309 P.3d 53, 72 (N.M. 2013).

service as well as from others who no longer wish to support the business given its views relating to members of a protected class. Each of these considerations limits the number of businesses that could—or would—object to public accommodations laws on First Amendment grounds. Although some businesses are involved in expressive activities, many more are not. And for every business that decides not to engage in expression related to members of a protected class, many more will.[318]

The relatively few First Amendment challenges to public accommodations laws that have been working their way through the courts bear this out. Although some bakers, photographers, and florists may challenge public accommodations laws, thousands more of these businesses have not. In this way, the marketplace of ideas is self-regulating. The free speech exception to antidiscrimination laws is limited only to those who engage in expression and object to promulgating a particular government-favored message, which ensures that members of protected classes have ready access to the type of expressive goods and services protected by the First Amendment. In the rare situation where there is no such access, where every baker or photographer in an area declined to create cakes or wedding albums, the government may be able to satisfy strict scrutiny.[319] Absent that showing, however, the fact that some—or even many—individuals find the refusal to create expression for members of a protected class wrong or misguided does not obviate the protection of the First Amendment. Rather, as the Court concluded in *Hurley*, such objections confirm the need for First Amendment protection: "[T]he law . . . is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[320]

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318. *See*, *e.g.*, State of Washington v. Arlene's Flowers, 389 P.3d 543, 549 (2017) (noting that the florist gave the respondent "the name of other florists who might be willing to serve him" and that "a handful of florists offered to provide their wedding flowers free of charge").

319. *See*, *e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

320. *Hurley*, 515 U.S. at 579.

C. The Supreme Court's Expressive Association Cases Confirm that the First Amendment Shields Organizations and Businesses from Public Accommodations Laws that Interfere with Their Expressive Activity

The unanimous Court in *Hurley* concluded its First Amendment analysis by contrasting the application of Massachusetts's public accommodations law in the parade context with the application of a New York antidiscrimination statute to an expressive association.[321] The difference in outcome between the two cases had nothing to do with the "inherent expressiveness" of a parade or to whom an observer would attribute a message. Instead, *Hurley* instructed that, while "the expressive associational character of a dining club . . . [was] sufficiently attenuated to permit application of the law," the club retained the First Amendment right to exclude "those whose views were at odds with positions espoused by the general club membership."[322] The First Amendment protected the club's right to engage in expressive association; it just so happened that in *New York State Club Ass'n* "compelled access to the benefit . . . did not trespass on the organization's message itself."[323]

In contrast, the forced inclusion of GLIB did interfere with the parade organizers' chosen message. In fact, the Court held that even assuming the parade was a public accommodation, "GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."[324] Thus, rather than establishing a rule "peculiar" to its facts, *Hurley* established the general rule that "[d]isapproval of a private speaker's statement does not legitimize use of the [State's] power to compel the speaker to alter the message by including one more acceptable to others."[325]

Connecting the Court's compelled speech and expressive association cases is appropriate, therefore, because both are predicated on the First Amendment principle articulated in *Hurley* and quoted in *Dale*: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with

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321. *See* New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 20 (1988).

322. *Hurley*, 515 U.S. at 580.

323. *Id.*

324. *Id.* at 580–81.

325. *Id.* at 581.

speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[326] Under both lines of cases, a speaker (whether an expressive association or a public accommodation engaged in expression) retains "the right to speak and the right to refrain from speaking at all,"[327] without governmental "interference with a speaker's desired message."[328]

That this principle governs in both contexts also is apparent from the Court's more recent expressive association cases, *Roberts v. U.S. Jaycees* and *Dale*. These cases make clear that, just as speakers have the right to speak and the complementary right not to speak, the "[f]reedom of association . . . plainly presupposes a freedom not to associate."[329] Requiring an expressive association to accept members that it does not want "may impair the ability of the original members to express only those views that brought them together."[330] Consistent with *New York State Club Ass'n*, *Roberts* acknowledges that an expressive association can invoke the protection of the First Amendment when the compelled inclusion of a member "will impede the organization's ability to engage in these protected activities or to disseminate its preferred views."[331] Applying the Minnesota public accommodations law to require the Jaycees to accept women members did not implicate the First Amendment because the Jaycees "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association."[332] Because allowing women as members did not interfere with the Jaycees' advocating and promulgating its desired message, *Roberts* upheld application of Minnesota's public accommodations law.[333]

Dale reinforces that public accommodations laws violate the First Amendment when they interfere with a speaker's autonomy over the content of its own message. Unlike the antidiscrimination law in *Roberts*, New Jersey's public accommodations law did violate the Boy

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326. *Hurley*, 515 U.S. at 579 (quoted in Boy Scouts of Am. v. Dale, 530 U.S. 640, 661 (2000)).

327. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

328. Rumsfeld v. Forum for Acad. and Inst. Rights, Inc., 547 U.S. 47, 64 (2006).

329. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

330. *Id*.

331. *Id*. at 627.

332. *Id*. at 626.

333. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000) ("But in [*Roberts*] we went on to conclude that the enforcement of [public accommodations] statutes would not materially interfere with the ideas that the organization sought to express.").

Scouts right of expressive association. In reaching this conclusion, the Court relied heavily on *Hurley*:

> As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.[334]

Under *Dale*, an association need not associate "for the 'purpose' of disseminating a certain message" to qualify for First Amendment protection; it "must merely engage in expressive activity that could be impaired in order to be entitled to protection."[335] The same is true, *a fortiori*, for businesses that engage in expression. A business need not be formed for the "purpose" of promulgating a specific message on a specific topic (just like the Boy Scouts was not formed to convey a message about homosexuality) to qualify for First Amendment protection; all it must do is engage in expression with which an antidiscrimination law interferes. Thus, First Amendment protection is triggered whenever a public accommodations law "interfere[s] with" or "impair[s]" the chosen message of an expressive association or business. [336]

If a business provides non-expressive goods or services to the public (such as stock photographs of nature or doughnuts, cakes, and cookies that are for sale to all customers), the First Amendment may not shelter the sale of such goods or services because compelled access would not interfere with any message the business sought to communicate. However, when a public accommodations law requires a business "to propound a particular point of view," the First Amendment "shield[s]" the speaker's "choices of content."[337] If a customer seeks to express a view that "trespass[es] on the [for-profit business's] message," that customer "could nonetheless be refused" service "just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."[338] The choice of content, "be it of the popular

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334. *Id.* at 654.

335. *Id.* at 655.

336. *Id.* at 654, 655 (discussing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 579 (1995)).

337. *Hurley*, 515 U.S. at 575.

338. *Id.* at 580–81.

variety or not," is directly undermined when public accommodations laws are applied to require for-profit businesses either to speak the government's desired message or to remain silent.[339]

To the extent a state seeks to apply its public accommodations law to expressive activity to "produce a society free of the corresponding biases" against members of the protected classes, "it is a decidedly fatal objective."[340] If courts can prevent bakeries, photographers, florists, painters, musicians, writers, and other artists from expressing their views on certain issues and policies (such as same-sex marriage, gender relations, religion, etc.), then social discourse may become more neutral toward members of protected classes, thereby removing the need for courts to step in and correct aberrant or disfavored expression. But this outcome is possible only if the courts jettison the well-established First Amendment protections that preclude using "a noncommercial speech restriction . . . to produce thoughts and statements acceptable to some groups or, indeed, all people."[341] Under the Court's compelled speech and expressive association cases, the government "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."[342] This limit on governmental authority applies to important and controversial issues, such as same-sex marriage, as well as mundane topics because the larger societal values of the First Amendment can be advanced only if the "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons."[343]

III. *RUMSFELD* DOES NOT INSULATE ANTIDISCRIMINATION LAWS FROM FIRST AMENDMENT CHALLENGE

In *Masterpiece Cakeshop*, the Colorado court invokes *Rumsfeld* to support its claim that the bakery "does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally."[344] The law schools in *Rumsfeld* challenged the Solomon Amendment's requirement that they treat

339. *Dale*, 530 U.S. at 660.

340. *Hurley*, 515 U.S. at 578–79.

341. *Id*. at 579.

342. *Id*.

343. *See* Cohen v. California, 403 U.S. 15, 25 (1971) (quoting Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting)).

344. Craig v. Masterpiece Cakeshop, 370 P.3d 272, 286 (Colo. App. 2015).

military and non-military recruiters alike, arguing that this requirement "compelled them to send 'the message that they see nothing wrong with the military's policies [regarding gays in the military], when they do.'"[345] The court below correctly noted that *Rumsfeld* rejected this argument but instead of analyzing the Court's reasoning, relied on *Rumsfeld*'s observation "that students 'can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so.'"[346] Based on this quote, the court concluded that "because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation . . . a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs."[347]

Elane Photography invokes *Rumsfeld* for a similar proposition—that the NMHRA does not require the regulated businesses to affirm any belief but only to "provide [its] services without regard for race, sex, sexual orientation, or other protected classifications."[348] On this view, New Mexico's law regulates conduct (to whom a business must offer its services) and any impact on expression is incidental. Drawing on *Rumsfeld*, the court concludes that "Elane Photography is compelled to take photographs of same-sex weddings only to the extent that it would provide the same services to a heterosexual couple."[349] If Masterpiece does not want to make wedding cakes for same-sex couples, it simply can stop making all wedding cakes.

Contrary to the lower courts' suggestion, *Rumsfeld* does not support the holdings in *Masterpiece Cakeshop* and *Elane Photography*. Rather, *Rumsfeld* mandates the opposite result because it adopts the same rule as *Hurley*—that the First Amendment is violated when "the complaining speaker's own message [is] affected by the speech it [is] forced to accommodate."[350] *Rumsfeld* then confirms that the government violated the First Amendment for the same reason in *Tornillo* and *Pacific Gas*: "interference with a speaker's desired message."[351] In *Tornillo*, the interference resulted

345. *Id*. (quoting Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 65 (2006)).

346. *Masterpiece Cakeshop*, 370 P.3d at 286.

347. *Id*.; *see also* State v. Arlene's Flowers, 389 P.3d 543, 557 (Wash. 2017).

348. Elane Photography, LLC v. Willock, 309 P.3d 53, 65 (N.M. 2013).

349. *Id*.; *Rumsfeld*, 547 U.S. at 62 (stating that the law schools' speech related to military recruiters was "only 'compelled' if, and to the extent, the school provide[d] such speech for other recruiters").

350. *Rumsfeld*, 547 U.S. at 63.

351. *Id*. at 63–64.

from the right-of-reply statute, which "infringed the newspaper editors' freedom of speech by altering the message the paper wished to express."[352] Similarly, in *Pacific Gas*, "the forced inclusion of the other newsletter interfered with the utility's own message."[353] The Court contrasted these situations with *PruneYard*, in which there was no threat of a speech compulsion. The mall owner had created a type of public forum similar to the Solomon Amendment's equal access policy[354] and like the law schools in *Rumsfeld*, had not engaged in expressive activity.[355] Thus, although there were no compelled speech violations in *Rumsfeld* and *PruneYard*, the Court confirmed that "forced associations that burden protected speech are impermissible."[356] Accordingly, given that the legal rule is the same in *Hurley* and *Rumsfeld*, the difference in outcome is a consequence of the factual differences between the two cases.

The critical distinction is that in *Rumsfeld* the law schools "are not speaking when they host interviews and recruiting receptions."[357] The Solomon Amendment "neither limits what law schools may say nor requires them to say anything;" rather, "[i]t affects what law schools must *do* which is affording equal access to military recruiters."[358] As a result, because the schools were not engaged in speech activity, accommodating military recruiters could not affect or interfere with the law schools' own message. To the extent the law schools were required to engage in any expression, such as sending out emails or posting notices on bulletin boards, such speech "is plainly incidental to the Solomon Amendment's regulation of conduct."[359]

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352. *Id*. at 64.

353. *Id*.

354. Bakeries and photography studios are not quasi-public fora (as in *PruneYard*) nor are they subject to a conduct requirement imposing an open access policy (as in *Rumsfeld*). The businesses have not opened up their speech activity for use by third parties. Rather, they are businesses that design and create their own forms of expression. When applied to the businesses' expression, public accommodations laws appropriate the speech in service of the objectives underlying such antidiscrimination laws, requiring for-profit businesses to condone or promulgate certain messages.

355. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 12 (1986) (plurality opinion) ("Notably absent from *PruneYard* was any concern that access to his area might affect the shopping center owner's exercise of his own right to speak.").

356. *Id*.; *see Rumsfeld*, 547 U.S. at 63.

357. *Rumsfeld*, 547 U.S. at 64.

358. *Id*. at 60 (emphasis in original).

359. *Id*. at 62; Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011) ("It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

In contrast, the expression compelled in *Masterpiece Cakeshop* is the artistic work of the business and its owner. There are not two separate things—the conduct (allowing recruiters on campus) and the incidental speech (making students aware of the recruiters' presence on campus). There is only the design and creation of the custom wedding cake. As a result, the public accommodations laws mandate specific speech—a particular wedding cake for a specific couple—not simply expression that is incidental to some independent conduct requirement.

Although the states' ability to regulate conduct is well-established, *Hurley* and *Rumsfeld* emphasize that the First Amendment restricts the government's ability to regulate speech activity. Consequently, *Rumsfeld*'s claim that the law schools' speech "is only 'compelled' if, and to the extent, the school provides such speech for other recruiters"[360] cannot be taken as a general First Amendment pronouncement that speakers confronted with public accommodations laws must either acquiesce and convey the government's desired message or stop providing their expressive goods or services to non-protected classes of individuals. Instead, *Rumsfeld* confirms the uncontroversial view that law schools do not have a constitutional right to engage in the underlying conduct giving rise to the incidental speech requirement.[361] If the law schools decide to no longer engage in certain conduct (namely, allowing recruiters access to their buildings), then they will not have to "afford equal access to military recruiters" and consequently, will not have to send out emails or post notices on their behalf.[362]

The contrast with for-profit businesses that engage in expression is stark because they do have a constitutional right—the right to "choose the content of [their] own message."[363] *Masterpiece Cakeshop* and *Elane Photography* violate this right by requiring for-profit businesses to either create expression with which they disagree or remain silent and forego creating speech that fosters their own views. But this presents businesses with an unconstitutional Hobson's choice—either acquiesce in a speech compulsion (by carrying the

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360. *Rumsfeld*, 547 U.S. at 62.

361. Gibboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.") (citations omitted).

362. *Rumsfeld*, 547 U.S. at 60.

363. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995).

government-mandated message) or submit to a speech restriction (by refraining from speaking about an important public issue like same-sex marriage). At the same time, businesses that agree with the protection afforded groups listed in the public accommodations laws remain free to express their views without governmental interference. As a result, when applied to speech activity, antidiscrimination laws favor "certain preferred speakers . . . taking the right to speak from some and giving it to others."[364] In so doing, "the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice."[365] Under CADA, Masterpiece loses its right to speak in favor of traditional marriage through its creative works and instead, is required to promote same-sex marriage through the creation of a wedding cake or to get out of the wedding cake business altogether.

Moreover, the breadth of the rule championed by the Colorado court is alarming. If a reasonable observer understands that compliance with a generally applicable law does not reflect the speaker's own views, then *Wooley*, *Barnette*, *Riley*, *Pacific Gas*, and *Tornillo* were all decided wrongly. Observers would have known that New Hampshire forced the Maynards to be a "mobile billboard" and would have understood that displaying "Live Free or Die" was not a reflection of the Maynards' beliefs.[366] The same holds true for the school children in *Barnette*, the fundraisers in *Riley*, the utility company in *Pacific Gas*, and even the newspaper in *Tornillo*. Under the lower court's proposed rule, none of these cases would have involved a compelled speech violation because observers would not have viewed compliance with the law as a reflection of the speakers' own views.

The problem, of course, is that the Court struck down the government regulations in each of these cases because the laws *did* compel speech. The First Amendment violation "resulted from interference with a speaker's desired message,"[367] not an observer's failing to know that a general law required the expressive activity. "[T]he fundamental rule of protection" under the First Amendment—"that a speaker has the autonomy to choose the content of his own message"—would be eviscerated if a reasonable observer's knowledge that a public accommodations law mandated the expression permitted the government to wrest control over the content of a message from

364. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2009).
365. *Id*. at 340–41.
366. Wooley v. Maynard, 430 U.S. 705, 715 (1977).
367. *Rumsfeld*, 547 U.S. at 64.

the speaker.[368] The government could force businesses to speak the government's desired message or to stop conveying a disfavored message simply by passing a public accommodations law.

CADA, therefore, is inconsistent with the First Amendment because it requires for-profit businesses engaged in expression to change their desired message. To comply with the lower court's ruling, Masterpiece and its owner must either speak when they want to remain silent (by making a wedding cake for a same-sex couple) or remain silent when they would prefer to speak (by no longer designing wedding cakes for heterosexual couples). None of the compelled speech cases justify this result. Rather, these cases compel the opposite conclusion because as *Dale* reminds us, the First Amendment protects the "freedom to think as you will and to speak as you think" and "eschew[s] silence coerced by law—the argument of force in worst form."[369]

CONCLUSION

Public accommodations laws serve important functions, targeting discriminatory conduct to ensure access to goods and services in the public sphere. The growing scope of antidiscrimination laws reflects the changing views of the majority in each state, and the Constitution safeguards each state's right to regulate such conduct to advance its interests and to protect its citizens. At the same time, though, the First Amendment shields the right of speakers to express views contrary to the majority. As a result, when a public accommodations law is applied to compel businesses to foster a government-preferred message—that is, "to produce thoughts and statements acceptable to some groups or, indeed, all people"—the law "grates on the First Amendment," "limit[ing] speech in the service of orthodox expression."[370] In fact, "[t]he Speech Clause has no more certain antithesis."[371] Robust First Amendment protection is necessary to protect the marketplace of ideas from even subtle forms of government interference. As *Pacific Gas* explains, if "the government [were] freely able to compel . . . speakers to propound political messages with which they disagree . . . protection [of a speaker's freedom] would be empty,

368. *Id.* (quoting *Hurley*, 515 U.S. at 573).

369. Boy Scouts of Am. v. Dale, 530 U.S. 640, 660–61 (2000) (quoting Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

370. *Hurley*, 515 U.S. at 579.

371. *Id.*

for the government could require speakers to affirm in one breath that which they deny in the next."[372]

The First Amendment limit on public accommodations laws is "strong medicine," but the Founders deemed it necessary to "remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity."[373] Although the Court's laissez-faire approach may at times "stir people to action," "move them to tears," or even "inflict great pain,"[374] "no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[375]

372. Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 16 (1986) (plurality opinion).

373. Cohen v. California, 403 U.S. 15, 24 (1971) (citing *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)).

374. Snyder v. Phelps, 562 U.S. 443, 460-61 (2011). *See also* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (citations omitted); *Hurley*, 515 U.S. at 574 (confirming that the First Amendment protects expressive activities that private citizens—or the government—might think "are misguided, or even hurtful") (citations omitted).

375. *Cohen*, 403 U.S. at 24 (citing *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)).