No. 16-111

In The Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.;
and JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; and DAVID MULLINS,

Respondents.

On Writ Of Certiorari To The Colorado Court Of Appeals

BRIEF OF *AMICI CURIAE* AMERICAN COLLEGE OF PEDIATRICIANS, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, CHRISTIAN MEDICAL AND DENTAL ASSOCIATION, AND THE CHRISTIAN PHARMACISTS FELLOWSHIP INTERNATIONAL IN SUPPORT OF PETITIONERS AND REVERSAL

NIKOLAS T. NIKAS
DORINDA C. BORDLEE
MADELINE MOREIRA
BIOETHICS DEFENSE FUND
3312 Cleary Avenue
Metairie, LA 70002
(504) 231-7234

ROGER G. BROOKS
Counsel of Record
3804 W. Cornwallis Road
Durham, NC 27705
(919) 402-1758
Brooks3804@gmail.com

CATHERINE W. SHORT
LIFE LEGAL DEFENSE FOUNDATION
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether, consistent with the First Amendment, an individual may be compelled, under color of non-discrimination laws, to devote his or her creative efforts to the creation of custom products or services to be used to celebrate an event or relationship that he or she believes, by reason of faith or personal conviction, is immoral.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include four national organizations whose members include physicians, pharmacists, physician assistants, allied healthcare professionals, and medical and pharmacy students. *Amici* and their members share a profound interest in defending the fundamental right of conscience to practice their vocations in accord with their religious beliefs and moral convictions. *Amici* oppose abortion as contrary to historical and Judeo-Christian medical ethics.

Amici medical organizations recognize that the connection between custom-designed wedding cakes and medical rights of conscience may seem remote. On the contrary, however, *amici* urge the Court to consider that how Mr. Phillips' rights of free speech, conscience, and free exercise are treated in the present case is very likely to have rapid and lasting impact on the rights of medical professionals to practice their professions consistently with their consciences and the teachings of their faiths on issues of life and death – or indeed to practice their professions at all. *Amici* include the following:

The **American College of Pediatricians** ("the College") is a national scientific organization of pediatricians and other healthcare professionals dedicated

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to this brief's preparation or submission.

to the health and well-being of children. Formed in 2002, the College is committed to fulfilling its mission by producing sound policy recommendations based upon the best available research, in order to assist parents, and to influence society in the endeavor of child-rearing. The College currently has members in 47 states, and in several countries outside of the United States. Of particular importance to the College is the sanctity of human life from conception to natural death.

The **American Association of Pro-Life Obstetricians and Gynecologists** ("AAPLOG") is the largest organization of pro-life obstetricians and gynecologists in the world. Founded in 1973 and numbering 4,600 members and associates, AAPLOG's mission is to re-affirm these enduring principles: that its members, as physicians, are responsible for the care and wellbeing of both their pregnant woman patient and her unborn child; that the unborn child is a human being from the time of fertilization; that elective disruption/abortion of human life at any time from fertilization onward constitutes the willful destruction of an innocent human being; and that the procedure will have no place in their practice of the healing arts. AAPLOG is simultaneously concerned about the short and long term medical risks of abortion to women's health and well-being, as well as the pressures to participate in or facilitate abortion which are increasingly being brought to bear on individuals in the medical professions by their state and local governments.

The **Christian Medical and Dental Associations** ("CMDA") is a nonprofit national organization of Christian physicians and allied healthcare professionals with over 18,000 members. In addition to its physician members, it also has associate members from a number of allied health professions, including nurses and physician assistants. CMDA provides up-to-date information on the legislative, ethical, and medical aspects of defending conscience in healthcare for its members and other healthcare professionals, as well as for patients, institutions, and students in training. CMDA is opposed to the practice of abortion, which is incompatible with a respect for the sanctity of human life consistent with its members' religious and moral convictions.

Christian Pharmacists Fellowship International ("CPFI") is a nonprofit interdenominational fellowship of Christian pharmacists and pharmacy students. CPFI is greatly concerned about its members' rights of conscience and their ability to exercise those rights in their professional practice. CPFI believes strongly in the sanctity of human life and supports the rights of Christian pharmacists to practice their professions in a manner consistent with their religious and moral convictions. CPFI therefore opposes regulatory efforts to force pharmacists to dispense prescriptions intended to end human life.

SUMMARY OF ARGUMENT

Amici urge that it is inescapable that how this Court treats conscience and religious conviction in the present case will greatly influence how courts, legislatures, regulators and even citizens around the country treat the life-and-death issues of faith and conscience that confront medical professionals.

In *Obergefell*, this Court "emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015). Now, just two years later, Respondents ask this Court to approve an application of state law that would force Mr. Phillips to "condone" same-sex marriage by both his active assistance and his symbolic expression, seriously compromising his ability to "advocate with the utmost, sincere conviction" against such marriages.

Similarly, despite this Court's recognition in *Roe v. Wade*, 410 U.S. 113 (1973), of the widespread existence of "vigorous opposing views" and "seemingly absolute convictions" against abortion "even among physicians," *id*. at 116, and despite the widespread enactment of state and federal conscience protection statutes to ensure respect for those convictions, the decision in *Roe* has led to ironic demands that individual medical professionals *must* perform, assist with, or facilitate abortions, without regard to the teachings of their own faiths, consciences, and convictions.

Amici write to explain how the issues in the present case implicate the fundamental rights of healthcare professionals, and to respectfully urge that the Court should by no means permit any weakening or qualification of well-established protections against compelled speech, and of free exercise.

Jack Phillips of Masterpiece Cake Shop crafts custom wedding cakes. Customers come to Mr. Phillips not for an "off-the-shelf" or mass-produced product, but because of his creative artistry in cake design and decoration. Based on his religious convictions, Mr. Phillips believes that same-sex unions – while legal – are wrong, and he has refused requests to participate in the celebration of such unions by creating wedding cakes for them.

In Section I.A. below, *amici* review the profound and unshakable nature of the conviction held by many medical professionals based on faith, reason, or both, that abortion – while legal – is the taking of human life, and is so severely immoral that they cannot perform, condone, participate in, or facilitate it in any way.

In the present case, the State of Colorado demands that Mr. Phillips apply his artistry to participate in designating as a "marriage" that which his religious faith teaches is not a marriage, and to assist in celebrating something he believes should be taught against rather than celebrated.

Similarly, and as detailed in Section I.B below, despite many state and federal "freedom of conscience" laws passed since *Roe v. Wade*, and despite repeated

and emphatic statements by this Court that should have barred this door, medical professionals such as members of *amici* face increasing demands and even legal requirements that seek to compel them to *speak* to make referrals for abortion, and to *act* to take the life (or assist in taking the life) of "unborn child[ren]," *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007), without regard for the sincere religious or ethical convictions of those professionals that they cannot participate, directly or indirectly, in conduct that terminates a human life.

To force Mr. Phillips to make this cake would threaten a core liberty that is of the greatest possible importance to medical professionals – protection against compelled speech contrary to conscience, including purely symbolic expression. This Court has rejected governmental efforts to compel speech as vigorously as it has rejected efforts to restrict speech. Further, the scope of liberty and protection is no less merely because the compelled (or restricted) speech arises in a commercial or professional setting, or will be compensated. A ruling that permits the State of Colorado to compel Mr. Phillips to devote his artistic talents to designating and celebrating as a "marriage" something his religion teaches him is not a marriage would severely undercut these strong precedents. If this Court sanctions Colorado's efforts to compel symbolic speech connoting approval from Mr. Phillips on this controversial and deeply personal topic, the implications for the rights of medical professionals in the

practice of their professions are clear, and disturbing. (Section II.A.)

This Court's precedents also teach that the state should not be permitted to coerce *amici*'s members to *act* contrary to conscience unless it can (at least) satisfy the test that the requirement furthers a compelling interest by the least restrictive means. This is so notwithstanding the holding in *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), because the laws that make these demands are not (at least as applied) "neutral laws of general applicability," and also because in the case of medical care, the free exercise rights of medical professionals often come tightly entangled or "hybridized" with other protected rights, including First Amendment rights of free expression, and autonomy rights not unlike those this Court has identified with respect to pregnant women, that would be severely violated by forced participation in the abortion and dismemberment of unborn children contrary to conscience. (Section II.B.)

Finally, a restrictive mandate that furthers no cognizable interest of the state at all certainly cannot further a "compelling interest." Critically, seventy-five years of repeated precedent teaches that the state can have *no* cognizable interest, let alone a compelling interest, in protecting individual citizens from "dignitary harm" – that is, from even public criticism, disagreement, and disapproval from other citizens who disagree with their opinions and criticize their choices. Indeed, "if it is the speaker's opinion that gives offense,

that consequence is a reason for according it constitutional protection." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978). It is of the utmost importance that the Court do and say nothing that in any way undermines this core principle of First Amendment law. (Section III.)

ARGUMENT

I. MEDICAL PROFESSIONALS CURRENTLY FACE EFFORTS TO COMPEL SPEECH AND CONDUCT ON MATTERS OF LIFE AND DEATH, IN VIOLATION OF FREEDOM OF SPEECH, CONSCIENCE, AND FREE EXERCISE.

A. The Immovable Object of Conscience

The conflict of conscience and religious conviction directly at issue in the present case will no doubt be detailed by the Petitioner. To make clear the scale of the potential implications of this case for medical professionals, however, *amici* must state without euphemism the conflict of conscience that is most frequently impacting those professionals.

Common sense, medical science,[2] and law all recognize that an "unborn child," *Gonzales*, 550 U.S. at

[2] *See, e.g.*, Keith L. Moore and T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology* (7th ed. 2003) ("Human development begins at fertilization when a male gamete or sperm (spermatozoon) unites with a female gamete or oocyte (ovum) to

160, is a living being from the earliest stages.[3] To deny that this unborn child is *human* life requires fancy semantic footwork – the human fetus or unborn child has no genes but human genes; there is no type of life other than "human" that it could be.[4] Nor can there be any argument but that abortion kills that living being, *Gonzales*, 550 U.S. at 151 – that, indeed, is the goal.[5] Deciding the ethical implications of these facts, however, moves us into the realm of faith, conscience, and moral philosophy.

As adherents of the traditional Christian understanding of the sacred value of every human life, the medical professional members of *amici* organizations – and many other individuals of faith – believe that the infant in the womb is as entitled to life as any of us.

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produce a single cell – a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual.").

[3] *See Gonzales*, 550 U.S. at 128 (recognizing Congress' authority to "show profound respect for the life within the woman"); *id.* at 126 ("By common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb."); *id.* at 139 (recognizing that an abortion procedure begins with a "live fetus").

[4] This common-sense understanding is supported by modern developmental biology establishing that at every phase of human embryonic and fetal development, the unborn child is not a "potential life," but rather an individual human being. *See, e.g.*, William Larsen, *Human Embryology* (3d ed. 2001) (explaining that male and female sex cells "unite at fertilization to initiate the embryonic development of a *new individual*.") (emphasis added).

[5] *See also Gonzales*, 550 U.S. at 140 (doctor's goal is to "ensure the fetus is dead"); *id.* at 136 (doctor may "kill the fetus" by fatal injection rather than by dismemberment).

Individuals sharing this conviction believe that abortion is the willful killing of a human being prohibited by that most ancient and foundational of religious commandments: "Thou shalt not kill." They believe that for even the most difficult problems that can arise in life, "Kill our children" cannot be the right answer. They believe that to facilitate an abortion in any way is "gravely contrary to the moral law."[6]

As this Court is aware, however, categorical condemnation of abortion as immoral is neither original nor unique to the Christian faith. In *Roe v. Wade*, the Court itself quoted the 2500 year old Hippocratic Oath – which it recognized as "the apex of the development of strict ethical concepts in medicine" – which joined abortion to murder and suicide in the oath, "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will

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[6] *See, e.g.*, Catechism of the Catholic Church §2271 ("Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law."), available at http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm (accessed August 21, 2017); *see also* Statement of The Church of Jesus Christ of Latter-Day Saints ("Latter-day prophets have denounced abortion, referring to the Lord's declaration, 'Thou shalt not . . . kill, nor do anything like unto it' *Doctrine & Covenants* 59:6). Their counsel on the matter is clear: Members of The Church of Jesus Christ of Latter-Day Saints must not submit to, perform, encourage, pay for, or arrange for an abortion. Church members who encourage an abortion in any way may be subject to Church discipline."), available at https://www.lds.org/topics/abortion?lang=eng (accessed August 20, 2017).

not give to a woman an abortive remedy." *Roe*, 410 U.S. at 131.

Nor does it require Christian "prejudices" or "animus against women"[7] for a doctor or nurse to conclude that – whatever the law may allow – she can neither advise nor have anything to do with a procedure that intends the death of an "unborn child," and does so by (to confine our descriptions to procedures that remain legal after *Gonzales* and the Partial Birth Abortion Ban Act of 2003) "ripping it apart," *Gonzales*, 550 U.S. at 137, with perhaps "a leg . . . ripped off the fetus" first, then continuing the dismemberment "piece by piece" until the "entire fetal body" has been "removed in parts," *id.* at 135-36, 150. A reasonable medical professional may find the abortion no less abhorrent if the unborn fetus is first killed by direct fatal injection of potassium chloride, *id.* at 136, or alternatively by crushing the infant's skull or "suck[ing] the baby's brains out," *id.* at 139 – still legal, in the case of a head-first presentation, so long as it is done at any stage before "the entire fetal head is outside the body of the mother," *id.* at 142, *quoting* 18 U.S.C. §1531(b)(1)(A).

Religious – or indeed merely ethical and personal – conviction that killing an unborn infant is unalterably wrong obviously involves the most profound moral question possible. It should not be surprising, then,

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[7] *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (recognizing that "there are common and respectable reasons for opposing [abortion]," and "the claim that . . . opposition to abortion reflects an animus against women in general must be rejected.").

that individuals who by faith or reason view abortion as the killing of a human child cannot "just let it go." Similarly, advocating steadily for life *against* law and majority culture, across decades or centuries if necessary, is no new thing for the church, which persistently taught against the longstanding practice in the Roman empire of "exposure" of infants for reasons including sex selection or deformity,[8] and similarly opposed mortal gladiatorial combats across centuries until those "games" were at last outlawed – at considerable personal cost to St. Telemachos, according to the 5th century historian Theodoret![9]

The clash of conscience surrounding abortion is not going to go away. We must find a way to live with it.

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[8] *See, e.g.*, the first century *Didache* Ch. II ("Thou shalt not murder a child by abortion nor kill them when born."), available at https://en.wikisource.org/wiki/Didache_(Lightfoot_translation)#Chapter_2 (accessed August 29, 2017); *see also* St. Jerome's fourth century Letter 22, "To Eustochium" (denouncing those who take drugs to procure abortion, and thus "murder human beings almost before their conception"), available at http://www.ccel.org/ccel/schaff/npnf206.v.XXII.html (accessed August 29, 2017).

[9] According to Theodoret, St. Telemachos rushed into the Roman amphitheater in the late fourth century in a effort to stop a gladiatorial combat, and was stoned to death by the crowds. 5 Theodoret, *Ecclesiastical History* Ch. 26.

B. Today, Health-Care Professionals Are Facing Extreme Pressures to Act Contrary to Conscience and Religious Duty.

Recognizing and respecting that many are profoundly convinced of the "Hippocratic" understanding of pre-born life and abortion, the Federal Government and the States passed large numbers of "right of conscience laws" in the wake of *Roe v. Wade* to protect medical professionals against coercion or discrimination,[10] and for some time a "live and let live" approach largely prevailed for medical professionals. More recently, however, legislation, action by Civil Rights Commissions, and private litigations have all attempted to compel medical professionals to perform or assist with abortions, against conscience and religious obligation. In addition to the examples well known to the Court from the *Hobby Lobby* and *Little Sisters of the Poor* cases:

- By virtue of delegating accreditation to a professional body, Maryland effectively requires that all obstetrics programs must include training in performing abortions. *See St. Agnes Hospital, Inc. v. Riddick*, 748 F. Supp. 319, 328 (D. Md. 1990).

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[10] Extensive lists of Federal and State "right of conscience" laws are collected in Mark Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 120, 148-52 (2012), and Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 77 (Douglas Laycock, et al., eds., 2008), 299-310.

- In 2005, the State of California sued the United States government, challenging the constitutionality of the Hyde-Weldon Amendment to the extent it prevented California from taking disciplinary action against healthcare providers who refuse to provide "emergency abortions." *See California ex rel. Lockyer v. United States*, No. 05-00328, 2008 WL 744840 *1, *6 (N.D. Cal. March 18, 2008) (dismissing case for lack of standing).

- In 2005, the State of Illinois issued regulations requiring all pharmacies to stock and dispense Plan B "morning after" pills, the governor publicly threatened non-complying pharmacists with "loss of professional licenses," and the State issued a press release announcing that the rule would be enforced "vigorously," forcing at least one pharmacy to close because its pharmacist moved out of state. *See Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373, 380-82 (Ill. 2008).

- Massachusetts state law requires all hospitals without exception to provide "morning after" abortifacient pills in cases of rape. Mass. Gen. Laws Ann. ch. 111, §70E(o).

- In 2007, the Pharmacy Board of Washington State enacted regulations that "prohibit pharmacies from providing facilitated referrals if a pharmacy or pharmacist has a conscientious objection

to delivering or dispensing that drug." *Stormans, Inc. v. Selecky*, 854 F. Supp. 2d 925, 933 (W.D. Wash. 2012), *rev'd on other grounds sub nom. Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), *cert. denied Stormans, Inc. v. Wiesman*, 136 S.Ct. 2433, 2434 (2016). The purpose and function of the regulation was to require pharmacists to dispense the Plan B "morning after" or abortifacient pill.

- In 2015, the ACLU sued the Catholic Trinity Health system claiming that its refusal to permit abortions to be performed in its facilities violates the federal Emergency Medical Treatment and Active Labor Act, 42 U.S.C. §1395dd. *See ACLU v. Trinity Health Corp.*, 178 F. Supp. 3d 614, 617 (E.D. Mich. 2016).

- To these legal examples might be added the semi-official force of a formal opinion issued in 2007 by the Committee on Ethics of the American College of Obstetricians and Gynecologists, which expressly asserts that Ob-Gyn physicians must refer patients for abortions, and in some cases perform abortions.[11]

[11] American College of Obstetricians and Gynecologists Committee Op. No. 385, *Limits of Conscientious Refusal in Reproductive Medicine* (2007), available at https://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine (accessed August 28, 2017).

These are just examples visible in the public record; understandably, coercion against conscience or "blackballing" of professionals who are unable to assist with abortions consistent with their religious convictions more often does not make the headlines. However, a substantial number of healthcare professionals have reported personal experiences of pressures to act in violation of their faith or conscience, including threats and reprisals they have experienced, directly to CMDA, or to Freedom2Care, an umbrella organization with which CMDA is affiliated. The large majority of such cases involved abortion. Many resulted in loss of employment or effective exclusion from professional degree programs. The CMDA has collected these individuals' accounts in their own words – along with reports of similar instances of coercion, abuse, and discrimination from other sources – in a report entitled "Real-Life Examples of Discrimination in Healthcare," which CMDA has made publicly available online.[12] To summarize, explicitly because of their conscientious objection to abortion, physicians, nurses, and students have been:

- Denied admission to medical schools;
- Rejected from Ob-Gyn residency programs;
- Told by the assistant director of an Ob-Gyn residency program that it is not

[12] http://www.freedom2care.org/docLib/20100920_Reallifestories.pdf.

possible to be an Ob-Gyn doctor and a Catholic;

- Forced to resign from a family medicine residency;
- Threatened with termination as physicians or nurses.

In short, conscientious objectors to abortion face concerted efforts to change the medical profession's historic Hippocratic oath from "I will not" to "I will," and to bring to bear the full power of the state to force medical professionals to take life contrary to conscience and contrary to religious obligation, on pain of exclusion from the medical profession and loss of their livelihoods – and with the net effect of reducing the number of family and Ob-Gyn medical providers, which can only be negative for women's health and access to care as a whole. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2783, 189 L. Ed. 2d 675 (2014) ("The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation."). *Amici* urge that it is inescapable that how this Court treats conscience and religious conviction in the present case will greatly influence how courts, legislatures, regulators and even citizens around the country treat the life-and-death issues of faith and conscience that confront medical professionals.

II. THE COURT SHOULD RIGOROUSLY PROTECT FREEDOM OF SPEECH AND FREE EXERCISE.

A. The Court Should Adhere to Its Strong Protections Against Compelling Speech.

This Court has been rigorous in insisting that government is no more free to compel speech than it is to restrict it, since both are essential components of "individual freedom of mind." *West Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943).[13] In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Court specifically protected an individual from even relatively passive compelled speech inconsistent with his own religious convictions concerning the value of life, in the form of a requirement that he place on his car a license plate bearing the slogan "Live Free or Die."[14] The government, the Court wrote, cannot compel a citizen to "becom[e] the courier" for a message that is contrary to his faith and conscience. *Wooley*, 430 U.S. at 717. Instead, citizens have a "right to decline to foster . . . an idea that they find morally objectionable." *Id.* at 714.

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[13] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

[14] Mr. Maynard, a Jehovah's Witness, testified that "this slogan is directly at odds with my deeply held religious convictions," which included a conviction that "life is more precious than freedom." *Wooley*, 430 U.S. at 707 n. 2.

Decidedly, the fact that the speech (or compelled speech) takes place in connection with a compensated transaction does not lessen the individual's First Amendment rights, except in certain narrow circumstances involving what has been called "commercial speech" – speech that does no more than "propose a commercial transaction." *See, e.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *compare Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (illustrating that author who writes for money is fully protected by the First Amendment). This narrow exception is relevant neither to the demands relating to abortion currently being made on medical professionals, nor to the facts of the present case. Thus, when a Justice of the New Mexico Supreme Court asserted that "compromis[ing] the very religious beliefs that inspire their lives" upon entering the "world of the marketplace" is the "price of citizenship," *Elane Photography, LLC v. Willock*, 309 P.3d 53, 80 (N.M. 2013) (Bosson, J., concurring), he misunderstood this Court's First Amendment precedents in a critical respect.

The Court has equally made clear that the boundaries around protected expression are expansive, not crabbed, encompassing not just words, but also nonverbal expression. *Barnette*, 319 U.S. at 633 (state cannot require students to salute the flag, as this would "require[] the individual to communicate by . . . sign his acceptance of the political ideas it thus bespeaks"). The protection extends even to abstract artistic expression that conveys no "clear social position" or ideas.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) (pointing to Jackson Pollock's "paint spatter" paintings and the music of Arnold Schöenberg as "unquestionably shielded" by the First Amendment).

1. Compelled Speech and Cake

In the present case, the Colorado Court of Appeals erred at just this point, too quickly concluding that no "expression" could be at issue because Mr. Phillips' refusal to create a cake for the complainants' same-sex marriage took place even before any discussion of design or words that might appear on the cake. *Craig v. Masterpiece Cakeshop, Inc. et al.*, 370 P.3d 272, 288 (Colo. Ct. App. 2015). As discussed above, *any* custom wedding cake (at least any that might be acceptable to a customer!) communicates a message far more intelligible than that of any Jackson Pollock painting – a message of celebration. A message of celebration and blessing is precisely the *point* of a wedding cake – it is not a utilitarian foodstuff. To create a custom and artistic wedding cake is to assist in celebration; by its nature, participation by creation not only assists but *condones* the wedding – something this Court has said that no one can be compelled to do contrary to faith or conscience. *Obergefell v. Hodges*, 135 S.Ct. at 2607. To contribute one's art under state compulsion would in fact be a forced "salute" – a coerced acknowledgment of respect contrary to the teaching of *Barnette*.

There can be no doubt that a publisher has an absolute right to refuse to print "replies" which represent viewpoints which it does not agree with or wish to disseminate. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). It is equally certain that a publisher has an absolute right to refuse to print a racist KKK flyer . . . or a tract against racism, or a "Celebrate Abortion" flyer. It should be equally certain that a sculptor has an absolute right to refuse to craft a statue of Francis Galton ("the father of eugenics"), or a crucifix to be placed in a church . . . or an abstract sculpture to be placed in the lobby of the Trump Hotel – even if creating sculptures for hire is his business, he offers and advertises that service generally, compensation is offered, and the sculptor has never refused any other sort of commission.[15] And finally, it should be equally certain that even an artist who works in the ephemeral medium of icing has a right to refuse to craft a "Happy Divorce" cake, a "Celebrating My Abortion" cake . . . or a "Celebrating My Same-Sex Marriage" cake, whether or not the celebratory design includes any lettering.

Indeed, *amici* respectfully suggest that a ruling requiring Mr. Phillips to design, create, and issue out of

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[15] *Cf. Should designers dress Melania and Ivanka?*, Washington Post, January 12, 2017, available at https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/01/12/should-designers-dress-melania-and-ivanka-the-question-is-more-complex-than-it-seems/?utm_term=.65eea451f95c (accessed August 28, 2017); *Nine artists who reportedly turned down performing at Trump's inauguration*, Business Insider, January 15, 2017, available at http://www.businessinsider.com/artists-who-turned-down-trump-inauguration-2017-1 (accessed August 28, 2017).

his shop a custom wedding cake to be used to celebrate a same-sex wedding would represent an absolutely unprecedented approval of compelled speech contrary to beliefs, and that it is highly unlikely that such a precedent could be confined safely within a fact-specific cage. For this reason, such a ruling would be of the gravest concern to *amici*.

2. Compelled Speech and Death

In the medical field, the problem of speech compelled against conscience is arising most obviously in the form of demands that those who will not perform abortions for reasons of conscience must refer patients to doctors who will. However, once the premise that abortion is killing a child is recognized and respected, it is unsurprising that many "conscientious objectors" do not find referral to be a morally acceptable solution. Arguably, it is the equivalent of a physician who says, "No, I won't poison your wife for you, but let me give you Sam's number. He'll do it." As our law recognizes in many criminal contexts, support and facilitation cannot so easily be differentiated from personal performance. And as this Court recognized in *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014), a religious conviction that even *facilitation* of abortion is immoral is entitled to the same respect and protection as religious conviction against the act itself. *Id.* at 2778; *see also Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715 (1981) ("It is not for us to say that the line he drew was an unreasonable one.").

But the problem of compelled communication is not limited to the problem of referral requirements. Instead, *any* demand that a physician perform or even consider with a pregnant patient whether she will obtain an abortion is a requirement that the physician enter into a physician-patient relationship with the mother – a relationship that Justice Douglas rightly described as "intima[te]," *Doe v. Bolton*, 410 U.S. 179, 219 (1973) (Douglas, J. concurring), and one that will frequently impose obligations of counsel and communication on the physician. If the physician believes that the only moral counsel in such a case is "Do not kill your child," then requiring that physician to enter into a physician-patient relationship for the *purpose* of providing government-mandated abortion services will almost inevitably create additional situations of compelled communication contrary to conscience.

B. This Court's Jurisprudence Condemns Laws Specifically Calculated to Coerce Individuals to Act in Violation of Religious and Conscientious Objections.

In *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), this Court (by Justice Scalia) held that the First Amendment's "free exercise" provision does not require the government to demonstrate a "compelling interest" in order to enforce "neutral laws of general applicability" against those who raise an objection of religious conscience – unless the conduct that is the focus of the free exercise claim comes "in

conjunction with other constitutional protections such as freedom of speech and press," or other constitutionally protected rights such as the parental right "to direct the education of their children," *id.* at 880-82, that was identified as "fundamental" in *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

Whether Justice Scalia's analysis, developed in the context of a claimed right to smoke hallucinogenic peyote, gives the Free Exercise Clause fair weight in all settings is hotly debated, but in any case it is likely irrelevant to both wedding cakes and abortion mandates.

First, while we assume that others will examine this question in detail and in light of the record facts, *amici* will observe that there appear to be strong reasons to doubt that the laws and regulations relevant to those situations are in fact "neutral laws of general applicability" at least as applied – the *purpose* or sole application of such laws is precisely to compel conscientious objectors to fall in line,[16] entirely unlike compulsory education, selective service, health-insurance,

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[16] As Princeton Professor Robert George has written in reference to the ACOG "ethics" opinion discussed in Section I.B *supra*, "The truth is that the physician who refuses to perform abortions or the pharmacist who declines to dispense abortifacient drugs coerces no one. He or she simply refuses to participate in the destruction of human life – the life of the child *in utero*. He is not 'imposing' anything on anyone, just as a sports shop owner who refuses to stock hollow point 'cop killer' bullets, even if he may legally sell them, is not imposing anything on anyone. By

and drug-related laws, each of which have obvious goals directed to important governmental interests to which the existence of conscientious objectors is entirely incidental.

Second, *amici* urge the Court to give careful thought to the fact that, as noted above, in the cases of purveyors of custom services for weddings who are coerced to provide their services for same-sex weddings, and equally in the case of medical professionals who are coerced to perform or assist with abortions, the conduct that is demanded will commonly if not invariably come tightly entangled with communicative and expressive aspects, creating just the sort of "hybrid" claim that Justice Scalia expressly excluded from his analysis. *See Smith*, 494 U.S. at 881-82. In such "hybrid" cases, the compulsion to *act* contrary to the demands of faith and conscience must surely *intensify* the injury and deprivation of right inflicted by the violation of the other entwined right, whether that is the affirmative right to advocate one's views and religious convictions "with the utmost, sincere conviction," *Obergefell*, 135 S.Ct. at 2607, the negative right to be free from compelled expression, or some other right.

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contrast, those responsible for the report and its recommendations evidently *would use coercion* to force physicians and pharmacists who have the temerity to dissent from the philosophical and ethical views of those who happen to have acquired power in the American College of Obstetrics and Gynecology, either to get in line or to go out of business." Robert George, *Conscience and Its Enemies*, 18 The Catholic Social Science Review 281, 285 (2013) (emphasis in original).

When the Court confronts laws that attempt to compel participation in abortion and other practices that destroy human life, as it inevitably will, it will indeed find other rights belonging to the medical professional in the "hybrid" package, including the right of the "attending physician" to decide whether to perform an abortion. *Roe*, 410 U.S. at 163. Further, it seems reasonable to conclude that a physician possesses an interest akin to a right of privacy or personal autonomy that would be violated by being compelled to participate in a procedure that is "inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325 (1980). "Whether to have an abortion requires a difficult and painful decision," *Gonzales*, 550 U.S. at 128; surely a doctor's decision as to whether to kill an unborn child may be no less painful. If we must imagine a mother's "anguish[]" "when she learns . . . that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child," *Gonzales*, 550 U.S. at 159-60, we must equally imagine the horror of a doctor or nurse who is told that she *must* perform or assist with this act, or its functional equivalent. "For the staff to have to deal with a fetus that has 'some viability to it, some movement of the limbs'," testified one doctor quoted by this Court, "[is] always a difficult situation." *Gonzales*, 550 U.S. at 140. No doubt – and all the more so for the doctor or nurse whose religion teaches that what he or she is witnessing and participating in is the killing of a unique and unrepeatable human life. Indeed, the widespread adoption of "right of conscience" protection laws

by States as well as the Federal Government over several decades suggests a broad recognition that medical professionals should not be involuntarily subjected to such traumatic harm.[17]

And indeed, if "private physicians and their patients" have no "constitutional right of access to *public* facilities for the performance of abortions," *Webster v. Reproductive Health Services*, 492 U.S. 490, 510 (1989) (emphasis added), and "if it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to [public] financial resources to avail herself of the full range of protected choices," *Harris v. McRae*, 448 U.S. at 316, then it would seem to follow *a fortiori* that private patients have no right to compel (with the force of the state) the personal services of a medical professional to perform an abortion against her will, conscience, and religious convictions. The framework of *Smith* leads to no contrary conclusion.

[17] *See* Rienzi, *supra* at 121, 170-71.

III. NO COMPELLED SPEECH AND VIOLATION OF FREE EXERCISE CAN BE JUSTIFIED BY A DESIRE TO PREVENT SUPPOSED "DIGNITARY HARM" TO INDIVIDUALS, AS SUCH A HARM IS NOT COGNIZABLE UNDER THE MOST BASIC PRINCIPLES OF FIRST AMENDMENT LAW.

A government mandate that restricts free speech or compels speech, or that restricts free exercise in the context of a "hybrid" mixture that includes other fundamental rights as well, must meet the "strict scrutiny" standard of furthering a "compelling governmental interest" by the "least restrictive means." *See, e.g.*, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). Of course, to establish that an "interest" is furthered does not end the inquiry (the questions of "compelling" and "least restrictive means" remain), but if no cognizable interest at all is furthered, then the inquiry is finished at the threshold.

This is the fact in the present case, likely in all retail-level "custom wedding services" cases, and in most if not all cases in which medical professionals are pressured to speak and act contrary to religious conscience.

Amici respectfully submit that it is critical to recognize "lack of cognizable interest" as a *threshold* question and potential safe harbor, to be considered by courts *first* in such cases, because for small retailers and individual medical professionals, the cost, stress, and disruption of extended litigation is too often prohibitive – the mere fact that charges or claims are

brought must terminally chill (or compel) the speech, or drive the retailer or professional out of his livelihood, and no legal vindication years later can repair that harm and deprivation of rights.[18] (We note that Mr. Phillips has now been embroiled in legal proceedings for more than five years.)

Amici believe that no crumb of interest cognizable by government could be furthered by requiring Mr. Phillips to design and create a cake. As we understand it, advocates of laws such as the one under which Mr. Phillips has been fined and enjoined posit two interests (using a variety of terminology): protecting citizens from economic harm, and protecting them from what is increasingly referred to as "dignitary harm." For quite different reasons, neither supposed interest can justify application of such laws to deprive individual artisans or medical professionals of fundamental rights of speech and conscience.

We expect that others will detail from the record the facts that Mr. Phillips did not inflict and could not have inflicted any economic harm on the complainants.[19] *Amici* wish to emphasize what they believe is

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[18] *Cf. Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976) (Summary judgment is particularly important in libel cases, "for prolonging a meritless case . . . could result in further chilling of First Amendment rights.").

[19] The Colorado Court of Appeals made no finding that the complainants suffered any difficulty at all in obtaining a cake for their wedding celebration. *Cf. Stormans, Inc.*, 854 F. Supp. 2d at 948 (W.D. Wash. 2012) ("[N]o Board witness, or any other witness, was able to identify any particular community in Washington –

the even more important point: *that the state has no cognizable interest in protecting individuals from "dignitary harm" resulting from expressions of disagreement or disapproval.*

For example, one commentator has referred to "the dignitary interests of same-sex couples – not to be embarrassed, . . . not to have their choice questioned." Fretwell Wilson, *supra* at 94.

Amici urge that the Court should say loudly and clearly that the very concept of a governmental interest in protecting citizens against "hav[ing] their choice questioned" is not merely flatly inconsistent with this Court's assurance in *Obergefell* that those who believe that "same sex marriage should not be condoned" retain their right to "advocate with utmost, sincere conviction" and may "engage those who disagree with their views in an open and search debate," *Obergefell v. Hodges*, 135 S.Ct. at 2607, it is a dagger to the heart of the ideal of a "marketplace of ideas,"[20] and of at least 75 years of First Amendment jurisprudence, in which

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rural or otherwise – that lacked timely access to emergency contraceptives or any other time-sensitive medication."). *See* J. Craddock, *The Case for Complicity-Based Religious Accommodations*, 12 Tennessee J. of Law & Policy 9-10 (2017) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2992324.

[20] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988), *quoting FCC v. Pacifica Foundation*, 438 U.S. at 745-46; *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("The best test of truth is the power of the thought to get itself accepted in the competition of the market.").

this Court has "said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017). *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (affirming the right of a Jehovah's Witness to play a phonograph record that "attacked the [Catholic] religion and church" and "incensed" listeners); *Street v. New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *Pacifica*, 438 U.S. at 745-46 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) ("Speech does not lose its protected character . . . simply because it may embarrass others."); *Hustler*, 485 U.S. at 55-56 (1988) (*quoting Claiborne Hardware* and *Pacifica* to reiterate these same principles); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) ("Our precedents . . . recognize that a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it . . . stirs people to anger.") (internal quotations and citations omitted); *Hurley*, 515 U.S. at 574 (1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."); *Snyder v. Phelps*, 562 U.S. 443, 448, 459 (2011) (government may not bar protestors from exhibiting signs such as "God

Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," "Pope in Hell," and "God Hates You" near a military funeral).[21]

In short, *amici* urge this Court to reemphasize in this case, as it did in *Obergefell*, that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered," *Obergefell*, 135 S.Ct. at 2607, and to make clear that the long-established principles of First Amendment law that provide this "proper protection", *id.*, are not sacrificed when one enters the workplace or because the principles that one wishes to teach are deemed offensive by others—or even by the state.

[21] *See generally* Craddock, *supra*, at 14 ff.

CONCLUSION

For these reasons, it is respectfully submitted that the Court should reverse the final judgment of the Colorado Court of Appeals.

Respectfully submitted,

ROGER G. BROOKS
Counsel of Record
3804 W. Cornwallis Road
Durham, NC 27705
(919) 402-1758
Brooks3804@gmail.com

NIKOLAS T. NIKAS
DORINDA C. BORDLEE
MADELINE MOREIRA
BIOETHICS DEFENSE FUND
3312 Cleary Avenue
Metairie, LA 70002
(504) 231-7234

CATHERINE W. SHORT
LIFE LEGAL DEFENSE FOUNDATION
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

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